

# Relocation: what happens when on parent wants to move with the children?



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Mari Vagg on 21 October 2014. This webinar can be viewed for free at [www.asklois.org.au/webinars/past-webinars](http://www.asklois.org.au/webinars/past-webinars).

## Defining 'relocation'

- Put simply, 'relocation cases' involve a parent moving with their child
- There are no specific provisions in the Family Law Act 1975 that define 'relocation'
- In relocation cases, there is a tension between the child's right to have a relationship with both parents, and the child's interest in ordinarily living with a parent who is happy and not 'imprisoned' in a place the parent does not want to be

## Can your client just leave with the kids?

### 1. It will depend on the distance

- There is no specific border or defined distance within which a parent can safely move
- Lack of access to a car or public transport might influence whether a case is treated as a relocation case
  - Eg, while the suburbs of Richmond and Cronulla are both in Sydney, it can take over an hour to drive between the two. In contrast, Orange and Bathurst are a similar distance but are considered to be in the same region. Depending on the circumstances of each case it is possible that a move from Richmond to Cronulla would be treated as a relocation case whereas a move from Orange to Bathurst would not

### CASE STUDY 1

Alex and Chris both live in Albury, NSW which is a town on the state border. They have a shared care arrangement for their 3 kids. Chris wants to move to Wodonga, which is in Victoria. Chris' new house is a 10-minute drive from Alex's house. Chris wants to move interstate. **Does he need Alex's permission?**

**Answer:** Chris can move. State borders do not matter. What is important is whether or not the existing arrangements for shared care will be able to continue if Chris moves.

### 2. If there are existing Court orders:

- Need to look closely at what the existing court orders say to see whether they can continue to work after the move
- If she cannot comply with the Orders for the child to spend time with the other parent as a result of the move, she will be in breach of the Court Orders
- Occasionally, the Orders will still work even if the client moves away. For instance, if she has sole parental responsibility for the children to live with her and spend time with the father as agreed. In that case she will not need to do anything and can move without the other parent's consent.

### 3. If there are no Court Orders:

- The key question here is whether or not the other parent will agree to the move. Can the current arrangements continue after the move?
- If they can, it may not be necessary to seek the other parent's permission. Eg, if she will be moving closer to the other parent's location

### CASE STUDY 2

When Robert and Liz separated 2 years ago Liz moved to a house on the same street as Robert. Robert leaves for work early so on any weekdays the kids are with him, they have breakfast at Liz's place before school. This has worked well so they never felt the need to formalise the arrangement. Liz's lease is up and the landlord wants her to move out. Liz has found a house in a nearby town, a 20-minute drive away from Robert's place and 25 minutes from the kid's



school. Robert doesn't want Liz to move out of the town because he doesn't want to drive the kids to Liz's place in the mornings. **Can Liz move to the nearby town?**

**Answer:** Yes, Liz can move to the nearby town. Liz and Robert will have to try to come to an agreement about what will happen in the mornings. If they need some help to work out an agreement, Family Dispute Resolution at a Family Relationships Centre might be useful for them. However, if Liz's move would more substantially interfere with the time that Robert spends with the children then Liz would need to obtain permission to move.

### CASE STUDY 3

Liz couldn't find anywhere affordable in the area so she decides she wants to move with the kids to a more affordable area. She grew up in C and still has lots of family and friends there. C is 2 hours drive from A. Robert is opposed to the move. The kids spend every Wednesday and Thursday as well as alternate weekends with him. **Can Liz and the children move to C without Robert's consent?**

**Answer:** No. Even though Liz and Robert don't have any court orders or even a parenting plan, the move will substantially interfere with the children's time with Robert

## Parental responsibility

- 'Parental responsibility' means all the duties, powers, responsibilities, and authority which, by law, parents have in relation to children (s 61B *Family Law Act*)
- Parents who have **equal shared parental responsibility** must consult and try to agree about significant long term issues for the child/ren (ss 4 & 65DAC, *Family Law Act*)
- The reason that a client who wants to relocate is unlikely to be able to move without agreement of the other parent is because a decision about where a child lives is a major long term issue
- If a parent makes a major decision unilaterally, they may be viewed unfavourably if it goes to court, even if there are no court orders in place

## Options for a primary carer who wants to relocate

Assuming that the client would not be able to comply with the current arrangements as a result of the move, she has following options:

1. Move away with agreement that the other parent
2. Apply to court for orders permitting her to move away
3. Move away without an agreement or orders and risk court action by the other parent

### If there are existing orders:

- If the move makes it more difficult to comply with existing arrangements or orders about spending time, the other parent will need to agree or a change in orders must be sought

### If there are no existing orders:

- It is still important to obtain the other parent's agreement, preferably in writing, to avoid being ordered to return with the children until the case has been decided

## Risks of relocating without agreement or court order

If a parent decided to move away without the permission of the other parent, the other parent could make an urgent application to court for a **Recovery Order**

- It is up to the court to decide whether they believe there was a significant enough risk to remove the child without permission of the other parent
- If the court agrees with the other parent, the client will have to return her child to the area they were previously living in or to the other parent within a prescribed amount of time
- Alternatively, the order may be given to the police who can find and return the child to the other parent
- The order may also prevent the client from taking her child again or from having the child live with her until the case has been decided by the judge



It is important that the client recognises that the other parent could make an application for a **Location Order or a Commonwealth Information Order**

- These are orders for a person, or for a government agency such as Centrelink, to provide information about her whereabouts to the Court
- For victims of domestic violence who flee with the child, this makes it hard to go into hiding
- Realistically, the only way to relocate without the father's permission or a court order is when the father does not take legal action to find her
- If the client decides to leave unilaterally, it's a good idea to leave a note or send an email. However, the client should be aware that the note would be evidence if the matter ends up in court. Therefore she shouldn't promise anything she isn't willing to do

**If there are existing orders:**

- There is a real risk of contravention proceedings being brought against the client
- If the other parent can establish that your client has breached the orders without a reasonable excuse, the Court may impose a penalty such as make-up time for the other parent, a Good Behaviour Bond, or a fine

**Important:**

- In many cases, starting litigation after a location and recovery order is not ideal, especially where there aren't strong reasons for the client making the unilateral decision to move away
- If the move was her only realistic option, and she is seen to be acting in the best interests of the child, the court may rule in her favour. There's still a risk she may be perceived in a negative light
- It is very important that the client gets legal advice before unilateral relocation!

**If an agreement can be reached**

**If the client decides not to risk some of those repercussions, what can she do?** It is best if parents can come to an agreement about the move and how the other parent will spend time with the child

**If there are existing court orders**, the parents have two options:

1. They can modify the orders by writing up a parenting plan which they both sign and date. Although this plan is not enforceable in itself, it overrides the previous court orders and renders them unenforceable
2. They can file an application for consent orders with the Family Court. These new consent orders would then override the court made orders

**If there are no current court orders:**

- The parents could agree informally. If they choose this option, it is recommended that the agreement is in writing, preferably by way of Consent Orders or a Parenting Plan
- Where a parent has refused to agree in writing, every effort should be made to get the other party to confirm he is okay with the move in writing – an email or SMS would suffice

**If the parties cannot agree**

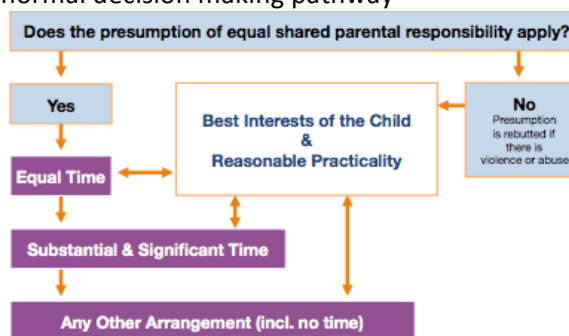
- In most cases, the client will need to invite the other parent to participate in Family Dispute Resolution (FDR) to try to come to an agreement about the move
- If the other parent refuses FDR or if FDR isn't appropriate (eg, due to domestic violence), a 60I certificate will be issued by the FDR practitioner
- Alternatively, where there has been domestic violence or one of the other exceptions applies, the client could skip FDR and file an affidavit along with her initiating application
  - This requires completing an 'Affidavit – Non-Filing of Family Dispute Resolution Certificate' or,



- If she's seeking interim orders and lodging an affidavit anyway, the reasons for going straight to court and the evidence in support of those reasons set out in that affidavit
- If FDR is not suitable, or the parents fail to reach an agreement, the client will need to file an Initiating Application at Federal Circuit Court or Family Court to get orders allowing her to move with the child

### What does the court consider?

- The courts must consider the **best interests** factors set out in s 60CC *Family Law Act* and what is **reasonably practical** in the circumstances
- The court has to follow the normal decision making pathway –



- Neither of the parties bears an onus or responsibility of proving that the child should or should not be allowed to relocate. However, satisfying a court that it is in the best interests of a child to relocate can be difficult because it is harder to maintain a meaningful relationship with the other parent

#### If there are existing orders:

- The applicant must satisfy an additional hurdle – that there has been a **significant change in circumstances** since the existing orders were made

#### **MRR v GR** – High Court decision

- The parties lived in Sydney since 1993
- In January 2007 they moved to Mount Isa with their 4 year old daughter so the father could obtain a position with a mining company
- They separated later in 2007. The mother moved to her father's home in Sydney with the child
- The father obtained an interim order requiring the return of the child
- The mother returned to Mount Isa with the child in October 2007
- On final appeal, the High Court found the Federal magistrate erred in its finding because it never found it was reasonably practicable for an equal shared time arrangement.

### Preparing a relocation case

- The parent who wishes to move should tell the court why it is in the best interests of the child that they are allowed to relocate. This should include reasons why the move is good for the child and why the move will be good for them and enable them to be a better, happier parent.
- The evidence should cover the following things;
  - *The relationship between the child and each parent, including details of how much time he or she spends with each of them*
  - *The reasons for moving, such as the importance of a better income for the long-term welfare of the child, for the mother's career, for her new relationship, or a desire to rejoin her family*
  - *Any advantages to the child such as better care facilities, better health care, better family support, a relationship with other relatives, better schooling opportunities, better lifestyle for your child*
  - *Detailed evidence of the proposed new house, employment, school, child-care facilities [etc]*
  - *How will the other parent be able maintain a meaningful relationship with the child – (including travel arrangements and communication). The client should work out concrete proposals for how the child will spend time with and communicate with the other parent*



- *Eg, by increasing the length of visits during school holidays, regular phone and video calls etc and researching travel costs and how they will be covered is also helpful*
- If the parents are attempting FDR, this preparation should be done before the joint session
- The Court will likely order a Family Report and often ICLs are appointed in these cases

### Interim hearings

If the parent has already moved, the Court will consider:

- Why the parent made a unilateral decision to relocate the child rather than going through the proper process
- The judge will want to know whether it was absolutely necessary to make the unilateral decision

If the parent has not already moved:

- She can seek interim orders which will permit her to move straight away rather than waiting until the final hearing

#### **McAllister & Day**

- Ms McAllister (mother) and Mr Day (father) are the parents of X (18 months)
- Unilateral relocation of child from the Brisbane area to rural South Australia by mother
- Interim hearing arrangements for care of child
- Mother seeks orders for child to live with her in South Australia & alleges domestic violence
- Father vehemently contested allegations of violence
- Court considered the need to protect the child from further exposure to family violence as well as how the child may benefit from having a meaningful relationship with the father
- Federal Magistrate felt that moving to SA was not the mother's only option for keeping safe, and therefore it was not essential that she unilaterally relocated - ordered mother return to Brisbane, child to live with the mother and have contact with the father at a contact centre, and made an injunction for the mother's protection (essentially a family law version of an AVO)

### Preventing the other parent from relocating

If the children live with the other parent and they want to relocate, your client has the following options:

- Apply to court for orders such as –
  - An order preventing the other parent from moving out of a defined geographical area,
  - Where there is a risk of the other parent relocating overseas, your client could make an application to have the children's names placed on the Family Law Watchlist
    - Your client can also undertake practical measures such as securing the children's passports
- Seeking legal advice is recommended

#### **CASE STUDY 5**

Shelley and Paul have 5 children. Since Paul left, the kids have lived with Shelley and he hasn't been seeing them much. Now Paul says that he's going to move to the Gold Coast and maybe he'll see the kids in the holidays. Shelley wants Paul to pull his weight and spend time with the kids on the weekend. They're his kids too right? **Can Paul move to the Gold Coast without Shelley's consent?**

**Answer:** A parent can't be forced to stay living close to their children. No judge is going to order someone to take care of a child if they don't want to because it poses a risk that the child would be neglected – even if this feels unjust for the other parent doing all the caring

For related information, also see our past Ask LOIS webinars and factsheets on:

- [Relocating Overseas with Children and the Hague Convention on Child Abduction](#)
- [Family Law: Recovery Orders](#)
- [Family Law: Contravention of Parenting Orders](#)
- [Family Law: Changing Parenting Orders and Significant Change in Circumstances](#)