

## RELOCATION

Most divorce orders include contact and care arrangement for children affected by the dissolution of a marriage. Divorced parents usually have to rearrange their lives to adjust to new family units following the dissolution of a previous marriage. The issue of relocation arises (in most cases) as a result of a divorced parents' need to adjust and rearrange their lives.

The Constitution states that every child has the right to parental and family care. Furthermore the Convention on the Rights of the Child requires the State to respect the right of the child to preserve his or her family relations without unlawful interference. States are further obliged to respect the right of the child who is separated from one or both parents to maintain personal relationships and direct contact with both parents on a regular basis, except if this is contrary to the best interest of the child. This means that the judiciary as an organ of state alert to these rights and obligations will be careful to respect such rights and obligations when considering an application allowing one parent to remove the child from immediate and constant contact with another parent.

### 1.1 Rules regarding relocation: the Children's Act

Unless a court orders otherwise, both parents retain guardianship of a child after a divorce. This means that even though a child has his/her permanent residents with one parent (primary caretaker), post divorce the other parent will retain the right to be consulted and to approve of certain decisions made by the primary caretaker in respect of the child.

#### A: Consent before relocation

Section 18 of the Children's Act sets out rights and responsibilities parents have in respect of their children. These include the right and responsibility to care for the child; to maintain contact with the child and to act as guardian of the child. Furthermore the Act stipulates that the person acting as guardian must *inter alia* give or refuse consent to the child's departure or removal from the Republic or for the application of a child passport. For the most part guardians can make decisions without consulting or getting approval from others who hold guardianship over the child. However, when it comes to a decision to depart with a child or to remove a child from the Republic all those who have guardianship over the child must give consent before relocation with the child can materialise. If a guardian refuses to consent to the removal of the child from the country, the parent wishing to relocate will have to approach the High Court to obtain consent from the court.

#### B: Consent for relocation by the unmarried father

If an unmarried father complies with the requirements set out in section 21 of the Act he acquires full parental rights and responsibilities in respect of the child including the right to act as his child's guardian. If the unmarried father does not comply with section 21 he can acquire specific rights and responsibilities, including the right to act as the child's guardian, in terms of an agreement with the mother (this section of the Children's Act is not in operation yet). If this too is not possible he can apply to the

High Court for a guardianship order. It must be stressed that unless the unmarried father has guardianship over the child his consent for removing a child from the Republic will not be necessary.

#### C: Relocation within the country

The Children's Act does not set out consent procedures for relocation within the country. The Act does stipulate however that co-holders of guardianship over a child can exercise their parental rights and responsibilities independently and without the consent of the other guardians rights. This means that a parent, with whom the child permanently resides, can independently and without the consent of other parent, decide to relocate with the child within the country.

However, section 6 of the Act states that a child given his age and maturity and a person who has parental rights and responsibilities in respect of that child must be informed of decisions in matters concerning the child which would significantly affect the child. Furthermore section 30 of the Act stipulates that a co holder of parental rights and responsibilities must consult and give consideration to the views of other co-holders of rights and responsibilities as well as the child when making decisions which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child. This includes decisions which would affect contact between the child and the other co-holder of parental rights and responsibilities, such as decisions to relocate with the child to another province or city.

In a recent judgment by the Cape High Court Erasmus J had an opportunity to consider some of the parental rights and responsibilities provisions of the Children's Act. The court found that although the custodian parent had to consult the other parent who also had rights and responsibilities in respect of the child it did not mean that the custodian parent was bound to give effect to the views and wishes of the other parent.<sup>1</sup> The court held further that a failure to give consideration to the views and wishes of the other parent and failure to inform him of her decision did not render her decision void or invalid. However, the decision would be subject to review.<sup>2</sup>

### **1.2 Factors to be considered in a relocation application**

South African courts have not been *ad idem* on the approaches to be followed when ruling on relocation applications. Different approaches appear to be used to cater for different circumstances. The following trends have been observed in relocation matters:

- Relocation applications are generally brought by women. The case of **Jackson v Jackson**<sup>3</sup> was the exception where the applicant who wanted to remove the children to Australia was the father.

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<sup>1</sup> Joubert v Joubert [2008] JOL 219229 (C) unreported at para 35.

<sup>2</sup> Id.

<sup>3</sup> *Jackson v Jackson* 2002 (2) SA 303 (SCA)

- Most cases concerns relocation to another country, however the case of **B v M**<sup>4</sup> which is the only one of its kind to date, dealt with relocation within the country.
- The motivation for an application to allow relocation with the child usually stems from employment opportunities for either the applicant (**Van Rooyen**)<sup>5</sup> (**H v R**)<sup>6</sup> (**Coetsee**)<sup>7</sup> or his/her spouse **B v M**; a loss of confidence in the country's economy and the escalating crime rate (**Jackson v Jackson**) (**H v R**) and a lack of a family support system in SA (**Van Rooyen**).

In an application to approve a decision to relocate with a child (whether internal or outside the country) courts usually take the following into account (these factors don't serve as a closed list but arise from past relocation decisions).

- **The best interest of the child**

The best interest principle has been applied in relocation cases even before the advent of the Constitution or the Children's Act. It is generally considered in the best interest of the child to remain with the custodial parent. The Court in **Joubert v Joubert** found that the custodian parent generally has the right to have the child with him/her.<sup>8</sup> However in **F v F**<sup>9</sup> it was found that courts must not readily assume that the custodial parent's proposals are necessarily compatible with the child's welfare. Different factors will be considered to assess what is in the best interest of the child including the need to preserve a particular family unit that the child is part of, the advantages and disadvantages that the move will have on the children (whether or not they would suffer trauma if separated from one of the parents).

- **Purpose of relocating**

The motive for the relocation must be genuine; reasonable and *bona fide* and should not serve merely to frustrate the access rights of the other parent (or holder of parental rights and responsibilities). The Court found in **F v F** that the mother's plan to relocate was ill researched and unstructured. The application to approve her decision to relocate was dismissed.

- **The needs of the custodial parent to go on with their lives post divorce.**

In **B v M** the court found that South African judgments have explicitly accepted that married persons are and should be free to create their own lives post divorce untrammelled by the needs or demands of their former spouses.<sup>10</sup> The applicants' right to freedom of movement and family life is thus always a factor taken into account by the court.<sup>11</sup>

- **Due consideration of the impact of separation on the non-moving parent.**

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<sup>4</sup> *B v M* 2006 (2) BCLR 1034 (W).

<sup>5</sup> *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C).

<sup>6</sup> *H v R* 2001 (3) SA 623 (C).

<sup>7</sup> *Coetsee v Coetsee* (T) Case No: A 389/08. Judgment date 13 June 2008 (unreported)

<sup>8</sup> *Joubert v Joubert* para 31.

<sup>9</sup> *F v F* (2006) 1 ALL SA 571 (SCA) at para 13.

<sup>10</sup> Above note 4 at para 158.

<sup>11</sup> See *F v F* at para 11.

The court will consider whether the applicant has taken into account the non-moving parents' right of access to the child and whether a plan has been put in place to preserve the relationship of the child with the non-moving parent.

- **The relationship between the child(ren) and parents**

The amount of time the child spends with each parent is also a factor considered by the court. Where parties basically share the same amount of time with the children relocation could have a more detrimental affect on the children and their relationship with the non moving parent.

- **The views of the child**

In appropriate circumstances depending on the age and maturity of the child the court will have regard to the views of the child regarding the proposed relocation. This is in line with the child's right to participate in decisions affecting the child.

A decision to relocate with a child from a previous marriage or other relationship affects the rights and responsibilities of the parent who will be staying behind. The law thus requires all guardians to consent to the removal of a child from the republic and requires the views of that parent to be taken into account when the child is moved from one province to another. The best interest of the child is always central to a decision concerning the removal of the child from the Republic or to another province. Many of the factors the court considers are set out in section 7 of the Children's Act but these factors are not a mathematical list to be checked for compliance, they must be considered as a whole to assess the best interest of the child.