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CASE NOTES

U v U*

U v U: THE HIGH COURT ON RELOCATION

JULIET BEHRENS†

[In this case note I comment on the High Court's recent and highly-publicised decision in U v U. In this case, a majority of the Court dismissed a mother's appeal against a decision of the Family Court which prevented her from relocating with her daughter to India. I provide some background context to relocation, identify the legal issues and discuss decisions on those issues in the High Court. I argue that the decision has left the law on relocation less clear than it has ever been. I then analyse the decision by reference to a number of themes: discretion and its alternatives; gender equality; violence; a more inquisitorial Family Court; and legal strategies. I argue that attention must now turn to legislative reform and that such reform should embody legislative principles and presumptions which defer to the judgment of a child's primary caregiver in relocation cases.]

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I INTRODUCTION

The decision in *U v U*¹ is the High Court's second and most recent consideration of a 'relocation case' in which one parent asks a court to stop the other parent moving to a new location with a child or children. In this case the mother,

* (2002) 191 ALR 289.

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¹ (2002) 191 ALR 289.

who was the residence parent, had applied to take her now nine year old daughter back to live with her in Mumbai, India, where, the Court found, she had family and better employment prospects. The father sought to have the child reside with him in Australia or, alternatively, with her mother but within the Sydney-Wollongong region. The trial judge ordered that the child should reside with her mother in Australia.² The mother's appeal to the Full Court of the Family Court was unsuccessful³ and she appealed to the High Court.

In a five to two decision, the High Court dismissed the appeal. As a result, the woman with whom the child lives most of the time must continue to reside in the Sydney-Wollongong area. She cannot return to her homeland unless she leaves her child behind. The judgment contained strong dissents by Gaudron and Kirby JJ, who would have ordered that the matter be reheard by a single judge. Kirby J has subsequently spoken about the case in a paper presented to the International Association of Youth and Family Judges and Magistrates as involving a 'problem [that] is likely to increase rather than diminish.'⁴

I have published elsewhere my concerns about restrictions on residence parents' relocation, and will return to these later in this case note.⁵ I am disappointed by the particular outcome in this case for a woman who has said publicly that she feels trapped and enslaved by the decision,⁶ and who I believe has a very strong case for relocation. I am also disappointed that this decision has not resulted in a clarification of the appropriate approach to these cases in a way that would advantage those seeking to relocate. Further, I argue that this case leaves this area of the law less clear than it has ever been. There are, however, some aspects to the judgments which I regard as positive. These include the strong dissents, which recognise the gendered implications of decisions to restrict relocation, and the majority's recognition that, given some evidence on the matter, a court should consider the possibility that, rather than restrict the residence parent's relocation, a non-residence parent could also relocate. In my view, the attention of those who are concerned about this issue must now turn to matters of legal strategy and to legislative reform.

In this case note I will begin by providing some background and examining the legal issues and the judgments in *U v U*. I will then explain my views about this and other relocation cases by analysing the issues raised in *U v U* in relation to various themes. I am a feminist researcher, and an overriding theme throughout this case note is the implications of decision-making in this area for gender equality.

² *U v U* (Unreported, Family Court of Australia, O'Ryan J, 6 March 2000) 2.

³ *U v U* (Unreported, Full Court of the Family Court of Australia, Kay, Holden and Carter JJ, 13 September 2000).

⁴ Justice Michael Kirby, 'Children and Family Law — Paramount Interests and Human Rights' (Paper presented at the International Association of Youth and Family Judges and Magistrates, XVI World Congress 2002, Melbourne, 27 October 2002) 25.

⁵ See Juliet Behrens, 'A Feminist Perspective on *B and B* (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65; Patricia Easteal, Juliet Behrens and Lisa Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *Australian Journal of Family Law* 234.

⁶ Leonie Lamont, 'Custody Ties That Bind', *The Sydney Morning Herald* (Sydney), 3 July 2002, 11.

II BACKGROUND

The decision in *U v U* has been the subject of much media commentary and public debate.⁷ This is to be expected, as the implications of relocation cases are great, both for the individuals concerned and for public policy. These cases feed into debates about 'family', the value of ongoing contact between non-resident parents and their children, children's rights and gender equality. As the cases nearly always involve fathers trying to stop mothers from relocating,⁸ they provide a focus for political debate about the position of men and women under contemporary Australian family law.

The law pertaining to these cases is contained in Part VII of the *Family Law Act 1975* (Cth), which deals with children, and in decisions of the Family Court and the High Court under that Act. The *Family Law Act 1975* (Cth) does not deal with 'relocation cases' separately, and case law has indicated that they are not to be treated as a different species of case from applications for residence and contact orders where relocation is not an issue.⁹ As with all these cases, in making a decision 'a court must regard the best interests of the child as the paramount consideration.'¹⁰ Other relevant provisions in the legislation include a principles and objects section relating to Part VII which, among other things, provides that 'except when it is or would be contrary to a child's best interests ... children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.'¹¹ There is also a checklist of factors which a decision-maker must take into account in determining what is in the child's 'best interests'. These include the nature of the relationships between the parties, the parenting capacities of the parents, the difficulties and expense of contact, the effect of any separation from a parent on a child, and any history of family violence.¹²

The case law emphasises the discretionary nature of decisions about parenting orders under Part VII and demonstrates that outcomes are notoriously unpredictable. Given the lack of legislative content on this issue, the approach of decision-makers has been strongly influenced by case law. Case law on this subject has a

⁷ See, eg, Leonie Lamont, 'Cards Stacked against Mothers, Says Judge', *The Sydney Morning Herald* (Sydney), 3 July 2002, 7; Luke McIlveen, 'Mother, Daughter Forced to Stay Here', *The Australian* (Sydney), 6 September 2002, 5; Editorial, 'Divorced Mothers Deserve Better', *The Sydney Morning Herald* (Sydney), 13 September 2002, 10; Owen Corcoran, 'Consider the Fathers' Side before Changing the Law', *The Sydney Morning Herald* (Sydney), 16 September 2002, 12; Bettina Arndt, 'Long Road to Fair-Contact Rules', *The Sydney Morning Herald* (Sydney), 20 September 2002, 13; Julie Szego, 'How a Mother with Career Goals Split the High Court', *The Age* (Melbourne), 5 October 2002, 14; Janet Albrechtsen, 'Children Unheard amid Din for Parents' Rights', *The Australian* (Sydney), 9 October 2002, 13.

⁸ *AMS v AIF* (1999) 199 CLR 160, 206 (Kirby J). Kirby J noted that approximately 84 per cent of residence parents are mothers. Thus, in practical terms, court orders restraining relocation restrict the freedom of movement of women far more than men. See also Easteal, Behrens and Young, above n 5, 240: in that study, 95 per cent of those wanting to relocate were women.

⁹ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, 735 (Nicholson CJ, Fogarty and Lindenmayer JJ) ('*B and B*'); *A v A: Relocation Approach* (2000) 26 Fam LR 382, 397 (Nicholson CJ, Ellis and Coleman JJ) ('*A v A*').

¹⁰ *Family Law Act 1975* (Cth) s 65E.

¹¹ *Family Law Act 1975* (Cth) s 60B.

¹² *Family Law Act 1975* (Cth) s 68F(2).

long history in the Family Court.¹³ The first relevant High Court decision was *AMS v AIF*,¹⁴ in which the Court upheld an appeal by a mother who had been prevented from relocating with a child from Western Australia to the Northern Territory. This case may be said to have lacked a clear ratio decidendi, and the Full Court of the Family Court in *A v A*¹⁵ attempted to clarify the appropriate approach in light of that decision.

In *A v A*, the Full Court attempted to give guidance to trial judges by indicating the stages of analysis which it would expect a decision on relocation to display. The first stage required identifying the relevant competing proposals of the parties; the second required dealing with the evidence and submissions in relation to each relevant statutory factor; and the third required a determination and explanation of which proposal is to be preferred, 'having regard to the principle that the child's best interests are the paramount but not sole consideration.'¹⁶

One of the major aspects of the decision in *AMS v AIF* was that a parent is not required to show compelling reasons for relocation. In *A v A*, the Full Court noted, consistently with *AMS v AIF*, that reasons for the proposed relocation must not be treated as a separate matter, but must be weighed with the other matters so far as they bear on the child's best interests.¹⁷ In addition, the Full Court stated that none of the parties bear an onus and that '[t]he ultimate issue is the best interests of the children and to the extent that the freedom of a parent to move impinges upon those interests then it must give way'.¹⁸ The Court also noted that '[e]ven where the proposal is made to remove the child to another country, courts will not necessarily restrain such moves'.¹⁹ It similarly referred to the importance of considering the arrangements proposed for the child to maintain contact with the parent 'no longer living permanently in close physical proximity'.²⁰

Given this law, what were the relevant factors in *U v U*? There were certain factors which leaned towards a decision restricting relocation. In particular, the fact that this was a case where the mother wanted to move overseas, rather than inter- or intrastate, was significant. In *AMS v AIF*, Kirby J stated that 'courts have suggested, rightly in my view, that a more relaxed attitude should be adopted to relocation within Australia than relocation overseas'.²¹ Another factor which weighed against relocation in *U v U* was that the mother had unilaterally taken the child back to India on one occasion and had tried to do so on another

¹³ See Behrens, 'A Feminist Perspective on *B and B*', above n 5; Eastaer, Behrens and Young, above n 5.

¹⁴ (1999) 199 CLR 160.

¹⁵ (2000) 26 Fam LR 382.

¹⁶ *Ibid* 409 (Nicholson CJ, Ellis and Coleman JJ).

¹⁷ *Ibid*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ (1999) 199 CLR 160, 209.

occasion. Also, the trial judge found that the father had a 'close and loving relationship' with the child.²²

Most of the other factors in this case, however, tended to favour relocation. For example, the mother had always been the primary caregiver of the daughter. The father and mother were both born in India and the mother had lived with the child in India for two and a half years after the initial separation. During that time she had provided regular contact to the father, who was living in Australia, in her home. There appears to have been no financial impediment to regular contact occurring,²³ and the mother was proposing that such contact occur for significant periods both in India and in Australia. Furthermore, the mother has few prospects of work in Australia where she is dependent on social security. She has good prospects of a career in India. The mother is isolated with few friends and no family in Australia, but has significant family support in India. There was also a counsellor's evidence that if she was forced to stay in Australia she would be distressed and that

[u]nless the mother is able to deal with her own distress, regarding her separation from her own parents, sufficiently to be able to accept that, in her child's best interests, she needs to stay in Australia, then the child will either be subjected to that distress, or will have her relationship with her father severely curtailed.²⁴

The mother also alleged that the father was emotionally and physically abusive while they lived together in Australia. The most serious of these allegations was that a physical assault preceded the premature birth of the child.²⁵ While the trial judge noted that the father had admitted that he hit the mother on two occasions during the marriage, for reasons which were not explained the trial judge did not accept 'that during the relationship the husband subjected the wife to domestic violence.'²⁶

III THE LEGAL ISSUES

There were a number of grounds of appeal in this case. The main grounds argued were failure to properly consider the proposals of the parties and their relevance; failure to give sufficient weight to long-term interests; failure to achieve an appropriate balance between optimising contact and providing the child with a stress-free environment; and failure to give consideration to international human rights obligations.

²² *U v U* (Unreported, Family Court of Australia, O'Ryan J, 6 March 2000) [160].

²³ *U v U* (2002) 191 ALR 289, 290 (Gaudron J). The husband travelled to India five times during the two and a half year separation period and had extensive contact with the child.

²⁴ *Ibid* 293 (Gaudron J), quoting the counsellor.

²⁵ I have read the affidavit of the wife filed in these proceedings at the Sydney Registry on 10 June 2000. These allegations are made at [37]–[51] of the affidavit.

²⁶ *U v U* (Unreported, Family Court of Australia, O'Ryan J, 6 March 2000) [196].

A Proposals of the Parties and Their Relevance

The appeal ground relating to the High Court's consideration of the parties' proposals was

that the trial judge and the Full Court erred in their approach by failing to focus on, analyse and reach a conclusion on the separate proposals of the respondent and appellant, but instead, concentrated their minds on the issue whether the appellant should be permitted to remove the child from Australia.²⁷

Gaudron J had suggested in the proceedings in which special leave was granted in this case that the cases were being dealt with incorrectly as applications to relocate. In the course of the special leave application, Gaudron J posed the question:

which of three alternatives better serves the interests of the child? The third alternative only arising, really, if the question is, is it better, if the question arises, when at a certain point in this case the wife would have said, 'Look, if you think the child's interests are better served by living with her father in Australia rather than with me in India, then I wish you to consider this possibility. But I only wish you to consider that possibility if you come to that answer.' Otherwise, if you approach it on the basis of permission to relocate, you are warping the issue, are you not?²⁸

Gaudron J appeared here to be clarifying what she said in *AMS v AIF*. There she stated that there had been a failure to determine the issues and that the case had in effect been turned into one about whether the mother should be permitted to relocate to Darwin, based largely on whether she had compelling reasons to do so.²⁹ For a majority of the judges in *AMS v AIF*, this was a substantial basis for upholding the mother's appeal.

The approach which Gaudron J hinted at in the special leave application would advantage parents who wish to relocate when compared with the current approach. It would be open to them to construct their proposals in such a way as to require the court to make a choice between the child living with their non-resident parent (usually their father) in the current location and living with their primary caregiver (usually their mother) in the new location. Such a decision is likely to favour the primary caregiver. It would only be if the choice was in favour of the father that the mother's alternative proposal, that the child live with her in the current location, should be considered.

In *U v U*, the mother put forward her proposal that the child live with her in India. The father sought orders that the child live with him or, that if the child were to live with the mother, that residence be in the Sydney-Wollongong area. In cross-examination the mother was asked: 'in the event of you not being permitted to take the child to Mumbai with you, is it your intention to remain living in the Wollongong area?' She answered 'yes' to this question.³⁰ The trial judge then treated this as a proposal by the mother, alternative to her application

²⁷ *U v U* (2002) 191 ALR 289, 302 (Gummow and Callinan JJ).

²⁸ Transcript of Proceedings, *U v U* (High Court of Australia, Gaudron J, 12 October 2001) 6.

²⁹ *AMS v AIF* (1999) 199 CLR 160, 191.

³⁰ *U v U* (2002) 191 ALR 289, 318 (Kirby J).

to the Court that the child live with her in India, and one to which he ultimately gave effect. One of the questions on appeal, then, became whether this was the appropriate approach to take.

For the majority, the question of whether the trial judge had properly identified the proposals of the parties did not matter because courts making parenting orders are not bound by the proposals of the parties. Gummow and Callinan JJ stated that, while in many cases a court will adopt the proposal of one of the parties in preference to the other,

[t]here will, however also be cases, and not a few of them we suspect, in which it will simply not be possible for a judge to adopt exclusively or perhaps even substantially, a proposal of either party. In such a case the final order will evolve out of the evidence as it emerges, and submissions as they are developed.³¹

Hayne J added that ‘it would be quite wrong to treat the decision that is to be made as confined to a choice between whatever may be the particular “proposals” that the parents may make for the residence of, and contact with, the child.’³² He went on to consider Gaudron J’s point that to fail to consider the possibility that the father could himself relocate, although he had not proposed this, was to apply sexist stereotypes. Hayne J responded that it should not be assumed that the other parent cannot move, but in this case there was no evidence on that matter. He said:

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.³³

For Kirby J, however, the trial judge erred in treating the mother’s ‘reluctant concession’ as a proposal by the mother, since

[t]reating the wife’s refusal to abandon her child and her expression of willingness (if necessary) to stay with the child in Australia as an ‘alternative proposal’ requires, in effect, that parent to show ‘good’ or ‘compelling’ reasons to relocate ... Such an approach stacks the cards unfairly against the custodial/residence parent. It is precisely the approach held to have been erroneous in *AMS* ... This approach also tends to constitute an unjust burden on women. It is not enough that the decision-maker avoids explicit reference to the need for such a parent to show a ‘good’ or ‘compelling’ reason for wanting to move. By treating the maintenance of the status quo as a third alternative ‘proposal’, advanced by the wife when it was not, much the same result ensues.³⁴

³¹ Ibid 302.

³² Ibid 326.

³³ Ibid 327 (emphasis in original).

³⁴ Ibid 321.

Gaudron J would also have allowed the appeal but her reasons, while focusing on this issue, were different from those of Kirby J. She indicated that the power to make parenting orders is limited by the requirements of procedural fairness, and consequently considered and rejected an argument that the mother had been denied procedural fairness. She pointed out that the father's alternative claim that the child live with the mother in Australia had been made known by his cross-application, and that this made consideration of that proposal necessary. With respect to the argument that Gaudron J had alluded to in the special leave process, she stated that the way in which these proposals had been put meant that 'all three proposals had to be separately evaluated and a choice made between them or ... a modified version of one or other of them.'³⁵ She noted, however, that the failure to explore the possibility of the father's relocation 'seems to me to be explicable only on the basis of an assumption, inherently sexist, that a father's choice as to where he lives is beyond challenge in a way that a mother's is not.'³⁶

For Gaudron J the error was in the failure to separately evaluate the different proposals. In particular, she notes that

[t]here was no evaluation of the father's proposal that N live with him in Australia and, notwithstanding that it was ultimately held to be preferable, there was little, if any, evaluation of his alternative proposal that N reside with her mother in Australia.³⁷

The majority's comments that a court is not bound by the proposals of the parties calls into question the Full Court of the Family Court's guidance in *A v A*.³⁸ As indicated above, the first step of this process required the court to identify the competing proposals of the parties, and the next steps involved assessment of those proposals. On this approach Gummow and Callinan JJ in *U v U* said:

we do not doubt that the Family Court is obliged to give careful consideration to the proposed arrangements of the parties. Whether the Court is obliged, or will be able in every case to treat each of the three steps as discrete and in the suggested order may be another question. But the Court is not, on any view, bound by the proposals of the parties.³⁹

The High Court has, therefore, cast doubt on the Full Court's attempt to indicate a clear approach to these cases and to give guidance to trial judges. In addition, they have provided little with which to replace it, a failure which to some extent continues a trend in decision-making on family law matters by the High Court.⁴⁰

³⁵ Ibid 296.

³⁶ Ibid.

³⁷ Ibid 297.

³⁸ (2000) 26 Fam LR 382, 408–9 (Nicholson CJ, Ellis and Coleman JJ).

³⁹ (2000) 191 ALR 289, 306.

⁴⁰ See Juliet Behrens, 'Family Law' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 269.

B *Short-Term versus Long-Term Best Interests*

Another appeal ground argued by the mother was that the focus of the trial judge had been on the short-term welfare of the child, to the neglect of her long-term interests. This was an interesting attempt to elicit some judicial consideration of the meaning of 'best interests' as an abstract term. As noted earlier, this is a notoriously nebulous and indeterminate standard. The legislation itself provides no guidance on this issue, and it is surprising to me that no court has given significant consideration to the question of what priority is to be given to short-term over long-term interests.

This ground of appeal was dealt with only by Gummow and Callinan JJ, and then very briefly and dismissively:

just how far ahead it is possible for a trial judge to look, and how reliable long term predictions about domestic, marital and social arrangements in modern times can be, are matters upon which minds will inevitably differ. The exercise, of looking to, and making orders for the future, is peculiarly a discretionary one. The exercise of the discretion in this case has not been demonstrated to be erroneous.⁴¹

I return to this comment under the theme 'Discretion versus Rules'.

C *Appropriate Balance between Maintaining Contact and Providing a Stress-Free Environment*

This appeal ground was an attempt to draw on the recent English Court of Appeal decision in *Payne v Payne*.⁴² In this decision, the Court emphasised the importance to be placed on the genuine proposals of a residence parent who wanted to relocate, in part because of the impact of a parent's stress on the child. Thus, while rejecting the argument that there was a presumption in favour of relocation, and noting that the welfare of the child is always paramount, Butler-Sloss P stated that '[t]he reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.'⁴³

The majority judges in *U v U*, although not explicitly rejecting this approach, did not embrace it. They indicated that the emphasis given in *Payne* to the importance of a stress-free environment 'is still one only of a multiplicity of considerations to be weighed in parenting cases.'⁴⁴ On the other hand, in his dissenting judgment, Kirby J found that the approach in *Payne* was 'correct'⁴⁵ in that it paid appropriate attention to the gendered social and economic consequences of caregiving upon women, consistent with the *Convention on the Elimination of All Forms of Discrimination against Women*.⁴⁶

⁴¹ *U v U* (2002) 191 ALR 289, 308.

⁴² [2001] Fam 473 ('*Payne*').

⁴³ *Ibid* 500.

⁴⁴ *U v U* (2002) 191 ALR 289, 308 (Gummow and Callinan JJ).

⁴⁵ *Ibid* 325.

⁴⁶ Opened for signature 1 March 1980, 1249 UNTS 13, 19 ILM 33 (entered into force 3 September 1981).

D Human Rights Considerations and Their Relevance

A different appeal ground argued was that 'the courts below failed to apply, or to give any consideration to Australia's international treaty obligations, particularly art 12 of the *International Covenant on Civil and Political Rights*'.⁴⁷ This ground sought to build on the first High Court relocation case, *AMS v AIF*, in which arguments based on the mother's rights to freedom of movement (under both the *Constitution* and international instruments) and equality had been central. In that case it was acknowledged that international instruments were relevant, although they 'merely express the sometimes conflicting principles which are already reflected in Australian law and court decisions'.⁴⁸

The major focus of rights arguments in *AMS v AIF* was on s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth), which essentially reproduces s 92 of the *Constitution*, but with reference to the Territory.⁴⁹ In *AMS v AIF*, the High Court found that a person's freedom of movement can be restricted through decisions about parenting orders without breaching s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth) or s 92 of the *Constitution*.⁵⁰ However, there was a lack of consensus about the test for validity. Some of the judges required that the restriction must simply be no greater than that reasonably required to achieve the objects of the *Family Court Act 1997* (WA).⁵¹ For Kirby J, any order would have to be proportional to 'the attainment of the welfare of a child and the protection of the child's best interests'.⁵² Gaudron J, however, took the narrower view that laws restricting relocation must be 'appropriate and adapted to avert a risk to the child's well-being'.⁵³

In *U v U*, the issue was not interstate movement, but international movement. The Court did not revisit the rights issues dealt with in *AMS v AIF*. The issue of the relevance of international human rights instruments was dealt with by the majority very briefly:

There are two answers to the appellant's argument. The first is that whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child if that were to be adversely affected by a movement of a parent. The second answer is that the primary judge did weigh up and treat as a relevant, important consideration, the appellant's wish to return to India.⁵⁴

This statement leaves open an important issue of interpretation of the 'best interests' test in s 65E of the *Family Law Act 1975* (Cth) in the context of relocation disputes. The different approaches to the 'best interests' test have been

⁴⁷ Ibid 302 (Gummow and Callinan JJ).

⁴⁸ *AMS v AIF* (1999) 199 CLR 160, 218 (Kirby J).

⁴⁹ Section 49 provides: 'Trade, commerce and intercourse between the Territory and the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'

⁵⁰ (1999) 199 CLR 160, 179 (Gleeson CJ, McHugh and Gummow JJ), 190 (Gaudron J), 214 (Kirby J).

⁵¹ Ibid 179 (Gleeson CJ, McHugh and Gummow JJ).

⁵² Ibid 216.

⁵³ Ibid 190.

⁵⁴ *U v U* (2002) 191 ALR 289, 308 (Gummow and Callinan JJ).

characterised by a current judge of the Family Court, Chisholm J, as ‘the weak view’ and ‘the strong view’.⁵⁵ Chisholm J describes ‘the weak view’ as the view that ‘the paramount consideration does *not* necessarily require the court to make whatever order it thinks best for the child, regardless of other things’.⁵⁶ Chisholm J contrasts this with ‘the strong view’, which requires a court ‘to identify what orders will be most likely to promote the child’s best interests’ and ‘to make those orders’.⁵⁷ It was unclear after *AMS v AIF* which approach was supported by the High Court, although as Chisholm J points out, ‘some language seems to support the weak view of the principle’.⁵⁸

This latest statement from the High Court is unclear. It might be seen as support for ‘the weak view’ of the best interests test, in the sense that it suggests that welfare will only trump a right of movement if the move will adversely affect a child. This is not the same as saying that a court must identify which order will serve the best interests of the child and then make that order (‘the strong view’), and seems similar to the aforementioned view taken by Gaudron J in *AMS v AIF*. On the other hand, it is hard to see how the weak view was applied in *U v U*; the outcome as well as the approach of the trial judge seems to involve an application of the strong view.

IV THEMES

In this section of the case note I will briefly analyse the case in relation to five themes: discretion and its alternatives; gender equality; violence; a more inquisitorial Family Court; and legal strategies.⁵⁹

A Discretion versus Rules

There is no question that the legislation provides judges with a broad discretion to make decisions in this area.⁶⁰ Indeed, Kirby J pointed out in *U v U* that he considered a presumption in favour of relocation, as proposed by the minority judges in the Canadian case of *Goertz v Gordon*,⁶¹ to be ‘incompatible with the

⁵⁵ Justice Richard Chisholm, ‘“The Paramount Consideration”: Children’s Interests in Family Law’ (2002) 16 *Australian Journal of Family Law* 87, 87.

⁵⁶ *Ibid* 93 (emphasis in original).

⁵⁷ *Ibid* 89.

⁵⁸ *Ibid* 107.

⁵⁹ The first two of these themes I have considered in greater detail elsewhere: see Juliet Behrens, ‘The Form and Substance of Australian Legislation on Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them’ (2002) 24 *Journal of Social Welfare and Family Law* 401.

⁶⁰ As John Dewar and Stephen Parker have noted, Part VII was influenced strongly by the *Children Act 1989* (UK) c 41 and was seen as a move *away* from discretion and towards a more rule-like framework: see John Dewar and Stephen Parker, ‘The Impact of the New Part VII *Family Law Act 1975*’ (1999) 13 *Australian Journal of Family Law* 96. The case law has confirmed, however, that decisions must still be made on the basis of an individualised assessment of the best interests of the child: Behrens, ‘Form and Substance of Australian Legislation on Parenting Orders’, above n 59, 404–5.

⁶¹ [1996] 2 SCR 27. For a discussion of this case, see Susan Boyd, ‘Child Custody, Relocation and the Post-Divorce Family Unit: *Gordon v Goertz* in the Supreme Court of Canada’ (1997) 9 *Canadian Journal of Women and the Law* 447. See also Martha Bailey, ‘The Right of the Non-

statutory obligation to exercise the discretions involved having regard to an individualised assessment of the best interests of the child.⁶² Beyond this, the majority also did not endorse the *Payne* approach, which, although not creating a presumption, gave strong emphasis to the genuine decisions to relocate by a residence parent. Such an approach would have reduced the amount of discretion in the decision.

In my view, the outcome in this case is another piece of evidence against such a broad discretion in family law matters. This is a debate which has received increasing attention in Australia in recent times.⁶³ In summary, I think we should be losing patience with legislation which produces such a high degree of unpredictability and where many fundamental value choices are left to individual judges.⁶⁴ While, in my view, legal decision-making in all fields is indeterminate, this is particularly so for family law, and perhaps even more so for relocation cases. I wonder what users of the family law system think when they are told, as they often are, that the outcome of their case will depend on which judge hears it?

The judgments in *U v U* are replete with references to the fact that this was a discretionary decision, and that an appeal must show a legal error. An example is quoted above in relation to the important question of the relative balance to be given to short-term considerations over long-term ones.

In my opinion, this degree of discretion is undesirable. The statutory list of relevant factors to be taken into account by decision-makers does little to provide more content to the best interests standard. For example, it says nothing about what style or styles of parenting are to be preferred, nor about what kinds of relationships are to be encouraged. It provides no guidance on the very important issue of whether a decision-maker should promote the short-term or long-term interests of the child. These matters are left to individual decision-makers who apply their own values and assumptions in a way which is rarely able to be reviewed.

Having said this, I do see a limited role for discretion vested in judges. It is impossible to imagine how it could be avoided in the area of decision-making relating to parenting orders. 'Bright line' rules would be too blunt in this context. In any case, I think discretion has an important role to play in softening the impact of generally applicable rules, particularly in an area such as family law. This is why I have argued elsewhere for the adoption in the legislation of general principles which make some of the value decisions necessary in this area, and for

Custodial Parent to an Order for Return of a Child under the *Hague Convention*' (1996) 13 *Canadian Journal of Family Law* 287.

⁶² (2002) 191 ALR 289, 324.

⁶³ See, eg, Peter McManus, 'Guidelines in Family Law: Rules by Another Name?' (2001) 15 *Australian Journal of Family Law* 51; Frank Bates, "'... Which Comforts while It Mocks ...': Some Paradoxes in Modern Family Law' (2000) 4 *Newcastle Law Review* 17; John Dewar, 'The Normal Chaos of Family Law' (1998) 61 *Modern Law Review* 467. The option of a presumption in favour of the primary caregiver is discussed in Susan Boyd, Helen Rhoades and Kate Burns, 'The Politics of a Primary Caregiver Presumption: A Conversation' (1999) 13 *Australian Journal of Family Law* 233.

⁶⁴ See Behrens, 'Form and Substance of Australian Legislation on Parenting Orders', above n 59.

rebuttable presumptions through which some greater guidance is given about appropriate outcomes.⁶⁵

In my view, legislative principles and presumptions should defer to the judgments of the primary caregiver (in the vast majority of cases, the mother) and I move now to explain that view in the context of decisions about relocation.

B Gender Equality

The reason I feel so passionately in favour of this position is that restrictions on relocation operate unfairly against the person who is likely to be providing the majority of care to a child. In doing so, they compound the social and economic disadvantages that accompany the provision of care, particularly where the caregiver is a woman.⁶⁶ In the worst cases, the father applying to stop the relocation is continuing a pattern of control and dominance over the mother.⁶⁷ Even where this is not the case, courts are effectively attempting to second-guess the judgments of primary caregivers. I do feel sympathy for a father who is facing the prospect of being more physically distant from his child, but I do not believe that such sympathy should outweigh concern for a mother who has come to the realisation that she needs to relocate. In addition, physical distance does not necessarily mean the end of contact, merely that it will be harder work to maintain. To say that these are not the right questions, and that we should be considering the 'best interests' of the child, belies the link between the welfare of children and that of their primary caregiver. It also presumes that judges have some reasonable basis for knowing what will happen as a result of their decision, and how to value that result. I will return to this in a moment.

The important gender dimensions of these cases were recognised by the two minority judges in *U v U*. Kirby J stressed the social fact of women's greater involvement in caregiving, and the potential of decision-making in this area to 'entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the *Convention on the Elimination of All Forms of Discrimination against Women* to which Australia is a signatory.'⁶⁸ Gaudron J was also alert to the impact of pervasive 'stereotypical views as to the proper role of a mother.'⁶⁹

Such 'stereotypical' views are so pervasive that it is often difficult to spot them. To take one example, in the case of *B and B*,⁷⁰ the Full Family Court said that it would be highly unlikely to enforce a contact order against a non-resident parent because 'it would be most unlikely that the children's best interests would be served by requiring the contact parent to have contact which he or she did not

⁶⁵ Ibid.

⁶⁶ As numerous studies have shown, sole parent families headed by women are far more likely to live in poverty: see, eg, Ruth Weston and Bruce Smyth, 'Financial Living Standards after Divorce' (2000) 55 *Family Matters* 10.

⁶⁷ See Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (2000) 86.

⁶⁸ *U v U* (2002) 191 ALR 289, 325.

⁶⁹ Ibid 296.

⁷⁰ (1997) 21 Fam LR 676.

wish to have'.⁷¹ Underlying this statement is the position that residence parents (usually mothers) should be expected to sacrifice their interests to what a judge perceives as being in their child's best interests, but contact parents (typically fathers) should not. The result of this is that contact parents are left free to relocate even if they have successfully applied to restrict the relocation of the residence parent. There is a lack of reciprocity between mothers and fathers both in terms of legal rights and caring responsibilities.⁷²

So, is it valid to talk so much of mothers' and fathers' rights? After all, these cases are about children's best interests and children's rights. The problem I have with this is that I do not have a great deal of confidence that children's rights and interests are being promoted by decision-making in this area. Work influenced by autopoiesis and postmodernism has taught us to be sceptical about our ability to know objectively what is in children's best interests. Family law decision-making often demonstrates what autopoiesis warns us of — the tendency of legal processes to take complex messages from psychology and other disciplines and simplify them into binary positions.⁷³ There is evidence of this occurring in *U v U*. An appeal to the Full Court was partly successful on the basis that the trial judge had interpreted a counsellor's report as saying it was important for the child to have frequent and liberal contact with both parents. In fact, as the Full Court recognised, the counsellor had also noted that the 'result could only be obtained by imposing it against the will of [her mother] and that of itself had significant negative connotations for the child'.⁷⁴ The Full Court found that this error was not of sufficient magnitude to vitiate the judgment.

I do think it is important to focus decision-making in family law matters more effectively on children. How this is best done is the subject of another article, but my preliminary view is that we should be working at developing *processes* which ensure that children have been listened to and their interests taken into account, regardless of whether the decision involving them is made by a judge or by their parents. This is consistent with research into what children want: not to trump their parent's decision, but to be listened to, and to have their interests taken into account.⁷⁵

In my view, then, there should be a legislative presumption which defers to the primary caregiver's decision about where to live with the child.⁷⁶ Many primary caregivers will decide to continue to live near the child's other parent. Evidence

⁷¹ Ibid 750 (Nicholson CJ, Fogarty and Lindenmayer JJ).

⁷² Carol Smart has suggested that, at least in the UK context, there is a climate in which the claims of men caring *about* children are heard over the claims of women caring *for* children: see Carol Smart, 'Losing the Struggle for Another Voice: The Case of Family Law' (1995) 18 *Dalhousie Law Journal* 173.

⁷³ Autopoietic theory derives from the work of Niklas Luhmann. For its application to law, see Gunther Teubner, *Law as an Autopoietic System* (1993). For an application in the family law context, see Michael King, *A Better World for Children? Explorations in Morality and Authority* (1997).

⁷⁴ *U v U* (2002) 191 ALR 289, 295 (Gaudron J), quoting the Full Court.

⁷⁵ See Carol Smart, 'Divorce and Changing Family Practices in a Post-Traditional Society: Moral Decline or Changes to Moral Practices?' (2000) 56 *Family Matters* 10, 18.

⁷⁶ For a more detailed discussion of the politics of primary caregiver presumptions, see Boyd, Rhoades and Burns, above n 63.

is growing that, so far as parenting decisions are concerned, many people make their decisions without regard to their legal rights rather than, as has become the accepted truth, 'in the shadow of the law'.⁷⁷ But for those who need to move, and who turn to the legal system to give them the power to do so, there should be recognition of their important role as primary caregiver of the child, and some considerable deference paid to their decisions on behalf of the child.

C *Violence (They Take It into Account Now, Don't They?)*

This case also alerts us to the fact that the work of ensuring that issues of domestic violence are taken seriously by decision-makers in family law must continue. Initially, this work focused on ensuring that the legislation referred to the relevance of such matters, as it now does.⁷⁸ Reports of researchers examining the impact of those reforms suggest that the position of victims of such violence has not improved and may have, in some ways, gone backwards.⁷⁹

My research into the *U v U* case has suggested that it is a clear example of the failure of the courts to take allegations of violence sufficiently seriously. It is surprising to me that a trial judge should note that the father had admitted hitting the mother on two occasions but should, in the same paragraph, state that he does not accept that the father subjected the mother to domestic violence. It is similarly surprising that there is no mention of violence in the High Court judgment. This is not a criticism of the High Court judges, who could not deal with issues that were not raised before them. However, surely something has gone wrong in the legal process if an issue so fundamental to a determination of where a child's best interests lie becomes completely irrelevant — even if as a result of a strategic decision by lawyers — in an appeal.

D *A More Inquisitorial Family Court?*

The decisions of the majority judges in this case demonstrate another significant dilemma in Australian family law. As indicated above, the majority was of the view that courts making decisions about parenting orders are not bound by proposals of the parties. This distinguishes family law decision-making from most other forms of decision-making in Australian courts, where a court must choose between the competing proposals of the parties. Yet the majority did not see a decision-maker as free to consider all possible options. So, for instance, it was pointed out that a decision-maker in this case could not make orders which would provide for the mother to reside with the child in India and the father to have regular weekend contact in India, because the Court had not received any evidence on that point.

This current 'halfway' house is, in my view, undesirable and points us towards a need to further resource and equip the Family Court to carry out more of an inquisitorial role. The Family Law Council has, for example, recently recom-

⁷⁷ Dewar and Parker, above n 60, 116, referring to the work of Herbert Jacob.

⁷⁸ See Juliet Behrens, 'Ending the Silence, But ... Family Violence under the *Family Law Reform Act 1995*' (1996) 10 *Australian Journal of Family Law* 35.

⁷⁹ Rhoades, Graycar and Harrison, above n 67, 82.

mended the establishment of a Child Protection Service which would, among other things, 'investigate child protection concerns and provide information arising from such investigation to courts exercising jurisdiction under the *Family Law Act*.'⁸⁰ There is a strong case for extending these sorts of services and for enhancing the inquisitorial role of the Family Court.

E *Legal Strategies (for What It's Worth!)*

One of the benefits of a more inquisitorial approach is that it reduces the scope for outcomes to be strongly influenced by legal strategies. It is a sad but inevitable fact that, under the current system, outcomes in cases are strongly influenced by decisions of legal practitioners on matters of strategy. This is perhaps particularly so in such a discretionary jurisdiction as that exercised by the Family Court in children's matters.

It seems to me that there are some other important messages about strategies for legal practitioners from the decision in *U v U*. I write this while recognising the limitations of my perspective as an academic with very little experience of practice. Also, I am not in any way being critical of the legal practitioners in this case, who made their decisions based on factors about which I have no knowledge.

The first and most obvious point is that the High Court decision in *U v U* effectively excludes one type of strategy that lawyers for those seeking to relocate might adopt: namely, to construct their clients' proposals in such a way as to require a court to consider only the proposal that the child live with them in the current location if the court would make an order that the child live with the non-primary caregiver in the current location.

Second is the fairly obvious message of Hayne J (whose judgment was endorsed by the other majority judges) that practitioners acting for those who are seeking to relocate need to put to those who are seeking to restrain them the possibility of them relocating as well. Had the question of whether the father was willing to relocate to India been put to him in this case, there would have been some evidence upon which a judge could have made a decision to order that the child live in India with her mother and have regular weekend contact with the father in India. It is important to note Gaudron J's point about natural justice and to recognise that this may be denied to the father unless such orders were sought as part of the mother's application.

Third, apart from the question of gathering evidence for the possibility of orders of that type being made, such questions will test a father's commitment to his child and will make more obvious the point that he may be seeking to impose restrictions on the mother without being willing to make sacrifices himself. Questions which establish this lack of reciprocity between the mother and the father could be used effectively to argue in favour of relocation.

Fourth, it is difficult to understand how a father who had admitted hitting the mother, and against whom more serious allegations were made, can be reconstructed into a father who is 'child-focused' and who has a very good relation-

⁸⁰ Family Law Council, *Family Law and Child Protection: Final Report* (2000) 1.

ship with the child.⁸¹ Much of the answer may just be that the trial judge did not believe the mother. However, in my view, practitioners need to resist the story that the father is 'of course' a 'good father' unless that is in fact the case.⁸²

V WHERE TO FROM HERE?

In my view, the decision in *U v U* has left the law on relocation more unclear than it has ever been. In particular, the staged approach provided by the Full Court as a guideline in *A v A* has been called into doubt by the High Court's decision that the Family Court is not bound by the proposals of the parties. In addition, the appropriate approach to the application of the best interests test in the relocation context has been further muddled. This lack of clarity makes it particularly difficult to predict how the decision in *U v U* will affect outcomes into the future. The ways in which particularly high profile decisions are interpreted and applied in practice is often unpredictable, particularly in a discretionary jurisdiction such as this. For example, John Dewar and Stephen Parker⁸³ have noted the 'reverse effect' of an earlier Full Court decision on relocation, *B and B*. They found that, despite the fact that the mother was allowed to relocate in that case, and that the Full Court said the law had not changed, 'its practical effect on the dynamics of disputes, and on professional understandings and advice-giving, has been quite the opposite.'⁸⁴ This must alert us to the danger that overly simplistic (and incorrect) messages will be taken from the decision in *U v U*; for example, that the unsuccessful outcome will be seen as a tightening of the law relating to relocation, particularly in cases involving an overseas relocation.

In my opinion, there is now little scope for a change in approach to be adopted through the case law, yet I would argue that the case for reform is strong. This is why I believe that attention must now turn to protecting the position of the primary caregiver through legislative reform.

There are other issues which arose in *U v U* which I have not explored here. For instance, I have not touched on the difficult question of whether and how courts should compare social and economic conditions in different countries. Such comparisons are invited by cases like this in which overseas relocation is proposed. The mother in this case, in personal conversations with me, has spoken bitterly of being cross-examined about health and other conditions in her home country. There are issues of cultural difference which were not referred to at all in any of the judgments in this case. For example, the mother has said that this

⁸¹ Much recent research has demonstrated that violence against a child's caregiver can also have a significant impact on a child's wellbeing: see, eg, National Committee on Violence against Women, Department of the Prime Minister and Cabinet, *National Strategy on Violence against Women* (1992). See also articles published in (1995) 9 *Australian Journal of Family Law* 1, a special issue on family violence.

⁸² For a discussion of how gender roles are constructed in family law, see Richard Collier, "'Waiting Till Father Gets Home": The Reconstruction of Fatherhood in Family Law' (1995) 4 *Social and Legal Studies: An International Journal* 5; Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *International Journal of Law, Policy and the Family* 71.

⁸³ Dewar and Parker, above n 60.

⁸⁴ *Ibid* 103.

was an arranged marriage, which seems to be a relevant context for the decision, and yet was not mentioned.

Finally, this case and others like it demonstrate, in my view, that there is a vital need for research that contributes to knowledge about the results and effects of court decisions that restrict, or enable, relocation. Decisions on these matters are based on a range of assumptions or guesses about what will happen as a result of a particular decision, and yet there is no empirical evidence which explores the aftermath and helps to make these assessments. It is difficult to have a great deal of faith in a process that involves making such important decisions for children and their parents yet is so unpredictable and has no follow up mechanisms to assess the results and impacts of the decisions.