



Federal Magistrates Court of Australia - Family Law

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Kilbourne & Partridge [2009] FMCAfam 1286 (10 December 2009)

Last Updated: 11 December 2009

FEDERAL MAGISTRATES COURT OF AUSTRALIA

KILBOURNE & PARTRIDGE *[2009] FMCAfam 1286*

FAMILY LAW – Parenting orders – relocation – held wife restrained from relocating with the children from Bendigo to Ocean Grove as this would preclude the children from continuing to spend significant and substantial time with the husband.

[Family Law Act 1975](#), [ss.60B](#), [60CA](#), [60CC](#), [65DAA](#)

A v A: Relocation Approach [\[2000\] FamCA 751](#); [\[2000\] FLC 93-035](#)

U v U [\[2002\] HCA 36](#); [\(2002\) FLC 93-112](#)

Applicant:	MR KILBOURNE
Respondent:	MS PARTRIDGE
File Number:	MLC 13474 of 2007
Judgment of:	Bender FM
Hearing dates:	24 & 25 November 2009
Date of Last Submission:	25 November 2009
Delivered at:	Melbourne
Delivered on:	10 December 2009

REPRESENTATION

Counsel for the Applicant:	Mr Puckey
Solicitors for the Applicant:	Septimus Jones & Lee
Counsel for the Respondent:	Mr McLeod
Solicitors for the Respondent:	Ellinghaus Weill

ORDERS

- (1) All previous parenting orders be discharged.
- (2) The husband and wife have equal shared parental responsibility for the children [X] born [in] 1999 (“[X]”), [Y] born [in] 2001 (“[Y]”) and [Z] born [in] 2006 (“[Z]”).
- (3) The husband and wife have sole parental responsibility for the day to day care, welfare and development of [X], [Y] and [Z] when the children are in their care.
- (4) [X], [Y] and [Z] live with the wife.
- (5) The wife be restrained from moving the place of residence of [X], [Y] and [Z] from the Bendigo area, other than with the written consent of the parties.
- (6) [X], [Y] and [Z] spend time with the husband:

- (a) each alternate weekend from after school Thursday to before school Tuesday;
- (b) for half of the school term and long summer vacations at times to be agreed, and failing agreement the first half of the term holidays and for the long summer vacation the first half in 2009/2010 and the second half in 2010/2011 and alternating years thereafter;

- (c) on [X], [Y], [Z] and the husband's birthdays, if the birthdays fall on a day when they are not spending time with the husband, for no less than two hours on a school day and for no less than four hours on a non-school day;
- (d) from 3.00pm on Christmas Eve to 3.00pm on Christmas Day 2009 and each alternate year thereafter and from 3.00pm Christmas Day to 3.00pm Boxing Day 2010 and each alternate year thereafter;
- (e) if Father's Day falls on a day when [X], [Y] and [Z] are not spending time with the husband, then from 9.00am to 5.00pm on that day; and
- (f) as otherwise agreed between the parties.

(7) In the event [X], [Y], [Z] are with the husband, his time shall be suspended:

- (a) from 9.00am to 5.00pm on Mother's Day;
 - (b) on [X], [Y], [Z], [M], the expected baby and the wife's birthdays, if the birthdays fall on a day when they are not spending time with the wife, for no less than two hours on a school day and for no less than four hours on a non-school day; and
 - (c) from 3.00pm Christmas Day to 3.00pm Boxing Day 2009 and each alternate year thereafter and from 3.00pm on Christmas Eve to 3.00pm on Christmas Day 2010 and each alternate year thereafter.

IT IS NOTED that publication of this judgment under the pseudonym *Kilbourne & Partridge* is approved pursuant to [s.121\(9\)\(g\)](#) of the [Family Law Act 1975](#) (Cth).

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
BENDIGO**

MLC 13474 of 2007

MR KILBOURNE

Applicant

And

MS PARTRIDGE

Respondent

REASONS FOR JUDGMENT

Introduction

1. This matter arises from the respondent wife's long held desire to relocate from Bendigo to Ocean Grove with the parties' three children [X] born [in] 1999 ("[X]"), [Y] born [in] 2001 ("[Y]") and [Z], born [in] 2006 ("[Z]").
2. The husband is vehemently opposed to the proposed relocation as he believes it is not in the children's best interests as it would take them from the community in which they have lived all their lives and dramatically reduce the time the children are currently spending with him.
3. The husband seeks that the existing arrangements continue whereby the children live with the wife in Bendigo and spend five nights with him each fortnight.
4. In the event the children are not permitted to relocate to Ocean Grove, the wife shall remain residing in Bendigo and the parties agree that the existing arrangements for the children shall continue.

Background

5. The husband was born [in] 1971 and is 38 years of age. He is a [tradesman] by profession who works as a sub-contractor.
6. The wife was born [in] 1972 and is 37 years of age. She is [employed in the Education Industry] working on average one day per week.
7. The parties commenced cohabitation in mid 1992 and married [in] 1997. They separated amicably on 2 June 2006.
8. Upon separation, the parties were able to resolve financial matters between themselves as well as arrangements for their children. Initially [X] and [Y] spent alternate weekends with the husband. Because [Z] was only a newborn, she spent day time only with her father.
9. In March 2007, after discussion between the parties, it was agreed the husband would undertake employment as a builder in Newman, Western Australia. This would enable him to earn considerably more income than he would otherwise and thus be able to retain land that had been previously jointly owned.
10. The husband worked for twelve months in Western Australia. During this period, he returned to Bendigo every five weeks for ten days when he would, with the wife's cooperation, spend considerable time with the children.
11. The husband returned permanently to Bendigo in April 2008 and by agreement thereafter, the children spent time with him from after school Thursday to before school Tuesday in each alternate week, as well as holiday time and time on special occasions.
12. In early 2008, the wife commenced a relationship with Mr B. They have a daughter, [M], who is eight months old and are expecting their second child in April 2010.
13. The husband has re-partnered with Ms T. They reside on a jointly owned 40 acre property just out of Bendigo.
14. In April 2008, the wife advised the husband she wished to relocate to Ocean Grove. The husband, via his solicitors, indicated his opposition to such a move. The wife put those "plans" on hold at that time.
15. In 2009, the wife again indicated her desire to relocate to Ocean Grove. The husband issued these proceedings seeking orders restraining the wife from relocating the children to Ocean Grove.
16. The matter came before the court on 21 July 2009, when interim orders were made by consent confirming the parties' longstanding arrangements for the children and restraining the wife from changing the residence of the children until further order.
17. To their credit, since separation both parties have cooperatively co-parented their children and have at all times remained

child-focussed. This high level of cooperation has been challenged by the current impasse as to where the children should live.

Husband's proposal

18. The husband is seeking orders that the wife be restrained from relocating with the parties' three children from Bendigo to Ocean Grove.
19. The husband seeks that the current arrangements in relation to the children continue to remain in place, in that the children live with the wife and spend time with him from after school Thursday to before school Tuesday in each alternate week as well as for half holidays and on other special occasions.
20. In his initiating application, the husband also sought orders that in the event the wife chose to move to Ocean Grove, that the children live with him. At the commencement of these proceedings, the wife made it very clear that in the event the children were not permitted to relocate to Ocean Grove, she would continue to reside in Bendigo and the existing arrangements would remain in place.
21. It was the husband's evidence that he did not believe that a move to Ocean Grove would be in the children's best interests. He was particularly concerned that such a move would take the children away from their schools, the community in which they had grown up, their extended family and would have the impact of significantly reducing the time that the children were able to spend with him.
22. The husband was also concerned as to the impact that travel time between Ocean Grove and Bendigo would have on the children, particularly [Y] who has a history of suffering from car sickness. The husband was also concerned as to how alternate weekends away from their primary residence would impact on their ability to be involved in sport. It was common ground that [Y] in particular is a child who as he gets older will be heavily involved in sport as he has a real love and interest in such activities.
23. The husband is a sub-contracting builder and has the capacity to be flexible in relation to his own working arrangements. At this time, when the children are with him, the husband does not work on the Friday or Monday which enables him to have one on one time with [Z] who is currently three going on four years of age. He believes that this is a very important period for both he and [Z] and the ongoing development of their relationship.
24. The husband spoke very positively of the wife in the context of her role as the children's mother and confirmed that she had done everything to promote and encourage the children's relationship with him since separation.
25. It was the husband's evidence that in 2007, he and the wife had lengthy discussions about him going to Western Australia to work for twelve months and what arrangements could be put in place to best ensure that his relationship with the children was not impacted by this decision. He confirmed that the wife ensured that the children spent as much time as possible with him when he returned to Bendigo every five weeks, as well as ensuring that he was able to maintain regular telephone conversations with them during his time in Western Australia.
26. It was the husband's evidence that since his return to Bendigo, he and the wife have been able to work co-operatively with each other, including the wife being able to telephone him to obtain his support in relation to disciplinary issues in relation to [Y], who it would appear is the more challenging of the parties' three children.
27. The husband confirmed that the wife has had a longstanding ambition to move to live in Ocean Grove that goes back to the time during which they were married. He conceded that this was a genuine dream of hers and that it was not in any way an effort by her to try and interfere with his relationship with the children. He confirmed the wife would always promote that relationship.
28. The husband was cross-examined as to whether he would contemplate moving to reside in or around the Bellarine Peninsula in the event the wife was successful in her application to relocate. It was his evidence that he would have to think very seriously as to whether that would be something he would do in those circumstances as he and his partner, Ms T, own their own home in Bendigo, it is where he has family and friends and it is the community in which he has lived and worked for the majority of his life.
29. The husband conceded that he would be able to obtain employment in the Bellarine Peninsula and that he is in fact estranged from his parents and his brother, and has been for many years. He confirmed that the children have a relationship with their paternal grandparents and paternal uncle because of the efforts of the wife, and commended her in this regard. He also indicated that he was pleased that the children did get to have this relationship in these circumstances.
30. The husband indicated that he did not know Mr B well. However, he was positive in terms of the relationship that the wife had with him and more importantly spoke positively of the relationship that he has with the children.

Ms T

31. Ms T is the husband's partner and they are in a committed relationship.
32. She and the husband jointly own a 40 acre property just out of Bendigo, where they have a three bedroom home as well as horses, dogs, cats and other livestock.
33. Ms T has been employed in administration for some eighteen years with a Bendigo [omitted] company.
34. It was her evidence that she has a very good relationship with the children, and that she and they enjoy the time they spend with each other when the children are with the husband.
35. It was Ms T's evidence that on the Tuesday morning, she is the one responsible for delivering the children back to the wife and spoke of a positive relationship that she has with the wife and her partner, Mr B.
36. Ms T spoke in positive terms of the parenting relationship between the husband and the wife.
37. She too was questioned as to whether she would be prepared to move to the Bellarine Peninsula in the event the wife was successful in her application to relocate to Ocean Grove. Like the husband, Ms T conceded that she had a portable employment, but that a decision to move would be one that could not be taken lightly. As with the husband, her home, community and life was very much based in Bendigo.

The wife's proposal

38. The wife is seeking orders that she be permitted to relocate with the parties' three children to Ocean Grove.
39. It is her proposal that if allowed to relocate, that the children spend time with the husband in Bendigo each alternate weekend from 6.00 pm on Friday until 6.00 pm on Sunday. The wife also indicated that she was prepared to bring the children to Bendigo for one further weekend in each of the school terms. It is her proposal that the children spend up to ten days with the husband in each of the term school holidays as well as half the long summer vacation. She was also open to arrangements for special occasions, including birthdays, Christmas and Father's Day.
40. At the commencement of the hearing, as set out earlier in this judgment, the wife indicated to the court that in the event she was not permitted to relocate, that she would remain in Bendigo and that the existing living arrangements for the children would remain in place.
41. It was the wife's evidence that she has had a long-held dream of living at Ocean Grove. She has been travelling to Ocean Grove since childhood and it is a part of the world that she genuinely believes would offer her and the children great opportunities in terms of lifestyle and experience.
42. The wife spoke positively of the children's relationship with the husband and of him as a loving, caring and committed father.
43. The wife in her evidence conceded that if permitted to relocate, there would be a diminution in the time that the children spend with the husband, but was genuinely of the opinion that this would not impact on their relationship with him.
44. It was the wife's evidence that whilst the move for the children might initially be difficult in that they would be leaving their schools and their friends, she believed that they would adjust to the change and that the opportunities afforded to them would be in their best interests.
45. It was the wife's evidence that she believed the children would manage the fortnightly travel between Ocean Grove and Bendigo as they were already making that trip very regularly on the weekends when the children were with her and her partner Mr B. She conceded that [Y] initially did have difficulties with travel sickness

- but that this is now well managed with medication and that he no longer finds car travel a difficulty.
46. When the wife commenced giving her evidence, she advised the court, and it must be said the husband, that she was again with child and was due in early April 2010.
 47. It was the wife's evidence that she had recently sold the property in which she, Mr B and the children had been living and settlement of the sale of that property was due to take place in December 2009. It was her evidence that she had sold the home because it was too small to accommodate herself and her growing family. It is noted that the husband conceded that the wife had previously mentioned the possibility of a sale for these reasons and there was no inference made that the wife was in any way pre-empting the decision of this court.
 48. It was the wife's evidence that she was disappointed that the husband was not supporting her long-held dream to move to Ocean Grove, particularly in circumstances where she had supported his wish to work in Western Australia for twelve months, and had gone out of her way to accommodate him in having the opportunity to do that.
 49. It was the wife's evidence that she was not unsympathetic to the husband's opposition to that move, and could understand that he would be concerned about a decrease in the time he would be able to spend with the children. However, she did not believe that the husband needed to fear that his relationship with the children would be diminished in any way as she would continue to be fully supportive of their relationship with him as she had always been in the past.
 50. The wife was of the view that the children would be able to continue to have an ongoing relationship with both their maternal and paternal extended families. Her parents, who live in Bendigo, are very supportive of her desire to move and have indicated that they would be regular visitors and would continue to offer her the same support as they have in the past.
 51. The wife confirmed that the relationship the children have with the paternal extended family was because of her efforts, and that she would continue to ensure that the children spent time with and were involved with their extended paternal family.
 52. The wife conceded that [X] in particular was very happy at his current school, was a member of the School Council, and had many friends with whom he interacted on a regular basis. It was her evidence however that his best friend with whom he has dinner on a regular basis comes from a family who regularly visit the Geelong area and that she believed there would be no interference with that particular friendship.
 53. It was the wife's evidence that the Bellarine Peninsula offered the children an opportunity for change and growth, and that they would find the move positive and enjoyable, particularly as they have holidayed there all their lives.
 54. The wife confirmed that she and the husband had always been able to work cooperatively with each other in relation to the parenting of their children. She spoke somewhat sadly of the impact that the current dispute between them had had on their ability to cooperate as well as they had historically in relation to the children and indicated that currently they tended to communicate by way of email rather than as freely and openly as they had in the past.
 55. It was the wife's evidence that she would be very disappointed if she was unable to move to Ocean Grove and it was clear that she thought it would be most unfair that her ability to make a new start could be restricted by the court and/or by the husband. However, she conceded that the children were her primary consideration and that she would continue to care and love them to the best of her ability regardless of the outcome of these proceedings.
 56. The wife confirmed that she and Ms T had a positive relationship and also spoke positively of the children's relationship with her.

Mr B

57. Mr B is the wife's partner and they have been in an ongoing committed relationship since early 2008. They have a daughter [M], who is eight months of age and their second child is due in April 2010.
58. Mr B has two teenage children who live with their mother in Castlemaine. It was his evidence that he sees his older children every few days, with him either driving down to Castlemaine to visit them or they being able to jump on the train and visit him without any difficulty.
59. Mr B is a [employed in the Youthcare Industry]. Following qualification, he was employed with [S] in Bendigo, but ceased that employment earlier this year because of professional differences with the manager.
60. It was Mr B's evidence that he was able to obtain employment [in the Youthcare Industry] in the Bellarine Peninsula shortly after [M]'s birth. He commuted between the Bellarine Peninsula and Bendigo for the first three months of that employment but found it too difficult and resigned from that position. He is currently working in grounds maintenance, employment that he undertook prior to his re-training.
61. It was Mr B's evidence that he too is keen to relocate to Ocean Grove. He is a keen surfer and Ocean Grove would appear to be "his break of choice".
62. It was Mr B's evidence that the employment opportunities for him in the Bellarine Peninsula are much broader than in Bendigo, and in particular that the model of therapeutic intervention offered in the Bellarine Peninsula was one that he was very keen to pursue.
63. It was his evidence however that in the event that the wife was not permitted to relocate to Ocean Grove, Mr B would be able to find employment in the Bendigo region without difficulty.
64. When specifically asked whether he would support the wife and the existing arrangements continuing in the event that they had to remain in Bendigo, Mr B made it quite clear that she and the children had his one hundred percent support.

Joy Slattery

65. Joy Slattery is a Federal Magistrates Court Regulation 7 Family Consultant, who prepared a detailed family report in this matter dated 16 October 2009. Ms Slattery also gave viva voce evidence at the final hearing of the matter.
66. Ms Slattery confirmed that the children have a close, loving and meaningful relationship with both of their parents.
67. Ms Slattery noted in paragraph 73 of her report as follows:

"It is my view that both Mr Kilbourne and Ms Partridge are very appropriate and caring parents who have always taken the utmost responsibility for [X], [Y] and [Z]. It is my view that Mr Kilbourne and Ms Partridge have the capacity to meet the emotional, intellectual, health and overall needs of [X], [Y] and [Z] and that they have both worked hard to continue doing this."

68. Ms Slattery noted that the current issue between the parties has caused some degree of conflict and that this has impacted on their capacity to be as effective co-parents as they have been historically.
69. In paragraph 71 of her report, Ms Slattery noted as follows:
 - o *"[X] and [Y] are both happy living in Bendigo and do not want to move away from Mr Kilbourne but at the same time they still want to live with Ms Partridge but do not want their time with Mr Kilbourne decreased. It is my view that [X] and [Y] are moving into the stages of development where they increase their dependence on their father as the male role model they identify with so at these stages in their lives and from here on they have a strong need to be with him as much as is possible."*
70. In paragraph 75 of her report, Ms Slattery stated:
 - o *"It is my view that relocation may cause some anguish to [X] and [Y] given the above mentioned issues, but not so much to [Z] given her age. It is my view that if relocation is not granted, then [X] and [Y] would be fine about this and not suffer serious emotional effects apart from whatever impacts on them from any issues suffered by Ms Partridge."*
71. In relation to the impact upon Ms Partridge in the event she was unable to relocate, Ms Slattery noted further in paragraph 75 as follows:

- *“It is my view that Ms Partridge presents as a level headed and stable parent who always places the children’s needs as her priority so if relocation was not granted she would deal appropriately with this in time.”*
- 72. When cross-examined during her viva voce evidence on this issue, it was Ms Slattery’s evidence that she was of the view that Ms Partridge would be able to deal with a refusal to relocate appropriately, and that similarly Mr Kilbourne would also deal with a decision that the children could relocate appropriately. Ms Slattery formed this view on the basis that:
 - *“I see both Mr Kilbourne and Ms Partridge as very stable people who are very child focussed.”*
- 73. In cross-examination, Ms Slattery was asked to consider that in the circumstances of one or other of their parents being very disappointed as a result of the decision of this court, what would be the circumstance from the perspective of the children’s best interests which would make it easier for them to deal with one or other of their parents’ disappointment. It was Ms Slattery’s evidence that what would probably minimise the effects on the children would be for them to continue to be able to spend time with their father as they do now.
- 74. In her evidence, Ms Slattery indicated that she did not believe it was part of her brief to make recommendations as to whether the children should relocate or not, as that was the matter to be determined by the court. However, she was specifically questioned as to what her view was from the children’s perspective as to the best arrangements that should be put in place for them. In response to the specific question:
 - *“Leaving aside the adults and the legal issues, is the best thing from a child psychology perspective the current arrangements continuing?”*

Ms Slattery answered:

“Yes.”

- 75. Ms Slattery was also asked on her views in relation to the potential impact on the children in relation to not only moving away from their father and extended family, but also moving away from the community, school and friends in which they are most comfortable. Ms Slattery indicated that:
 - *“It is my view that unless it is very essential, like as in perhaps a service family, then why would you disrupt the children’s current circumstances unnecessarily.”*
- 76. Ms Slattery was then challenged as to whether she was disposed against relocation in any circumstances. She replied:
 - *“Unless it was entirely necessary, my option would be not to disrupt the children to that extent.”*

Best interests of the child

- 77. Part VII of the *Family Law Act 1975* (“the Act”) deals with children. Section 60B of the Act sets out the objects and underlying principles of Part VII of the Act as follows (omitting for present purposes s.60B(3) which deals with Aboriginals and Torres Strait Islanders):
 1. *The objects of this Part are to ensure that the best interests of children are met by:*
 - *(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*
 - *(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
 - *(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
 - *(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*
 - *2. The principles underlying these objects are that (except when it is or would be contrary to a child’s best interests):*
 - *(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and*
 - *(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and*
 - *(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children; and*
 - *(d) parents should agree about the future parenting of their children; and*
 - *(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*
- 78. Section 60CA of the Act provides that:
 - *In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.*
- 79. It is established law that in relocation cases, the best interests of the children remain the paramount consideration. This must be determined in the context of the provisions of section 60CC of the Act, as well as the matters the court has to consider under section 65DAA of the Act.
- 80. In this case, both of the parties agree that they should have equal shared parental responsibility for their children. They have been able to parent cooperatively since separation, and whilst the recent dispute has impinged on their ability to communicate and cooperate as effectively as they have historically, the reality is that they still both remain entirely child-focussed and continue to make decisions on a day to day basis between themselves as to what is the best for their children. Accordingly, there is no doubt that such an order should be made.
- 81. However, there are important consequences which flow from such an order. Where the parents have equal joint parental responsibility for a child(ren), section 65DAA of the Act requires the court to consider the child(ren) spending equal time, or a substantial and significant time, with each parent. It provides as follows:
 - *1. If a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child, the court must:*
 - *(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and*
 - *(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and*
 - *(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.*
- 82. As noted earlier in this judgment, the parties have had in place for some considerable period of time, arrangements whereby the children live with their mother and spend five nights each fortnight with their father as well as extended holiday time and time on special occasions. Whatever the outcome of these proceedings are, neither party is seeking that orders be made for the children to spend equal time with both of their parents.
- 83. Sections 65DAA (2) and (3) of the Act provide as follows:
 - *2. If:*
 - *(a) a parenting order provides (or is to provide) that a child’s parents are to have equal shared parental responsibility for the child; and*
 - *(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents;*
 - *the court must:*
 - *(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and*
 - *(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and*
 - *(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time*

with each of the [parents](#).

- 3. For the purposes of subsection (2), a [child](#) will be taken to spend substantial and significant time with a [parent](#) only if:
 - (a) the time the [child](#) spends with the [parent](#) includes both:
 - (i) days that fall on weekends and holidays; and
 - (ii) days that do not fall on weekends or holidays; and
 - (b) the time the [child](#) spends with the [parent](#) allows the [parent](#) to be involved in:
 - (i) the [child](#)'s daily routine; and
 - (ii) occasions and events that are of particular significance to the [child](#); and
 - (c) the time the [child](#) spends with the [parent](#) allows the [child](#) to be involved in occasions and events that are of special significance to the [parent](#).

- 84. The husband's proposal is that the wife be restrained from relocating to Ocean Grove and that the current living arrangements continue for the children.
- 85. If the wife is permitted to relocate to Ocean Grove, her proposal is that the children spend alternate weekends with the husband in Bendigo as well as extended holiday time. This would be a considerable reduction in the time that the children currently spend with the husband and would greatly impact on his ability to be involved in the children's daily routines, including school and sporting activities, as well as the many special occasions such as birthdays, in the event that they fell during the school week.
- 86. It is common ground that the husband currently attends parent-teacher interviews, has organised and put in place [Y]'s attendance at soccer and Auskick, and is otherwise actively involved in the children's lives on both weekdays and weekends as well as holidays.
- 87. In determining what is in the best interests of the children, the court must have reference to the matters set out in sections 60CC (2) and (3) of the Act. Each matter contained in the subsections must be considered and assessed in the context of each of the party's proposals and behaviours and a determination made of which party's proposals best meet the children's best interests.
- 88. Section 60CC(2) of the Act sets out the primary considerations which are as follows:

Section 60CC 2(a) the benefit to the [child](#) of having a meaningful relationship with both of the [child's parents](#)

Section 60CC 2(b) the need to protect the [child](#) from physical or psychological harm from being subjected to, or exposed to, [abuse](#), neglect or [family violence](#)

- 89. There is no evidence whatsoever that these children are at any risk of physical or psychological harm as a result of being subjected to abuse, neglect or family violence in the care of either of their parents.
- 90. To the credit of the parties, the children have a close, loving and meaningful relationship with both of them. Both parents have encouraged that relationship.
- 91. It is the wife's evidence that it is her genuinely held belief that her move to Ocean Grove with the children will in no way diminish the children's relationship with the husband.
- 92. This view of the wife is supported by Ms Slattery. At paragraph 76 of her family report, she says as follows:
 - *"It is my view that if relocation is granted there is no reason as to why the relationship that [X], [Y] and [Z] have with Mr Kilbourne would be harmed."*
- 93. However, the nature of that relationship in the event of relocation must be altered. The husband will cease to have the same level of involvement in the children's daily lives and will have much greater difficulty in being able to be consistently involved in their school lives, kindergarten lives, sporting and other extra-curricular activities with the degree of spontaneity and flexibility that he now currently has.
- 94. Currently, the husband spends two days a fortnight with [Z] on a one on one basis, as he has adjusted his work schedule in order to be able to do this. The proposed relocation would bring that important time between [Z] and the husband to an end.
- 95. Section 60CC(3) of the Act sets out the additional considerations to be taken into account, and I will look at each of those in turn.

Section 60CC 3(a) any views expressed by the [child](#) and any factors (such as the [child's](#) maturity or level of understanding) that the [court](#) thinks are relevant to the weight it should give to the [child's](#) views

- 96. The parties agree that the children, and in particular [X] and [Y], have expressed different views in relation to whether they want to stay in Bendigo or move to Ocean Grove.
- 97. The parties were in agreement that in recent times the boys have said they would like to go to Ocean Grove and agree that earlier they had indicated they didn't want to leave Bendigo.
- 98. In their interviews with Ms Slattery for the purposes of the family report, both [X] and [Y] were asked how they would feel in relation to their living arrangements.
- 99. Ms Slattery reports in paragraph 49 that [X] was asked how he would feel if it was decided that he live with his mother. She reports that he said:
 - *"OK 'cos we'd still be able to see dad like we do now."*
- 100. Ms Slattery reported that she asked [X] if there was anything he would like to tell the judge and he indicated:
 - *"Not really"*

and that he would be fine with being told by the judge what he had to do.

- 101. In relation to [Y], Ms Slattery reports he was asked how he would feel if the current arrangements continued and he replied:
 - *"Good."*
- 102. When specifically asked how he felt about the move to Ocean Grove with Ms Partridge and seeing his father on alternate weekends from Friday to Sunday, he said:
 - *"Good 'cos I like the beach and I like Bendigo too so I don't know."*
- 103. Ms Slattery then reports [Y] said:
 - *"Sad 'cos we won't see dad as much as we do now."*
- 104. Like his brother, [Y] didn't have anything he wanted to tell the judge.
- 105. No interviews were conducted with [Z] because of her young age.
- 106. [X], [Y] and [Z] are only young and accordingly not a great deal of weight can be attached to their views. What is apparent however is that whilst the idea of living at the beach is exciting for them, they really don't have any concept of what that means to them in a practical sense and in particular the impact that would have on them in terms of moving away from their father, their friends, their school and their community.
- 107. What is clear is that the children do not wish to spend any less time with their father than they do now. The reality is that that is not possible if they were permitted to move to Ocean Grove.

Section 60CC 3(b) the nature of the relationship of the [child](#) with:

(i) each of the [child's parents](#); and

(ii) other persons (including any grandparent or other [relative](#) of the [child](#))

108. It is common grounds that the children have a close and loving relationship with both their parents.
109. The husband made it clear that at no time did he ever want to be just a “weekend dad”.
110. It was argued on the husband’s behalf that the relationship he has with his children is one that has arisen as a result of him having their “shared care”. He takes the children to and from school, he participates in their sporting activities at all times whether such activities fall on a weekend during their time with him or not, he has regular phone calls with the children, and participates in their birthdays and other special events. In relation to [Z], the husband has one on one time with her every second Friday and Monday which has lent itself to them having a very close and loving relationship.
111. The wife has been the children’s primary carer since birth. It was her evidence, which was not refuted by the husband, that they made a decision when the children were born that she would be primarily a “stay at home mum” and to this end, she has taken extended maternity leave from her employment as a [omitted] to enable that to happen.
112. When the children were seen by Ms Slattery, the possibility of them living with the husband in Bendigo in the circumstances that the wife chose to relocate was still on the table. Both [X] and [Y] made it very clear that they wished to continue to live with their mother.
113. The children have a close and ongoing relationship with their maternal and paternal grandparents. As set out earlier in this judgment, these relationships, particularly with the paternal family, have been encouraged and made possible by the wife. I am satisfied that those relationships will continue wherever the children should reside.
114. Both the husband and wife have re-partnered and it is agreed that the children have positive relationships with both their parents’ new partners.
115. The wife and her new partner, Mr B, have a baby daughter, [M], who is eight months old and are expecting their second child in April next year.
116. The children love their little sister and will no doubt develop a close and loving relationship with their new sibling upon his or her birth.
117. When interviewed by Ms Slattery, [X] included in his family group Mr B’s two elder children, [L] aged 16 years and [E] aged 14 years (“[L] and [E]”), and it is apparent that he sees them as part of his family.
118. At the moment Mr B is able to see [L] and [E] very regularly as they live 30 minutes away in Castlemaine, and it was his evidence he sees them several times each week. If he were to move to Ocean Grove, this level of interaction would be considerably diminished. This did not seem to be something Mr B had properly thought through as his only comment was:
- o “They’d be able to come down to Ocean Grove.”

Section 60CC 3(c) the willingness and ability of each of the [child’s parents](#) to facilitate, and encourage, a close and continuing relationship between the [child](#) and the other [parent](#)

119. In considering this factor, the court must also take into account sub-s.60CC(4) and (4A) which provide as follows:
- o 4. Without limiting paragraphs (3)(c) and (i), the [court](#) must consider the extent to which each of the [child’s parents](#) has fulfilled, or failed to fulfil, his or her responsibilities as a [parent](#) and, in particular, the extent to which each of the [child’s parents](#):
 - (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long term issues in relation to the [child](#); and
 - (ii) to spend time with the [child](#); and
 - (iii) to communicate with the [child](#); and
 - (b) has facilitated, or failed to facilitate, the other [parent](#):
 - (i) participating in making decisions about major long term issues in relation to the [child](#); and
 - (ii) spending time with the [child](#); and
 - (iii) communicating with the [child](#); and
 - (c) has fulfilled, or failed to fulfil, the [parent](#)’s obligation to maintain the [child](#).
 - o 4A. If the [child’s parents](#) have separated, the [court](#) must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.
120. Reference has been made already in this judgment to the credit both parties must be given in ensuring that the children have a close and loving relationship with each of them and to the cooperative manner in which they’ve gone about parenting their children since their separation.
121. Unfortunately, the current dispute between the parties has caused tension between them and there has been a breakdown in their ability to co-parent as well as they have in the past. It is also apparent that the children are conscious of the current acrimony between their parents. In her family report at paragraph 73, Ms Slattery notes that:
- o “The conflict that has developed between (sic the parents) does place the emotional well-being of [X], [Y] and [Z] in jeopardy.”
122. It is noted however that Ms Slattery was of the view that whatever the outcome of the case, both parents are capable of moving on and ensuring that they continue to co-parent their children in a child-focussed manner.

Section 60CC 3(d) the likely effect of any changes in the [child](#)’s circumstances, including the likely effect on the [child](#) of any separation from:

(i) either of his or her [parents](#); or

(ii) any other [child](#), or other person (including any grandparent or other [relative](#) of the [child](#)), with whom he or she has been living

123. There is no doubt that if the children relocate with the wife to Ocean Grove, there will be a change in the relationship that the children have with the husband.
124. Whilst they will continue to have a meaningful relationship with him, its’ fundamental nature will have to change because the husband can no longer be involved in the children’s day to day activities to the same level and extent that he has been.
125. As set out previously in this judgment, Ms Slattery specifically raised concerns in relation to the two boys in the event of relocation. She noted that at their current stage of development, their father as their main male role model would become even more important as they develop and they will have a need for even more time with him.
126. In paragraph 76 of her report, Ms Slattery again set out the importance of [X] and [Y] moving into the stage where they will want to be starting to spend more time with their father as he is their major male role model.
127. Ms Slattery was also cross-examined as to the impact of [Z] no longer being able to spend one on one time with her father that she currently enjoys. It was Ms Slattery’s view that it would certainly be the better option for [Z] for “that time” to be able to continue into the future.

Section 60CC 3(e) the practical difficulty and expense of a [child](#) spending time with and communicating with a [parent](#) and whether that difficulty or expense will substantially affect the [child](#)’s [right](#) to maintain personal relations and direct contact with both [parents](#) on a regular basis

128. The distance from Bendigo to Ocean Grove is just over 200 kilometres and the trip takes somewhere between three to three and a half hours depending upon the time of day and the route taken. Thus, each fortnight the children would spend up to seven hours in the car.
129. Whilst not an insurmountable distance, there is no doubt that having to make this trip every second weekend will impact upon the children. The trip on Friday evenings will be made at the end of the school day when the children are tired and in winter will be taking place in the dark. In order for the children to be back in Ocean Grove by 6:00 am, their time with their father will have to finish no later than

Ocean Grove by 6.00 pm, then time with their father will have to finish no later than mid-afternoon on the Sunday.

130. It's the wife's proposal that the parties meet halfway between Ocean Grove and Bendigo for changeover in order for there to be a sharing of the travel burden.
131. Whilst the wife was clearly volunteering to undertake such responsibility, she did not seem to have contemplated the difficulties this might afford her with young [M] and the arrival of the new baby.
132. It was the wife's evidence that she, Mr B and the children regularly travel to Ocean Grove for weekends and for holidays, and that the children cope very well with the trip and in fact enjoy it.
133. However, in cross-examination, the wife did concede that there had been occasions when they had returned from Ocean Grove for the weekend when [X] and [Y] had been too tired to go to school the next day.
134. It was also common ground that [Y] in particular is very keen on sport and that as he gets older, it is anticipated that he will be an active participant in team sports. Having to travel to Bendigo every second weekend must impact on his ability to participate in his sport. The wife's response to this issue that [Y] could play sports that had week-night competitions was, might I suggest, disingenuous. If [Y]'s sporting choices are such that his games are only played on a weekend, his ability to participate would be severely impacted upon in the event of relocation.

Section 60CC 3(f) the capacity of:

- (i) each of the [child's parents](#); and
 - (ii) any other person (including any grandparent or other [relative](#) of the [child](#));
- to provide for the needs of the [child](#), including emotional and intellectual needs

135. Both parents have the capacity to and have provided for the emotional and intellectual needs of their children.
136. There is no doubt that the wife genuinely wants to move to Ocean Grove, that she genuinely believes that this will be a positive experience for the children. It is her belief such a move will not impact on the children's relationship with their father.
137. There is no doubt that the children are excited about the concept of living at the beach, particularly at Ocean Grove where they have spent many enjoyable weekends and holidays.
138. However, the practical realities of leaving their schools, friends and in particular their father, is beyond their grasp at their age. I have formed the view that the wife is subconsciously minimising the potential impacts of such a move on the children in her desire to fulfil her long-held dream to move to Ocean Grove herself.

Section 60CC 3(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the [child](#) and of either of the [child's parents](#), and any other characteristics of the [child](#) that the [court](#) thinks are relevant

139. The children were born in Bendigo and this is their community in which they have been nurtured and have flourished.
140. In her family report, Joy Slattery raises that one of the main issues for [X] and [Y] is that they are moving into stages where they will be identifying more with their father as their male role model and may be wanting to spend more time with him into the future than they currently do now. This will not be possible if the children are living in Ocean Grove.

Section 60CC 3(h) if the child is an [Aboriginal](#) child or a Torres Strait Islander child:

- (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
- (ii) the likely impact any proposed parenting order under this Part will have on that right;

141. Not relevant.

Section 60CC 3(i) the attitude to the [child](#), and to the responsibilities of [parenthood](#), demonstrated by each of the [child's parents](#)

142. As has been a constant theme throughout this judgment, both parents demonstrate a very positive attitude to the responsibilities of parenthood. They have cooperated at all times with each other in the rearing of their children, and whilst the recent rupture in that relationship caused by the current dispute has impacted upon their ability to communicate with each other, the reality is that they have still done so and have still ensured that the children have a positive and meaningful relationship with each of them.

Section 60CC 3(j) any [family violence](#) involving the [child](#) or a [member](#) of the [child's](#) family

143. Not relevant.

Section 60CC 3(k) any [family violence order](#) that applies to the [child](#) or a [member](#) of the [child's](#) family, if:

- (i) the order is a final order; or
- (ii) the making of the order was contested by a person

144. Not relevant.

Section 60CC 3(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further [proceedings](#) in relation to the [child](#)

145. The difficulty in any relocation case is that whatever the outcome is, one of the parents is going to be extremely distressed at that determination.
146. Having said that however, both the parties in this matter to their credit are child-focussed and I am satisfied they will ensure that they continue to parent their children to the best of their ability.

Section 60CC 3(m) any other fact or circumstance that the [court](#) thinks is relevant

147. As previously set out in detail in this judgment, the wife genuinely wishes to move to Ocean Grove and believes this will afford her and her family greater opportunities and much better lifestyle. In the event she is unable to move it will cause her a great deal of unhappiness.
148. In her family report, Ms Slattery indicated that she asked the wife how she would be affected if she was not allowed to move. Ms Slattery reports in paragraphs 14 and 15 of her report as follows:
 - o "Ms Partridge said that she would be devastated and mortified with the system. Ms Partridge said that she has not compromised the children's needs at any time. Ms Partridge said that emotionally she would be very crushed as she does not believe as a couple that she and Mr B should have their dreams taken away or compromised by another couple. Ms Partridge said that she would be devastated for the children as well, as relocation would open up a lot of other opportunities for them

- ...would open up a lot of other opportunities for them.
- Ms Partridge said that she would feel her parenting rights are being abused if she cannot choose. Ms Partridge then said that if she had to stay in Bendigo she would be very unhappy and until she was able to get her head around this it may impinge on her parenting... In addition, Ms Partridge believes that it would be damaging to her parenting relationship with Mr Kilbourne.”
149. There is no doubt that if not permitted to relocate, the wife is going to be very distressed by this decision. However, she herself conceded that she and Mr B will continue to make their life in Bendigo, purchase a larger property to accommodate their expanding family and will continue to spend as much time at Ocean Grove as possible.
150. As noted earlier, in her family report, Ms Slattery makes the following observations in relation to Ms Partridge in paragraph 75:
- *“It is my view that Ms Partridge presents as a level headed and stable parent who always places the children’s needs as her priority so if relocation was not granted she would deal appropriately with this in time.”*
151. Ms Slattery also makes the following insightful observation:
- *“If relocation is not granted at this time then there is no reason why Ms Partridge could not keep her dream and plan for this to be a reality at some future time.”*
152. Ms Slattery was also asked what the impact would be on the husband in the event that relocation was allowed. It was her evidence that like the wife, the husband is a level headed and stable person who is very child-focussed and that whilst he too would be severely distressed by any decision that allowed the children to move, over time he would deal with this and ensure that he did everything in his power to maintain and develop his relationship with his three children.
153. It was argued on behalf of the wife, that there is an alternative outcome for this case and that is for not only the wife and children to relocate, but also for the husband and Ms T to move to the Bellarine Peninsula. In that circumstance, the wife would be able to achieve her dream and the husband’s relationship with the children would not be impacted upon in any way as it was common ground that the existing arrangements would remain in place if the parties were geographically close to each other.
154. In *U v U* [2002] HCA 36; (2002) FLC 93-112 at paragraph 175, Hayne J held:
- *“When one parent... wishes a child who is, or is to be, resident with that parent to move to a place distant from the other parent, it should not be assumed that that other parent cannot, or should not, contemplate moving to be near the child. There may be... compelling reason for that other parent... not to move, but it would ordinarily be expected that these reasons would be explored in evidence and the validity of any assumption that the other parent will not move would be examined. Just as, in this case, the mother was asked what she would do, if she could not have the child reside with her in India, so too it might have been expected that the father would be asked what he would do, if the mother were to have the child reside with her in India. Such questions should not be treated as mere forensic tests of parental devotion, to which only one answer is seen as being satisfactory proof of being a loving parent. Rather, they are no more than a prelude to a deeper inquiry about where the best interests of the child may lie and what arrangements will best serve those interests.”*
155. The husband was cross-examined at some length in relation to the possibility of him moving to the Bellarine Peninsula, either in the event that the wife was successful in relation to her application to relocate or as a possible resolution of the matter as a whole. It was his evidence that he would have to think very seriously as to whether he would be in a position to move to the Bellarine Peninsula in the circumstances that the children were able to relocate there. The husband has a secure job, a property, a settled relationship and Bendigo has been his home for most, if not all, of his life. To his credit, the husband did not exclude the possibility that if the children relocated he would move, but sensibly indicated it was something he would have to think about long and hard.
156. Ms T, the husband’s partner, gave similar evidence.
157. It was apparent from the husband’s evidence, that his preference would be to remain living in Bendigo.

Conclusion

158. This has been an extraordinarily difficult matter to determine. The court is faced with two outstanding parents who have at all times been child-focussed and who have worked cooperatively in the parenting of their children.
159. The case law is quite clear that when a party seeks an order to relocate, they are not obliged to establish a good reason for wanting to relocate (see *A v A: Relocation Approach* [2000] FamCA 751; [2000] FLC 93-035). Having said that, in this instance the wife has a long-standing desire to live in Ocean Grove and she genuinely believes that a move to that town would afford her and her family great happiness and a myriad of opportunities.
160. However, the reality is that in determining the best living circumstances of the children, the court has to look at the advantages and disadvantages of the parties’ competing proposals.
161. The advantages for the children in moving to Ocean Grove would be that they would live with a parent who is fulfilling her life-long dream and the joys and pleasures of living by the beach.
162. The disadvantages however are the loss of the kind of relationship that they currently have with their father. Ms Partridge, in her evidence, spoke of:
- *“the quantity of the children’s relationship being reduced but not the quality.”*
163. I don’t accept this. The children currently spend significant and substantial time with their father as it is defined under section 65DAA of the Act. Their father is currently involved not only on weekends but in the children’s day to day living. He takes them to school, he attends their sporting and special school events, he spends one on one time with [Z] and is available to them and to the wife on very short notice in the event of any emergency or crisis, or unexpected positive event happening in the children’s lives. If the children live three and a half hours away from him, the children will be denied that level of involvement by their father in their lives.
164. Further, as Ms Slattery has set out in her report, as the boys [X] and [Y] get older, the husband as the major male role model will be playing an even more important part in their lives and they may well end up needing more time with him than they are currently having. Again, this would not be possible if they are living three and a half hours away from him.
165. I accept that this needs to be balanced against the wife’s right to freedom of movement and opportunities to move on in her life and hence the difficulty when faced with decisions of this type.
166. However, on balance I believe that it is in the best interests of the children that they continue to reside in close geographical proximity to the husband. I am therefore of the view that it would be in the best interests of the children that they remain living with the wife in Bendigo and spending significant and substantial time with the husband in accordance with the current arrangements.
167. In forming this view, I have considered the possibility of the husband following the children to the Bellarine Peninsula by allowing the wife to relocate, but I believe that is not a practical or realistic option at this time in the circumstances that the husband is in secure employment, a secure relationship, has his own house and is in the community where his friends and family are based.
168. There is no doubt that the wife will be very disappointed in this decision and that she will initially struggle to come to terms with it. However, I am satisfied that she will adjust to this disappointment and will continue to be the loving, supportive and caring mother that she has been to the children all their lives.
169. I am also satisfied that the wife will continue to support the children having a meaningful and loving relationship that they currently have with the husband.
170. In her evidence, Ms Slattery suggested that the parent who was disappointed by the outcome of this case would benefit from some counselling to assist them in adjusting to the decision and to assist them in developing strategies to maintain the positive parenting relationship that the parties have had historically. This may be of assistance to the wife in this case.

I certify that the preceding one-hundred and seventy (170) paragraphs are a true copy of the reasons for judgment of Bender FM

Associate: Sarah Hession

Date: 10 December 2009

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