South Africa: High Courts - Gauteng

Boehmke v McGregor (25560/04 [2005] ZAGPHC 366; 04/25560) [2005] ZAGPHC 114; 2006 (9) BCLR 1034 (W) (1 November 2005)

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

APPEAL CASE NO A5019/05

WLD CASE NO 04/25560

In the matter between:

BOEHMKE, Anthea Yvette

(Formerly McGregor, born Burns) Appellant

and

McGREGOR, Andrew George Respondent

JUDGMENT

Satchwell J

INTRODUCTION

1. The appellant wishes to move to Cape Town with her current husband and their son, T. who is one year old. She wishes her children, M. aged ten and S. aged eight, by a former marriage to the respondent, to relocate with her. The children's father, the respondent, refuses to give his consent thereto.

2. Appellant brought an application for an order that she be allowed to remove the children from Johannesburg to Cape Town subject to certain conditions pertaining to access by the children to their father. Such order would require variation of the agreements entered into between these parents regulating arrangements for the care of M. and S..

3. The matter was decided on papers. The presiding judge in the court a quo, Joubert AJ, commented that this matter had come before him with 'some sense of urgency' and, notwithstanding that he would have liked to have 'given a carefully reasoned, more meticulous judgment', decided then to give his reasons for his decision since the unsuccessful party in the matter might 'wish to appeal this order on an urgent basis'. The court a quo dismissed the application with costs.

4. It is against that decision that Appellant now appeals.

THE APPROACH ON APPEAL

5. Appeals in custody matters concerning minors are "treated like other appeals, as matters to be decided upon the existing records"[1]. Since this matter was decided on affidavit, this appeal court is in as good a position as was the court a quo: if we come to the conclusion that the court a quo was wrong, we must interfere[2].

6. This court sits as the upper guardian of minors. The discretion which we exercise is not circumscribed in the narrow or strict sense of the word[3]. It requires no onus, in the conventional sense, to be satisfied.

THE PARENTS AND THEIR CHILDREN

7. Appellant and respondent married on 14 September 1991. Their son, M., was born on [day/month] 1995 and their daughter, S., was born on [day/month] 1997. They divorced on 10 September 1999.

8. At the time of the divorce the parents entered in to an agreement which was made an order of court. Clauses 3 and 4 of the agreement provide for "Custody of the Minor Children" and "Access to the Minor Children".

9. Clause 3 reads:

> 3.1 Custody of the two minor children, M.M. and S.M., will be awarded jointly to the parties.
>
> 3.2 The parties agree that it is in the best interests of the minor children that custody of the children vest jointly in the parties.
>
> 3.4 The parties agree that the exercise of their respective custodial rights shall be governed by the best interests of the minor children and in the utmost good faith.
>
> 3.5 It is the wish of the parties motivated by their desire to serve the best interests of the minor children, and they agree between them, that they shall discuss and consult with each other in regard to their minor children's future education, religious upbringing, medical treatment (save in the case of emergency) and all matters incidental thereto

and major issues pertaining to the minor children as aforesaid requiring parental decisions will be discussed between the parties and failing agreement will be resolved in terms of clause 9 [4].

3.6 Each party will have equal access to all health and school records.

10. Clause 4 provided that M. and S. would reside with the respondent and that the appellant would be entitled to 'reasonable rights of access' which rights included the first and third weekends of each month from Friday evening until Monday morning, all mid-term breaks, one half of school holidays, Mother's Day. There were provisions for parent's birthdays and telephonic access[5]. Since the parties changed the residence and access arrangements within three months of the agreement being made an order of court, these provisions have long since ceased to be of any application.

11. Three months after the granting of the divorce, appellant and respondent reached a new agreement. With effect from January 2000, they "changed the primary residency"[6] of M. and S. and agreed that the children would "reside with [the appellant] primarily and during the week that [she] was required to travel they would reside with the respondent"[7].

12. During April 2001, appellant and respondent consulted a clinical psychologist, Dr R Duchen. They then agreed that they would retain joint custody. In a four week cycle, the children would spend week one till Thursday with appellant, the weekend from Thursday to Sunday with the respondent, week two until Friday with appellant, the weekend and week three till Friday with the respondent, week four and the last weekend with the appellant. During weeks one, two and four the children would lunch with the respondent one day a week and during week three the children would lunch once with the appellant.

13. The effect of this arrangement is that, since April 2001, the children have spent approximately 16 nights out of every 28 day cycle with the appellant and 12 nights out of each 28 day cycle with the respondent.

.4. Respondent is an executive in a publishing enterprise owned by his family. He remarried in October 2001. His present wife, Mrs Karen McGregor, has two sons, Christian and Daniel, from an earlier marriage whom she brought with her from Cape Town to live with her and the respondent.

.5. Appellant is a qualified psychologist. During the marriage and thereafter she was in the employment of and then a Director of the Conservation Corporation Africa. She remarried in September 2002 her present husband, Mr Paul Boehmke. Since that time she ceased to work and describes herself as "a full-time mother". She claims to be able so to do because Mr Boehmke supports her and because he provides a home for and meets all the living expenses of M. and S. when living with her [8]&[9].

.6. During April 2004 the appellant and Mr Boehmke had a baby, T., and M. and S. acquired a half-brother.

RELOCATION OF APPELLANT'S HUSBAND, APPELLANT AND BABY THOMAS

.7. Appellant's husband is a property developer. He is originally from Cape Town and has lived in Johannesburg for some twenty two years. During 2003 he had been unable to find suitable development projects in Johannesburg.

.8. Appellant states that, towards the end of 2003, Mr Boehmke was "presented with an exceptional opportunity to purchase and restore the Majestic Hotel and the New Kings Hotel in Kalk Bay on the False Bay coast. The site is situated in an urban conservation area. The development thereof requires very special skills as a re-zoning, coupled with a historical input assessment, has to be undertaken. The project involving the two landmark hotels involves restoring the hotels, creating apartments and re-developing the remainder of the site into a village in the appropriate architectural style." Appellant concludes by describing this as "a one-in-a-lifetime opportunity in that the site is unique and the first development of its kind in this historically significant part of the Cape"[10].

.9. Mr Boehmke is a 50% shareholder in the company which owns the property being developed. He is also contracted as the Project Manager for which he is paid a salary with which he supports his family. This requires his active and direct involvement in all aspects of the development. From the time of purchase of the property certain administrative functions, including rezoning and drafting and submission of plans, have

been undertaken and this work Mr Boehmke has been able to perform, notwithstanding that he is not based in Cape Town. He has travelled between Cape Town and Johannesburg.

10. The construction phase of the development was to commence in January 2005. This phase requires Mr Boehmke presence on the site on a daily basis to "supervise, manage and facilitate the construction" of the development[11]. It is anticipated that this project will be completed in 2007. There are other prospects of property development work in the Cape thereafter.

11. The respondent has no personal knowledge of the business dealings of Mr Boehmke and was therefore unable to dispute the averments concerning his and his family's relocation to Cape Town. The respondent did, however, query a number of issues. He pointed out that the duration of the project is not stated nor are Mr Boehmke's future plans. He suggested that there would be opportunity for Mr Boehmke to commute to Johannesburg while working on this project. Respondent seemed to question the motivation for the relocation by referring to Mr Boehmke's statement that it had been a "life long dream" to return to Cape Town[12].

12. Accordingly, the respondent concluded in his answering affidavit that "I regard the purported Cape Town development as a mere ipso dixit masking Boehmke's real motive in simply wanting to return to Cape Town"[13].

13. The respondent's own comments on the Cape Town development both confirm its existence and the need for the relocation of Mr Boehmke and his family thereto. It is not a 'purported' development. It is a reality. It is not in dispute that Mr Boehmke must support his family, that he is a property developer, that he is both a shareholder in the company owning the property and the project manager of the development as described by him[14]. That he has been required to be in Cape Town is confirmed by his presence there during the week. That the construction phase of the development now requires his continued presence in Cape Town, including over weekends, cannot be disputed.

14. It can be accepted that Mr Boehmke was partially interested in or enthusiastic about or even solicited involvement in this Kalk Bay project by reason of his desire to live in Cape Town. That such a relocation may have been Mr Boehmke's 'dream' does not render it any the less a reality. Nor does it render it any the less a bona fide decision.

15. There is nothing on these papers, including all the discussions and meetings with

psychologists, to suggest that this move to another city within the Republic of South Africa is occasioned by anything other than a genuine and lucrative business venture within the chosen field of experience and endeavor of Mr Boehmke. Mr Boehmke works for his living and that of his family. It is common cause that he is currently actually working in Cape Town.

[26] One assumes that Mr Boehmke and his family would not be as enthusiastic about a development in Tristan da Cunha or Upington of which they have no previous experience, where there are no family connections, where they do not already have a home and where schools and other amenities are not available to the same extent as in Cape Town. Cape Town is a city where Mr Boehmke and the appellant already own a small home in Newlands where the family can live on a daily basis and a holiday house at Cape Infanta. It also the metropolis closest to the holiday/ weekend home owned by a family trust of which the respondent is the beneficiary. This renders the 'dream' and the work/investment opportunity both compatible and desirable.

[27] The speculative nature of property development, the limited time span of each operation, the ad hoc emergence or creation of development opportunities understandably render it impossible for any developer such as Mr Boehmke to place on record his intended ventures and work commitments over the next five to ten years. No architect, advocate, attorney, accountant, medical practitioner in private practice would be able to do otherwise. Entrepreneurial activity is by its very nature not capable of being cast in stone so far ahead. However, the length of time spent by Mr Boehmke in Johannesburg in the past confirms that he is no "gypsy". The very size and nature of this Kalk Bay development suggests that he is a man of some financial means and that he is capable of using the reputation he has established to solicit further development referrals or create new opportunities for himself. That Mr Boehmke and appellant have two residences in the Cape confirm that they are highly unlikely to flit around the country from opportunity to opportunity.

[28] The information before us strongly leads to the view that a "temporary" solution as proposed by the respondent [15] will not resolve the problem.

[29] The court a quo found that the appellant's husband needs to move to Cape Town to be able to provide for his family, that Mr Boehmke had begun to work on the preliminary stages of the development quite some time prior to the offer of Project Manager in Cape Town, that Mr Boehmke had commenced commuting to and from Johannesburg during

these stages, that his presence was now required in Cape Town throughout the week during the construction stage. I concur.

30. I am satisfied that the relocation of Mr Boehmke to Cape Town and the proposed relocation to Cape Town of the appellant and T. are genuine, reasonable, undertaken for purposes associated with the best possible interest of the entire family, are actuated by bona fide intentions and not intended as a ruse to strip the respondent or M. or S. of the time spent with each other or a subterfuge to remove the children from the respondent's parenting contribution.

OPTIONS ON RELOCATION

31. Both appellant and respondent have made it clear that each of them "would find it intolerable to be separated from the children"[16]. Appellant has stated that " I am not prepared to consider leaving without M. and S.. I believe that to even indicate a possibility of leaving with T., and excluding M. and S. from the family would severely impact upon them. I believe that it would indicate to my children, who are too young to understand legal niceties that I prefer T. over them". The respondent has stated that "I am concerned and apprehensive that my primary bond with the children will be seriously undermined and my crucial parenting role will be reduced by the arrangements suggested by applicant which will in any event be further reduced due to practicalities"[17].

32. Some time was expended by two of the psychologists, to whose expert opinions this court is asked to have regard, on the various options available to both the appellant and the respondent in arranging their lives and those of their children, M. and S., as also the lives of their respective spouses and their other children and step-children.

33. This exercise is useful because it assisted in focusing the mind of this court on the realities of the situation in a manner which was perhaps not immediately available to the court a quo. It also thereby contributed to a more accurate understanding of what could or could not be said to be the status quo and whether or not the status quo, which the trial court hoped to reestablish by its order, actually exists[18].

34. In her initial report, Dr Duchen identified three possible scenarios for consideration and the advantages and disadvantages of all of these[19]. Dr Fasser performed the same exercise although she made it clear that she did not consider that one scenario was even a possible option.[20]. These same three scenarios were addressed by respondent's counsel in argument who rightly pointed out that they all involve two family units of which M. and

S. are the common denominators.

35. The first option (advanced by the appellant) is that she and Mr Boehmke with T., M. and S. establish their new home in Cape Town and that M. and S. spend periods of time with respondent in Johannesburg and in Cape Town when he travels there on business or on holiday.

36. The second option (advanced by the respondent) is that no relocation takes place. The respondent and Mrs McGregor would continue to live in Johannesburg with his stepchildren. Appellant would live alone in Johannesburg without her husband but with baby T.. M. and S. would continue to reside in Johannesburg spending three weeks in the month with appellant and one week with respondent. Mr Boehmke would live and work in Cape Town and travel to Johannesburg to see his wife, child and two stepchildren over weekends. For so long as T. remains a baby and does not attend any school, the appellant would have one week during which M. and S. are not living with her and she could then travel to Cape Town with baby T. to live with her husband and T. with his father.

37. The third option (advanced at some stage by respondent) is that the appellant relocate to Cape Town with her husband and baby T.. M. and S. would come to live with the respondent and Mrs McGregor and her children. M. and S. would visit the appellant in Cape Town over holidays and she could travel to Johannesburg during the month as and when she can, perhaps establishing a home in Johannesburg for that purpose.

38. Clearly all of these options are mired in the anguish of two loving parents and the concern of distressed spouses. Each needs to be examined in the light of the established principles which give guidance towards achieving the 'best interests of the children' in circumstances such as these.

APPROACH BY SOUTH AFRICAN COURTS TO RELOCATION

39. Approaches to relocation cases differ from jurisdiction to jurisdiction. Amongst the approaches to resolving a relocation dispute are a number of approaches: acceptance that the custodian parent has made a decision which is his or hers to make and placing an onus on the non-custodian parent to show that relocation would be detrimental to the child; preparedness to permit relocation but requiring the custodian parent to convince the court that the relocation is justified – what is called the 'compelling reasons' test; an

ostensibly neutral focus on the 'best interests' of the child. Within each approach different criteria are considered relevant. These may include the loss or reduction of contact by the child with the non moving parent and maintaining the continuity of the child's primary family unit.

10. Our courts adhere to the 'best interests' approach as they are required to do by the Constitution[21]. Our courts have emphasized the importance to the child of continuity in the child's primary relationship, usually the custodian parent [22].

11. South African law has over the years been developing towards the proposition affirmed in Jackson v Jackson 2002(2) SA 303 SCA that:

> 'It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable' (per Scott JA at 318F).

12. The majority in Jackson supra approved a rationale behind this general principle that in most cases:

> '... it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken'. (at 318 G) [23].

13. This approach was foreshadowed in the line of reasoning set out in Godbeer v Godbeer 2000(3) SA **976 WLD**[24] :

> "Undoubtedly, the welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family. In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. I do not think that the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family.' (Per Nugent J at 981J-982C).

[14] The application of this general approach is necessarily dependent on the facts of each case. Tolstoy may have commented in the fictional world of Anna Karenina that "All happy families resemble one another, but each unhappy family is unhappy in its own way" but no two families can ever be identical as to their constituent members, the permutations in family dynamics or the challenges which they face. Not only is the psyche of each individual different but the context within which the family functions or malfunctions is always complex and never as expected. In Jackson supra, the majority judgment was at pain to stress that "...each case must be decided on its own particular facts" (318H) and that past decisions provide no more than useful guidelines.

[15] Thus, in Jackson the father of two young children wished to emigrate to Australia where he had no family or other connections solely for the sake of the children, one of whom was found to be an 'at risk' child. In Godbeer v Godbeer supra the mother of two daughters wished to return to the United Kingdom where she had family and in circumstances where her employer was also relocating while her former husband, a South African whom she had met here, did not wish the children to leave. In Bailey v Bailey 1979(3) SA 128 A the mother of three children wished to return home to England where she wished the children to be educated while her South African husband opposed this proposed emigration. In Cocking v Van Der Walt (unreported judgment dated 6 August 2003, Case No. 7070/03 (W)) the mother of two daughters had remarried and she and her new husband decided to emigrate to England where he, and then she, had obtained employment. In Latouf v Latouf **[2001] 2 All SA 377** T, the mother of the minor child sought and obtained employment opportunities in Australia because she was, inter alia, concerned about the crime rate in South Africa. In H v R 2001(3) SA 623 C, the mother of a young daughter had remarried and her new husband had obtained employment in England. In Ford v Ford [2004]2 All SA 396 (W) [Ford trial]supra the mother of a daughter wished to return to her home in England in preference to remaining in South Africa where she had no family, had become divorced from her English husband, had been hijacked and had not obtained pension and other benefits associated with permanent employment.

[16] The increasing numbers of relocation disputes referred to in psychological and legal literature as also in South African jurisprudence and that of other jurisdictions, is a

reflection of the increasing trend of geographical mobility particularly in relation to work, coupled with a higher rate of divorce, after which former partners go their different ways. This seems to be one such case. The reasons for relocating within and without South Africa are endless - undertaking new employment opportunities, following a new spouse or partner, educational ambitions, desire to rejoin family [25]. In each case, the parent who is to remain behind opposes the move by reason of distress at the impending departure of the beloved child and the consequent loss of contact and the diminution of the parent-child relationship. In some cases the non-moving parent has shared parenting on the basis of equal time and responsibility while in others the involvement has been limited. Sometimes the relationship between the divorced spouses is amicable and supportive while, in other cases, the relationship is acrimonious and hostile. In many cases the bond between the parent to remain behind and the child(ren) has been found to be loving. In each case our courts acknowledge the hurt and desperation of the parent who does not plan to relocate.

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[7] I am, with respect, in agreement with the approach adopted by Nugent J in Godbeer supra when he stated " I do not think that I can, or should, consider weighing the relative merits of living in this country or living in the United Kingdom. Matters like the quality of their schooling, the relative standard of living and so forth are, in my view, quite peripheral in the present case. Whether they live in this country or in the United Kingdom, they will be properly provided for as far as housing, sustenance and education is concerned." (at 981B) and with Goldblatt J in Cocking supra who stated "It is not for me to decide what is the best place for people to live. This is a decision that they must make and it is not necessary and I do not intend commenting on the advantages and disadvantages of living in South Africa as opposed to living in some other country" (at page 4). Rumpff JA in Shawzin supra commented that the children would not enjoy in Canada "… a standard of living equal to what they were used to in Johannesburg. That standard was apparently high. I do not think that to be able to live in affluence is of educative value to boys of that age; their education and happiness in these formative years depend, or should depend, on other things in life" (at 669B)

[8] M. and S. will be well cared for wherever they live with either the appellant or the respondent or both of them – in Johannesburg or Cape Town. Their current arrangements

in Johannesburg are established before the court. As far as the proposed arrangements in Cape town are concerned, the court has been told that the appellant and her husband own a holiday home in the Cape and a small house in Cape Town and plan to purchase a larger one for permanent living. The children have been enrolled[26] in two well known schools. M. and S. will continue with their extra mural and other activities. They have been financially supported in the provision of a home and other necessaries by their stepfather who has undertaken to continue so doing.

49. Notwithstanding comments in the papers about an excess of extra mural activities and a lack of appreciation of the need for the children to participate in psychotherapy, it is clear that arrangements for the care of M. and S. are not really the issue in dispute. The most painful issue which understandably is the source of the respondent's opposition to the appellants relocation to Cape town with the children is that he lives and works in Johannesburg and he would be separated from his children with whose lives he is much involved.

OTHER JURISDICTIONS

50. Counsel for both appellant and respondent furnished us with copies of a number of articles or extracts from legal and psychological publications. These include or deal with judgments of courts in other jurisdictions such as the United States of America, Canada, Australia and England. They also cover research conducted in other societies into family issues, including relocation.

51. Insofar as the works authored or co-authored by psychologists or addressing psychological issues, only one had been mentioned in any of the reports prepared for the court a quo by the psychologists[27]. The remainder were presented with Counsel's Heads of Argument[28]. They have been read and are interesting and raise important issues for consideration. However, one must be mindful of the extent to which they can be utilized by the court.

52. This court is not composed of psychologists or persons who purport to have special skill

and expertise in the social or medical sciences. We have no knowledge, other than that which we read in the articles, of the nature of the research conducted, the scientific data and principles utilised and acceptability thereof, the methodology involved and appropriateness thereof, the credibility of the researchers and the research carried out, the scientific or academic esteem in which the researchers are or are not held, the professional or academic standing of the authors. This court has no knowledge of the degree of acceptance or rejection of these findings or propositions in reputable academic and professional circles.

53. We also cannot ourselves make the leap from experiences in the United States or Canada to the South African situation since we have no knowledge of the extent to which the research is locality specific or culture based. It's relevance to the South African experience in general or to this litigation in particular has not been outlined to us.

54. What one does ascertain from reading these publications is that they are frequently critical of each other, often dispute the basis of or the validity of research conducted by others, challenge the reliability or applicability of other's findings to the issue discussed and doubt the value of the judicial decisions which may have been based thereupon. In the face of such disagreement, we are not in a position to adjudicate between them. For instance the Bruch and Wallerstein articles are both based upon amici curiae briefs submitted to the California Supreme Court in re Marriage of Burgess **913 P. 2d 473** (Cal. 1996) which briefs are much criticized in the Kelly, Warshak and Gardner articles.

55. I believe that there are potential problems in a non-expert judge or court placing reliance upon academic material where the foundation is not properly laid for the reception of thereof [29]. Accordingly, this court is not in a position to assess the merit of the conclusions arrived at in these articles and then form our own independent judgment by the application of these criteria or principles to the evidence before us [30].

56. The overview of the jurisprudence in other countries is equally sobering.

67. As far as the USA is concerned, we read that family law is a matter for the individual states and not the Federal Government, with the result that it is impossible to say that there are any general principles which can be applied to parental relocation cases. In Gruber v Gruber **583 A 2d 434**, 437 (Pa 1990) (Pennsylvania) the court stated "We note that our research has failed to reveal a consistent, universally accepted approach to the question of when a custodial parent may relocate out-of-state over the objections of the non-custodial parent. In fact, the opposite is true. Across the country, applicable standards remain distressingly disparate." Further, the articles outline disagreements between and within state jurisdictions as to the criteria to be taken into account in relocation cases. Where trends have emerged, significant distinctions are found between states; thus to rely on one judgment may be to misunderstand it's legal and social context. For instance, Ramirez-Barker v Barker (1992) in North Carolina, Tropea v Tropea (1996) in New York, in re Marriage of Burgess (1996) in California, in re Matter of Francis (1998) in Colorado may be cited as authorities for decisions in favour of relocations but some utilized the 'best interests' standards while others replaced this with a rebuttable presumption in favour of the parent with primary physical custody while yet others set varying requirements to such relocation.

68. We learn that there has been a "dramatic shift" by the Australian courts from the way in which English courts have dealt with relocation, the former now emphasizing the "child's best interests" and favouring parental freedom of movement while the latter emphasize the bona fides of the proposed relocation and the wishes of the residential parents[31] . The Court of Appeal in Payne v Payne **[2001] EWCA Civ 166**, **[2001] Fam 473**, [2001] 1 FLR 1052 indicates that the English position favours the custodian parent with the child's welfare seen as being intricately interwoven with that of the primary caregiver. The court explicitly asked "what would be the impact on the mother..?" The enquiry is whether the motivation behind the move is bona fide and, if so, then unless the evidence clearly demonstrates that the child's welfare will be more detrimentally affected if the move takes place than if the custodial parent is prevented from relocating, the move will be permitted. The Full Court of the Family Court of Australia in B v B: Family Law Reform Act **1995 (199) FLC 920** – 755 undertook a comprehensive analysis of the law including that of the United Kingdom and Canada and identified the question as that of weighing the child staying with the relocating parents against the changes to the child's environment and the loss or reduction of contract with the other parent resulting from

relocation. (para 9.62). Subsequently, the High Court in AMS v AIF; AIF v AMS 9 **[1999] HCA 26; 1999) 199 CLR 160** set out certain general principles relating to relocation and inter alia stated the "statutory instruction to treat the welfare or best interests of the child does not mean that the legitimate interests or desires of the [relocating] parents ought to be ignored, the legislation being enacted in a society which attaches a very high importance to freedom of movement and the right of adults to decide where to live".

59. Again I would be very hesitant to even attempt any kind of review of international jurisprudence on relocation since development takes place within the context of particular statutory and case law and we have not been addressed on such a broad overview.

60. In short, interesting though the literature may be, I suggest that we must be careful not to rely on authorities where we are not properly or reliably au fait with the full jurisprudential background. We must seek such guidance as we can but accept our own limitations in so doing.

PRINCIPLES APPLICABLE TO RELOCATION OF CHILDREN

61. It is immediately apparent that the majority, if not all, South African authorities on this topic have been concerned with circumstances which differ in two significant respects from the issue before this court. Firstly, they deal with the question of relocation beyond the borders of the Republic of South Africa whereas we are here concerned with a move from Johannesburg to Cape Town. Secondly, earlier decisions deal with the situation where one parent has been appointed the custodian parent by the court whereas we are here concerned with joint custodians.

62. It is not difficult to extract guidance from earlier decisions. It is trite that all cases must be decided on their own facts. This renders the principles developed eminently flexible and capable of adaptation to varying circumstances. Relocation of parents and children, whether within or without the Republic's borders, necessarily involves continuing fragmentation of the original family unit with the associated distress of parents and children separated from each other and from familiar environments. Our courts have previously taken this into account. Further, that custodianship has been an important factor for consideration in other judgments does not mean that our courts have always so narrowly construed the opportunities for and the value of parenting that earlier

judgments cannot speak to other arrangements such as joint custody [32].

53. Most importantly, the overriding principle of having regard to the 'best interests of the children' has been enunciated and applied by our courts both prior and post the Constitutional imperative as set out in Section 28 (2) of the Constitution of the Republic of South Act 108 of 1996 which provides that "a child's best interests are of paramount importance in any matter concerning the child". Application of this overriding principle suggest that consideration and application of principles in earlier cases involving international relocations where there are custodian and non-custodian parents in dispute would not obscure the fundamental issues before us today where there is a proposed relocation by one joint custodian to another South African city.

54. Certain guidelines may be distilled from the Constitution, judgments of South African courts, conventions to which South Africa is a signatory:

1. The interests of children are the first and paramount consideration [33].
2. Each case is to be decided on its own particular facts [34].
3. Both parents have a joint primary responsibility for raising the child and where the parents are separated, the child has the right and the parents the responsibility to ensure that contact is maintained[35].
4. Where a custodial parent wishes to emigrate, a court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodial parent is shown to be bona fide and reasonable [36] [37]
5. The courts have always been sensitive to the situation of the parent who is to remain behind[38]. The degree of such sensitivity and the role it plays in determining the best interests of children remain a vexed question [39].

55. Assistance should also be sought in judgments from other jurisdictions which subscribe to the same or similar standards for the care of children. However, the 'best interests' standard utilized in many jurisdictions may, nevertheless, contain therein certain presumptions favouring the custodian or primary caregiver or the noncustodian or non primary caregiver or simply purport to be neutral.

CARING FOR THE CHILDREN

Parenting

56. Appellant and respondent are the joint custodians of M. and S.. Both parties have sought to establish that each should be described as the primary caregiver of the children[40]. The appellant relies upon the fact that she is a full time mother and home maker[41] while the respondent says that during the marriage he was "both mother and father' to the children [42]. The appellant sets out the tasks she does in respect of the children during the day[43] while the respondent stresses his availability for involvement in the children's lives[44].

57. This court is alert to the fact that both these parents, in their different ways, "continued, albeit separately, to exercise their ordinary function as parents"[45]. We do not seek to moralise about the quantum or value of the parenting contributions made by either of the parties during their marriage, after their divorce, after each negotiation and renegotiation of the residency and access arrangements .

58. It would be misguided of this court to attempt to determine the best interests of the children according to concepts of blame and criticism and social stigmatization of a parent. For instance, this court would not criticize the respondent for being a working father since this, after all, contributes to the support of himself and his family. Equally we would not criticize the appellant for having been a working mother during her marriage and after her divorce since this, after all, contributed to the support of herself and her family. Furthermore, both appellant and respondent as individuals were and are entitled as adult human beings to make choices as to how they utilize their talents and skills and find fulfillment in the wider world [46].

59. It must be stressed that this is not a case of judging the personal characteristics of either party to this litigation. As Dr Duchen put it in her later memorandum "in all fairness I cannot recommend one of these parents above the other…" because to do so I would have to rely on "marginal differences with regard to their respective positions".

60. Dr Duchen has commented that the relationship "between the parents is compromised and has progressively become more compromised during the time of my assessment". Numerous people highlighted the "differences in parenting styles between the parents. The differences seem to have become more pronounced as the children's needs changed and after Mrs Boehmke's marriage. The parents have very different ideals for the children

and pursue different ideas as to what lifestyle the children should have". The parents have divergent views on a number of issues which fuel the disagreements between them. Both parents report these difficulties to be longstanding. Instances of these disagreements were apparent in the papers and are dealt with elsewhere in the judgment [47].

'1. Conflict between divorced parents has received different evaluation in our courts[48]. Both counsel referred us to articles dealing with greater or lesser degrees of conflict within the family and between parents[49]. Research on the impact of post-divorce conflict on children has apparently yielded mixed results[50]. Some suggest that relocation may be in the best interests of children as contributing to elimination of such trauma but it appears that this view is espoused only where there is aggression or violence of a nature and on a scale never even contemplated within the McGregor children's experience[51]. Dr Duchen addressed this issue advising " Conflict between parents does not provide enough reason for changing a custody arrangement. In this case, ... both parents have a lot to offer in terms of their perspectives. Their divergent views could only benefit the children...." and she recommended that joint custody arrangements should stay intact [52].

The Primary Care Giver

'2. Both counsel sought to identify the 'primary care giver' and each have relied on this role in support of each party's case. Although our courts have, usually in the absence of a custodian parent, relied on this as one relevant criteria[53], South African law has not adopted the practice of simply identifying whomsoever may be thought to be the 'primary parent' or 'primary caregiver' as determinative of the enquiry.

'3. Amongst the articles to which we have been referred are arguments for and against the adoption of the so-called 'primary parent presumption' as well as an indication of the extent to which the presumption does or does not play a significant role in US jurisprudence. For instance, Bruch states that a growing body of social science literature has identified the child's relationship with it's primary caretaker as the single most important factor affecting it's welfare when the child's parents do not live together and stresses the importance of continuity in the child's primary emotional relationship while Warshak critiques this 'primary parent presumption' as frequently overlooking the quality of the parent-child relationship and reflecting unfair gender bias.

'4. In South African law we do not adhere to any such 'primary parent presumption'. Indeed, we adhere to no presumptions save the ultimate test of the 'best interests of the child'. As far as parenting is concerned we have long since abandoned the 'maternal preference rule'. Our courts adopt as holistic approach as possible to the question as to what constitute the 'best interests' of the child and how these may be ascertained

'5. Where this court is concerned with the 'best interests' of the children in the context of relocation of one parent with the children then we are required to assess the role played by each family unit and each parent in the lives of these children.

'6. Indeed, the enquiries separately conducted by Dr Duchen, Dr Fasser and the office of the Family Advocate indicate the attempts to attain as overall and all embracing a perspective of the positions of M. and S. from as wide a number and variety of perspectives as possible. The reports of all experts (save Carr) appear to follow the approach of Gindes as to the issues which need to be canvassed in the course of such enquiry.

'7. The only assistance of Dr Warshak's article in the present instance is the reminder that "Both parents contribute distinctively to their child's welfare. And during different developmental stages a child may relate better to one parent than to another, or rely on one parent more than the other." [54].

Residency

'8. Both parents worked fulltime during their marriage, the appellant working and traveling for Conservation Corporation SA and the respondent in the family's business. At the time of the divorce, in September 1999, it was agreed that the children would and they did reside with the respondent and the appellant exercised weekend access to the children. The respondent paid for the services of a fulltime nanny, a char and, after the death of the nanny, for an au pair. At the end of 1999 the appellant changed her travel obligations to her employer. The parents then agreed, that from January 2000, the children would live with the appellant and during the week that she was required to travel they would live with the respondent. The respondent continued to meet the costs of the nanny succeeded by the au pair until his wife-to- be moved into his home with her children in January 2001 and thereafter "she does not require the services of an au pair" preferring

to personally meet the children's needs [55].

'9. An intervention of Dr Duchen in April 2001 was occasioned by differences between the parents as to parenting approaches and disagreements as to arrangements for moving the children between the homes of their two parents. Since that date the children have spent approximately 16 nights out of every 28 day cycle in the appellants's home and 12 days in the same cycle in the respondent's home[56].

30. Appellant submits that it is clear from the papers that the she is the primary caregiver of M. and S.. The children are primarily resident with her and at her home. It is submitted that the court a quo was incorrect in referring to the situation as one of 'joint residency' when the respondent himself stated that 'primary residency' was with the appellant and the court itself found that the children's 'nucleus family' was with the appellant.

31. Respondent's counsel submitted that it is not common cause that since 2000 primary residence has been with the appellant but that, since January 2000, there has been a situation of joint residency [57]. The admission made by the respondent was to the effect that primary residency with himself had changed to joint residency with both himself and the appellant. It is not primary residency which has changed to the appellant[58]. What the court a quo found was that, after 2000, the children resided primarily with the appellant but that the parents (and the children) enjoyed joint residency [59].

Primary family unit or 'Nucleus Family Unit'

32. Quite obviously, once these parents had divorced what has been called the 'family constellation' has had to adapt. With the remarriages of both parents and acquisition of two stepbrothers and then a halfbrother, new family units have developed which are also deserving of protection.

33. Appellant submits that, notwithstanding that legal custody is shared and that the children may spend a considerable period of time with the respondent, recognition must be given to the finding of the court a quo that, for M. and S., the 'nucleus family unit' consists in their mother, stepfather and their baby brother, T.. It is argued that this 'nucleus family unit' constitutes the most fundamental and significant set of relationships for the children

from which they should not be separated.

34. Respondent has submitted that this court should not find that there is only one 'nucleus family unit' consisting in the children, their mother and stepfather and brother T.. The court should find that that there is another nucleus family consisting of their father, their stepmother and their two stepbrothers. It is argued that the existence of two such nucleus families appears from the allegations of both appellant and respondent in their descriptions of their daily and intimate involvement in the lives of M. and S. [60].

35. In Respondent's Heads of Argument reference was made to 'binucleur familes' and it was submitted that M. and S. are the beneficiaries of a full support system consisting not only in their parents and stepparents but also their brother, stepbrothers, grandparents, uncles, aunts, cousins and therapists. This description arises from a reference in the first report of Dr Duchen to the article by Gindes wherein 'Binuclear' is identified by one writer as a term used to describe the post divorce family. Gindes comments as follows:

> "The binuclear family consists of two households, with the child living in both. The binuclear family includes stepparents, step siblings, even formers spouses of stepparents as well as parents, full siblings and half siblings. While this is a broad definition of the post divorce family constellation it highlights the interconnectedness of the various people involved " (at page 121)

36. It should be noted that Dr Duchen referred to this article by Gindes in connection with the advantage to children from divorced homes to have contact and good relationships with both parents [61] and the qualitative changes in the relationships between both parents and children when there is a relocation and especially the risks to which children are placed if they are deprived of meaningful relationships with one of their parents [62]. This issue will be addressed later in the judgment.

37. The reference by respondent's counsel to the binuclear family reminds one that that the 'best interests' of the child is a multifaceted concept which necessarily takes into account as many factors as may be relevant to a particular situation and a particular child and that one should not omit to have regard to all family relationships of which each child is a participating member.

38. That there are two families of which M. and S. are a part, does not however, negate the finding by the court a quo that M. and S. view their mother and her husband and their

brother as their 'primary' or 'nuclear' family unit.

M. and S.'s relationships with their parents

39. With considerable care, M. and S., as well as their parents and stepparents, were subjected to evaluation by psychologists, social workers and the office of the Family Advocate. The tests undergone, the interviews conducted, the analyses drawn and the conclusions reached are set out in the reports of Dr Duchen, Dr Fasser and Mr Carr, Mrs Khanyile and Adv Thokoane.

40. On the basis of their respective interactions with the children, the children's emotional bonding with and reliance upon their parents was assessed. Overall, there does not seem to have been much divergence in their opinions except insofar as they have found themselves able to consider the various relocation or non-relocation options to which this judgment has already referred.

41. The learned judge in the court a quo commented that "all in all, the experts do not come up with a recommendation that is firm or strong in favour or either the relocation to Cape Town or the maintaining of the status quo"[63]. With respect to the learned judge, I understand the conclusions of the various experts somewhat differently and cannot agree that there is any status quo which is capable of maintenance.

Mr Carr

42. Mr Carr, a psychologist, prepared a report for the use of the Court. His report was the sequel to an application to court by the respondent for an order that the appellant be ordered to provide written consent for the children to be assessed by Mr Carr. It would appear that the respondent was very determined that Mr Carr assess the children and provide a report. For reasons set out in the papers, the appellant was not so inclined.

43. It subsequently emerged that the respondent's stepson had previously consulted with Mr Carr[64], that the respondent had previously himself consulted with Mr Carr concerning this matter before this court [65], that Mr Carr had referred the respondent to his present attorney of record for legal advice and representation[66].

44. The court a quo commented that the "objectivity of Mr Carr was attacked by the applicant" and the learned judge decided that "for the purposes of this judgment I will disregard the findings of Mr Carr"[67].I am of the view that the caution of the court a quo was not misplaced.

[95] M r Carr's independence had been compromised, perhaps unintentionally, by his earlier involvement with the respondent's family and particularly by recommending legal representation to one party to this litigation. Zeffert et al comment that the fact that an expert is partisan affects his or her credibility – particularly in a dispute about custody where he or she must be neutral if he or she is to assist the court [68] [69]. In English law too, emphasis is placed on the need for "..an expert witness [who] should provide independent assistance to the court by way of objective unbiaised opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate"[70].

Dr Duchen

[96] Dr Duchen's report sets out the tests which she performed on the children as well as both sets of parents and stepparents.

[97] As far as M. is concerned, he "perceives both his parents in a realistic manner". The testing and interviews indicated the rating between parents as revealed by M.. He rated his father higher on the "competency and supportiveness scales" and rated his mother higher on the "follow-up and consistency and admirable character traits scales". Dr Duchen concluded that "M.'s results indicate a very balanced relationship with both parents and he feels that his parents have close to an equal ability to fulfill his needs" [71].

[98] M. rates his mother higher in a number of respects: the ability to communicate clearly, argue constructively, help solve a school subject, help him deal with a bully, patience, help him calm down, produce of feelings of security, help him cope with fears, enforcing homework assignments, trustworthiness, show altruism, enjoyment of others company, accept criticism, maintain a positive mood. Mathew rated his mother lower in her ability to be a reliable source of information, help with everyday medical problems, help M. deal with new situations, help the child cope with fears, be a patient listener.

[99] M. rates his father higher in his ability to solve ownership problems, be a reliable source of information, cope with emergencies, assertiveness, help with everyday medical problems, leadership skills, showing love, helping him with new situation, create feeling of confidence, enforce bed time limits, keep promises. M. rates his father lower in his ability to be a reliable source of information, argue constructively, help to solve a school subject problem, patience, help him calm down, help him cope with fears, enforcing home work assignments, trustworthiness.

10. Dr Duchen had contacted M.'s school teacher who commented that his behaviour was indicative of "high levels of anxiety" and that his homework was not always done during the week that he lives with his father.

11. As far as S. is concerned, she has a realistic perception of both parents and does not yet idealise either of her parents. The imbalance with which S. is rating her parents "is no of an extent that creates concern". She rates her father very low in certain areas and her mother very low in other areas. Dr Duchen commented that two overt aspects could contribute to all these ratings: S. has been "displaced" as the youngest child in the family and S. is reacting with regard to the proposed relocation.

12. S. rates her mother higher in her ability to communicate clearly, argue constructively, help her to solve her school subject problem, leadership skills, help S. cope with fears, help S. deal with new situations, keep promises, show altruism. S. rates her mother lower in her ability to solve ownership problems, be a reliable source of information, assertiveness, help with everyday medical problems, help S. with a bully, help S. deal with new situations, produce feeling of security, be a patient listener, enforce bed time limits, trustworthiness, enjoyment of others company, accept criticism, maintain a positive mood.

13. S. rates her father higher in his ability to solve ownership problems, be a reliable source of information, assertiveness, patience, showing her love, helping S. deal with new situations, creating feelings of confidence, follow up consistency, trustworthiness, accept criticism, maintain a positive mood. S. rates her father lower in his ability to communicate clearly, help solve a school subject problem, leadership skills, help her to calm down, help her cope with fears, showing altruism, enjoyment of other people's company. The BPS results indicate that S. "rates her father higher on all four scales, namely, competency, supportiveness, follow up consistency and admirable character traits".

[14] Dr Duchen contacted S.'s teacher who advised that she is an anxious child, with special needs with academic work which work is frequently not done during the week she spend with her father.

[15] Duchen made it clear that she considers her position somewhat compromised since she was initially consulted by both parents and used as a mediator to assist in resolution of problems some years ago[72]. At the end of the day, Duchen attempts to negotiate a 'compromise' position[73], the compromises apparently proposing to put the relocation of appellant, her husband, her baby and M. and S. on hold. This would not provide M. or S. or T. or their parents with a course for the future and , as was pointed out in Jackson supra "leaving the issue for another day does not seem to be realistic".

Dr Fasser

[16] Dr Fasser's report sets out the tests she performed as well as the nature of her consultations with both parents, stepparents and children.

[17] In the Family Relations Test, M. selected only his mother's current family. The highest number of responses was for his mother with none of these being negative, the next highest involvement was with Paul, also with no negatives, his most balanced response was towards S.. In the Kinetic Family Drawing Test and the Tree Test, M. again only drew his mother's current family. She commented on M. that he indicates a good self- image, sensitivity and vulnerability but does not experience boundaries clearly.

[18] In the Family Relations Test, S. chose her mother's current family and included both sets of her grandparents. S.'s responses were equally split between her mother, M., T. and Paul. The major proportion of S.'s negative responses were to M. and her grandparents. In the Kinetic Family Drawing Test and the Tree Test, S. drew her mother's current family. Dr Fasser commented that it was clear that S. sees herself as " allied with T.". In both tests, Dr Fasser comments that S. called her stepfather, Paul Boehmke, "Daddy" .

The Family Advocate

)9. The Office of the Family Advocate was necessarily concerned to ascertain the extent to which the proposed relocation complied with the views expressed by our courts in similar matters. Mrs Khanyile is a social worker in the service of the Office of the Family Advocate who perused documentation, interviewed the parents and interviewed the children privately.

.0. Mrs Khanyile concluded that he children "feel torn between the parents" and "both children want to please and to be loyal to the other parent". She also commented that "the children feel loved, secured and comfortable in both settings".

.1. Mrs Khanyile commented that the children have spent almost as much time with their father as with their mother because of the shared residency situation but concluded that "The one outstanding feature on the part of the applicant is that she is a full-time mother who sees to the day to day needs of the minor children. I t can therefore be highlighted that she is the more available parent, willing and devoted to the task of physically caring for her children"[74].

Conclusions

.2. In her report of 4th August 2004, Dr Duchen commented on the differences in parenting style between the parents as also the very different ideals which they have for their children. These differences were by Dr Duchen and were highlighted by numerous people as becoming more pronounced between the parents as the children grew older. The result, concludes Dr Duchen, is that the parents are providing two emotional landscapes for the children[75].

.3. In the same report, Dr Duchen stated:

> "The BPS results indicate that S. identifies Mr McGregor as the person whom could meet her needs best. She has a positive relationship with Mrs Boehmke as well .(one should note that these BPS-results could reflect S.'s insecurities

regarding the proposed move). Both parents indicated that S. has a very close relationship with her mother. The BPS results further indicate that M. rates his parents nearly equal in their ability to meet his needs" [76] [77] [78]

.4. Dr Fasser's conclusion, based on her assessment of the children, is that:

"Their primary family of reference is their mother's current family. That consists of their mother, Mr Boehmke and their brother T.. They see their mother as their primary care giver and her home and its routine as the foundation of their lives. …….. My finding is at variance with Dr Duchen where she summarizes in her memorandum (Page 1) that the "children tested to have more of an emotional involvement with Mr McGregor at present". It should be noted, that in her report Dr Duchen states (page 36) ".S. identifies Mr McGregor as the person who could meet her needs best… but that M. rates his parents nearly equally in their ability to meet his needs". Dr Duchen in her report (page 39) accepts that S.'s responses to the BPS could have been a function of insecurities regarding the proposed relocation and that both parents agree that S. has a very close relationship with her mother. Furthermore, I agree that the results of the BPS are not necessarily a true reflection of the children's covert feelings as they both try and defend their positions, especially around the relocation issue, and are afraid to lose the regard of either parent."

And

"it is agreed that S. has a close relationship with mother and that M. rates his parents nearly equally in their ability to meet his needs. Results of BPS are not necessarily a true reflection of the children's covert feelings.." [79]

THE JUDGMENT OF THE COURT A QUO AND THE STATUS QUO

The Reasons for the Judgment of the Court A Quo

.5. Those factors which contributed to the decision of the court a quo are summarised towards the end of the judgment:

> "It seems to me that the trauma of moving to Cape Town and the effect, the adverse effect, that will have on the children's relationship with the respondent father, outweighs the benefits that will occur if the nucleus family is maintained in Cape Town. It seems to me that to move the children to Cape Town will be vastly disruptive of their social and school life; will be very disruptive of the relationship which they have with their father and will be disruptive of the way of life that has been established between them and their mother and father over the past four years….. I am mindful that the effect of dismissing this application would be that the newly formed marriage between the applicant and Mr Boehmke would be put under strain and some measure of risk, but in the end, having considered all the views expressed by the psychologists and having carefully considered the facts, I am of the view that the status quo should, in the interests of the children, not be disturbed……[80]

.6. We have heard argument on a number of these considerations and they are considered by this appeal court below.

" The Status Quo should not be disturbed"

.7. The learned judge indicated that it was his view that the status quo should not be disturbed. In this regard he had earlier referred to the fact that the children resided with the appellant 'primarily' but that, in effect, the parties enjoyed 'joint residency'. The children live within a new "nucleus family" comprising "their mother and Mr Boehmke and their new born stepbrother" [81]. The learned judge commented on the "way of life which has been established between them and their mother and their father over the past four years". This he detailed as enabling the children to spend one week a month with their father, portion of some Wednesdays, alternate weekends all of which he found amounted to some "13 days in the month" as well as sometimes taking them to and from school. He referred to this as "the present status quo [which]has been maintained regarding the parenting of the children for what is now a period of some four years"[82] The learned judge commented that it was this arrangement which was sought to be altered "very substantially"[83] and which he concluded should "not be disturbed".

18. The court a quo gave no content or definition to the status quo which it wished to remain undisturbed and which desire formed the cornerstone of the judgment. It appears that the court had in mind the retention of the "nucleus family", the "parenting" arrangement of the children and the "way of life" which had been established between the parents.

19. It is however, quite clear that the 'status quo' to which the court made reference in the judgment is no longer in existence and accordingly cannot be maintained. Events intervened to disturb the status quo established in 2000 and have incrementally continued so doing throughout 2001, 2002, 2003, 2004 and 2005.

20. Firstly, the respondent remarried and introduced a step mother and two step siblings into the former matrimonial home; secondly, the appellant remarried and introduced a step father into the children's home; thirdly, the appellant and her husband had a baby, T., introducing a step brother into the children's network of blood relatives; fourth, the children's stepfather could not obtain suitable employment in Johannesburg, found a challenging and rewarding project in Cape Town and was obliged to relocate himself and his family to Cape Town; fifth, the children's stepfather has already commenced living in Cape Town and, when his presence in Cape Town is not required, he commutes to Johannesburg over weekends.

21. With respect, the status quo envisaged by the learned judge had already ceased to exist at the time of making handing down his judgment.

22. The court a quo accepted that the appellant's husband cannot and does not work and therefore live in Johannesburg but in Cape Town. In refusing the appellant permission to join her husband in Cape Town with all her three children, appellant's counsel argues that the court a quo set in motion a train of events which the learned judge did not apparently envisage:

1. The appellant is left in Johannesburg to raise M., S. and T. largely as a single parent in

the absence of her husband who now works and lives in Cape Town.

2. The "nucleus family unit" of M. and S. is now broken up, notwithstanding that it is common cause that M. and S. have a strong and close relationship with both their stepfather and half brother T..

3. T. is now to be raised in Johannesburg in the absence of his father who works and lives in Cape Town and commutes to Johannesburg when he can.

4. The court a quo explicitly accepted that the "nuclear family" would de facto break up and that this would place a strain on the marriage of the appellant and Mr Boehmke. The court a quo also accepted that there was a risk that the marriage might be at risk of permanent dissolution. If that were to happen, all three children would lose their "nucleus family" and T. would lose his only family as one entire unit.

5. If the marriage did not survive this enforced separation, then appellant would have to return to work as she did both during her marriage with the respondent and as she did after the divorce from the respondent. All three children would lose their mother as a stay-at-home parent.

6. The separation of the appellant from her husband, T. from his father, the strain on and the risk to the marriage will, no doubt, impact detrimentally on the appellant who, it is argued is the children's "primary caregiver", this in turn would impact detrimentally on the welfare of the children.[84]

13. Respondent's counsel conceded that the status quo apparently envisaged by the court a quo could not be maintained However, it was submitted that the status quo of M. and S. vis a vis their relationship with their mother and father would be left intact by the court's decision. It is submitted that this course of action is the one least detrimental to all parties concerned and in particular to M. and S. because the appellant would be able to commute with T. to Cape Town to see her husband and T.' father and, in turn, Mr Boehmke would be able to commute to Johannesburg to see his wife and son and stepchildren.

24. I am in agreement with the submissions of appellant's counsel that there will certainly be some direct and indirect consequences of the order refusing relocation of M. and S. with their mother and that there may be others as yet only anticipated. I am sure that such consequences were unintended by the court a quo but they certainly impact on the "best interests" of M. and S. and on T. as well. The result would be at odds with the principles set out in earlier decisions of our courts [85].

25. This court accepts that no lives are static and particularly not those of the adults and children who make up the appellant's and respondent's families. Even prior to the actual divorce in 1999 a process of flux and change was set in motion which has continued to this day. The order of the court a quo could not reinstate that which had ceased to be. I find that the order of the court a quo has already contributed and could further contribute to one or more or all of the events to which appellant's counsel drew our attention. These continuing results which impact upon M. and S. and their families must be considered in the remainder of this judgment.

THE ' BEST INTERESTS' OF MATTHEW AND SABINE

Identifying the factors which conduce towards the children's 'best interests'

26. On the papers before us, whether in the judgment of the court a quo, the founding and answering affidavits, the reports of the various experts, as well as in argument at the hearing of this appeal we were referred to a number of issues associated with the lives, circumstances, wellbeing, activities, relationships, dependancies of M. and S.. All these contribute to a greater or lesser extent and in isolation or in conjunction to determining each of their "best interests".

27. Amongst these issues are the disruption of the children's bond with their father, the children's perception in and involvement in their primary family unit, their attachment to all parents and stepparents, the existence of the marriage between the appellant and Mr Boehmke, the existence of T. who is the son of the appellant and Mr Boehmke and half

brother to S. and M., the conflicted relationship between the appellant and the respondent, the demands placed on the respondent and Mr Boehmke to hold down employment and earn livings to support their families, the arrangements made for the care of M. and S. in both Johannesburg and Cape Town, the personal needs and desires of all adults and children involved in this issue taking into account the Constitutional acknowledgments of the rights of human dignity, freedom and equality.

28. We have been referred to the ratio in Ford (trial) supra where the court a quo cautioned that a relocating parent cannot pay "scant regard to the fact that the access which the children would have to their father would be seriously curtailed…... A major consideration should be the consequence of interrupting a close psychological and emotional bond which a child has with the non-custodial parent". With this reasoning the majority of the court in Ford (appeal) supra could find no fault and concluded "This imposed an obligation on the appellant to place this factor at the forefront of her decision to relocate".

29. We have been informed that the experts consider M. and S. to have close emotional bonds with both their mother and father as also their stepmother and stepfather. Dr Duchen found that "The children tested to have more of an emotional involvement with Mr McGregor at present " while Dr Fasser found that, for the children, "their primary family of residence is their mother's current family..... they see themselves as primarily belonging to the family that consists of their mother, Mr Boehmke and their brother, T.".

30. We know that the respondent has remarried and his new wife relocated from Cape Town with her two sons. We know that the appellant has remarried and that she and her new husband have a son, T.. Mrs Khanyile of the Office of the Family Advocate commented that whether or not M. or S. relocate to Cape Town or remain in Johannesburg "they will lose" and then went on to comment that should the appellant remain in Johannesburg with her minor children she will "compromise her baby's relationship with his father and sacrifice the stability of her new marriage"[86]. The learned judge in the court a quo was also alert that dismissal of the application for the children to relocate would result in " the newly formed marriage between the applicant and Mr Boehmke would be put under strain

and some measure of risk".

31. The reports of Dr Duchen and Dr Fasser indicate that the interactions between the appellant and the respondent are not without mistrust and acrimony. Many examples may be taken from these reports and the court paper. Respondent passes moral judgment upon appellant's working to earn a living during her marriage and after her divorce, believes that Mr Boehmke is part of "an ongoing assault to eliminate me", holds similar views on parenting with his current wife but not with the appellant about whose views on parenting he has "concerns", feels that "Mrs Boehmke attempts to exclude him from the custodial role", feels that appellant makes decisions unilaterally, has concerns regarding the stability of the appellant and Mr Boehmke's relationship, feels that the appellant does not take the same view as does he of the need for psychotherapy for the children, unilaterally decided to speak directly to the children about the proposed relocation notwithstanding his undertaking to the appellant not do so (no reason given), intrudes himself on the time spent by the children with the appellant notwithstanding the special events which are being celebrated (for instance the attempt to see the children when they were with the appellant over the weekend of T.' christening and Mr Boehmke's birthday). Appellant believes the current time allocation of the children between the parents is "disruptive", feels that respondent does not attend to the children's homework, indicates there are constant disagreements between the two of them, refers to difficulties with decisions regarding extra-mural activities (emails were attached to the papers), states there is always a "power struggle" between her and the respondent, feels that "everything is a problem for Mr McGregor", is concerned that the respondent does not allow the appellants parents and the children's grandparents to contact them while they are with the respondent, finds the respondent reluctant to take the children to certain events.

32. It would appear from the majority of the writings to which we have been referred by both Counsel that there are attempts in all jurisdictions to search for "simple rules to decide relocation cases"[87] .

33. Where it is accepted that the children's 'best interests' are the primary concern, some

authors suggest that the courts should consider the age and developmental needs of the children, the quality of parent-child relationships, the psychological adjustment of the parents, and the likely effects of moving on the children's social relationships, as well as the cultural and educational opportunities in both locations[88].

34. One interdisciplinary group of scholars drafted nine research and policy-based guidelines to assist courts in evaluating relocation disputes[89] which guidelines include,

1. "a child's abilities to form healthy relationships and to adapt to change depend on a healthy primary relationship and are, accordingly, endangered if that relationship is disrupted.
2. "it is in the best interests of children in all but unusual cases to maintain contact with both parents when the parents do not live together.
3. "research indicates that a child's healthy psychological adjustment depends on the quality of the attachment between the child and it's non-custodial parent, but is not related to the particular visitation pattern or the frequency or length of visits.
4. "it is normal, healthy and desirable for parents whose relationship has ended to build separate lives.
5. "these separate lives can be expected to include changes such as increased reliance on extended family relationships, the creation of new personal and family relationships, and new educational and career choices, any of which may involve relocation.
6. "when a parent who is a child's primary caretaker chooses to relocate for such substantial reasons, it is the public policy of this state to maintain the child in its primary relationship.
7. "it is against the public policy of this state to require a custodial parent to choose between custody of the child and a committed new personal relationship, the parenting of other children, the support of friends or family, or educational or career opportunities.

8. "except in cases of serious of continuing domestic violence or emotional abuse, however, it is also against the public policy of this state for a primary caretaker to relocate with the child for insubstantial reasons or with the intention of disrupting the child's relationship with the other parent.

9. It is also against the public policy of this state, except in unusual circumstances, to order the relocation of the child during the last two years of high school if the child strongly prefers to the remain in a school and community in which the child is established [90].

35. Subject to the caveats already given with regard to foreign legislation, policies and practices, the above suggestions, do indicate useful areas for consideration by South African courts, some of which have already been articulated by our courts.

How to Ascertain the "Best Interests" of the Children?

36. In the unreported judgment dissenting from the majority of the court in Ford [Appeal] supra, I discussed the manner in which one may attempt to give meaning and content to the concept of the "best interests of the child". The majority of the court expressed no view on this issue. Since the judgment is unreported, it is convenient to repeat those portions of the judgment which are relevant to the issue before us today.

37. Our law has developed the "best interests of the child" approach[91] which has now been enshrined in the Constitution[92] which, in Section 28(2) proclaims that "a child's best interests are of paramount importance in every matter concerning the child". This principle has become known, in one form or another, in many national legal systems and has been recognized in international instruments[93].

38. However, some writers suggest that the principle has yet to acquire much specific content or to be the subject of any sustained analysis designed to shed light on its precise meaning[94]. The result is that diverse interpretation may be given to the principle

in different settings. I suggested that care also be taken be taken to avoid slavish adoption of such content as has been given to specific legislation or instruments since language as also constitutional, cultural, familial, social and other traditions inform contrasting interpretations[95].

39. The full complexity of the South African Constitution is continually being explored. Section 28(2) and the "best interests" principle do not represent and are not situate within a Constitution which envisages a monolithic or uni-dimensional approach reflecting a single, unified philosophy of childrens' rights. There can be no specific and readily ascertainable recipe for resolving the inevitable tensions and conflicts that arise in each given situation.

40. The respective concerns and entitlements of different actors involved cannot be assumed to always be clearly defined and delineated. In different situations, other interests to be balanced may include, not only the particular child but also brothers, sisters, individual or both parents, the nuclear and the extended family and sometimes the local community, society and the State.

41. The "best interests" principle is used to provide a framework for addressing the entire range of major issues affecting children. The principle may be invoked in relation to and in the context of the separation of the child from the family setting, adoption and comparable practices, parental responsibility for the upbringing and development of the child, the child's involvement with the police and the justice system, the provision of housing and social services [96], access to schooling [97] and so on.

"The Value of Context in identifying the Best Interests of M. and S."

42. In interpreting the phrase " best interests" it is appropriate to have regard to the term "best" which introduces a comparative quality. The Shorter Oxford English Dictionary includes as definitions, "excelling all others in quality", "most advantageous" and "most appropriate. Two distinctions are drawn: first between that which is considered to be consonant with the child's welfare and that which is not ; secondly, between those

interests which are more advantageous to a child than others which are less advantageous. It may, of course, develop that a combination of factors – some neutral, some less advantageous, some more advantageous and even some seemingly disadvantageous – may together approximate or combine to form a child's "best interests".

[43] Amongst the definitions of "interests" , the Shorter OED includes "the relation of being objectively concerned in something by having a right or title to, a claim upon, or a share in", " the relation of being concerned or affected in respect of advantage or detriment" and "the feeling of one who is concerned or has a personal concern in any thing". There is no stipulation as to the content of these "interests". These must be seen in within the whole of Section 28 which includes rights to name and nationality; family, parental or appropriate alternative care; basic nutrition, shelter, basic healthcare and social services; protection from maltreatment, neglect, abuse or degradation; protection from exploitative labour practices; exemption from detention except under certain circumstances; legal representation in certain civil proceedings; exemption from participation in and protection during armed conflict. Satchwell J did not assume that the child's "interests" are limited to those specified in this section since the remainder of the Constitution also speaks to children.

[44] In Minister of Welfare and Population Development v Fitzpatrick 2000(3) 422 CC Goldstone J wrote ,

> "the plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). (at 428D-D).

[45] There is also no stipulation as to the priority (if any) to be ascribed to any one of the child's well-being, education, physical or mental health, or spiritual, moral and social development or other interests.

46. I found it significant that the Legislature elected to identify the child's best interests as of "paramount" importance. The Shorter Oxford English Dictionary includes amongst the definitions of "paramount", "above in scale of rank or authority; superior" and also "highest in power or jurisdiction; supreme". A child's best interests is the pre-eminent consideration amongst all other considerations[98]. However, the Legislature did not intend the "best interests" of the child to be the sole or exclusive aspect to be considered because it did not prescribe that the child's "best interests" are the only factor to be considered or the sole determinant of the exercise of a court's discretion. The 'best interests' principle is the paramount consideration within a hierarchy or concatenation of factors but it is not always the only factor receiving consideration in matters concerning children [99]

47. Not only does the wording of the Constitution lead to this interpretation, but all such interests are necessarily the product of and contextualised by a multiplicity of other factors which include the interests of other persons, communities and even the State. The position of each child and the interests of each child are more dependant on other persons and other considerations than are adults. This remains the case when considering the "best" as opposed to other interests.

48. As was pointed out by Kirby J in the decision of the Australian High Court in U v U **[2002] HCA 36** , although the best interests of the child are to be treated as paramount "They are not to be elevated to the sole factor for consideration. The economic, cultural and psychological welfare of the parents is also to be considered, because they are human beings and citizens too and because it is accepted that their welfare impacts upon the welfare of the child. The general quality of life of both the parents and the child is relevant" (at para 159)

49. Context was recognised in Godbeer v Godbeer 2000(3) SA 976 WLD, where Nugent J commented:

> "In approaching the matter I am required to accord paramount consideration to the welfare of the children (See Bailey's case

supra) but that is itself a relative concept which can only be judged within the context of their particular circumstances" (981 I)

60. Appreciation of the value of context is not confined to legal authorities but appears also in the psychological literature concerned with the best interests of children. Dr Duchen's report cited the article by Gindes which, inter alia, comments that relocation needs to be considered from a "developmental or life cycle family system perspective" and "Parties need to be considered as individuals at different developmental stages in the context of a separating family". Gindes cautions that the factors involved in assessment of relocation options are "complex and interdependant" "because relocation does not occur in a vacuum not associated with other significant life events". The result is that "Research has not been able to identify the contributions of each variable in a definitive fashion".

61. Interpretation of a Constitutional right in its context, was held in Grootboom supra, to require consideration of contextual setting as also social and historical rights (at 61H-62B). Such context has, of course, been recognised by numerous judgments of our courts. One such practical instance is that alluded to by Scott JA in Jackson supra at 318F where he refers to the parental context within which children live and the impact upon them of living with a parent "thwarted" in implementing a decision reasonably taken.

62. "Best interests" standards are regarded as indeterminate because the phrase is, as indicated above, inherently subjective. Interpretation of the principle must inevitably be left to the judgment of the person, institution or organisation applying it. In so doing, interpretation as to what is "best" amongst a selection of "interests" creates a discretion in the power who or which makes that selection.

63. There is difficulty in identifying the criteria that should be used to evaluate alternative options open to a decision-maker seeking to act in a child's best interests [100]. The Constitution provides a number of signposts. These include the rights set out in Section 28 and, of course,

"...the Constitution, in its opening statement and repeatedly thereafter, proclaims

> three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom."[101]

64. No one factor can be given pre-eminence in all cases involving children. The complexity of the "best interests" principle require the court to consider all factors which contribute towards ascertaining children's "best interests. It is necessary to avoid a uni-dimensional focus which fails to suggest a careful balancing of the different ingredients which may all point towards and comprise the children's "best interests".

The "Best Interests of the Children" in the wider social and Constitutional context

65. Formulation of the 'best interests' of children standard must also have regard to the best interests of family relationships in particular, society generally and constitutional principles.

66. To formulate a 'best interests' of the child approach which has the effect that primary caregivers or custodian parents will always be obliged to live in close proximity to the other parent from whom they are divorced may have certain undesirable consequences for both individuals and wider society.

67. One concern would be the signal that is sent to parents and children about the constitutional values of human dignity freedom and equality. In Van Rooyen v Van Rooyen 1999(4) SA 435 C, the court sought to

> "apply individual justice in the sense that all the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of these children's best interests" (437 H).

68. Where this is not done, a message could possibly be sent that primary caregivers or custodian parents are "shackled" to the other parent. Such message suggests that primary caregivers or custodian parents lose an independent right to "freedom of movement" and accordingly a vast conspectus of the attributes of "dignity" are denied

them as well. South African judgments have explicitly accepted that formerly married persons are and should be free to create their own lives post divorce untrammeled by the needs or demands of the former spouse[102] .

59. The majority of the High Court of Australia in AMS v AIF; AIF v AMS **[1999] HCA 26; (1999) 199 CLR 160** restated that the statutory instruction to treat the welfare or best interests of the child as paramount does not mean that the legitimate interests or desires of the parents ought to be ignored, the "legislation being enacted in a society which attaches a very high importance to freedom of movement and the right of adults to decide where to live " and, commenting on the former requirement to demonstrate 'compelling reasons' to justify relocation, stated

> "It effectively ties that parent to an obligation of physical proximity to a person with whom, by definition, the personal relationship which gave rise to the birth of the child has finished or at least significantly altered".

60. I am, with respect, in agreement with Kriegler J when he said in President of the Republic of South Africa and another v Hugo 1997(6) BCLR 708 CC that

> "One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities" (at 743F).

61. Further, one should not lose sight of the fact that primary caregivers or custodian parents are most frequently the mother. It is perhaps a notorious fact that

> ".. mothers, as matter of fact, bear more responsibilities for child-rearing in our society than do fathers. This statement is, of course, a generalisation. There will, doubtless be particular instances where fathers bear more responsibilities than mothers for the care of children. In addition, there will also be many cases where a

> natural mother is not the primary care giver, but some other woman fulfils that role, whether she be the grandmother, stepmother, sister, or aunt of the child concerned….". (per Goldstone J in Hugo supra at 727G).

52. This means that the aforesaid restriction on mobility and abrogration of "freedom of movement" would impact more inequitably upon women than upon men. That may not be the intention behind an approach which requires primary caregivers or custodian parents to remain resident where the other parent chooses to be resident. But discrimination which is unintended or unforeseen or even made in good faith is still not necessarily fair. I suggest that careful consideration need be given to applying the "best interests" principle in a manner which does not create adverse effects on a discriminatory basis – in this case gender discrimination.

53. One should also be mindful that primary caregivers or custodian parents (intending or wishing to relocate) may choose not to foster loving relationships and close bonds between children and the other parent. Primary care givers or custodian parents may deliberately encourage a weakening of the relationship between children and the other parent in order to facilitate easy relocation. This particular appellant may have served her own interests far better (and selfishly) by not agreeing, after discussion with Dr Duchen, to increase the access by the respondent to M. and S. from alternate weekends to one full week with two weekends and Wednesday afternoons per month. If she had not done so, she (and Mathew and S. and T. and Mr Boehmke) may not have been put through the litigation ordeal which has taken place

THE FACTORS TO BE TAKEN INTO ACCOUNT IN DETERMINING MATTHEW AND SABINE'S 'BEST INTERESTS'

"Maintaining the Nucleus Family"

54. The learned judge in the court a quo referred to the "benefits if the nucleus family unit is maintained". Those benefits appear from the body of the judgment when the appellant's case was set out. By continuous references to the 'nucleus family', the court a quo seemed to accept that, in principle, the appellant and T. should be with their husband

and father[103]. I cannot fault this reasoning

65. It is common cause that the appellant, since her marriage to Mr Boehmke, does not work and is a fulltime mother and homemaker[104] with the result that "the children are primarily in the care of their mother"[105] She has been married to Mr Boehmke since September 2002 and their son, T., was born in April 2004.

66. M. and S. have a "very positive and loving relationship with Mr Boehmke"[106] and Dr Duchen has described the enthusiasm which the children evince for him and with which they relate to him while Dr Fasser has described how they call their stepfather "Porky" and S. has sometimes called him "Daddy". The judgment has already referred to the children's high responses to their stepfather in the testing which they underwent.

67. Both children are attached to their brother, T., with S. being particularly allied with him. "The children have developed a very positive bond with T."[107]

68. All the reports comment that the appellant and her husband are psychologically well-functioning parents[108].

69. This is the family unit which non-relocation of the children to Cape Town will disrupt. One member will work and live in Cape Town and see his wife, his son and his stepchildren only over those weekends he is able to leave Cape Town. One member will effectively become a single parent as she raises three minor children alone in Johannesburg. One member will become a child who only knows his father from weekends and school holidays. Two members will see their stepfather over weekends and perhaps some school holidays.

70. Our courts should be alert to preserve and protect family units and not to initiate or allow actions or policies which would cause disruption and dislocation and possibly permanent dismemberment.. The Constitution recognizes the right of every child to "family or

parental care"[109] and we should be vigilant to ensure that T. enjoys his chance at complete family life and that M. and S. have the opportunity to as full enjoyment as is possible of their new 'primary family unit'.

'1. Furthermore, these same two children cannot but be aware that their mother cannot live with her husband because she has chosen to remain in Johannesburg to bring them up and provide them with a home. They will know that she wants to live in Cape Town with her husband[110]. They will know that their brother does not live with his father because their common mother has placed their need to live with them above their brother's need to share a daily home with and live with his father.

'2. This is a terrible burden to place upon M. and S.. The appellant and Mr Boehmke and possibly T. could not but fail at some time or another to experience and to express feelings of bitterness and frustration at what had happened. Scott JA in Jackson supra was alive to this consideration when he commented that

> "... it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonably and genuinely taken'. (at 318 G).".

'3. These concerns are not unique to South African courts. In P (LM)(otherwise E) v P (GE) [1970]3 All ER 669 , Lord Justice Winn commented that "I am very firmly of opinion that the child's happiness is directly dependent not only on the health and happiness of the mother but on her freedom from the very likely repercussions, of an adverse character, which would result affecting her relations with the stepfather and her ability to look after her family peacefully and in a psychological frame of ease , from the refusal of the permission to take the child to New Zealand." while Lord Justice Sachs commented that non relocation desired by a parent "..is the sort of sacrifice that ought not to be accepted by this court, for the very reason that it may well in the long term enure to the detriment of the child".

'4. In Payne v Payne **[2001] EWCA Civ 166**, [2001]Fam 473, [2001] 1 FLR 1052, one of the questions the court said ought to be asked was "What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?" and referred to the importance which the English courts attach to "the emotional and psychological well-being of the primary carer", stressing that in any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor. In Re B (Leave to Remove:Impact of Refusal) **[2004] EWCA Civ 956**, the headnote reads that the Court of Appeal held that it was necessary to make a full and careful assessment of the consequence to the mother and her present husband of a refusal of the application and to set that in the scale against the inevitable detriment to children in the loss of regular and frequent contact with the absent parent. It was important to give great weight to the emotional and psychological well-being of the primary carer, not merely to take note of the impact on the primary carer of a refusal

'5. This is the family described by the court a quo as the "nucleus family unit". I believe that this court must therefore take into account the likely disadvantages to the children of living with a mother who has had to sacrifice otherwise legitimate aspirations in order to retain the care giving role of and for her children.

'6. It is not just the dislocation of the primary family unit or "nucleus family unit" with which this appeal court is concerned. Inevitably, the separation, the expense of maintaining contact, the development of different lives, resentment on all sides will place considerable strain on the Boehmke marriage. This is not just idle speculation.

'7. Dr Duchen anticipates this when she wrote "Mrs Boehmke would be in a very difficult situation and her present marriage will be under strain. She and Mr Boehmke will feel resentful that they once again had to consider Mr McGregor's position in deciding on aspects concerning their lives" **111**.

'8. Mrs Khanyile has commented on compromising of relationship of T. with his father and the possible "sacrifice to the stability of her new marriage" **112**. She went further to

express the opinion that it "was better for the children to have biological parents who are happy and have stability in their relationships" The learned judge in the court a quo said that this opinion "does not make much sense" because the biological parents include both respondent as well as the appellant and relocation to Cape Town would not make the respondent happy or have a beneficial effect on the stability of his relationship with either his present wife or children. With respect the learned judge misunderstands the important point made by the social worker which is that, in general terms it is better for biological parents to be happy and stable in their relationships and this includes the appellant with her husband, in this particular case the biological mother would be possibly sacrificing the stability of her marriage which would place the children in an invidious position for exactly the reasons referred to by Scott JA in Jackson supra.

'9. Dr Fasser advises that

> "In my opinion a more fundamental and pervading consequence could emerge over time. A feeling of resentment towards the children themselves as a result of the forced sacrifice would potentially penetrate the parenting relationship. Often parents who sacrifice their own happiness and life fulfilment in the service of their children, subtly and inadvertently come to expect those same children to take on the responsibility of repaying them for that sacrifice. In such cases these children, instead of proceeding with their lives, spend a large portion of it discharging their perceived duty, in return, to their parents.
>
> The above consequence could obviously be further compounded by the stress that such a sacrifice would have on the spontaneous, generous and natural functioning of the parent. Moreover, the potential disintegration of the marriage and as such the quality of the parenting that the children would receive could be compromised."[113]

30. As indicated by appellant's counsel, should this marriage not survive this enforced separation, appellant may well be obliged to return to work. Mr Boehmke would support his son T. but certainly no longer support M. and S. and the appellant would need to find

employment of some sort. The result would be as anticipated by counsel: T., as well as M. and S., would have a working mother while T. would additionally have no father in the same city.

31. With respect to the court a quo, I do not believe that the learned judge gave sufficient weight to the importance of keeping this family intact.

32. Indeed no reference at all was made in the judgment to the effect upon T. of living in a home without his father as anything other than a visiting weekend parent. This appeal court is the upper guardian of T. and we must also be mindful of his 'best interests' in answering the question before us..

"Adverse Effect on children's relationship with the respondent father"

33. The court a quo noted that the appellant and respondent had exercised a form of "joint residency" for some years, that the children lived with the respondent for some 13 days each month and that it was proposed to alter this arrangement "very substantially". The court commented that should the children go to Cape Town "the ready access that the respondent father previously had will come to an end". The learned judge took the view that the generous access offered would not resolve the problem because "Effective parenting does not turn only on how many days a parent has access to children. It does make a difference that both parents are in immediate proximity to children"[114]. .

34. The court accepted that the appellant would not go to Cape town to live there with her present husband if the application failed but that she would stay in Johannesburg with M. and S.. The court a quo took the view that the relationship that the children have with their father could then continue as before. This would be "least disruptive of the lives of the children who would have no need to relocate" and "most important of all, they will maintain the relationship they have had with their father".

35. Respondent's counsel submitted that to permit the appellant to move M. and S. from

Johannesburg from would constitute a "desecration of the shared parenting arrangement". It is a myth that shared parenting necessarily involves a fifty per cent time share in the raising of children. Shared parenting means "the active involvement of both parents in the daily lives of their children over periods of time which promote the children's development"[115]

36. The respondent has clearly expressed his deep anxiety that " I am concerned and apprehensive that my primary bond with the children will be seriously undermined and my crucial parenting role will be reduced by the arrangements suggested by applicant which will in any event be further reduced due to practicalities"[116]. This fear is entirely realistic although the respondent's test results indicate that he may "lack the energy to cope with everyday activities…… and worries easily about things" [117] and "feel like he does not have the adult ability to cope with pain and loss"[118] which may, according to the experts, result in the respondent focusing on deficits and being more pessimistic regarding outcomes [119].

37. Quite obviously, a move by M. and S. with their mother and stepfather and brother to live in Cape Town while their father still lives and works in Johannesburg, will necessarily diminish the time spent by the children with their father and he with them, reduce his involvement in their daily activities and change the nature of their interaction which is currently for a full week and two weekends and Wednesdays each month.

38. This is, regrettably, neither the first nor the last time in which a court is required to consider the impact on a parent and his or her child if and when such parent and child live apart on the parent divorcing or being divorced from the other parent. That relationship is disturbed whether the parent and child now live in different homes, different towns or cities, different provinces or even different countries. Our courts have always been sensitive to the plight of both child and the parent with whom the child is no longer resident.

39. In Shawzin supra, the court accepted that such separation would be a "severe blow" to the non-custodian parent and that it would also be a loss to the children who would no longer have the non-custodian constantly near them. However, the court found that

there would however be "a compensation" because the bond between the children and the non-custodian parent would not be broken by reason of long holidays and opportunities to visit each other. In Bailey supra, the majority judgment described the result of the removal as being "drastic curtailment" of the rights of access of the non-custodian parent and that the children would be denied the undoubted advantage of being in close contact with such parent during their adolescence. However, the court did not anticipate a complete break in the relationship between this parent and the children, as opportunities to visit from time to time in each country would "offset the hardships" likely to flow from such relocation.. In Van Rooyen supra , the court was mindful of the "further disruption" to children who would be deprived of frequent contact with the non-custodian parent but took the view that the position could be palliated and the disruption to the children minimised by the generous access proposed. In H v R supra there was evidence as to the potential deterioration in the bond between father and children and even argument as to "trauma" which may be experienced but the court held that "adaptation" would take place.

10. It would appear that our courts do not usually, in the circumstances of each case, regard the effect of the removal of children on the non-custodian parent's relationship with those children as "conclusive of the issue" (per Trengrove JA in Bailey supra at 145A).

11. As was pointed out in Van Rooyen supra :

> "It is trite that the interests of the children are, all else being equal, best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal, familial world and the circumstances necessitate that the best must be done in the children's interests to structure a situation whereby access by the non-custodian parent is curtailed, that contact between him and the children is effectively preserved" (439 H – I)

and in Godbeer supra :

> Undoubtedly, the welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family.

> In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives, thereby anticipating that their lives might take them on different paths. … (at 981J) …… For indeed it is the respondent's access to the children which is, in my view, the only material consideration that weighs against the applicant's decision….. Furthermore, I do not approach the issue from the perspective of the respondent, for whom it will undoubtedly, and quite naturally, be a deeply traumatic experience to be deprived of the comfort which he derives from the company of his children. I approach the matter rather from the point of view of the children, who will be deprived of the comfort of their father's ready presence. (981 E – G) ……. She is undoubtedly fully aware of the value to be placed on close contact between the children and their father and I think that is borne out by the nature of the access arrangements which have existed up to now and the ease with which they have been exercised" (981 J – 982 C)

[12] In Ford [trial] supra the court a quo was concerned that certain of our legal authorities

> "… do not sufficiently emphasise the importance of the relationship between a child and the non-custodian parent and the detrimental consequences that may arise if a child is separated from such non-custodial parent especially if there is a close emotional bond"

The court went on to caution that a relocating parent cannot pay "scant regard to the fact that the access which the children would have to their father would be seriously curtailed…. A major consideration should be the consequence of interrupting a close psychological and emotional bond which a child has with the non-custodial parent".

[13] With this reasoning the majority in Ford (appeal) supra stated it could find no fault and concluded "This imposed an obligation on the appellant to place this factor at the forefront of her decision to relocate"[120]. (my underlining).

[14] I regret that I must continue to disagree with the majority of the court in the Ford

[appeal] judgment. To hold that the relocating parent must place this close psychological and emotional bond which the child may have with the non-relocating parent at the "forefront" of any decision regarding the future of the child ignores the multiplicity of factors which such parent must take into account and the context within which each such audit must be performed[121].

[15] It may be that this bond should, in certain circumstances, be at the 'forefront' of the parent's mind. It may equally be that the child's physical safety and security should, in other circumstances, be at the forefront of the parent's mind in making a relocation decision. Or it may be that questions of a home and shelter and food should, in yet different circumstances, be at the forefront of the parent's decision. In some cases it may be that the pre-eminent consideration is the opportunity for special medical and healthcare while in yet other cases it may be the absence of political or ethnic or religious persecution or other discrimination. There may be circumstances where the relationship between siblings is the greatest source of stability and comfort for children whose parents are about to relocate. A parent may be required to place priority on the ability to care for other family members whose needs are more urgent, stark or life threatening.

[16] In short, one cannot specify which factor must be or should be in the vanguard of a parent's decision concerning a child. The factors necessarily depend on the context within which one is attempting to determine the 'best interests of the child". As this judgment has already pointed out that is a combination of the purpose for which one is attempting to determine such interests, the other interests receiving consideration, the relationship of a myriad of interests to each other, the balancing of 'best', 'worst' and 'neutral' interests and all other factors which assist in ascertaining, as best one can, the 'best interests' of the minor children. Each case depends on it's own facts[122]

[17] However, I am in agreement with the cautionary reminder in Ford [trial] supra that one must have regard to the interruption of the bond between parent and child and the effect which this may have upon the child in the event of relocation. This is a factor, sometimes a very important factor, to be taken into account in the enquiry as to "best interests'.

Access by M. and S. to their father and the respondent's access to them

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)8. The Appellant has offered access on terms intended to be as convenient as possible to the respondent. This includes weekends to be spent in Johannesburg by M. and S. at her (Mr Boehmke's) expense, video and telephone access, weekend access in Cape Town when the respondent is there on business or at his holiday home in the Western Cape.

)9. Her good faith in this regard is not in doubt since she has adhered to other arrangements concerning the children and has, subsequent to the 2001 meeting with Dr Duchen, increased the time spent by the respondent with the children.

)0. The court a quo noted that generous access which the appellant offered to the respondent if the children were to relocate to Cape Town. However, the learned judge found that the ready access of the father to the children would be difficult to maintain in practice.

)1. Respondent's counsel has identified the practical difficulties. There would be the inevitable involvement of both M. and S. in weekend activities in Cape Town which would make it both stressful and undesirable for them to spend weekends in Johannesburg with their father. There is the non-congruence between the school holidays in the Western Cape (four term) and the Gauteng schools attended by the respondent's stepsons (three term) which would make it impossible to coordinate holiday activities for M. and S. and their stepbrothers other than over the long December school holidays.

)2. It is difficult to conceive that the appellant's future and that of her son T. and her husband Mr Boehmke should be dependant upon the congruence or otherwise of the school holidays of respondent's stepchildren with those of M. and S.. This suggests that the fate of the "nucleus family unit" is to be tailored to the private school terms in Gauteng attended by respondent's stepchildren.

)3. The respondent has set out in his answering affidavit that he is employed at an executive

level in a family business which has made it possible for him to take at least one full weekend on holiday each month and to have at least one six week holiday each year. The respondent has access to a holiday home at Arniston in the Western Cape (which is apparently owned by a family trust of which he is one of or the beneficiary) where other members of his family have holiday homes. The respondent and his family spend much time at Arniston. In addition, the respondent travels to Cape Town on business.

[34]. In short, the respondent already has links with the Western Cape himself and travels to that part of the country on business and holiday. Cape Town is, by air, little more than two hours away from Johannesburg [123].

[35]. Of course children would prefer to maintain regular physical face to face contact with the absent parent. As has been pointed out in other judgments, contact does not today have to be exclusively physical or face to face and can include telephonic, internet, photographic, filmed and intermittent physical contact [124].

[36]. The children may indeed find it inconvenient to spend time over weekends with their father when they have made arrangements to attend birthday parties, play with friends, watch or participate in sporting or other activities. This will be the case whether M. and S. live in the same town as their father or not. His role will, whatever the geography , include transporting the children and waiting to make the return journey. This would be his responsibility wherever the children live. If the children do not wish to travel to Johannesburg to spend time away from their other engagements then the respondent has accommodation available to him in which he and the children can spend the weekends in the Cape.

[37]. Relocations often have major repercussions for the children relocating and the parent who remains behind. Nevertheless, even in those cases the 'severe blow"[125] to, the "drastic curtailment" of [126] or the "further disruption" [127] of the access of the parent who remains to the children has usually been ameliorated by suitably considered revised access arrangements.

)8. In no sense could it be considered that M. and S. would be "deprived of [a] meaningful relationship" with their father as researched in the authorities cited by Kelly & Lamb.

"The trauma of moving to Cape Town"

)9. The court a quo commented on the

> "trauma of moving to Cape Town and the effect, the adverse effect that that will have on the children's relationship with the respondent father outweighs the benefits that will occur if the nucleus family is maintained in Cape Town. It seems to me that to move the children to Cape Town will be vastly disruptive of their social and school life; will be very disruptive of the relationship that they have with their father and will be disruptive of the way of life that has been established between them and their mother over the past four years"

.0. The learned judge appears to have identified three sources of "trauma" for M. and S.. The first is disruption of their social and school life. The second is disruption of the "way of life which has been established over the past four years". The third is disruption to the relationship which they have with their father.

.1. The anticipated disruption to the status quo which the court sought to maintain has already been dealt with in some detail.. The disruption of the children's social and school life should have regard to the ages of the children and the transitory nature of their attendance at primary schools and the attachments there formed [128]. They will be leaving primary school and moving on anyway.

.2. Appellant and respondent have been separated since mid 1999 and divorced since September of that year. Since that time, both M. and S. have been exposed to a plethora of disruption. They have lived in the matrimonial home with both appellant and respondent; then in the matrimonial home with respondent only and in the appellant's home with appellant only; then in the matrimonial home with respondent, their

stepmother and her children (even sharing bedroom with those new step siblings); then in the appellant's home with their step father and now joined there by their brother T.. They have also traveled very regularly to Cape Town to the appellant and Mr Boehmke's holiday home and to the respondent's holiday home. Not only has Dr Duchen commented but both the respondent and the appellant have complained about each other's different and sometimes contradictory parenting approaches which has led to conflict between the parents and to which M. and S. have been expected to adapt as they move between parents and houses.

.3. In short, these children have accommodated the separation of their parents, the advent of stepparents, the introduction of stepsiblings and the arrival of a half brother. They adjust to different parenting styles as they move from their father's home (where their stepmother "personally meets the children's needs"[129]) to their mother's home. They are the younger children in their father's home and the older children in their mother's home. They hurtle backwards and forwards between each parent several times per month spending the first weekend and week of each month with their mother, then a long weekend with their father, the second week with their mother, the third weekend and the week and the weekend with their father, the final week and weekend with their mother.

.4. M. and S. have already been exposed to change, dislocation and disruption in all areas of their lives.

.5. Certainly, they have indicated, expressly or tacitly, their concerns about further changes in their lives. However, for the respondent to suggest that " the prospect of the children having to leave my home, being the home of their birth, further fills them with dread" is somewhat melodramatic and hardly realistic in a parenting approach to children who already rotate between two homes, have access to two holiday houses and have already learnt to adapt to their parent's changing circumstances. Such an attitude does not do justice to the real difficulties involved in relocating children to a city where one parent, the respondent, does not live.

Expert Opinion on the impact of relocation of M. and S.

.6. The experts gave careful consideration to the possible scenarios available to M. and S. and their parents. Dr Duchen believed three options should be considered while Dr Fasser believed only two options were even possible. None are ideal. As the social worker, Mrs Khanyile, succinctly put it – no matter which option is implemented the children "will lose"[130]. This is a classic example of the "best interests" of the children being no more than an attempt to ameliorate a difficult and undesirable situation. The 'best' situation disappeared when the marriage relationship between respondent and appellant disintegrated and they decided to become divorced.

.7. As to the scenario that Mr and Mrs Boehmke relocate with the children to Cape Town, Dr Duchen identified the following advantages. The children remain primarily in the care of their mother who is a fulltime parent. They develop and maintain a relationship with their sibling T.. They enjoy a positive and loving relationship with Mr Boehmke and especial reference is made to the enthusiasm the children have for Mr Boehmke. Mrs Boehmke and Mr McGregor are both psychologically well-functioning parents. The children can utilise electronic means of communication and access is generously offered and can be exercised.

.8. As to the scenario that Mr and Mrs Boehmke relocate with the children to Cape Town, Dr Duchen identified the following disadvantages. The BPS results indicates that S. identifies Mr McGregor as the person who could meet her needs best. The children will lose the input from the very person (the respondent) they regard as significant and important in their lives. The impact of significant decreased contact between the child and non-moving parent is determined by a number of factors (age, cognitive and language ability, psychological assessment and parenting capacities of relocating parents, psychological adjustment and parenting capacities of non-relocating parents, the extent and focus of conflict between parents, economic realities following relocation, distance between two homes after relocation). However, it is accepted that relocation creates a qualitative change in the relationship between the relocating parent and the children as well as between the non-moving parent and the children. Children who are deprived of meaningful relationships with one of their parents are at greater risk psychologically even when they are able to maintain relationships with their other parent. Relocation results in

a necessary fragmentation of a children's life. Weekend contact will be possible but would be problematic.

19. As to the scenario that no relocation of Mrs Boehmke and the children takes place, Dr Duchen identified a number of advantages. Children are better off if they have contact and good relationships with both parents. These children will continue in their current school, extra-mural activities and social lives.

20. As to the scenario that no relocation of Mrs Boehmke and the children takes place, Dr Duchen identified the disadvantages. Mrs Boehmke "would be in a very difficult situation and her present marriage will be under strain. She and Mr Boehmke will feel resentful that they once again had to consider Mr McGregor's position in deciding on aspects concerning their lives. Mr Boehmke will have to continue to commute."

21. As to the scenario that Mr and Mrs Boehmke relocate without the children to Cape town, Dr Duchen identified a number of advantages. Mrs Boehmke's marriage will "benefit from this move". The children will continue in their current lives. The children have a positive and loving relationship with Mrs McGregor. The children are of an age where they can utilise electronic means of communication. Mrs Boehmke and Mr McGregor are psychologically well-functioning parents.

22. As to the scenario that Mr and Mrs Boehmke relocate without the children to Cape Town, Dr Duchen identified a number of disadvantages. Mrs Boehmke is a full time mother who attends to the daily needs of the children while Mr McGregor works. S. has a positive relationship with her mother while M. rates his parents nearly equal in their ability to meet his needs with the result that "the children will lose the input from a person they regard as very significant and important in their lives". The impact of significant decreased contact between the child and non-moving parent is determined by a number of factors (age, cognitive and language ability, psychological assessment and parenting capacities of relocating parents, psychological adjustment and parenting capacities of non-relocating parents, the extent and focus of conflict between parents, economic realities following relocation, distance between two homes after relocation). However, it

is accepted that relocation creates a qualitative change in the relationship between the relocating parent and the children as well as between the non-moving parent and the children. Children who are deprived of meaningful relationships with one of their parents are at greater risk psychologically even when they are able to maintain relationships with their other parent. Relocation results in a necessary fragmentation of a children's life. The children have developed a very positive bond with T. and Mr Boehmke and the loss of these relationships would impact negatively on them.

13. Dr Duchen had also commented on the level of conflict between the appellant and the respondent and that "the relationship betweeen the parents is compromised and has progressively become more compromised"[131]. However, she advised that "conflict between parents does not provide enough reason for changing a custody arrangement" and she recommended that the joint custody arrangement should remain intact.

14. Dr Fasser took the view that there are only two options for consideration – no relocation by Mrs Boehmke to Cape Town to join her husband or Mr and Mrs Boehmke relocating to Cape Town with the children.

15. Dr Fasser did not believe the third possible scenario of Mr and Mrs Boehmke relocating to Cape Town without M. and S. could be seriously considered. From her assessment of the children their primary family of reference is their mother's current family. This does not mean that their father's family is not important but that they see themselves as primarily belonging to the family that consists of their mother, Mr Boehmke and their brother, T.. In this, it is safe to assume that they see their mother as their primary care giver and her home and its routines as the foundation of their lives. Dr Fasser comments that S.'s responses to the BPS are accepted by Dr Duchen as a function of her insecurities regarding the proposed relocation. In this regard it should be noted that Dr Duchen referred in her report to two possible overt aspect which could attribute to these ratings – the one is that S. has been "displaced" as the youngest child in the family while the other is that to which Dr Fasser made reference. Dr Fasser agrees that the results of the BPS are not necessarily a true reflection of the children's covert feelings. Dr Fasser states that Mrs Boehmke is the primary caregiver, a stay-at-home mother and resident parent to the

chiildren, and this role that she plays in the life of the children is not replicated or echoes by Mr McGregor. Although the children receive love, affection and input from their father, he does work, albeit with a flexible schedule. She referred to the teacher's adverse reports on completion of homework by the children during the week they stayed with their father and comments that this manifestation of Mr McGregor's parenting does beg certain questions, not least that the "act of good parenting is also to prepare children to be functional adults in the outside world and as such requires energy and perseverance that has to be pitted against taking the path of least line of resistance". Dr Fasser comments that "predictability, routine and security would be particularly important for a child like M.". The suggestion that certain day to day parenting could be done by Mrs McGregor would be to rely on the input of a step-parent which is not a supportable replacement for a "willing, available and well functioning biological parent". Dr Fasser concluded that "it is not possible to replace Mrs Boehmke's role with either Mr McGregor or with Mr and Mrs McGregor. As a primary care giver, as a stay-at-home mother and as a psychologically well functioning parent, her place in the children's life is fundamental and essential"[132]

[6]. As regards the option that no relocation takes place, Dr Fasser concurs with Dr Duchen that there is consensus that children are better off if they have contact and good relationships with both parents. However, for this to continue it would necessitate Mr Boehmke commuting between Cape Town and Johannesburg. Dr Fasser is in agreement with Dr Duchen that such a situation would result in resentment on the part of Mr and Mrs Boehmke but, over and above this, Dr Fasser is of the opinion that a more fundamental and pervading consequence which could emerge is resentment towards the children, compromising the quality of parenting and potential disintegration of the marriage.(which has already been set out in this judgment). These results could negate the current benefits of a working joint custody arrangement, the good relationship which the children have with both parents and the positive regard which they have for their parent's place in their lives. The advantages to the option of no relocation are that the status quo with the children's father would be unchanged and that the children would continue in their current school and extra mural activities and social lives.

[7]. As regards the option that Mr and Mrs Boehmke and the children relocate to Cape Town,

Dr Fasser advises that the most obvious disadvantage is that the children would have "impoverished contact with their father compared to their current experience". This relationship is important and Mr McGregor is a psychologically well-functioning parent. However, Dr Fasser is not in agreement with Dr Duchen as to the parent with whom the children have a greater emotional involvement – Dr Fasser has found this to be the children's mother.

28. Dr Fasser made a further comment that M. "is a highly anxious child who has difficulty with separation " who needs "predictability, structure and security" and she comments that a move to Cape town is going to be extremely difficult for him and "may put him at psychological risk". Accordingly, Dr Fasser recommends that "M. would have to be nurtured and supported through the change and his psychological vulnerability monitored in a responsible and consistent way so that any risk could be nipped in the bud. This option would require a huge amount of commitment from Mr and Mrs Boehmke to attend to M.'s needs as a priority, as well as financially facilitating consistent and ongoing contact between the children and their father. It would also require the commitment of Mr McGregor to alleviate the stress that he children may feel as a result of leaving his immediate sphere of influence by assuring them that he would make every effort to see them when he could and relieving them of the responsibility of making him feel better at the their leaving."

29. In her first report, Dr Duchen referred to opinions expressed to her by M.'s psychotherapist Ms Alfred and M.'s play therapist Ms Rosenthal[133]. Neither of these individuals have prepared reports or deposed to affidavits[134]. There is no indication of the qualifications of these individuals, the scientific criteria for any such opinions which may have been expressed, whether these opinions are based upon testing conducted or narrative observations made by the individuals. Absent provision of any such ground for consideration it is not possible for this court to test the accuracy of the conclusions or the validity of the opinions expressed. Dr Duchen has given no basis as to what criteria, if any, she has applied to judge these other person's opinions [135]. As Wessels JA pointed out in Coopers (South Africa) Pty Ltd v Deutsche Gesellschaft fur Schadlingsbekemapfung Mbh 1976(3) SA 352 A

> "An expert's opinion represents his reasoned conclusion based on certain facts or data which are either common cause, or established by his own evidence or that of some competence witness. Except possibility where it is not controverted, an experts bold statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the facts from which the reasoning proceeds, are disclosed by the expert." (at 371F-G).

30. Neither Dr Duchen nor Dr Fasser identify any "trauma" to which the children may be exposed as the result of their relocation to Cape Town.

31. At most, Dr Duchen comments that the children will lose the input from the very person (the respondent) they regard as significant and important in their lives, that relocation creates a qualitative change in the relationship between the relocating parent and the children as well as between the non-moving parent and the children, that children who are deprived of meaningful relationships with one of their parents are at greater risk psychologically even when they are able to maintain relationships with their other parent and that relocation results in a necessary fragmentation of a children's life. At most, Dr Fasser refers to the children experiencing "impoverished contact with their father compared to their current experience" while M. "is a highly anxious child who has difficulty with separation" " who needs "predictability, structure and security. A move to Cape Town by M. is going to be extremely difficult for him and "may put him at psychological risk" and would require nurturing and support through the change which would require commitment from Mr and Mrs Boehmke and Mr McGregor.

32. Interestingly, neither of these experts who prepared considered and substantiated reports was able to make a strong or firm recommendation against the relocation of M. and S. to Cape Town with their mother, brother and stepfather just as they were unable to make firm recommendation against their remaining in Johannesburg with their father, stepmother and stepbrothers.

83. Dr Duchen referred in her report to those factors which Kelly & Lamb believe determine the impact of significant decreased contact between the child and non-moving parent[136]. These include age and cognitive and language ability of the children, psychological and parenting capacities of both relocating and non-relocating parents, the extent and focus of the conflict between the parents, economic realities following relocation and the distance between the two homes thereafter. Both Duchen, Fassser and the Office of the Family Advocate have given consideration to all these factors.

84. It is worth noting that Kelly & Lamb have commented on the absence or paucity of empirical research in the USA on children's well-being after separation and divorce whether non-moving parents are or are not involved in their children's lives. On average children benefit from being raised in two parent families rather than divorced households but, say these authors, despite the well documented risk associated with divorce, the majority of divorced children as young adults enjoy average or better social and emotional adjustments. Although the authors state that relationships with parents continue to play a crucial role in shaping children's social, emotional, personal and cognitive development into middle childhood and adolescence, they also conclude that "many factors affect the psychological adjustment and welfare of young children, so it is seldom possible to identify the predicable and universal consequences of any event as complex as parental divorce or relocation" [137].

85. Braver & Ellmann comment that, in a recent review of the social science literature undertaken for the legal community (1998) "not a single empirical study could be found containing direct data on the effects of parental moves on the well-being of children of divorce"[138]. The study reported on by these writers examined the outcomes of college students whose parents had divorced at some time and the indices assessed were current measures of psychological and emotional adjustment, general life satisfaction, current health status, relationship among the parents, perceptions about having lived "a hard life' and the extent of financial help the students were receiving from parents. Braver and Ellman concluded that "consequences are not clear" and that any results were not 'causal' but correlational'.

36. Perhaps this explains why the experts (Duchen, Fasser) have not unequivocally advised on the solution to this problem, equally have not specified 'trauma' (other than anxiety) to which the children would be subject and have been cautious in predicting harm to the children if they are to live with their mother in Cape Town while their father lives in Johannesburg.

37. It is difficult to envisage what consequential "trauma" was envisaged by the court a quo should M. and S. move to Cape Town. There is no evidence in this regard. There is certainly evidence of heartache, sadness, anxiety on the part of the children and the respondent. But not psychological trauma. That M. may be at unspecified psychological risk can apparently be ameliorated by the support of his mother, father and step father. The appellant is a qualified psychologist who has tendered her undertaking that M. would be placed in therapy with an appropriate psychologist and that S. would be assessed to see whether or not this was even needed.

Views of the child

38. In determining the best interests of a child, one of the factors or criteria which a court may take into account is the preference expressed by the child with regard to the proposed relocation.

39. Dr Duchen records that M. "feels that it is fine to go to Cape Town" while S. indicated it would be "alright to go" to Cape Town

40. Dr Fasser, in a confirmatory affidavit [139], deposed that the children had said to her that they were happy to relocate to Cape Town. However, Dr Fasser had not set this out in her report since she believed it to be irrelevant. It was clear to her that it was necessary to disregard any verbalisations from the children on this aspect as she considers the children to be at the stage where they are prepared to state whatever it is that psychologists wish to hear Hence she chose to conduct more subtle, or covert, tests upon the children to establish their true views and needs and thereby enable her to ascertain a more accurate position by using other than verbal means.

41. In MacCall v MacCall 1994(3) SA 201 C, King J summarised the authorities to the effect that:

> "If the court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment, weight should be given to his expressed preference" (207 H –I)

42. In the present instance, it would seem that the children have expressed both verbally and indirectly to two different experts that they were each comfortable with the proposed move to Cape Town with their mother and other family members. Hearsay statements allegedly made to persons who had not deposed to affidavits and who had not qualified themselves as experts cannot be of assistance to the court.

CONCLUSION

43. I find that the relocation of Mr Boehmke, stepfather to M. and S., to Cape Town and the proposed relocation to Cape Town of the appellant and T. are genuine, reasonable, undertaken for purposes associated with the best possible interest of the entire family, are actuated by bona fide intentions and not intended as a ruse to strip the respondent or M. or S. of the time spent with each other or a subterfuge to remove the children from the respondent's parenting contribution.

44. I find that the primary residence of M. and S. is with their mother, the appellant, with whom they spend three weeks and one weekend each month. I find that the appellant is a fulltime mother and homemaker and that this has certain implications for her children's relationship with her. I find the appellant to be the primary caregiver of these children. I find that the children perceive their primary or nucleus family to be that comprising their mother, their stepfather and their half-brother.

45. I find that any separation of M. and S. from their mother would far outweigh any other consideration which has been placed before this court.

46. I note that the appellant has indicated that she will not leave M. and S. if her application is refused and if this appeal is not upheld. She will live as a single parent in Johannesburg while her husband lives and works in Cape Town. M. and S. will continue to live three weeks of the month and one weekend with their mother and T. will live with his mother without his father, save for his father's visits to Johannesburg when his work commitments permit.

47. I find that this disruption to the marriage of the appellant, to the family of T., to the family of M. and S. is not in the best interests of all three of these children. An absent husband, father and stepfather places the entire family at risk in a multiplicity of ways.

48. The appellant is deprived of the support and companionship of her husband. She is required to be a single parent to three children. She is placed in this position solely because she cannot leave M. and S. and herself live with her husband and baby in Cape Town. It would not be an unreasonable response to resent the respondent and the children for placing her in this position. This would certainly impact on her parenting and M. and S.'s relationship with their mother.

49. M. and S. have lived much of their lives with divorced parents and two homes. In recent years they have acquired two complete families each containing a parent, stepparent and step or half siblings. They would now be deprived of the one complete family which is identified as the primary family unit. T. has only ever known a complete family of two parents, a half brother and sister. He would now live without a father for the indefinite future.

50. Should this marriage not survive, then all three children would, in all likelihood, find themselves with yet another broken family. Their mother would probably have to work to

support herself and to support, at the very least, M. and S.. All three children will lose the fulltime mother and homemaker from which they currently benefit.

51. There will be a change in the respondent's contact with and access to his children as a result of their relocation to Cape Town. This will cause the respondent much pain and can cause the children some anxiety. However, the access tendered by the appellant (which would be financially facilitated by Mr Boehmke) recognises the important role played by their father in the lives of M. and S.. Such access cannot replace the present regular and easy access which the children have with their father and vice versa. However, it goes some way to ameliorating an extremely painful situation. After all, Cape Town is not on another continent, is only a few hours away by aeroplane, is a city to which the respondent travels and is the nearest city to his own holiday home.

52. I find that no factual basis has been laid to establish that the children would suffer "trauma" in the event of their moving to Cape Town with their mother and half-brother to join their stepfather. They will both miss their father, stepmother and stepbrothers. The experts recommend that the parents commit themselves to relieving the children of stress as far as possible. At most, it is suggested that M. is an anxious child who fears separation and that all parents and stepparents should be committed to providing him with the support which he needs. He is already in therapy in Johannesburg and this can continue in Cape Town if necessary. Both children are familiar with Cape Town where there are family and friends. Their maternal grandparents are to locate there as well. Their father and his siblings have holiday homes in the Cape as well.

53. I find that the court a quo misdirected itself by regarding the disruption to the relationship between the respondent and his children as "more weighty" than the other considerations to which I have referred.

54. To my mind there are three further compelling factors in weighing up all the factors to be taken into account. Firstly, non-relocation involves the separation of appellant and her spouse with all the concomitant potential effects including those prejudicial to three children. Relocation does not visit the other marriage involved in this litigation with the

prospect of such calamity. Secondly, non-relocation involves T. who is not mobile and cannot travel without his mother. Accordingly it results in denial to T. of his relationship with his father because his mother must remain to provide a home and care for his brother and sister. Thirdly, non-relocation renders the appellant less mobile than would be the respondent in the event of relocation since she cares for T. every day and night of the month and for M. and S. for three weeks and one weekend of the month. This situation impedes her ability to maintain the façade of a united family unit.

[35] The loss of the immediacy and availability of valuable parenting from the respondent to his children must be evaluated in the light of the above considerations. I take the view that, in the weighing up process, the totality of the children's lives and therefore their 'best interests' require that they and their mother and their half brother be permitted to join their stepfather in Cape Town.

ORDER

[36] Both respondent and appellant's counsel presented the court with draft orders for consideration in the event that this appeal was successful. We are indebted to them for their practical approach to the arrangements to be made.

[37] It is common cause that the Agreement of Settlement entered into between the parties at the time of their divorce has been amended by them in various respects over the years. Insofar as it may be considered necessary I would confirm that the parties retain joint custody of the children. Insofar as the draft orders suggest amendment of the financial arrangements pertaining to the maintenance of the children, we heard no argument in this regard and are not in a position to make any order with financial implications save those which deal directly with the relocation of and access to the children and which financial arrangements have been tendered in the course of this appeal. Mr Boehmke is not a party to this litigation. He is the stepfather of the children concerned. I do not think we can and should make any order binding Mr Boehmke to make payment of any monies.

[38] Insofar as an obligation is placed upon the appellant to furnish two return air tickets each

month for use by the children from Cape Town to Johannesburg is concerned, I (Satchwell J) would have provided in the order for an alternative obligation that the appellant provides respondent for his own use with one return air fare per month from Johannesburg to Cape Town in lieu of the above two airfares during those months when the children cannot or do not wish to travel to see their father and his family in Johannesburg. However, I am overruled by the majority of the court in this regard on the basis that such an order would not be consistent with the principles underlying this judgment and would fail to acknowledge the entitlement of the appellant to live with her husband and her children in a city which is at no great distance from the respondent's home.

59. I am conscious that this order reduces the appellant's time with the children on their birthdays but take the view that she is the parent who will be able to make other arrangements to accommodate the absence of the children on such occasions.

60. The appellant has asked for costs of the hearing in the court a quo and of this appeal. I take the view that it cannot be said, notwithstanding our finding, that the respondent's opposition to the relocation of his children was occasioned by anything other than his perception of what was and is in the 'best interests' of his children. He should not be penalized for that commitment.

61. It is ordered as follows:

1. The appellant is granted leave to remove the minor children, M.M. and S.M., from the jurisdiction of the court to Cape Town.

2. Such order shall, with due regard to holiday arrangements made by the parents of the children, take effect from 1st January 2006.

3. The respondent shall have reasonable rights of access to the children which shall be

exercised with due regard for the children's educational, social, religious and other needs and requirements.

4. Such access shall include the following:

   i. The respondent shall be entitled to exercise access to the children every alternate week-end from Wednesday when the respondent shall collect the minor children from their school in Cape Town until Monday when the respondent shall return the minor children to their school in Cape town, the respondent to ensure that the children attend school on the Thursday and Friday while the children are with him. In the event that a public holiday is attached to a weekend then the respondent shall be entitled to exercise access to the children on that weekend and the period of the weekend shall be extended by an additional Monday.

   ii. The respondent shall be entitled to have the children travel to Johannesburg for one weekend per month, which weekend is included within and not additional to the alternate weekends specified above. The children shall not miss any school. The period in Johannesburg shall therefore commence after school on Friday and terminate on Sunday evening unless the period in Johannesburg has a public holiday on a Monday or Friday adjoining thereto, in which case the weekend shall begin after school and shall terminate the night before school recommences.

   iii. The respondent shall be entitled to daily telephone access to the minor children. The respondent shall be entitled to email and video camera access to the children. The necessary facilities for the children shall be provided by the appellant. Telephony costs shall be borne by the respondent where he makes the call.

   iv. The respondent shall have access to the children for half of the December/January school holidays, such access to alternate annually between the parties.

   v. The respondent shall be entitled to exercise access to the children on one of the short school holidays and half of the June school holidays it being understood that the children will have two long and two short school holidays per annum. If the children attend a three term school then the respondent shall exercise access to the children on one of the two non-December/January holidays or, by arrangement, half of each of the two short holidays.

vi. The respondent shall be entitled to spend Father's Day and his own birthday with the children by electing to exercise access for the day from 09h00 to 18h00 if such day does not fall over a weekend, provided that the children fulfill all school requirements. If Fathers Day or the respondent's birthday fall over the weekend, then the respondent shall be entitled to spend the entire day with the children in addition to his usual weekend access.

vii. The respondent shall be entitled to spend portion of the children's birthdays with them if that day does not fall over a weekend when he has access to the children. If any one of the children's birthdays falls over a weekend which is not one to be spent in the normal course with the respondent, then the respondent shall be entitled to elect to exercise access to the child or children for the entire day from 09h00 to 20h00.

5. The appellant shall provide the respondent with all the children's school reports and any other educational or extra-curricular reports and shall give the respondents reasonable notice of all school functions and extra-curricular functions to which parents are invited to attend.

6. The appellant shall meet the costs of one return airfare per month from Cape Town to Johannesburg for each of the minor children on an airline of her choice and at such fares as she may be able to negotiate.

7. Each party shall pay their own costs including the costs of the hearing in the court a quo and this appeal.

Satchwell J

I Agree

Mbha J

I agree

Tshiqi J

Dated at Johannesburg this 1st day of November 2005

Appellants counsel: Adv J Gauntlett SC

Adv S B Van Embden

Appellants Attorneys: Marston and Taljaard

Respondents counsel: Adv S Weiner SC

Respondents Attorneys: Kantor Attorneys

1 Goodrich v Botha and Others 1954(2) SA 54 (A) 545E

2 Bailey v Bailey **1979 (3) SA 128** (A) at 14F

3 See Bezuidenhout v Bezuidenhout 2005(2) SA 187 (SCA [17]

4 Clause 9 provides for "Dispute Resolution" and the use of an arbitrator appointed by agreement and failing such agreement, for appointment by the Chairman of the Johannesburg Bar Council.

5 Sub clause 4.6 provided that "neither party shall be entitled to remove the minor children from the Republic of South Africa without having obtained the prior written consent of the other and which consent shall not be unreasonably withheld."

6 Answering Affidavit para 20.4

7 Founding Affidavit para 9

8 Founding Affidavit para 11; Answering Affidavit para 22.

9 The Divorce Agreement provided that "the parent with whom the children are residing incur the day to day costs relating to the children", the appellant would "pay for the cost of the children's clothing", the respondent would pay all costs of the nanny and char, the respondent would be "responsible for all medical expenses" and the "cost relating to pre-school, primary school, tertiary education would be borne equally between the parties". At the present time, the respondent pays for all Matthew and Sabine's educational and medical expenses but makes no contribution to their living expenses while they are with the appellant. The appellant continued working full time after the marriage, claimed no maintenance for herself and no maintenance has ever been paid to her in respect of the children.

10 Founding Affidavit para 13

11 Founding Affidavit para 16

12 Answering Affidavit para 24

13 Answering Affidavit para 24.8

14 Dr Duchen's testing of Mr Boehmke reveals him as a man who "Identifies life's demands and has experienced succeeding at them. He understands that they require dedication and diligence.."

15 See, for instance, the suggestion at para 24.4. of the Answering Affidavit that Mr Boehmke continue to commute between Cape Town and Johannesburg "on a temporary basis".

16 Conclusion to Duchen Report, page 104 of Record.

17 Para 56.8 of Answering Affidavit, page 206 of Record

18 This approach is also somewhat analogous to that of the Family Court and High Court of Australia which identifies relevant competing proposals – but with the caveat set by Hayne J in U v U [2002]HCA36 that the inquiry should not merely be limited to those proposals made by parents and, in so doing, ignore relevant evidence and in AMS v AIF supra where the court said that in practice "those competing for the care and custody of a child will present proposals to the Court to advance the welfare of the child" (para 4). In the High Court it is accepted that there will be cases in which it will simply not be possible for a judge to adopt exclusively or even substantially a proposal of either party and "the final order will evolve out of the evidence as it emerges and submissions as they are developed" see U supra at para 70.

19 Annexure AB10 to Founding Affidavit, page 94 of Record.

20 Annexure AMG-2 to Answering Affidavit

21 Section 28(2) of the Constitution.

22 See the discussion in Bonthuys "Clean Breaks: Custody, Access and Parents Rights to Relocate" **(2000) 16 SAJHR 486** at 488 onwards that earlier cases appear to have been approached on the premise that the custodian parent has the right to decide where the children should live, and that, unless the non-custodian can illustrate that it would be clearly detrimental to the child, relocation would be authorised. This approach was then replaced by the predominant interests or best interests of the child approach.

23 One instance of the adverse consequences upon children which would result from frustration of the endeavour of the custodian parent is that suggested in Jackson (at 318 G) where children would be exposed to the '… bitterness and frustration which would adversely affect the children'

24 See also Ex Parte Critchfield 1999(3) SA 132 (W); Van Rooyen v Van Rooyen **1999 (4) SA 435** (C);; H v R 2001(3) SA 623(C)114 ; Heynike v Roets 2001(2) Al SA 79 (C) 154 ; Cocking v Van Der Walt (unreported judgment dated 6 August 2003, Case No, 7070/03 (W)) 168.

25 See the discussions on the numerous motives for relocations in M Gindes in "The psychological effects of relocation of divorce" Vol 15, 1998, American Academy of Matrimonial Lawyer at 128 -131 : Bruch & Bowermaster "the Relocation of Children and Custodial Parents: Public Policy, Past and Present" (1996) 30 Family Law Quarterly at 248/9; Lowe and others "International Movement of Children: Law Practice and Procedure" (2004) Chapter 8 at 99 onwards; Braver and Ellman "Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Consdierations" Jounal of Family Psychology 2003m ?Vol 17, No 2, at pages 207-208

26 Subject to the respondent's intervention in writing to the Cape Town schools.

27 Gindes supra is mentioned in Dr Duchen's report though it would seem that both Duchen and Fasser followed the methodology outlined in that article.

28 These included J. S Wallerstein and T J Tanke "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" **(1996) 30 Family Law Quarterly 305**; J B Kelly & M E Lamb "Developmental Issues in Relocation Cases involving Young Children: When, Whether and How?" – Journal of Family Psychology 2003 Vol 17, No 2, 193-205; C Bruch and J Bowermaster "The Relocation of Children and Custodial Parents: Public Policy, Past and Present" **(1996) 30 Family Law Quarterly 246**; R Warshak (1996) "The Primary Parent Presumption Primarily Meaningless" ; M Green: "Shared Parenting – Popular Myths " 9th Australian Institute of Family Studies Conference, 2005; S I Braver, I M Ellman & W Fabricius "Relocation of Children After Divorce and Childrens Best Interests: New Evidence and Legal Considerations", Journal of Family Psychology 2003, Vol 17, No 2, 206-219; M Gindes "The

Psychological Effects of Relocation for Children of Divorce" Journal of the American Academy of Matrimonial Lawyers 1998 Vol 15; R Gardner "The Burgess Decision and the Wallerstein Brief" 1998.

29 In Ex Parte Critchfield 1999(3) SA 132 W, Willis J cautioned against having regard to textbooks and articles where the credentials of authors have not been established before the court (140 I)

30 See Davie v Edinburgh Magistrates **1953 SC 34** at 40 .

31 Lowe and Others, International Movement of Children: Law Practice and Procedure (2004), Chapter 8 International Relocation: the Position in Some Other Jurisdictions"

32 Most pertinently see Jackson v Jackson 2002(2) SA 303 SCA and Ford v Ford [2004]2 All SA 396 (W) [Ford triall] and the majority of the court in Ford v Ford unreported appeal judgment, Case No WLD 5001/04 [Ford appeal] all of which judgments did not find custodianship the decisive factor in determining the issue of relocation.

33 Section 28(2) of the Constitution. See also the full discussion in the minority judgment in Ford v Ford (appeal) supra.

34 Jackson supra at 318F

35 Section 28(1) of the Constitution confers the right on every child to "family or parental care…" and this would imply an corresponding duty on the child's parents to provide such care.

36 Jackson supra at 318F

37 In line with the decisions of the English courts (see Payne supra; and in Re B (Leave to Remove:Impact of Refusal) **[2004] EWCA Civ 956**,) and Australia (although the High Court has now explicitly set aside the requirement that the relocation be proven to be bona fide and justifiable (see AMS v AIF surpra; see also U v U).

38 See Bailey v Bailey 1979(3) SA 128 (A); Godbeer v Godbeer 2000(3) SA 976 (W); Van Rooyen v Van Rooyen 1999(4) SA 435 (C) at 437 G. These and other judgments are discussed a t paras 59-68 of the minority judgment in Ford appeal supra.

39 For instance, contra the decisions in the other authorities referred above, in Jackson supra, in Ford [trial] supra] and the majority in Ford [appeal] supra found that the best interests of the children coincided with the wishes of the non-relocating parent .

40 On this issue appellant alleges she has been the primary caregiver with effect from 2000 and three months after the divorce (para 9) which respondent denies (para 21.1)

41 Para 11 of Founding Affidavit

42 Answering Affidavit para 19.9

43 The daily tasks are set out at para 54.4 of the Founding Affidvit

44At para 51.9 of his answering Affidavit he sets out his responsibilities for and activities with the children during the week they reside with him, over weekends and holiday periods.

45 Per Scott JA in Jackson supra at 319E

46 We do not find helpful to our decision comments by the respondent that the children went to live with the appellant because she needed to "make amends for past failings as a mother" (para 20.3) or that she now 'showed a commitment to mend her ways" (para 51.2.3).

47 See for instance an exchange of emails where the respondent wanted to see the children over a weekend they were with the appellant notwithstanding that it was Thomas' christening and Mr Boehmke's birthday; the emails concerning cricket coaching for Matthew from Graham Pollock which the respondent interpreted as causing "confusion to the child which causes anxiety and this has been such an area of confrontation between us in the past it surprises me that it surfaces again."

48 See for instance Bailey supra and contra Stock v Stock 1981(3) SA 1280 A

49 Appellant referred us to Wallerstein op cit and Respondent to Gindes op cit.

50 Kelly & Lamb op cit page 199

51 See the discussions in Kelly & Lamb at 199; Bowermaster pages 262/3.

52 Pages 33 to 35 of Duchen's report, page 92 to 94 of the Record.

53 See Van Rooyen v Van Rooyen 1999(4) SA 435 C; Jackson supra

54 For instance, when the children lived primarily with the respondent he decided to and could pay for and employed a nanny and char (para 19.29 of Answering Affidavit) and after the nanny died a full time au pair (para 2.3 of the Answering Affidavit) which assistance he no longer has since he now has a wife. (Paragraph 22.6 of Answering Affidavit). Appellant has not had a wife but did benefit from the respondent's provision of the nanny and the au pair but she is now able to be a fulltime mother and is fortunate enough not to need to delegate to a nanny, char, au pair or wife.

55 Paragraph 22.6 of Answering Affidavit.

56 According to Dr Duchen's outline of the time spent over weekdays and weekends by the children with each parent.

57 Paragraphs 7, 45, 20.3 ,21, 51.2.3, 52 of the Answering Affidavit

58 Annexure AMG2 page 251 line 23

59 At page 548 of the Record.

60 Paragraph 11 of the Founding Affidavit and paragraph 51.9 of the Answering Affidavit.

61 Page 38 of Dr Duchen's report, page 97 of the Record.

62 Page 39 and 40 of Duchen's Report, page 99 of the Record

63 Page 12 line 5 of the Judgment, Page 558 of the Record.

64 Respondent says no more than three times at para 46 of his Answering affidavit, page 184 of the Record.

65 Paragraph 40.2 of the Answering Affidavit, page 180 of the Record

66 Paragraph 41.of the Answering Affidavit, page 182 of the Record.

67 Page 10 line 10 of the Judgment, Page 5556 of the Record.

68 See Zeffert et al "The South African Law of Evidence" 5th ed; Wigmore JH "Evidence in Common Law" Vol 2; Andrrews & Hirst, "Criminal Evidence" 2nd ed; Odgers, WB " Powells Principles and Practice of the Law of Evidence" 10the ed; Tapper C, "Cross on evidence" 7th Ed.

69 At page 306 and see Stock supra.

70 National Justice Cia Naciera SA v Prudential Assurance Co Ltd, The Ikranian Reefer [1993] 2 Lloyd's Report 68 at 81.

71 Page 28 of Dr Duchen's August 2004 Report, page 87 of the Record.

72 Indeed, this is the initial attitude taken by Respondent to the use of the Duchen report to which he objected – See para31.16 of the Answering Affidavit, page 175 of Record.

73 Record II:102-4

74 Page 6 of the Khanyile's report, page 543 of the Record.

75 Page 33 of the Report, page 92 of the Record.

76 Page 39 of the Report, page 98 of the Record

77 And also at page 39 36 of the Report, page 95 of the Record "that the BPS results indicates that Sabine identifies Mr McGregor as the person who could meet her needs best. The BPS results further indicate that Matthew rates his parents nearly equal in their ability to meet his needs"

78 And also at page 1 of the September memorandum where e she concluded that she was the mediator appointed for the parties and could not recommend one of the parents above the other, Dr Duchen stated:

"The children tested to have more of an emotional involvement with Mr McGregor at present."

79 Page 18 of the Report, Page 249 of the Record

80 Page 12 pf the Judgment , Page 558 of the Record

81 Page 4 line 8 and page 12 line 11 of the Judgment.

82 Page 7 line 5 of the Judgment.

83 Page 3 of the Judgment, Page 549 of the Record

84 See Jackson at 318G-H. See specifically the Court of Appeal in in re B supra and in Payne supra. See also U v U supra , AMS v AIF supra.

85 See Godbeer supra; Jackson supra; Van Rooyen supra;

86 Page 7 of the Report, page 544 of the Record

87 Kelly & Lamb op cit at page 201.

88 Kelly & Lamb op cit at pages 201/2

89 Bruch & Bowermaster op cit at page 267. Some of which recommendations are based on the research literature, while others express the members professional expertise, their shared policy judgments or their appraisal of legislative realities. (as a consequence the documents contains an important inconsistency in its eighth paragraph which implies that relocation should be refused if a parent wishes to disrupt the child's relationship with the other parent or has insubstantial reasons for wanting to move).

90 Obviously these guidelines refer explicitly to the public policy of the State of California and, to the extent that they take account of legislative and judicial realities, do so with reference to that State. It should also be borne in mind that the authors of these guidelines include, amongst others both Bruch and Wallerstein who have clearly identified themselves with the presumption in favour of primary caregivers and both of whose amicus curiae briefs were utilized in the Burgess judgment.

91 Fletcher v Fletcher 1948(1) SA 130A; Shawzin v Laufer 1968(4) SA 657 A; Bailey v Bailey 1979(3) SA 128 A

92 Constitution of the Republic of South Africa, Act 2000 of 1993

93 See Bannantyne v Bannantyne (CG as amicus curiae) **[2002] ZACC 31; 2003 (2) SA 363** CC which, at footnote 29, refers to article 3(1) of the United Nations Convention on the Rights of the Child 1989 as also article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990.

94 See for instance "The Best Interests of the Child", Alston P ed, UNICEF 1994 and articles contained therein.

95 For instance the U.N Convention provides that the best interests of the child must be "a

primary consideration" in "all actions concerning children" while the African Charter provides that it shall be "the primary consideration". In the United Kingdom , the Childrens Act of 1989 provides that "the childs' welfare shall be the courts paramount consideration".

96 See Grootboom supra

97 See Harris v Minister of Education 2001(8) BCLR 796 T.

98 The uses of the definite article "the" and not the indefinite "a" is, of course, a clear indication that competing interests should not be given greater importance than the interests of a child.

99 See, for example, in the public domain, the decision of the Constitutional Court in Grootboom v Government of the Republic of South Africa 2001(1) SA 46 CC where the Court took into account the need of children, inter alia, for shelter but held that socio-economic rights had to be understood in context, corresponding obligations were not absolute and unqualified, there was evidently an overlap between other rights and those conferred by on children by section 28.

100 Mnookin comments in "In the interests of Children; Advocacy, Law Reform and Public Policy" (New York) 1985 cited, in Alston op cit. "The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but there are especially acute in this context…. Even if predictions [as to the consequences of policy alternatives] were possible, what set of values should a judge use to determine a child's best interests…? [Sh]e must have some way of deciding what counts as good and what counts as bad "The choice of criteria is inherently value-laden; all too often there is no consensus about what values should inform this choice. These problems are not unique to children's policies, but there are especially acute in this context…. Even if predictions [as to the consequences of policy alternatives] were possible, what set of values should a judge use to determine a child's best interests…? [Sh]e must have some way of deciding what counts as good and what counts as bad

101 Per Kriegler J in S v Mamabolo (E TV and others intervening) **[2001] ZACC 17**; **2001 (3) SA 409** CC at **430 F.**

102 See for instance Godbeer supra already quoted and others to similar effect.

103 See lines 10 and 20 at page 12 of the judgment, page 558 of the Record.

104 See Duchen's Report page 14, page 73 of the Record

105 Dr Duchen at page 35 of her Report, page 94 of the Record

106 Duchen page 35 of the Report,page 94 of the Record

107 Page 41 of Duchen's Report, Page 100 of the Record

108 Page 35 onwards of Duchen's repport.

109 Section 28(2) of the Constitution.

110 Dr Fasser reported that the appellant "Wants to be with her husband and build upon their relationship with their son Thomas".

111 Page 38 of Duchens report, Page 97 of the Record

112 Page 7 of Khanyile's report, Page 544 of the Record

113 Page 20 and 21 of Dr Fasser's Report, Page 252 of the Record

114 Page 6 of the Judgment and Page 552 of the Record

115 Michael Green "Shared Parenting – popular myths" - 9th Australian Insititute of Family Studies Conference, Melbourne February 2005

116 Page 206 of his Answering Affidavit.

117 Page 18 of Duchen's Report, page 77 of the Record

118 Page 9 of Fassers Report, page 240 of the Record

119 Page 16 of Fassers Report, page 247 of the Record.

120 Page …. Of the unreported judgment of Cachalia J

121 See the Gindes article referred to by Dr Duchen and dealt with elsewhere in this judgment.

122 As we are reminded by the majority in Jackson supra

123 Kelly & lamb comment that when parents and children relocate, it is inevitable that children travel to maintain meaningful relationships with their non moviing parents, particularly as they get older but that there is no empirical research on the impact of travel demands on children.

124 However, the cost of insisting upon physical contact "is to impose serious deprivations upon the human rights of custodial parents who are mostly women. To take the contrary view is 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." Per Kirby J in U v U **[2002] HCA 36**

125 Shawzin supra at 669A

126 Bailey supra at 144G

127 Van Rooyen supra at 439F

128 See Van Rooyen supra at 439F-G

129 Paragraph 22.6 of Answering Affidavit

130 Page 6 of her Report, Page 543 of the Record

131 Page 33 of Dr Duchen's report, Page 92 of the Record

132 Page 19 of Dr Fasser's Report, Page 250 of the Record

133 See page 27and 28 of the Report, Page 88 of the Record

134 In the appellant's replying affidavit she stated that she had spoken to Ms Alfred who says she had not seen the affidavit which refers to her opinion and that she does not confirm what is said Page 371 of the Record

135 See Davie v Edinburgh Magistrates **1953 SC 34** at 40 .

136 See at page 36 of Duchen's Report, page 95 of the Record.

137 Kelly & lamb op cit at page 202

138 Op Cit at page 209

139 Page 466 of the Record
