ADJUDICATION OF CHILD RELOCATION DISPUTES IN SOUTH AFRICA

BY

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DECLARATION

I, Motseotsile Clement Marumoagae, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole nor any part of it has been or is to be submitted for another degree in this or any other university.

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ABSTRACT

This thesis discusses the adjudication of child relocation disputes (CRDs) in South Africa. The central thesis is that judges require adequate legislative guidance when exercising their discretion in CRDs. At present, judges adopt widely different reasonings when adjudicating CRDs and this has led to inconsistent CRDs jurisprudence. Due to lack of legislative guidelines, judges can choose to rely on any factor to reach their desired outcomes while at the same time rejecting those factors that might contradict their intended outcomes. In typical CRDs, parents who have been awarded the care and residency (usually mothers) wish to relocate with their children. They usually attempt to justify the proposed relocation on factors such as: their right to freedom of movement; pursuit of new romantic relationships; better work opportunities; improved standard of living; concern about crime; attainment of quality education; reuniting with family members; lack of family support; and abuse from non-custodial parents among others.

Non-custodial parents often object to the proposed relocation on the basis that relocation will affect their rights to maintain contact with their children. To substantiate this claim, they usually indicate the extent of their interest in their children's lives and the amount of time they spend with their children. They often question the genuineness and good faith of the intended relocation and cast doubt on the ability of relocating parents to provide a better life for their children post-relocation. Occasionally, they invoke arguments relating to the disruption of the child's life and routine, including schooling, faith, and extramural activities.

This thesis argues that CRDs are not as unique as they are often made out to be. For every CRD, there is likely to be precedent, local or foreign that can shed light on how such dispute should be adjudicated. However, many CRDs cases, both in South Africa and in foreign jurisdictions deal with similar CRDs differently. This makes it easy for judges who are adjudicating CRDs to reject certain precedents and follow others, or to reject the approaches of all previous cases and formulate their own novel approaches. This thesis argues that judges through their discretion can formulate their own approaches, which they can use to reject evidence that is contrary to their desired outcomes and rely instead on evidence that supports their intended outcomes. As a result, CRDs jurisprudence invokes many judicial approaches such as: reliance on predetermined presumptions for and against relocation; the reasonableness test; tender years and maternal preference; and the exceptional or compelling circumstances test.

Judges can use these tests to either grant or refuse custodial parents' permission to relocate. When the application of certain tests works against their intended outcomes, judges have skilfully deviated from such tests to suit their subjective views on parenting. Judicial discretion is usually exercised in the name of the Best Interests of the Child (BIC) principle, which is thoroughly discussed in this thesis. Most importantly, this thesis argues for the limitation of judicial discretion in CRDs through the provision of legislative guidelines which will assist judges when determining CRDs. This thesis proposes an amendment to the Children's Act 38 of 2005, to incorporate a specific chapter dealing with CRDs which considers the involvement of both parents in their children's lives to the extent possible. There is a shift in thinking regarding CRDs in some jurisdictions, where the roles of both parents in their children's lives are adequately assessed when CRDs are determined. The proposal of this thesis is centred around the establishment of a legislative mechanism that will enable judges to identify, select, weigh, and adequately balance competing factors in CRDs to ensure that all cases are thoroughly investigated and considered.

METHODOLOGY

This is a qualitative research study that is theoretically based, and was conducted by reviewing and interpreting available primary and secondary sources of law. The primary materials that were consulted are among others: International Law instruments such as, conventions, declarations, and charters; the Constitution of the Republic of South Africa, 1996; national and foreign statutes; and national and foreign case law. The secondary materials that have been consulted include textbooks and scholarly books; published scholarly articles; and conference papers.

ABBREVIATIONS AND ACRONYMS

AD	Appellate Division
African Charter	African Charter on the Rights and Welfare of the Child
ALR	American Legal Realists
BIC	Best interest of the Child/Children
CILSA	Comparative and International Law Journal of Southern Africa
CPD	Cape Provincial Division
CRC	Convention on the rights of the child
CRDs	Child Relocation Disputes
Constitution	Constitution of the Republic of South Africa, 1996
DRC	Declaration of the Rights of the Child
FLA	Family Law Act 53 of 1975
Hague Convention	Hague Convention on the Civil Aspects of International Child Abduction
MAA	Matrimonial Affairs Act 37 of 1953
NPD	Natal Provincial Division
PER	Potchefstroomse Elektroniese Regsblad
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TPD	Transvaal Provincial Division
UK	United Kingdom
UN	United Nations
USA	United States of America
WLD	Witwatersrand Local Division

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1 CHAPTER ONE: COMPLEXITIES ASSOCIATED WITH CHILD RELOCATION DISPUTES

1.1 INTRODUCTION

Child relocation disputes (hereafter CRDs) arise when two parents, who have separated and do not live together, disagree on whether their children should be removed from their current jurisdiction. Usually, one parent has valid reasons for the intended relocation with the child and the other parent advances equally sound reasons for objecting to the intended relocation.[1] On the one hand, the custodial parent who is usually the mother, desires to move on with her life and take full advantage of life opportunities at her disposal by relocating to a different place either within the country or to a different country. On the other hand, the non-custodial parent who is usually the father, objects to the proposed relocation because he wishes to remain actively involved in 'his' child's life, which involvement might prove to be beneficial for the child if properly assessed by the courts. This thesis discusses this conflict and argues that judges need adequate legislative guidelines when adjudicating CRDs.

Without such guidelines, individual judges enjoy almost unlimited discretion when determining what is in the best interests of the child (hereafter BIC) and this has led to an incoherent development of CRDs jurisprudence in South Africa. Judges are expected to resolve CRDs by striking an appropriate balance between what is in BIC and the differing interests of their parents. This thesis examines South African law regarding CRDs with a view to demonstrating the difficulties courts face when adjudicating these disputes, particularly when faced with two committed and loving parents one of whom might be forced to separate from their child. This thesis evaluates the approaches developed by the courts and the ways in which individual judges evaluate various factors placed before them. It examines competing parental interests, where parents wish to reside near their children and how such interests are balanced with what is in BIC.

1.2 PROBLEM STATEMENT

Judges' unlimited discretion leads to inconsistency and legal uncertainty in CRDs. Judicial discretion makes it difficult for litigants to predict factors that a judge will consider decisive when making a relocation order. South African judges have not developed a consistent and

[1] South African Law Reform Commission 'Family dispute resolution: Care of and contact with children' Project 100D Issue paper 31 (December 2015) 64.

coherent CRDs jurisprudence because of lack of adequate legislative guidelines that can assist them when choosing and balancing competing factors. Judicial discretion enables judges to pick and choose factors that align with their desired outcomes while ignoring those that contradict such outcomes. This has increased CRDs litigation and appeals because parties are aware that CRDs can be decided differently depending on who the judges are. There is evidence of matters being heard by a total of nine judges in different South African courts dealing with the same facts, from the trial court to the Supreme Court of Appeal (SCA), where three contradictory judgements pointing in different directions were delivered.[2]

Judges have unconstrained freedom not only to analyse the facts as they please, but also to choose to rely on selected factors to reach their own desired outcomes. The judges' backgrounds, lived experiences and legal training, the facts of the case and parties before them, and their views on how children should be raised, inform their discretion to treat certain factors as more important than others when determining CRDs. Available research indicates that judges' beliefs and ideological orientations affect their decision making.[3] Judges' subjective opinions can lead them to subconsciously invoke deeply held biases (some of which they might not even be aware) when dealing with CRDs.[4]

Judicial discretion is always justified on the basis that the novelty and complexity of family law cases make it impossible to apply strict rules, principles, standards, and legislative provisions to human conduct. This makes it necessary for judges to apply independent thinking when deciding CRDs.[5] Discretion is believed to provide judges with the '… authority to respond to the full range of circumstances a case presents and thus to do justice in each individual case'.[6] The flexibility associated with judicial discretion is perhaps the strongest justification for its usefulness when judges decide cases that are not regulated by any rule or statutory provisions. The level of discretion that judges enjoy when determining 'custody' matters and by extension CRDs has been described as the 'ultimate power and authority to decide the matter beyond regulation'.[7]

It is true that every family is different and a 'one-size fits-all' solution is not necessarily ideal. However, CRDs matters are seldom completely novel or unique. The reality is that there

[2] This will be demonstrated in subsequent chapters when discussing *Jackson v Jackson* 2002 (2) SA 303 (SCA) and *F v F* [2006] 1 ALL 571 (SCA).
[3] See generally Baum *The Puzzle of Judicial Behavior* (1997).
[4] Conner 'Abuse and discretion: Evaluating judicial discretion in custody cases involving violence against women' (2009) 17 *Journal of Gender, Social Policy & the Law* 163 at 215.
[5] Finlay 'Judicial discretion in family and other litigation' (1976) 2 *Monash University LR* 221.
[6] Schneider 'The tension between rules and discretion in Family Law: A report and reflection' (1993) 2 *Family Law Quarterly* 229 at 234.
[7] Conner op cit note 4 at 165.

is very likely another court, either local or foreign, that has encountered similar facts and has pronounced on them. In other words, family disputes are not inherently unique. As such, legislative guidelines that are designed having regard to past judicial pronouncements can resolve most of these disputes. The narrative that each case should be dealt with on its own merits will result in similar cases being decided differently, without even regard to precedent. Deviation from the past should be limited to instances where it is shown that previous decisions were clearly wrong. If a previous decision is regarded as correct, then future cases should be guided by it. Judicial precedent can legitimately be followed in CRDs. In following precedent, judges should be guided by legislation.[8] There is a need to limit judicial discretion through adequate legislative guidelines that will reduce the leeway that judges currently have to reach decisions based on their intuitions. These guidelines will require courts to balance specific factors to reach decisions that are in BIC.

Even though child relocation law has received some academic attention in South Africa, it remains the most under researched area of South African family law compared to jurisdictions such as United States of America, Canada, and Australia. South African judges and academics have not considered the role of judicial discretion in the adjudication of CRDs and how this encourages inconsistent approaches when courts are faced with similar facts. This is the gap that this thesis aims to address. In particular, this thesis demonstrates that the law regulating CRDs in South Africa is unpredictable.

1.3 AIMS AND OBJECTIVES

At present, judges adopt widely different reasonings when adjudicating CRDs and this leads to inconsistent CRDs jurisprudence. This thesis illustrates how judicial discretion has impeded the development of a coherent South African CRDs jurisprudence. To improve the South African child relocation law, this thesis will study the approaches followed in United States of America, United Kingdom, Canada, and Australia to identify lessons that South Africa can learn from these jurisdictions. The objective of this thesis is to recommend amendments to the Children's Act[9] by suggesting specific CRDs legislative guidelines. A draft child relocation legislative provisions will be provided in chapter six of this thesis.

Legislative guidelines will enable consistency in the adjudication of CRDs while retaining judges' limited discretion. If the legislature provides legislative guidelines and the

[8] Lacey 'Judicial discretion and human Rights: Expanding the role of international law in the domestic sphere' (2004) 5 *Melbourne Journal of International Law* 108 at 110.
[9] 38 of 2005.

Constitutional Court delivers an authoritative precedent on how these guidelines should be applied, the Supreme Court of Appeal and all the divisions of the High Court will be bound by the decision of the Constitutional Court. The proposed legislative guidelines are aimed at preventing arbitrary decision-making based on the moral convictions and beliefs of individual judges. The proposal for legislative guidelines regarding CRDs is not novel and there are academics that have made such a call previously.[10] Domingo for example has identified the inconsistent South African child relocation approach and recommended what she referred to as 'Relocation Act'.[11] Clark has commented on the inconsistencies relating to CRDs in South Africa. She argues that there is a need for legislative guidance but has also shown preference for the exercise of judicial discretion in CRDs.[12] The major difference between the approaches adopted by both Clark and Domingo and this thesis is that, this thesis makes a case for the limitation of judicial discretion and also provides CRDs draft legislative provisions. Most importantly, this thesis advocates the crafting of a balancing mechanism that will assist judges when dealing with competing factors.

1.4 BACKGROUND OF THE STUDY

1.4.1 FAMILY LAW IN A PLURALISTIC SOUTH AFRICAN SYSTEM OF LAW

South Africa is a diverse country with different cultures and traditions which must not be contrary to the Constitution of the Republic of South Africa, 1996 (hereafter Constitution), and other official laws. South Africa has a plural legal system which consists of the common law (a hybrid of Roman-Dutch and English law) and African Customary Law.[13] There are also systems of personal law such as Jewish law, Hindu law and Islamic law which are yet to be legislatively recognised.[14] Historically, South African custody law developed within the private law system of Roman-Dutch common law. Since the adoption of the Constitution, courts have also been willing to use customary law in disputes relating to children.[15] Both these systems of law are subject to the Constitution. This thesis traces the way CRDs have been legislatively

[10] See generally Domingo '"For the sake of the children": South African family relocation disputes' (2011) 2 *PER* 148 and Clark 'The shackled parent? Disputes over relocation by separating parents — is there a need for statutory guidelines? 2017 (1) *SALJ* 80.
[11] Ibid.
[12] Ibid.
[13] Nicholson 'Globalisation v Glocalisation: no contest; legal comparison, mixed legal systems and legal pluralism' (2012) 2 *CILSA* 258 at 262.
[14] See Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 1 *Journal of Legal Pluralism and Unofficial Law* 143 at 147-148 and Prinsloo 'Pluralism or unification in family law in South Africa' (1990) 2 *CILSA* 324.
[15] See generally *Hlope v Mahlalela* 1998 (1) SA 449 (T).

regulated and determined by courts while developing the South African child custody jurisprudence. Such a study has never previously been undertaken in South Africa.

1.4.2 THE ROLE OF INTERNATIONAL LAW IN CRDs

1.4.2.1 Overview

South African law regulating the relationship between parents and children is influenced by international and regional treaties. In terms of section 39(1) of the Constitution, when interpreting rights such as the BIC, provided for in section 28(2) of the Constitution, the court must consider international law and may consider foreign law. Section 39(1) of the Constitution empowers courts to look at the way these instruments have been interpreted by courts from other jurisdictions.[16] Modern day disputes affecting children are subject to the Constitution and Children's Act, which must be considered against the background of relevant international treaties such as: Convention on the Rights of the Child;[17] The Hague Convention on the Civil Aspects of International Child Abduction;[18] Declaration of the Rights of the Child;[19] and The African Charter on the Rights and Welfare of the Child.[20] The Constitution makes international law part of South African law.[21] In terms of section 232 of the Constitution, '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'. The CRC, Hague Convention and the African Charter are the most important treaties that, when necessary, a South African court determining CRDs may be required to consider.

1.4.2.2 Convention on the Rights of the Child

Article 9(1) of the CRC enjoins states to pass laws that prevent children from being separated from their parents except in terms of court orders when separation is in the BIC. According to Zermatten '[t]he CRC creates a new status of the child based on the recognition that s/he is a

[16] Bekink '"Child Divorce": A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents' (2012) 1 *PER* 178.
[17] UN Doc. 44/25 of 20 November 1989 (hereafter CRC).
[18] UN Doc. 28 of 25 October 1980 (hereafter Hague Convention).
[19] UN Doc. A/4354 (1959) (hereafter DRC).
[20] CAB/LEG/24.9/49 (1990), entered into force 29 Nov 1999 (hereafter African Charter).
[21] Section 233 of the Constitution of the Republic of South Africa, 1996 provides that 'when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. Section 39(1) of the Constitution of the Republic of South Africa, 1996 provides that 'when interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

person and has the right to live a life of dignity and since the promulgation [in] 1989 the child has been understood to be a *subject of rights'*.[22] The CRC mandates various rights that seek to entrench the dignity of children such as: the prohibition of the inhuman treatment of children,[23] sexual exploitation,[24] and economic exploitation;[25] the development of the child's personality and talents to their fullest potential;[26] the recognition of children's rights to education;[27] the recognition of children's rights to the enjoyment of the highest attainable standard of health;[28] and the recognition of children's rights to freedom of expression.[29] As it will be shown below, the CRC provides that the BIC must be a primary consideration and encourages member states to create measures that would enable children to participate in matters that affect them. The CRC is an important binding international instrument that South African courts should consider when determining CRDs. South Africa ratified the CRC in 1995.

1.4.2.3 Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention provides for the return of children that have been wrongfully taken abroad or improperly retained abroad.[30] South Africa ratified the Hague Convention in 1996 and promulgated the Hague Convention of the Civil Aspects of International Child Abduction Act,[31] which came into operation on 1 October 1997.[32] This Act was subsequently repealed and replaced by the provisions of the Children's Act.[33] The objective of the Hague Convention is to secure the prompt return of children who are wrongfully removed or retained in another country as well as to ensure that the rights of custody (care) and access (contact) under the law which such children were removed from are respected by a country were the children have been taken to.[34]

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[22] 'The best interests of the child principle: Literal analysis and function' (2010) 18 *International Journal of Children's Rights* 483 at 483.
[23] Article 37 of the CRC.
[24] Article 34 of the CRC.
[25] Article 32 of the CRC.
[26] Article 29 of the CRC.
[27] Article 28 of the CRC.
[28] Article 24 of the CRC.
[29] Article 13 of the CRC.
[30] Brunch 'Central authority's role under the Hague Child Abduction Convention: A friend in deed' 28 (1994-1995) 1 *Family Law Quarterly* 35 at 35. See also Di Guglielmo 'Provisionally permanent? Keeping temporary custody orders under the Hague Convention on International Child Abduction' 151 (2002) *University of Pennsylvania Law Review* 619-666.
[31] 72 of 1996.
[32] http://www.justice.gov.za/hague/main.htm accessed on 23 April 2015.
[33] 38 of 2005. See also *KG v CB and Others* 2012 (4) SA 136 (SCA) para 18.
[34] Article 1(a) and (b) of The Hague Convention. See also *Central Authority v Houwert* 2008 (1) SA 49 (SCA) para 28 and Di Guglielmo op cit note 30 at 619.

Even though there is a clear difference between child abduction and child relocation, the two concepts are, nonetheless, linked when the child is removed by a parent who relocates to another country without the necessary authority to do so. For any parent to be able to make an application for the relocation of their child, the child must first be returned to the country where he or she was abducted. The Hague Convention represents the commitment of all the states that have signed it to work together when a child has been abducted to ensure the expeditious return of that child to a country that lawfully exercises jurisdiction over that child.[35] This Convention enjoins state parties to secure the return of abducted children to countries from where they were removed to restore the rights of custody to parents who had custody of such children. Article 7 of the Hague Convention encourages central authorities to co-operate with each other and to ensure that in their respective countries there are measures that will ensure the prompt return of children. Section 3 of the Mediation in Certain Divorce Matters Act[36] designates the Chief Family Advocate as the Central Authority in South Africa.[37]

1.4.2.4 Washington Declaration on International Family Relocation

In 2010, more than 50 judges and other family law experts from fourteen countries[38] attended a conference in Washington DC dealing with international relocation disputes.[39] This conference led to the adoption of the Washington Declaration on International Family Relocation which recommended among others: the procedures concerning international relocations; notice requirement for international relocations; enforcement of relocation orders; and the need for research in the area of child relocations. This declaration also identified a long list of factors that are relevant to decisions regarding international relocations. Domingo has correctly argued that South Africa can draw on the recommendations contained in this declaration.[40] For the purposes of this thesis, this declaration makes two important recommendations; the first is that child relocation 'determinations should be made without any

[35] Puckett 'Hague convention on international child abduction: Can domestic violence establish the grave risk defense under article 13' (2017) 30 *Journal of the American Academy of Matrimonial Lawyers* 259 at 260.
[36] 24 of 1987.
[37] See *Smith v Smith* 2001 [3] SA 845 (SCA*)* para 7 and *LS v AT and Another* 2001 (2) BCLR 152 (CC) para 13. See also Labuschagne 'International parental abduction of children: Remarks on the overriding status of the best interests of the child in international law' 33 (2000) 3 *CILSA* 333 at 335. The functions of the central authority are enumerated in article 7 of the Hague Convention.
[38] Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America.
[39] https://www.icmec.org/press/washington-declaration-on-international-family-relocation/ accessed on 23 April 2015.
[40] Domingo op cit note 10 at 163. See also Clark op cit note 10 at 113, where she is also of the view that lessons can be drawn from this declaration.

presumptions for or against relocation'.[41] As it will be shown throughout this thesis, presumptions are generally designed to favour one party and prevent courts from considering all other relevant factors when determining CRDs. The second recommendation is that there is a need to guide the exercise of judicial discretion through a list of factors.[42] It will be argued in this thesis that such guidance should be provided in a form of specific CRDs legislative guidelines.

1.4.3 LEGISLATIVE FRAMEWORK RELATING TO CHILDREN

Over the years, many statutes have been promulgated seeking to regulate custody disputes. Child law in South Africa has been regulated by the Child Care Act,[43] Guardianship Act,[44] and Natural Fathers of Children Born out of Wedlock Act,[45] Mediation in Certain Divorce Matters Act,[46] and the Divorce Act.[47] None of these statutes had specific provisions dealing with CRDs. Section 1(2)*(c)* of the Guardianship Act merely provided that 'a custodian parent may not remove a child in his or her custody from South Africa without the consent of the other parent, in the absence of a court order…'.[48]

In 2005, there was an exhaustive overhaul of child-related legislation through the promulgation of the Children's Act. Schedule 4 of the Children's Act repealed previous statutes dealing with child law and became the primary legislation giving effect to section 28 of the Constitution, which contains children's rights. It replaced parental authority with parental responsibilities and rights. Section 18 of the Children's Act lists four parental responsibilities and rights: care; contact; guardianship and maintenance. Care and contact are generally regarded as broader concepts than custody and access. Section 1(2) of the Children's Act provides that '[i]n any law, and the common law, the terms "custody" and "access" … must be construed to also mean "care" and "contact" as defined in this Act'. In this thesis, 'care' and 'contact' will be used unless the context necessitates the usage of 'custody' and 'access'. The Children's Act, just like its predecessors, does not have detailed provisions that adequately deal with CRDs.

[41] Clause 3 of the Declaration.
[42] Clause 4 of the Declaration.
[43] 74 of 1983.
[44] 192 of 1993.
[45] 86 of 1997.
[46] 24 of 1987.
[47] 70 of 1979.
[48] See Barrie 'The Approach of the courts regarding South African custodian parents' (2009) 3 *TSAR* 562.

The Children's Act specifies 'contact' as one of the parental responsibilities and rights. Reasonable access plays a major role when custodial parents wish to relocate with their children to other places either within South Africa or abroad, particularly when the access enjoyed by non-custodial parents would be curtailed. South Africa does not distinguish between internal and international relocation. Intended relocation has the potential to interfere with non-custodial parents' access to their children. It also interferes with the children's relationship with non-custodial parents, particularly when the relocating parent intends to relocate to a place which will make it difficult for the non-custodial parent to have regular contact with child. Non-custodial parents' reasonable access to their children would be impaired by the long distance between them and their children. Before the evolution of social media, relocation made communication between children and non-relocating parents difficult. While technological advancements have made long-distance communication easier, they nonetheless, do not compensate for the loss of physical interaction.

The Children's Act defines 'contact' as '… (a) maintaining a personal relationship with the child and (b) if the child lives with someone else visiting the child, or being visited by the child, or otherwise communicating regularly with the child by post, telephone or any other form of electronic communication'.[49] This definition is informed by Article 9(3) of the CRC, which provides that 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. If interpreted narrowly, Article 9(3) can be construed as mandating that every child should always have contact with both parents. However, this is not true in every case. There are circumstances that may justify preventing one or both parents from maintaining contact with a child. It may be justifiable to prevent an abusive and violent parent who had failed to advance the BIC from having access to the child. It is also questionable whether it would be in the BIC to maintain a relationship with a parent who '… has displayed poor parenting skills in the past; has a history of child abuse, substance abuse, mental health issues, or violence towards the custodial parent'.[50] It is in the BIC not to have contact with an abusive parent. It has been argued that '[c]hildren who witness violence are at risk for a number of significant emotional and behavioural problems such as aggression, bullying, anxiety, destruction of property, insecurity, depression, and

[49] Children's Act 38 of 2005, s 1.
[50] Kelly 'Enforcing a parent/child relationship at all cost? Supervised access orders in the Canadian Courts' 49 (2011) 2 *Osgoode Hall Law Journal* 277 at 280.

secretiveness'.[51] Where any parent presents a risk of violence to the child leading to the child's emotional abuse, a meaningful parent–child relationship will not be warranted.[52] Nonetheless, there is a shift in thinking regarding CRDs in some jurisdictions, where the roles of both parents in their children's lives are adequately assessed when CRDs are determined.

There are also tough decisions that relocating parents are forced to make in CRDs. For instance, parents in pursuit of economic opportunities may be inclined to leave their children under the care of extended family members.[53] This might create family environments for children in the absence of one or both parents. Thus, the assumption that it is in the BIC to have meaningful contact with both their parents at the same time does not apply to all children. The role and value of extended families in caring for children as a means of advancing their best interests is often overlooked particularly in the context of African families in South Africa.[54] At times, parents who oppose relocation may also have to consider relocating to places where custodian parents are relocating to, to maintain regular contact with their children. While this is an option which some courts in other jurisdictions have explored, however, this is not something which non-custodian parents in decided cases in South Africa have been asked whether it is an option that they are willing to consider.

1.4.4 THE BEST INTERESTS OF THE CHILD

1.4.4.1 International Recognition

The BIC principle is a fundamental concept in the determination of child welfare in all matters concerning children.[55] The first recognition of the BIC principle in international law was in the Declaration of the Rights of the Child (DRC). Principle 2 of the DRC provides that when member states enact laws aimed at the wellbeing of children, 'the best interests of the child shall be the paramount consideration'.[56] The DRC is not binding on any State. Nonetheless, it

[51] Kerr and Jaffe 'Legal and clinical issues in child custody disputes involving domestic violence' (1999) 17 *Canadian Family Law Quarterly* 3. See also Brinig 'Shared parenting laws: Mistakes of pooling?' *Notre Dame Law School Legal Studies* Research Paper No. 1426 (2014) 19 who argues that 'some parents (how many is contested) are not fit to be regular caretakers for children, usually because they are involved with substance abuse, abuse of children or mental illness'.

[52] Jaffe *et al* 'Custody disputes involving allegations of domestic violence: Toward a differentiated approach to parenting plans' 46 (2008) 3 *Family Court Review* 500 at 518.

[53] Seepamore 'Distance parenting – Implications for social work practice' 52 (2016) 4 *Social Work* 571. See also Section 28(1)(*b*) of the Constitution of the Republic of South Africa, 1996 which provides that 'every child has a right to family care or parental care, or to appropriate alternative care when removed from the family environment'.

[54] See generally Soorymoorthy and Makhoba 'The family in modern South Africa: Insights from recent research' (2016) 47 *Journal of Comparative Family Studies* 309.

[55] Supaat 'The principle of the best interests of the child as the basis of state obligation to protect refugee children in Malaysia' (2012) 1 *South East Asian Journal of Contemporary Business, Economics and Law* 146 at 146.

[56] Resolution 1386(XIV) of 20 November 1959.

provides useful guidelines regarding the welfare of children. Principle 7 of the DRC declares the BIC as a guiding principle to those responsible for children's education and guidance.[57] The inclusion of the BIC principle in the CRC effectively made this principle a binding rule of international law.[58] Article 3(1) of the CRC mandates that the BIC shall be a primary consideration in all actions concerning children irrespective of whether such actions are undertaken by organizations, courts, legislatures, or administrative authorities. Individual member states must determine the content and parameters of the BIC principle in their respective jurisdictions and how the principle will be considered in matters affecting children. The weight accorded to this principle in several countries varies.[59]

Article 4(1) of the African Charter states that, '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.[60] The only difference between the CRC and the African Charter is that the CRC uses the article 'a' as opposed to 'the' used by the African Charter. It has been argued that because the word 'the' is stronger than the word 'a', the African Charter provides somewhat more protection than the CRC for the BIC.[61] Nonetheless, irrespective of the linguistic differences between 'a' and 'the', ultimately the legislatures and courts of states that are signatories to the CRC and the African Charter should provide guidance as to the weight to be placed on the BIC principle within their respective jurisdictions. Unlike the CRC and the African Charter, section 28(2) of the Constitution has accorded the BIC principle paramount status. It provides that 'a child's best interests are of paramount importance in every matter concerning the child'. It has been argued that the word paramount used in the Constitution is stronger than the phrase 'primary consideration' used by the CRC and the African Charter.[62]

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[57] Kaime *The African Charter on the Rights and Welfare of the Child: A socio legal perspective* (2009) at 13. Kaime further argues that the 1959 Declaration 'marked a break with the prior conception of children as beneficiaries of charity and developed the child as a subject of international law with the ability to enjoy the benefits of specific rights and freedoms'. See also Van Bueren *The International Law on the Rights of the Child* (1998) at 12.

[58] Zermatten op cit note 22 at 484. See also Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) 91, where it is correctly stated that 'the principle of the best interests of the child is also referred to in other provisions of the CRC, in particular Articles 9 (1) (3), 18 (1), 21, 37 (c), and 40 (2) (iii)'.

[59] See Barratt and Burman 'Deciding the best interests of the child: An international perspective in custody decision making' (2001) 118 *South African Law Journal* 556.

[60] See Kaime op cit note 55 at 110.

[61] See Ferreira 'The best interests of the child: From complete indeterminacy to guidance by the Children's Act' (2010) 73 *THRHR* 5, Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' 30 (2002) 2 *The International Journal of Children's Rights* 157 at 160 and Davel 'The African Charter on the Rights and Welfare of the Child, Family Law and Children's Rights' (2002) 2 *De Jure* 281 at 283.

[62] See Bonthuys 'The Best Interests of Children in the South African Constitution (2006) 20 *International Journal of Law, Policy and the Family* 23 and Ferreira op cit note 61 at 6.

The BIC principle has been criticised and viewed as indeterminate in that it is not clear what it means and that it does not provide guidance as to where emphasis should be placed by the judge determining what is in the BIC.[63] Further that it lacks clarity and leads courts to develop a confusing jurisprudence on the meaning and status of the principle.[64] Zermatten argues that the BIC principle does not lend itself to a precise explanation of its application and it does not outline any particular duties or rules associated with it.[65]

1.4.4.2 Section 7 of the Children's Act

Section 28(2) of the Constitution is given content by section 7(1) of the Children's Act which seeks to provide a definition of the BIC principle, by listing several factors that must be considered. This provision is drafted in broad terms and enables judges to exercise their discretion when determining the BIC in CRDs. In *S v M*,[66] the Court held that '[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved'. The court was entrenching judicial discretion for situations wherein courts are called upon to determine disputes involving children. The court also held that '[t]o apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned'.[67]

Section 7 of the Children's Act provides a long list of potentially relevant factors, but does not provide the basis upon which judges can select and balance competing factors when determining the BIC. The factors listed in this section are general and vague factors aimed at establishing what is in the BIC. They do not specifically address what is in the BIC in the context of CRDs, which renders them inadequate to resolve CRDs. It is submitted that it is necessary to have specific CRDs legislative guidelines that will not only guide courts in their analysis of the facts before them but also constrain the discretion encouraged by section 7 of the Children's Act. Lack of clear guidelines on how to weigh and balance factors renders judges relatively free to decide CRDs as they wish, leading to inconsistency and uncertainty in the law. These factors do not provide a mechanism that courts can use to balance the parents' competing versions for and against relocation. These factors have not proved useful in CRDs

[63] Mnookin 'Child-Custody adjudication: Judicial functions in the face of indeterminacy' (1975) 3 *Law and Contemporary Problems* 226 at 230.
[64] Bonthuys op cit note 62 at 23.
[65] Zermatten op cit note 22 at 484
[66] 2008 (3) SA 232 (CC) para 24.
[67] Ibid para 24.

and judges by and large do not refer to them when determining these disputes. This enables judges to pick and choose factors that support their desired outcomes in CRDs matters.

1.4.4.3 Section 9 of the Children's Act

Section 9 of the Children's Act provides that 'in all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance must be applied'. It is trite that the guiding principle in all matters involving children is that their best interests are paramount.[68] Before a court can either grant or refuse a parent permission to relocate with the child, it should take into consideration the BIC. Such decisions should be made after carefully evaluating, weighing, and balancing competing factors, including the child's wishes in appropriate cases.[69]

Both the Constitution and the Children's Act use the term 'paramount' in relation to the BIC principle, however, this does not necessarily mean that the child's needs should always be elevated above those of other family members.[70] Sight should not be lost of the fact that when interpreted literally, it can be argued that section 28(2) of the Constitution puts the BIC above everything else which affects children. However, '… rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored, or that limitations of the child's best interests are impermissible'.[71]

The fact that the BIC principle has been accorded paramount status in South Africa does not mean that this principle is the overriding principle in all matters affecting children.[72] It is rather a guiding principle in decisions that affect children. It is important that, when decisions relating to children are taken, the interests of other family members are also considered. The court must be able to balance the interests of opposing family members in relation to the child and determine which amongst them would advance the BIC. This principle, in matters affecting children, is the pre-eminent consideration that should always preoccupy the minds of decision makers.[73] When considering the BIC principle, the court '… must also

[68] *Ford v Ford* [2004] 2 ALL SA 396 (W) at 397.
[69] *Ford v Ford* [2006] 1 ALL 571 (SCA) para 10.
[70] *S v M* 2008 (3) SA 232 (CC) para 117.
[71] Ibid para 112. See also *Minister for Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 19; *Bethell v Bland and Others* 1996 (2) SA 194 (W) at 208F-209D and *Ex parte Critchfield and Another* 1999 (3) SA 132 (W) at 142B-E.
[72] *S v M* 2008 (3) SA 232 (CC) para 119.
[73] See *B v M* [2006] 3 ALL SA 109 (W) para 146.

have regard to the best interests of the family relationships in particular, society generally and constitutional principles'.[74]

In *B v M*,[75] Satchwell J illustrated the link between the BIC and the interests of other family members and the necessity to adequately balance these interests. She interpreted the BIC based on the common goods that must be afforded to the child such as education, health and development and held that no priority can be ascribed to any of these common goods.[76] The common goods and other interests that may advance the wellbeing of children are not by themselves decisive when decisions relating to children are taken. Satchwell J further held that it is important, when considering what would be in the BIC, to also have regard to what would be best for other family members including parents.[77] Children do not exist as independent and separate entities but as interdependent and connected parts of their parents.[78]

The court appears to have adopted a 'relational autonomy' approach which discourages dealing with BIC in isolation of their parents' 'interests thereby limiting clashes of individual rights or interests between family members'. According to Herring '[t]he starting point for an approach based on relational autonomy is that a relational life is inevitable. From our earliest days our character and understanding of ourselves is fixed by our relationship with others'.[79] 'Relational autonomy can be viewed as a conception of autonomy that places the individual in a socially embedded network of others'.[80] Nedelsky argues that '[b]ecause we are always dependent on others for the possibility of autonomy, it follows that autonomy cannot mean independence'.[81] Care and interdependence are fundamental attributes of relational autonomy and the strict interpretation of the BIC can lead to other family members' rights being restricted while attempting to advance the interests of children. Parents may be restricted from moving freely, loving and having relationships with new people, pursuing new careers, or reconnecting with other family members.

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[74] Ibid 155.
[75] Ibid para 146.
[76] *B v M* supra note 73 para 145.
[77] Ibid 195.
[78] Scheininger 'Legal separateness, private connectedness: An impediment to gender equality in the family' (1998) 31 *Columbia Journal of Law and Social Problems* 283.
[79] Herring 'Relational autonomy and family law' in Wallbank, Choudhry and Herring (eds) *Rights, Gender and Family Law* (2009) 266. A thorough exposition of the concept of relational autonomy is beyond the scope of this thesis.
[80] See Dove *at el* 'Beyond individualism: Is there a place for relational autonomy in clinical practice and research?' (2017) 3 *Clinical Ethics* 150 at 153, who further argue that '… people develop their sense of self and form capacities and life plans through the relationships they forge on a daily and long-term basis. Relational autonomy asserts, therefore, that social surroundings and relationships are crucial for developing autonomy, and encourages us to act in ways guided by an ethic of trust and care'.
[81] *Law's relations: A Relational Theory of Self, Autonomy, and Law* (2011) 46.

There appears to be tension between the imperative of promoting the BIC which are regarded as paramount and the value and weight of other family members' interests when decisions relating to the child needs to be taken.[82] Moyo argues that taking the BIC as a paramount consideration represents a 'bossy' image of the child and '… fails to reconcile the rights of children and those of parents'.[83] According to Reece 'the paramountcy principle must be abandoned and replaced with a framework which recognises that a child is merely one of the participants in a process in which the interests of all participants count'.[84] In *S v M*, it was held that the BIC should be applied in a 'meaningful way without unduly obliterating other valuable and constitutionally-protected interests'.[85]

There is a need to balance what would be best for the children with what would be best for both parents. This will enable courts to 'preserve and protect family units and not initiate or allow actions or policies which would cause disruptions and dislocation and possibly permanent dismemberment'. In *M v M,*[86] the court cautioned that parents' interests should not be completely disregarded because '… best interests of the children might be paramount, but they are not the sole factors to be considered'.[87] It was further held in *LW v DB,*[88] that '[i]n different situations, other interests to be balanced may include, not only the particular child but also siblings, parents, nuclear and extended families and sometimes the local community, society and the State'. Nonetheless, the inclusion of BIC principle in the Constitution obliges courts and administrative authorities to consider how their decisions will affect children's lives.[89] The development of children as individuals is directly dependant on their interaction with those who constitute their family nucleus. Their development is enhanced by their interaction with other family members, particularly both of their parents. Relocation might be one of the few justifiable reasons to limit the physical and regular interaction of the child and other family members.

[82] Herring 'The Human Rights Act and the welfare principle in family law – Conflicting or complementary?' (1999) *Child and Family Law Quarterly* 223 at 224.
[83] 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) *African Human Rights Law Journal* 142 at 146.
[84] 'Paramountcy principle: Consensus or construct?' (1996) *Current Legal Problems* 267 .
[85] *S v M* 2008 (3) SA 232 (CC) para 25.
[86] *M v M* (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) para 7.
[87] Ibid.
[88] 2015 JDR 2617 (GJ) at 4.
[89] Sloth-Nielsen 'Children soup or chainsaws: Some implications of the Constitutionalisation of Children's rights in South Africa' (1996) *Act Juridica* 6 at 25. See also *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 134.

1.4.4.4 The views of children

The views of children play important role in child relocation jurisprudence. The need for children to express their views is recognised internationally, regionally and in South Africa. Article 12(1) of the CRC enjoins member states to '… assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.[90] Children may express their views personally or through their representative such as social workers, lawyers, relatives, parents or other competent persons.[91] Parkinson and Cashmore argue that 'a situation where children are afforded no means of making their views known is clearly a violation of their article 12 rights under the UN Convention on the rights of the child'. [92] Article 12(2) of the CRC provides that '… the child shall … be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body …'.

Article 4 of the African Charter also recognises children's rights to participate in judicial and administrative processes that involve them by allowing them to express their views when they can do so. Although these views ought to be taken into consideration, the CRC and the African Charter do not mandate that children's views should be decisive, but merely that they should be considered. Once expressed, such views will form part of the body of evidence that the court should consider. When considering children's views, courts should bear in mind that children are vulnerable to being influenced by a dominant parent in their lives and may at times be expressing the wishes of such a parent.[93] It is important to ascertain if indeed the child concerned is expressing their genuine views and not those of any of their parents. The African Charter and CRC recognise children as human beings with the autonomy to express their likes and dislikes. [94]

South Africa is a signatory to both the Convention and the Charter and has through section 10 of the Children's Act[95] recognised the need for children to participate in family

[90] See Committee on the Rights of the Child. General Comment No. 12 (2009): The right of the child to be heard CRC-C-GC-12 at 5 where it is stated that 'the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.
[91] Moyo op cit note 83 at 177.
[92] *The Voice of a Child in Family Law Disputes* (2008) 39.
[93] Denmark, Rabinowits and Sechzer *Engendering Psychology: Women and Gender Revisited* 2ed (2005) at 162 where it is argued that '… by expressing their views of the dispositions they attribute to their children, parents directly influence children's views of who they are and how they should act'.
[94] Chirwa op cit note 61 at 160. See also Gose *The African Charter on the Rights and Welfare of the Child* (2002) at 124 and 160.
[95] 38 of 2005.

matters that affect them. In terms of section 10 of the Children's Act, '[e]very child that is of such an age, maturity and state of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and the views expressed by that child must be given due consideration'.[96] It can be argued that considering the child's views in CRDs, and providing the child who is able to participate an opportunity to do, is an important aspect of determining the BIC.[97] Further, that their participation can enhance their dignity and make them feel part of the decisions that affect them. However, section 7 of the Children's Act does not list the child's wishes and participation as factors to be considered when dealing with the BIC.[98]

In South Africa, it is rare for parents involved in CRDs to call their children as witnesses in support of their cases in court. Despite this, section 10 of the Children's Act does allow children who are able to provide their views to participate in such disputes. This Act, however, neither mandates that children should be called as witnesses nor does it prohibit it. Within the ambit of this Act, it is evident that participation means that children who can express their feelings, views and wishes should be provided space to do so. It can be argued that perhaps what is meant is not for children to be called into court as witnesses on behalf or against any of their parents but rather to enlighten the court of how they view their parents' dispute and to express their desired outcome. Generally, courts treat children's testimonies in court with caution. Available social science research demonstrates that '[i]n relocation cases, the "wishes" of views of the child on the issue of moving may be hard to evaluate'.[99] Nonetheless, children should be recognised as 'experts on their own feelings' and must be allowed to express their views regarding the contemplated relocation, if they are able to provide such views.[100]

While it is generally accepted that there is some value in providing children the platform to express their views, there are several authors who have cautioned against giving children too much power to influence the outcome of their parental disputes. It has been argued that

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[96] See also section 31 (1)(a) of the Children's Act which stipulates that 'before a person holding parental responsibilities and rights in respect of a child takes any decision … involving the child, that person must give due consideration to any views expressed by the child, bearing in mind the child's age, maturity and stage of development'. See also *HG v CG* 2010 (3) SA 352 (ECP) para 23. See further Marumoagae 'What weight (if any) should be attached to children's wishes and views in child relocation disputes? Lessons from Canada' (2020) 28 *African Journal of International and Comparative Law* 466.

[97] See generally Barratt 'The child's right to be heard in custody and access determinations' (2002) 65 *THRHR* 556.

[98] In *McCall v McCall* 1994 (3) SA 201 (C) at 205E, the court listed the child's own views as one of the factors to consider when determining the BIC.

[99] Cashmore and Parkinson 'Children's wishes and feelings in relocation disputes' (2016) 28 *Child and Family Law Quarterly* 151 at 173.

[100] Ibid.

children's views, wishes and feelings may be unreliable for a variety of reasons such as the influence from their parents and siblings designed to turn them against their other parents.[101] Available research also indicates that some parents expect their children to take their sides and may influence them to reject other parents.[102] Parents who spend more time with children are more likely to influence the thinking of their children. Psychologists have demonstrated that there may be certain risks to children's emotional welfare when their views are held to be decisive, which may amount to burdening them with an inappropriate degree of power instead of assisting them to cope the separation of their parents.[103]

1.4.5 CHILD RELOCATION ADJUDICATION AND ASSOCIATED COMPLEXITIES

Relocation cases are generally regarded as among the most complex matters that can come before a judge.[104] On the one hand, if the judge permits relocation, one parent's contact with the child may be limited. On the other hand, refusing relocation may lead to a parent losing opportunities such as: new employment; education; marriage; or reconnecting with family members. These parental interests must be balanced with what is in the BIC, particularly when both parents are actively involved in the development of the child. The court is required to balance and attempt to reconcile parental wishes and interests while determining the factors that are likely to advance the BIC. Adjudicating CRDs becomes even more difficult when both parents enjoy warm and close relationships with their child or children. Such parents are unlikely to agree on whether the proposed relocation harms or benefits their child.

According to Kilkelly, in CRDs matters '… neither parent is being unreasonable, and both are motivated by justifiable and genuinely child-focused reasons, as much as by their own desires. This is the nub of the relocation dilemma, especially where both parents are fully involved in their children's lives and are competent carers'.[105] As put by Glennon, CRD matters '… often pit two well-intentioned parents against each other, in many cases undermining a

[101] Mantle *et al* 'Whose Wishes and Feelings? Children's Autonomy and Parental Influence in Family Court Enquiries' (2007) 37 *British Journal of Social Work* 785 at 794.
[102] Kruk 'The Impact of Parental Alienation on Children: Undermining Loving Parent-Child Relationships as Child Maltreatment' (2013) available at https://www.psychologytoday.com/blog/co-parenting-after-divorce/201304/the-impact-parental-alienation-children, accessed 25 December 2017.
[103] Warshak 'Payoffs and Pitfalls of Listening to Children', (2003) 52 (4) *Family Relations* 373 at 374.
[104] Zafran 'Children's Rights as Relational Rights: The Case of Relocation' 2010 *Journal of Gender, Social Policy & the Law* 163 at 165.
[105] 'Relocation: A Children's rights perspective' (2010) 1 *Journal of Family Law and Practice* 24. See also Austin 'Relocation, research, and child custody disputes' in Kuehnle & Drozd (eds) *Parenting plan evaluations: research for the family court 2012* (540-559) 540. See also Brandon & Stodulka 'Relocation and the best interests of the child — can it be determined?' 12 (2011) 4 *ADR Bulletin* 81 at 85.

prior history of inclusion of both parents in their children's lives…'.[106] The court is faced with the challenge of preventing or mitigating disadvantages that might materialise because of the intended relocation.

CRDs matters are also problematic because they can potentially interfere with one parent's constitutional right to move freely. Court orders that prevent relocation of children might have the effect of restricting custodial parents' freedom of movement. This may lead them to conclude that '… their own lives are being thwarted by their previous partner in a now-defunct marriage'.[107] According to Parkinson, Cashmore and Single:

> '[r]elocation cases ... reflect the tension between the freedom of people as adults to leave a relationship and begin a new life for themselves, and the harsh reality that while marriages (and other relationships) may be dissoluble, parenthood is not. ... Maintaining that connection if one parent moves a long way from the other is difficult, to say the least'.[108]

Relocation can also provide relocating parents the opportunity to re-start their lives, thereby improving their state of happiness to the advantage of their children. It is difficult for courts when relocating parents and those who object to the proposed relocation advance valid and cogent reasons for their respective positions.[109] Parents are often not willing to accommodate each other's interests, making CRDs difficult to adjudicate.[110]

Another important complexity in the context of CRDs adjudication is the role of expert witnesses. Biased expert testimony poses challenges in the adjudication of CRDs. The court must evaluate whether the evidence of each expert witness is of any assistance to the determination of the matter. Parents often call witnesses who are sympathetic to their causes. It has been correctly argued that '[u]nwittingly, courts succeeded in burdening themselves with case-by-case custody determinations, often involving a battle of experts, in lengthy and hotly contested custody litigation'.[111]

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[106] 'Divided parents, shared children: Conflicting approaches to relocation disputes in the USA' (2008) 2 *Utrecht Law Review* 55.
[107] Ibid at 55.
[108] 'The need for reality testing in relocation cases' (2010) 1 *Family Law Quarterly* 1.
[109] Boshier 'Have Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 10.
[110] Debele 'A children's rights approach to relocation: A meaningful best interests standard' (1998) *Journal of the American Academy of Matrimonial Lawyers* 75.
[111] DiFonzo 'From the rule of one to shared parenting: Custody presumptions in law and policy' (2014) 52 *Family Court Review* 213 at 214.

Finally, CRDs have the potential to take up considerable court time, place heavy financial burdens on those involved and may lead to a significant delay in resolving the matter.[112] The various challenges presented in CRDs necessitate amendments to the Children's Act to provide adequate legislative guidelines that will capacitate the courts to deal with CRDs more efficiently in a consistent and predictable manner.

1.5 SUMMARY OF THE CHAPTERS

Chapter two Starts by briefly illustrating how CRDs jurisprudence has been influenced by the law regulating custody and access. It proceeds by demonstrating that judicial discretion has enabled judges to decide CRDs in accordance with their own pre-determined views. It enables them to select parts of the evidence that favours their desired outcomes and reject that which contradicts their intended conclusions. This leads to a situation where factors which were disregarded by one judge are amplified by another to either deny or grant permission for the primary caregiving parent to relocate.

Chapter three discusses the way in which South African judges have dealt with CRDs where one of the parents' wishes to relocate to another country. This chapter highlights the inconsistent reasoning in some of the cases, wherein the facts that usually would enable the mother to relocate, would be used by a different judge to prohibit the relocation of the father in a different case with similar facts. This does not mean, however, that custodial mothers have not been refused permission to relocate in South Africa. It further demonstrates that while there are no presumptions in South Africa *per se*, nonetheless, the reasoning of most South African judges suggests a preference for a presumption in favour of custodial parents, who are often mothers.

Chapter four shows how judges can use expert evidence through their judicial discretion to arrive at their desired outcomes. Judges can reject expert witness testimony or parts thereof that contradicts their intended outcomes, while relying on expert reports (or parts thereof) that supports their intended outcomes. It also discusses the importance of socio-legal research in CRDs.

Chapter five aims to illustrate that judicial discretion in CRDs has contributed to the inconsistent development of this area of law through an analysis of CRDs in selected foreign jurisdictions which have a long history of CRDs adjudication: Canada, United States of America, United Kingdom, and Australia. It shows the dangers of presumptions that are

[112] Henaghan 'Going, going… gone – To relocate or not to relocate, that is the question' (2010) 1.2 *Journal of Family Law and Practice* 30.

generally followed in the USA. Further, that courts in the United Kingdom and Australia have crafted useful judicial guidelines that can be considered when establishing specific CRDs legislative guidelines in South Africa. This chapter will also review CRDs legislative provisions in the USA state of Florida and Canada to evaluate what South Africa can learn therefrom.

Chapter six concludes by proposing the insertion of sections 280A to 280G into the Children's Act. It is argued that these provisions should constitute PART II of Chapter 17 of the Children's Act. Throughout the thesis, unless context otherwise requires and given the gendered nature of parenting, when discussing cases, parties will be referred to as mothers and fathers and not the traditional naming of parties such as plaintiff, defendant, respondent, appellant, and applicant.

2 CHAPTER TWO: THE ROLE OF JUDICIAL DISCRETION IN CRDs ADJUDICATION

2.1 INTRODUCTION

The purpose of this chapter is to demonstrate the role of judicial discretion in the adjudication of CRDs. The judges' discretion in CRDs is often justified on the basis that these cases require an approach that addresses the specific facts which are particular to the family before the court. Further, that legislation and previous decisions do not always adequately provide guidance for future cases, thus necessitating judicial creativity. According to Drobak and North '[t]he world is too complex and dynamic to enable even a comprehensive statutory regime to provide answers for all the problems that are sure to arise'.[1] It is nonetheless, worth pointing out that, '… the fact that no two-family situations are identical does not mean that there are no regularly recurring fact patterns that can and should be treated in the same way …'.[2]

This chapter illustrates that through judicial discretion, judges can select aspects of the evidence that is aligned with their desired conclusion while rejecting evidence that contradicts their intended outcomes in CRDs. This chapter starts by briefly discussing the development of judicial discretion in custody and access matters, which are central to CRDs. This historical overview is important because contemporary CRDs decisions continue to be influenced and informed by principles and practices that developed in particular historical contexts. CRDs arises when one of the parents' wishes to relocate with the child to a different place in South Africa or to a different country, decisions that affect custody and access rights of the children's parents. This chapter will also reflect on the impact of legal presumptions on the adjudication of CRDs. It will then reflect on the shift in thinking regarding the post-separation parental care, wherein emphasis is now placed on the need of both parents to be involved in their children's lives. This chapter concludes by reflecting on some of the challenges of judicial discretion in CRDs and how South African has responded to them.

[1] Drobak and North 'Understanding judicial decision-making: The importance of constraints on non-rational deliberations' (2008) 26 *Washington University Journal of Law & Policy* 131 at 133.
[2] Glendon 'Fixed rules and discretion in contemporary family law and succession law' (1986) 60 *Tulane Law Review* 1165 at 1171.

2.2 THE ROLE OF CHILD CUSTODY AND ACCESS PRINCIPLES IN THE DEVELOPMENT OF CRDs JURISPRUDENCE

CRDs principles are influenced by the development of the South African law which regulates custody, as influenced largely by Roman-Dutch Law, and access as influenced by English law. In relation to custody, two Roman-Dutch law principles can be identified that applied to custody disputes between married parents: '[d]uring the subsistence of the marriage, the father [had] a preferential right to the custody of his minor children; and on divorce the innocent spouse [was] entitled to the custody of the children of the marriage'.[3] Roman-Dutch authorities did not consider access rights when custody was ordered. According to Schäfer, the lack of attention to access may 'be that judges in the Netherlands before 1809 simply did not make provision for the parent who lost custody, or that such provisions as were made were seen as insufficient legal interest as to merit recording'.[4] There is no trace of child relocation principles at Roman-Dutch law. English law influenced South African family law through the concept of 'access' in custody disputes. In England, despite difficulties with the courts' conservative approach of preserving patriarchy and the laws that entitled fathers to automatically be provided custody of their children on divorce, mothers continued petitioning not only for custody but also to have access to their children.[5]

In South Africa, custody disputes were initially resolved based on the paramountcy of the husband and the view that those who caused the dissolution of the marriage should be penalised by being refused custody of their children.[6] The courts were empowered to provide custody to mothers if fathers were found guilty, more particularly, when their conduct led to the dissolution of marriages or threatened children.[7] This was an early indication that South African courts were prepared to make child-centred custody orders.[8] Courts began to pay more attention to the social conditions of the litigants before them as well as their living arrangements when determining what would be in the BIC under the circumstances.[9] In *Simey v Simey*,[10] the court in awarding custody to the mother and reasonable access to the father, referred to the

[3] De Soysa 'Resolving custody disputes between married parents in Roman-Dutch jurisdictions: will English law continue to be relevant?' (1993) 3 *CILSA* 364.
[4] Schäfer *The law of Access to Children* (2007) 12.
[5] See for instance *In re Fynn* 64 Eng. Rep. 205 (1848) (212); *Warde v Warde* 41 Eng. Rep. 1147 (Ch. 1849); *Eyre v Shaftsbury* 24 Eng. Rep. 659 (Ch. 1722); *Blake v Leigh* 27 Eng. Rep. 207 (Ch. 1756); *and Morgan v Dillon* 88 Eng. Rep. 361 (Ch. 1724).
[6] *Simey v Simey* (1880-1882) 1 SC 171 at 175.
[7] See *Farmer v Farmer* (1828-1849) 1 Menz 240.
[8] *Golborne v Golborne* (1902) 23 NLR 241.
[9] See *Farmer* supra note 7.
[10] *Simey* supra note 6.

English case of *In re Taylor* (4 Ch. D. 159), which dealt with access. This case opened the door for litigants when applying for or opposing custody to also request the court to deal with access. In granting a decree of divorce and custody to the mother, the court in *Bailey v Bailey,*[11] granted the father leave to have access to the child at all reasonable times. In *Cronje v Cronje,*[12] the court awarded custody to the mother, but also awarded the father the right to have reasonable access to the children. The court was aware that when both parents show some interest in being part of their children's lives, there should be some mechanism that enables them to live their separate lives while both maintaining relationships with their children. However, the court did not reflect on the benefits, if any, that children generally derive from the involvement of both of their parents in their lives. In most of the early cases where custody was claimed, the issue of access by the other parent was neither argued for nor considered by the courts.[13] There were, however, cases that granted reasonable access even though access was not requested.[14]

In the first part of the twentieth century, courts started to define the parameters of the amount of access that the non-custodial parent was entitled to, thereby developing the concept of 'reasonable access'.[15] It appears as if the facts of individual cases shed some light as to what was regarded as 'reasonable access' in the context of such cases. Towards the end of the nineteenth century, it became clear that the BIC were a primary consideration in custody decisions.[16] By the mid-twentieth century, the court's discretionary power to make custody orders in the BIC was confirmed by the legislature. The Matrimonial Affairs Act[17] empowered the court hearing a divorce or judicial separation to make custody and access orders that were in the BIC. Section 5(1) of the MMA made it possible for courts to grant sole custody orders. Schreiner JA in *Fortune v Fortune* held that section 5(1) of the MMA empowered the judge '… to grant custody in favour of either parent if it is proved to his satisfaction that it would be in the interests of the minor to do so'.[18]

One trend that is evident from the nineteenth century onwards regarding judicial discretion in custody and access matters is the shift in emphasis from a clear rule guaranteeing

[11] 1893 H 44 at 45.
[12] 1907 TS 871 at 876.
[13] In *Edwards v Fleming* 1909 TH 232 while the court held that the mother of an illegitimate child was its guardian and that the guardianship can be interfered with if the welfare of the child is in danger but did not say anything about access. In *Docrat v Bhayat* 1932 TPD 125.
[14] See *Alexander v Alexander* 1893 H 183; *Simey* supra note 6 and *Bailey* supra note 11. See also *Matthews v Haswari* 1937 WLD 110 at 113 and *Wilson v Eli* 1914 WR 34.
[15] See *Edwards* supra note 13 and *Marais v Marais* [1960] 2 All SA 21 at 24.
[16] See for example *Simey* supra note 6.
[17] 37 of 1953 (hereafter MMA).
[18] *Fortune v Fortune* 1955 (3) SA 348 (A) at 354.

the father's parental power over his children to the court's power to intervene as the upper guardian of all minors.[19] Courts also understood that there were rules and principles that should guide (and perhaps even limit) the exercise of their discretion. These principles included the tender years and maternal preference doctrine, which was well established by the mid-twentieth century. It was held in *Napolitano v Commossoner of Child Welfare* that 'in the absence of considerations pointing the other way, a girl of tender years should ordinarily be with her mother'.[20] There is evidence that courts continued to refer to this principle throughout the following decades, and even into the twenty first century.[21]

Nonetheless, the Supreme Court of Appeal in *Potgieter v Potgieter,* has pointed out that 'the courts have emphasised that parenting is a gender neutral function and that the assumption that a mother is necessarily in a better position to care for a child than the father belongs to a past era'.[22] Recent judgments have held that a father can be just as good a 'mother' as the child's biological mother and the mother can be just as good a 'father' as the child's biological father.[23] Currently, section 28(2) of the Constitution provides that the BIC is the paramount consideration and thus, should have an influence on the court's decision when determining CRDs. As it will be shown in chapter three of this thesis, courts are more inclined to allow custodial parents, most of whom in practice are mothers, to relocate with their children.

In relation to CRDs, when one parent is allowed to relocate with the child, such a decision immediately impacts of the ability of the non-relocating parent to exercise regular contact with the child. Disputes regarding custody and access continue to play a fundamental role in CRDs and require courts to adequately balance custody interests of relocation parents and access interests of non-relocating parents with the BIC, while at the same time considering the respective parental interests. As will be shown below, most jurisdictions are now emphasising the importance of both parents in children's lives and the concept of shared parental care. The balancing exercise which guides the ultimate decisions reached by courts, raises questions regarding judicial approaches used to either allow or prevent child relocation. It also attracts debates regarding the extent to which judges use their discretion to decide these cases, which is the main theme of this thesis.

[19] *Rooyen v Wemer* (1892) 9 SC 425 at 428-9.
[20] 1965 (1) SA 742 at 746C.
[21] See for example *Manning v Manning* 1975 (4) SA 659 (T)*; B v S* 1993 (2) SA 211 (W); and *McCall v McCall* 1994 (3) SA 201 (C).
[22] 2007 (5) SA 94 (SCA) para 26.
[23] See generally *Van der Linde v Van der Linde* 1996 (3) SA 509 (O).

2.3 JUDICIAL DISCRETION IN CRD ADJUDICATION

2.3.1 PRESUMPTIONS IN THE CONTEXT OF CRDs

The determination of CRDs has been subject of intense debates in recent times. On the one hand, there has been some support for judges to exercise wide discretion, which allows judges to take decisions that they deem appropriate in the CRDs before them.[24] This may lead to inconsistent decision making of cases with similar facts, making the law unpredictable. On the other hand, there is support for an approach where judges' discretion is either limited or guided by the application of the predetermined rules or presumptions.[25] In relation to rules, one extreme that could be imagined is where judges do not have any discretion and are restricted to strict applications of rules or presumptions depending on the specific facts of the cases before them, which is not desirable. This may lead to an inflexible application of the law which may not necessarily cater for all different factual circumstances that may arise in practice.

It is worth noting that all disputes involving children must be guided by the BIC, the application of which permits for considerable judicial discretion. Such discretion, as illustrated in chapter three, is often demonstrated when judges pick, choose, and overemphasise certain factors over other equally important factors which they render insignificant to achieve their desired outcomes. It is particularly worrying when judges fail to provide cogent reasons for their conclusions, as they should. Instead of strict rules or inflexible presumptions, this thesis advocates for legislative guidelines that will constrain judges' wide discretion that is based on the BIC. These guidelines should not only set out factors that must be considered, weighed, and balanced but should also mandate judges to provide cogent reasons for their CRDs approaches. These legislative guidelines should not eradicate judges' discretion but merely limit such discretion. It cannot be denied that judges will always find a way to exercise some form of discretion when determining family law disputes. The role and necessity of presumptions and judicial discretion has most recently been engaged by academics from Australia and Canada as well as psychologists from the USA.

According to Schneider from the USA, legal systems rarely if ever present a plain choice between rules and judicial discretion.[26] With discretion, the judge must evaluate the

[24] See Murry '[Re]Location, [re]location, [re]location: considering the relocation of the non-applicant parent alongside the child and applicant parent in a relocation dispute" (2018) 5 *Public Interest Law Journal of New Zealand* 155 at 164, where it is argued that '… in relocation cases, the court has discretion to adopt its own proposal. It is not limited to those put forward by the parties'.

[25] See generally Thompson 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 (1) *Family Court Review* 40.

[26] Schneider 'Tension Between Rules and Discretion in Family Law: A Report and Reflection' (1993) 27 *Family Law Quarterly* 229 at 235.

facts, apply the law and determine the best solution for the dispute. The rules almost prescribe how the judge should determine the dispute. In relation to CRDs, Cashmore and Parkinson from Australia, Thompson, from Canada and Stahl from USA, added their voices to the discretion/presumptions debate and expressed their views on what they regard to be the appropriate model for the adjudication of CRDs.

In 2015, Cashmore and Parkinson argued that '… relocation cases are best determined by reference to a series of questions, rather than by reference to presumptions or bright lines'.[27] While these authors generally do not favour presumptions, they nonetheless, recognise that courts need to be provided some guidance in order to foster an adequate balance between certainty and discretion.[28] They proposed that, first, the importance of the non-relocating parent's relationship with the child on the child's development must be determined.[29] This question recognises the shift in thinking in various jurisdictions, that it is usually in the BIC to develop and maintain meaningful relationships with both parents to the extent to which it is possible. This is a clear call for the court to make a genuine enquiry on the extent of the involvement of the non-relocating parent in the child's life, the value of such involvement in the development and wellbeing of the child as well as the potential harm to the child if this relationship is possibly impeded through relocation. Second, if relocation is permitted, the viability of the contact proposals should be evaluated.[30] This appears to be a call for both parents to meaningfully engage each other on the most reasonable and practical methods that can be adopted to ensure that the child maintains contact with the non-relocating parent. The court will then be enjoined to apply its mind to the feasibility of all the proposed contact methods to determine which of them are viable under the circumstances.

Third, should it be found that the non-relocating parent's relationship with the child is important to the child's development and will likely be diminished by the proposed relocation, viable alternatives to parents living long distances apart should be considered with a view to evaluate whether relocation is the least detrimental alternative.[31] This question places the child at the centre of the dispute and requires the court to prioritise the child's wellbeing by assessing whether there is another alternative that parents can settle for which may be less detrimental than relocation. This will render relocation to be a remedy of last resort. Parkinson and

[27] Parkinson and Cashmore 'Reforming relocation law: An evidence-based approach' (2015) 53 *Family Court Review* 34.
[28] Ibid at 28.
[29] Ibid.
[30] Ibid at 34.
[31] Ibid.

Cashmore appear to be proposing a model that would allow judges to exercise their discretion without being constrained by rules and presumptions but perhaps guided by past decisions. The proposed questions reflect the shift in thinking regarding the care of children where courts are enjoined by these authors to consider the value and importance of both parents in children's lives when determining CRDs. Parkinson and Cashmore's approach necessitate an assessment of whether it would be in the BIC to lose close relationships with their non-relocating parents which may be meaningful to their development. This approach suggests that judicial discretion must be guided by the unique facts of the case.

Thompson replied to Parkinson and Cashmore, and argued that the questions they proposed will not reform the law. Thompson is of the view that Parkinson and Cashmore's approach amounts to '… pure, unguided "best interest" approach to relocation which is a failure and that the proposed questions are asked in every relocation case already'.[32] Thompson argued that the BIC entails individual discretion which is exercised on a case to case basis by a trial judge and is not useful for legal analysis.[33] Further that long open ended and unweighted lists of relocation factors do not assist in shaping the BIC principle and asking few open ended questions will not constrain the BIC principle analysis.[34] He is of the view that CRDs have limited outcomes and can be dealt with in accordance with 'intermediate-level guidance, irrespective of whether such guidance is referred to as "presumptions," "burdens", "guidelines" or "disciplines"'.[35]

Thompson seems to favour the use of rebuttable presumptions which are based on how courts typically seem to decide CRDs, to limit judges' discretion. He appears to be of the view that CRDs should be resolved through precedent because '[a] reading of relocation cases does reveal recurring fact situations and dominant patterns in decisions'.[36] He appears to not be in favour of judges being free to consider various alternative solutions and unilaterally choosing the solution that they believe is the most suitable for the dispute before them. Further that the solution must be prescribed by the law which judges simply have to apply to the facts before them. Thompson's advocates for less judicial discretion and clearer guidelines. It is submitted that instead of presumptions, it is better to establish legislative guidelines that can identify the most important factors and prescribe how they ought to be balanced to bind all judges irrespective of the courts they preside.

[32] Thompson 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 *Family Court Review* 40.
[33] Ibid at 41.
[34] Ibid.
[35] Ibid.
[36] Ibid at 46.

Thompson has also provided a contextual analysis of the type of presumptions that he believes are needed to deal with CRDs. He has distinguished presumptions from rules which usually specify outcomes in advance.[37] He is in favour of an approach which would allocate the burden of proof to one party which can shift to the other party.[38] He is of the view that presumptions can be set out '… for categories of relocation cases, to give some structure to relocation decision making and reduce some of the costs of the current "best interests" approach'.[39] Thompson appears not to view CRDs presumptions in the strict traditional sense, but as important guidelines that would enable courts to adequately determine cases before them.

Just like Thompson, Bala is of the view that when adjudicating CRDs judges should be guided by presumptions which have already been established through case law.[40] Bala and Wheeler are of the view that judges are already applying presumptions in CRDs which can be established from 'patterns and some judicial statements of principle', which can be used to resolve CRDs.[41] The challenge with presumptions created by judges is that other judges may feel that they are not bound by such presumptions. Judges in superior courts may also replace presumptions created by lower courts with their own, making the law uncertain. Bala correctly observed that a highly discretionary BIC test for CRDs results in uncertainty on how courts should approach these disputes and contributes to frequent litigation about relocation.[42] He is of the view that the extent of discretion and lack of direction afforded to trial judges by the BIC principle make CRDs less predictable and more difficult to settle.[43] However, the challenge with presumptions created by judges is that other judges may feel that they are not bound by such presumptions or those in superior courts can change or replace them with their own making the law uncertain. In order to overcome this difficulty, as Bala and Wheeler correctly argued, [i]t would be best for legislatures to enact laws to provide clearer guidance for these most important and challenging cases'.[44] Nathens, argued for the adoption of CRDs

[37] Thompson 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 (1) *Family Court Review* 40 at 46.
[38] Ibid.
[39] Ibid at 48.
[40] Bala 'Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf, accessed 23 June 2020
[41] Bala and Wheeler 'Canadian relocation cases: Heading towards guidelines' (2012) 30 *Canadian Family Law Quarterly* 271 at 319.
[42] Bala 'Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf, accessed 23 June 2020
[43] Bala *et al* 'A study of post-separation/divorce parental relocation' Presented to Family, Children and Youth Section, Department of Justice Canada (2012) 59.
[44] Bala and Wheeler op cit note 41 at 319.

presumptions and guidelines which will assist the court to '… recognise when there is a mobility issue that merits the application of specific legislative presumptions and guidelines'.[45] Further that there should be a 'legislated rebuttable presumption in place against permitting a parent to re-locate with a child away from the location of residence of the other parent'.[46] Bala and Wheeler are also of the view that there is a need for clear social science research evidence relating to the outcomes of children in CRDs, without which trial judges will apply open ended list of BIC factors that lead them to speculate about children's futures.[47] Social science research is dealt with in chapter four of this thesis.

Parkinson and Cashmore responded to Thompson and alleged that he misunderstood some of the points they made in their first article in the debate. They however, agreed with Thompson that the pure best interest approach is not helpful.[48] They also agreed that a list of relocation factors does not enhance predictability and certainty.[49] They nonetheless, argued that research evidence does not support the use of '… general presumptions in favour of relocation based upon the premise that in general, the best interest of the children will be promoted by allowing a mother to move far from the other parent because her happiness, and the happiness of her children, are so closely intertwined'.[50] Further that available research evidence also '… does not support a general presumption against relocation'.[51] They defended the questions they proposed by arguing that these questions offer a platform '… to focus resolutely on children's interests and not on adult rights and that will improve the best interests analysis'.[52] Further that their proposed questions are meant to assist the process of determining the BIC and can be asked by lawyers, mediators and courts as well as parents who are involved in CRDs.[53] They are of the view that Thompson's approach regarding presumptions is insufficient to assist with the differentiation of cases and to adequately address the risk factors involved in CRDs.[54]

[45] 'The importance of legal presumptions and legislated guidelines in Canadian relocation cases' (2003) 5 available at https://www.nathenssiegel.com/files/articles/PaperinternationalDecember-2-2013-REFORMATTED.pdf, accessed 20 June 2020.
[46] Ibid.
[47] Ibid at 312.
[48] Parkinson and Cashmore 'Reforming relocation law: A reply to Prof. Thompson' (2015) 53 (1) *Family Court Review* 56 at 57.
[49] Ibid.
[50] Ibid.
[51] Ibid at 58.
[52] Ibid at 60.
[53] Ibid.
[54] Ibid.

While Parkinson and Cashmore accept that there is a need for more guidance for parents and lawyers who are involved in CRDs, they nonetheless, reject that this should be in the form of presumptions. They argue that presumptions '… may have unintended consequences that are detrimental to the wellbeing of children whose parents have separated generally, creating perverse incentives for suboptimal parenting arrangements which are not consistent with the children's needs'.[55] Further that '… presumptions may also make parenting disputes harder to settle and resolve without adjudication'.[56] These authors recognises that rules and presumptions are inflexible and generally lead to a win or lose situation, where a relocating parent will be allowed to relocate or refused permission to relocate based on whether the prescribed criteria has been met. They appear to be of the view that, contrary to rules and presumptions, the questions they proposed would serve as guidelines that would assist courts in CRDs to reach outcomes that would best serve children by ensuring that they maintain meaningful relationships with both parents.

Stahl also entered the debate and argued that where there are no presumptions in favour or against relocation, parents can collaborate and develop a parenting plan that is based on the BIC which can be modified as the child's circumstances change.[57] Contrary to Parkinson, Cashmore and Thompson's views, Stahl is of the view that there is value that a list of factors bring to the decision making process in CRDs.[58] He argues that a list of CRDs factors are '…useful for public policy purposes … as well as judicial decision making in any given case'.[59] This seems to be a sensible submission because already, from decided cases, various factors have been established and arise regularly in most CRDs cases and are part of the CRDs jurisprudence. It is submitted that the proposed legislative guidelines should include these factors and provide a useful balancing mechanism that will assist judges to deal with competing factors when determining CRDs. Stahl argues further that consideration of good faith in CRDs is important because there are parents who are likely to act in bad faith, which can be contrary to the BIC.[60]

This thesis supports the identification of a list of CRDs typical factors which have already been established by courts in various jurisdictions and some of the socio-legal researchers. These factors should not be drafted in such a broad manner and lead to unlimited

[55] Ibid at 60.
[56] Ibid at 60.
[57] Stahl 'Critical issues in relocation cases: A custody evaluator's response to Parkinson and Cashmore and Thompson' (2015) 54 *Family Court Review* 632 at 634.
[58] Ibid at 635.
[59] Ibid.
[60] Ibid.

judicial discretion, which will render any guidance they offer meaningless. There should be a balancing exercise that will enjoin courts to adequately consider and weigh all competing factors without elevating any of them to the status of super factors. Contrary to the main recommendation of this thesis regarding legislative guidelines, Parkinson and Cashmore argue against special legislative provisions relating to child relocation. They identify two challenges with legislative provisions. First, they are of the view that legislative provisions '… require a somewhat arbitrary bright line as to what is and is not a relocation case'. Second, '… once a case is defined as a relocation dispute, lawyers in advising their clients, mediators helping to try to solve disputes, and judges determining cases, will focus on these factors while giving inadequate attention to other issues that go to the best interests of the child'.[61]

In making this point, Parkinson and Cashmore did not refer to examples of jurisdictions which have established legislative guidelines. An assessment of cases decided in jurisdictions like the state of Florida in the USA where CRDs have been decided in accordance with legislative guidelines might have added to the completeness of the argument. A careful study of cases from jurisdictions where there are legislative guidelines, as will be illustrated in chapter five of this thesis, demonstrates that notwithstanding, legislative guidelines, judges retain some level of discretion. This is to ensure that cases are decided in line with the BIC, particularly where it is shown that the mechanical application of statutory guidelines is clearly not in the BIC.

While this thesis advocates for statutory guidelines, it nonetheless, does not recommend the total abolition of judicial discretion in CRDs. It merely argues that such discretion should not be unfettered and must be limited by specific CRDs legislative guidelines. Nonetheless, the balancing exercise that should be linked to the proposed legislative guidelines must enable courts to pay adequate attention to all the competing interests and factors that support such interests to reach conclusions that are in the BIC. Austin, psychologist from USA, has expressed disagreement on similar grounds as follows:

> 'I disagree with the position of Parkinson and Cashmore that argues against the use of relocation factors by statute or case law. It appears they were concerned that adding a list of relocation factors to an existing, and sometimes a very substantial, list of best interests factors would unnecessarily bridle the needed judicial discretion for the nuances and context that relocation disputes entail. I suggest that, due to the complexities and inherent

[61] Parkinson and Cashmore op cit note 27 at 30.

> dilemmas associated with relocation disputes, a factorial analysis is needed to facilitate rational and sound decision making …'.[62]

A factorial analysis will assist judges to respond adequately to the specific circumstances of cases before them, while not unnecessarily deviating from previous approaches relating to similar cases. Stevenson *et al* have expressed concern that participants in the debate about the balance between statutory factors and broader discretion have not always provided '… their readers with a discussion of the qualitative social science data directly related to relocation in divorce cases'.[63] Social science, some of which is empirical in nature, plays an important role in not only the development of CRDs jurisprudence but also influence policy and legislative making processes. This will be dealt with in detail in chapter four of this thesis.

2.3.2 SHARED PARENTAL CARE

As it will be illustrated in chapter three, when exercising their discretion, most South African judges generally applied an outdated notion of parenting when resolving CRDs, wherein the wellbeing and happiness of custodial parents, who in most instances were mothers, was viewed as the decisive factor that contributed to the BIC. The South African courts have tried to ensure that custodial parents' right to decide where their children should reside is preserved, by allowing them to relocate with their children. Available research as well as legal developments in countries like Canada, Australia, United Kingdom and USA, demonstrate a shift in approach regarding post separation parenting in CRDs. In these jurisdictions, the value of the presence of both parents in their children's lives is now continuously emphasised. Shared parenting is generally premised on the idea that while romantic relationships can be terminated, nonetheless, parental obligations which arose from such relationships should not cease unless there is good cause for such termination.[64] Thus, parents are enjoined to restructure their lives in such a way that would enable them to cooperate and assist each other with the care and nurturing of their children post their separation and maintain a relationship with them.

The research conducted by legal academics and psychologists (as discussed in chapter four of this thesis) has provided valuable insights regarding children's needs and adjustments in CRDs and also demonstrated that children generally benefit from the active involvement of

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[62] Austin 'Comment on Parkinson and Cashmore's (2015) Research and proposal for reforming child custody relocation law: Child custody evaluator and psychological Perspective' (2016) 54 *Federal Law Review* 621 at 628
[63] Stevenson *et al* 'Associations between parental relocation following separation in childhood and maladjustment in adolescence and young adulthood' (2018) 24 *Psychology, Public Policy, and Law* 365 at 367
[64] Parkinson 'Family Law and the Indissolubility of Parenthood' (2006) 40 *Family Law Quarterly* 237 at 238.

both of their parents in their lives.[65] There is now emphasis on shared parental care where courts are enjoined by legislation to have regard to the importance of both parents in their children's care and nurturance.[66] It has been argued that shared parental care enable parents to complement each other by ensuring that the parenting weaknesses of one parent are balanced by the parental strengths of the other parent to the children's benefit.[67] DiFonzo observed that in recent times, '[t]he terminology of custody law changed to incorporate notions of "shared parenting" and "parenting plans" in place of the more rigid "custody" and "visitation" … [and] the phrase "frequent and continuing contact with both parents" appears in most state statutes with near mechanical regularity'.[68] In some countries, courts are legislatively required to consider shared parenting when it is required by parents who are viewed as fit to care for children, particularly where they have not exposed children to abuse and violence.[69] This shift in thinking enjoins courts when exercising their discretion to consider the value of both parents in their children's lives post separation.

There are, however, situations that may justify non-relocating parents being prevented from maintaining contact with their children post relocation. Factors that may negate meaningful parental shared care in CRDs include: abuse; domestic violence; neglect; abduction; substance abuse that prevents adequate parenting; one parent's active undermining of the child's relationship with the other parent; or utilisation of unreasonable and excessively restrictive parental means to prevent the child from developing a meaningful relationship with the other parent.[70] While some of these factors should be investigated further by the court, nonetheless, generally abuse and violence will lead the court to deviate from the principle of shared parental care and allow relocation.[71] Nonetheless, it is generally accepted that where it

[65] See National Parents Organisation 'National Parents Organization: 2019 Shared Parenting Report Card' available at https://www.nationalparentsorganization.org/images/2019_NPO_Shared_Parenting_Report_Card_v11_10172019.pdf, accessed 23 June 2020.

[66] DiFonzo 'From the rule of one to shared parenting: Custody presumptions in law and policy' (2014) 52(2) *Family Court Review* 213.

[67] Braver and Lamb 'Shared parenting after parental separation: The views of 12 Experts' (2018) *Journal of Divorce & Remarriage* 1 at 5

[68] DiFonzo op cit note 66 at 213.

[69] Brinig 'Shared Parenting Laws: Mistakes of pooling?' 2014 Notre Dame Legal Studies Paper No. 1426 (August 14, 2014) 38.

[70] Nunn and Lawrence 'Child Relocation: Case Law, Social Science, and Practice Implications' (2020) 32 *Journal of the American Academy of Matrimonial Lawyers* 383.

[71] It is important however, to bear in mind that when considering shared parenting, courts particularly in the context of CRDs, could also be confronted by non-custodial parents who while not abusive and violent, nonetheless, are strong disciplinarians. While such parents can become less popular with the children, nonetheless, their love and commitment to the children may justify their continued involvement in their children's lives. See Warshack 'When evaluators get it wrong: False positive IDs and parental alienation' (2019) 25 *Psychology, Public Policy, and Law* 1 at 6.

is possible to foster shared care, children would generally benefit from the involvement of both their parents in their lives.[72]

Due to the pressure exerted by lobby groups that argued for greater involvement of fathers in the care of their children and researchers who conducted studies that proved the importance of both parents in their children's lives, some countries began to rethink their parent/child laws. Countries like Australia, United Kingdom and Canada started responding by gradually moving away from emphasising the importance of children to have attachments with parents who were viewed as their 'primary caregivers' to ensuring that children maintain relationships with both of their parents.[73] These countries introduced legislative provisions that enjoin courts to consider the role of both parents in their children's lives.

As it will be shown in chapter five of this thesis, in Australia, section 61DA of the Family Law Act, 1975 provides for the presumption of equal shared responsibility which courts are enjoined to apply unless there is evidence of child abuse or family violence affecting children and custodial parents.[74] The presumption in favour of shared parenting when courts are adjudicating CRDs is in line with what some lobby groups have advocated for, that shared parenting presumptions should be adopted in order to restrain judges' discretion when adjudicating disputes involving children.[75] In terms of this presumption, courts are duty bound to consider the value of the involvement of both parents in their children's lives before deciding in a way which would separate one of the parents from their children. Parkinson observed that the legislatures that have encouraged shared parenting have not been too prescriptive and have allowed courts the space to exercise their discretion to determine what would be in the BIC in each case.[76]

While there are researchers who support the idea of statutory presumption of shared care, nonetheless, these researchers have cautioned that a one size fits all standard will not be appropriate and clear exceptions that can rebut such a presumption must be recognised.[77] It has been argued that '[a] shared parenting presumption is, then, unlikely to encourage those fathers who do not want contact to maintain relationships with their children. It might however, enable

[72] Ibid.
[73] Parkinson op cit note 64 at 243.
[74] See also Behrens, Smyth and Kaspiew 'Australian family law court decisions on relocation: Dynamics in parents' relationships across time' (2009) 23 *Australian Journal of Family Law* 222 at 226.
[75] See National Parents Organisation 'National Parents Organization: 2019 Shared Parenting Report Card' available at https://www.nationalparentsorganization.org/images/2019_NPO_Shared_Parenting_Report_Card_v11_10172019.pdf, accessed 23 June 2020.
[76] Parkinson op cit note 64 at 243.
[77] Braver and Lamb op cit note 67 at 9.

some fathers who do want contact to view the law less negatively'.[78] Bala cautions that any presumptions in favour of shared parenting in the context of CRDs should be carefully formulated. He is of the view that there is no need for the legislature to include the 'confusing concept of "substantially equal time" which might or might not imply shared custody'.[79] Parkinson has observed that there is a general confusion in the use of language regarding 'shared parenting' and 'shared care' and argues that while there is no universally accepted definition of what 'shared care' means, it nonetheless, does not necessarily mean equal time.[80] It is however, clear that irrespective of whether there is a presumption of shared parenting the general legislative recognition of this concept ensures that courts, when deciding disputes involving children, do not assume that non-custodial parents play less significant roles in their children's lives. Courts are enjoined to embark on a fact-finding mission of the actual role played by non-custodial parents in their children's lives.

Unfortunately, in South Africa, the legislature has not yet considered circumstances under which the involvement of non-custodial parents post relocation on their children's lives can be maintained, where it is possible to do so. In fact, while South African courts rhetorically refer to the rights of non-custodial parents, who are usually fathers, to maintain contact with their children, they nonetheless do not engage the importance of both parents being involved in their children's lives and the potential benefits that children could derived from such involvement. For judges to align themselves with the shift in thinking regarding parenting around the world, it is submitted that there is a need for legislative guidelines that will enjoin them to do so.

Despite the shift towards shared parenting around the world, unfortunately South African judges, as it will be demonstrated in chapter three, continue to use interpretative tools that seek to elevate the importance of custodial parents when resolving CRDs, most of whom in practice are mothers. This has enabled judges who fundamentally believe that it is generally in the BIC to be raised by their custodial parents (most of whom are mothers in practice) regardless of the facts before the court that illustrate that non-custodial parents (most of whom are fathers in practice) are better suited to care for their children, to either allow custodial parents or refuse non-custodial permission to relocate with their children.

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[78] Kaganas 'Shared parenting – a 70% solution?' (2002) 14 *Child and Family Quarterly* 374.

[79] Bala 'Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf, accessed 23 June 2020

[80] Parkinson 'The payoffs and pitfall of law that encourage shared parenting: Lessons from the Australian experience' (2014) 37 *Dalhousie Law Journal* 303.

It is worth noting however, that there is evidence that demonstrates that where shared parenting is legislated, judges' discretion to allow custodial parents to relocate is somewhat limited, particularly when it is clear that non-custodial parents play a significant role in their children's lives, who generally benefit from the involvement of both parents.[81] Legislation which requires judges to consider the importance of non-relocating parents in their children's lives, generally leads to custodial parents' relocation applications being declined, particularly where there is no evidence of abuse and violence.[82] According to Parkinson, many cases where relocation has been allowed in circumstances where shared parenting has been legislated, '… have involved situations where there are significant issues concerning the fitness and parenting capacity of one of the parents'.[83] In particular, relocation is likely to be allowed where there is history of violence, abuse or parental disinterest'.[84] He further notes the difficulty of parents who wish to relocate obtaining permission to relocate outside Australia since the shared parenting responsibilities were legislated.[85] According to Behrens, Smyth and Kaspiew, it was expected that it would be more difficult for courts to permit relocation in circumstances where parents were sharing the care of their children when such relocation decisions were made.[86] It appears that shared parenting which is beneficial for children and their development is seen as a bigger picture in the determination of their best interests in CRDs. It shifts focus from the parental rights and interests to what is best for children who are before the court.

It is impossible for courts to adequately safeguard the BIC without the exercise of any discretion. It cannot be denied that discretion is ingrained in the process of judicial decision making.[87] Given the fact that discretion is susceptible to abuse, it is submitted that adequate legislative guidelines will prevent the abuse of discretion. Limited discretion that is guided by legislative guidelines will enable judges to mitigate against the risk presented by parents who seek to advance their own interests by relocating without properly assessing and appreciating the importance of non-relocating parents' regular involvement in their children's lives. Such guidelines should also require judges to reflect on the role of relocating parents in preventing

[81] Behrens, Smyth and Kaspiew 'Outcomes in relocation decisions: Some new data' (2010) 24 *Australian Journal of Family Law* 97 at 99 and Parkinson 'The realities of relocation: Messages from judicial decisions' (2008) *22 Australian Journal of Family Law* 35.
[82] Behrens, Smyth and Kaspiew op cit note 81 at 99.
[83] Parkinson op cit note 81 at 37.
[84] Ibid.
[85] Ibid at 38, he observes that '… the pattern of decisions suggests that relocation has become significantly more difficult than it was before 2006', which is the year the amendments that introduced the concept of shared parental responsibilities. The Australian position will be dealt with in chapter five of this thesis.
[86] Behrens, Smyth and Kaspiew op cit note 81 at 100.
[87] See generally Schneider op cit note 26.

children from developing and maintaining positive relationship with their non-relocating parents.[88]

However, there are times where the relocation of parents may be completely justifiable even though the non-relocating parents are loving and devoted to their children (attributes that would ordinarily point to shared parenting). It is submitted that probably, children with special health and educational needs that require relocation to locations where such needs can be met can provide a basis for relocation even where non-relocating parents are committed to their children. Relocation will be more in the BIC than insistence that children maintain relationships with non-relocating parents while their health is deteriorating or are not attaining the kind of education that would enhance their development.[89]

It is submitted that the shared parenting initiative is one of the approaches from foreign jurisdictions that the South African legislature should consider when developing its CRDs legislative guidelines. South Africa should not fall behind while available research and jurisprudence of other countries clearly demonstrate the clear shift in thinking regarding parenting generally and child relocation, in particular. It is important that there is both legislative and judicial recognition in South Africa of the importance and value of both parents in children' lives to the extent to which both parents are able to maintain meaningful relationship with their children post-relocation. Currently, South African judges are not bound by any legislative provisions that require adequate consideration of the importance of both parents in their children's lives.

The concept of shared parenting in the context of CRDs is not without challenges. There is always a possibility of post separation conflicts between parents which may or may not necessarily have anything to do with children, some of which may include court applications, pattern of harassment of one parent by the other, or one parent negatively influencing the child. These may make shared parenting and joint decision making difficult between the parents.[90]

2.3.3 CHALLENGES WITH JUDICIAL DISCRETION

Currently in South Africa, there are neither judicial nor legislative presumptions which judges are mandated to follow when deciding CRDs. Nonetheless, in line with Thompson and Bala's approaches regarding precedent, judges generally defer to custodial parents (most of whom are

[88] Nunn and Lawrence op cit note 70 at 397.
[89] Ibid at 403.
[90] Parkinson 'Family Law and the indissolubility of parenthood' (2006) *Family Law Quarterly* 253.

mothers in practice) and endorse their decisions to relocate unless it is clearly demonstrated that relocation is not in the BIC. However, at times judges, as will be demonstrated in chapter three of this thesis, do not follow precedent on the basis that each case is unique and must be decided based on its own merits. This enable judges to exercise their discretion to decide or reason similar cases differently. This has made CRDs difficult to predict because without adequate legislative guidelines every judge is able to formulate their own approaches, which makes the law inconsistent.

Judicial discretion enables subjective decision making. Available research indicates that there are significant differences in the way judges determine CRDs.[91] As it will be shown in the discussion of South African CRDs cases in chapter three, judges do not adequately balance competing factors. They routinely select and place more emphasis on certain factors and render insignificant those factors that do not allow them to reach their desired outcomes without proper analysis. They turn selected factors into 'super factors'. This leads to the inconsistent development of CRDs jurisprudence and '…reflect[s] different interpretations of the law and beliefs about the best interests of children among clusters of judges who work together in the same location'.[92] It has been correctly argued that '… each judge inevitably has his own subjective opinion as to the degree of weight to be attached to each fact[or] in assessing the best custodian … [and] that it is undesirable to have a system of adjudication whereby different judges would make [different] custody orders in the same fact situation'.[93]

In the absence of adequate CRDs legislative guidelines, when CRDs arise in the future, courts will be at liberty to constantly decide and reason them differently depending on who the judges are. Failure to treat CRDs cases with similar facts the same leads to lack of predictability which encourages protracted litigation, wherein parties will appeal to higher courts with the hope of finding sympathetic judges who might view factors they rely on as 'super factors', which such judges will overemphasise to decide in their favour.

The BIC principle confers broad discretion on judges which carries the potential for abuse.[94] Mnookin forcefully argued that due to the indeterminacy of what is in the best interest of a particular child, it is justifiable to be concerned by the breath of power exercised by judges

[91] Parkinson 'Freedom of movement in an era of shared parenting: The differences in judicial approaches to relocation' (2008) 36 *Federal Law Review* 143 at 146 (footnotes omitted).
[92] Ibid.
[93] Bradbrook 'The role of judicial discretion in child custody adjudication in Ontario' (1971) 21 *The University of Toronto Law Journal* 402 at 403.
[94] Warshak 'Parenting by the clock: The best-interest-of-the-child standard, judicial discretion, and the American Law Institute's "Approximation Rule' (2011) 41 *University of Baltimore Law Review* 83 at 106.

in the resolution of custody disputes.[95] Bulow and Gellman have demonstrated that courts often resolve CRDs by '… imposing a solution based upon [their] own notion of what is the "best interests of the child".[96] They argue that '… any decision will necessarily depend, at least in part, on value judgments made by the person assessing the evidence'.[97] It has also been argued that '[a]s a result of wide discretion accorded judges in this area, coupled with their minimal familiarity with the families before them, judges will naturally rely on their personal biases and beliefs, including any gender or other biases they may consciously or subconsciously hold, rather than on any carefully defined standards'.[98]

It cannot be denied that historically, courts decided custody related disputes in favour of custodial parents, most of whom are mothers in practice. The custodial parents' preference provided custodial parents the right to freely decide where their children should reside and the right to relocate with them. While in principle, custody decisions before the shift in thinking towards shared parental care, were based on custodial parent preference and were not decided in favour of custodial mothers on the basis of their sex, there is nonetheless, evidence in the custody literature that some judges decided custody cases on the basis of motherhood.[99] It has been demonstrated that judicial discretion enables judges not only to conceal the basis of their decisions but also permits them to consult illegitimate considerations, such as gender bias, when making custody determinations.[100] Ronnfeldt observed that '[c]ourts are a mirror of societal ideals and culture that it serves, many elements of the present-day culture may impact judicial beliefs [and] bias.[101] Available research demonstrates that '… family law appears to be stagnant in regard to custody decisions, which frequently awards custody to the mother … thereby display[ing] gender bias …'.[102] Other studies illustrate that it is more difficult for fathers who want custody of their children to be awarded custody due to gender stereotypes.[103]

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[95] Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy (1975) 39 *Law and Contemporary Problems* 230.
[96] Bulow and Gellman 'The judicial role in post-divorce child relocation controversies' (1983) 35 *Stanford Law Review* 961.
[97] Ibid at 957.
[98] Nickerson 'Gender bias in a Florida Court: "Mr. Mon" v. "The poster girl for working mothers' (2000) 37 *California Western Law Review* 185 at 203.
[99] See for instance Rumpff JA's approach in *Shawzin v Laufer* [1968] 4 ALL SA 455 (A) at 466. This case is critically discussed in chapter three of this thesis.
[100] Schneider 'Discretion, rules, and the law: Child custody and the UMDA's best-interest standard' (1991) 89 *Michigan Law Review* 2249.
[101] Ronnfeldt 'Does gender still matter? Child custody bias in Illinois Family Court System' (Unpublished Master thesis Illinois State University 2016) 19.
[102] Estep 'Mommy or Daddy? Perceived gender bias and court awarded custodial guardianship' (Honours thesis 2011) 4.
[103] See Mason and Quirk 'Are mothers losing custody? Read my lips: Trends in judicial decision making in custody disputes – 1920, 1960, 1990 and 1995' *Family Law Quarterly* 215.

Gender bias, in custody cases, is a result of traditional gender stereotypes and has the effect of denying men the opportunity to participate actively and meaningfully in the care of their children.[104]

It cannot be denied that most children are raised by mothers, but it is undesirable for any particular individual child before the court to be viewed in terms of other children who are generally raised by their mothers, when that specific child is raised by his father. If the unique circumstances of the child before the court demonstrate that the primary caregiver is a father, it will not be in the BIC to award custody to the mother or allow the mother to relocate with the child merely on the basis that mothers are traditionally regarded as primary caregivers. This would be a blatant disregard of the child's reality and the fact their father is their primary caregiver.

Judges have views on how families should be structured, and the way parental roles should be discharged. It is almost impossible not to consider the judges' backgrounds, experiences and views in family law matters.[105] Eekelaar has demonstrated that the outcome of family law disputes '… depend on the personnel who make up the bench …'.[106] That certain judges, when deciding family law cases, inject a subjective ideology of family life where 'a stereotyped model of family life in which the more complex, certainly more conventional, structure of the mother's household …' is preferred.[107] Most importantly, Eekelaar further argued that '[f]amily law has too long suffered from the myth that, as every case is different, their resolution must be left to the discretion of individual judges'.[108] According to Garrison '… the research findings thus suggest that if trial judges are given clear legislative and appellate guidance, discretionary divorce decision making may, over time, produce highly predictable results'.[109]

Failure to establish CRDs legislative guidelines enables judicial officers to rely more on their discretionary thinking which might be almost unfettered at times and lead to the unpredictability of cases. As it was pointed out in chapter one of this thesis, section 7 of the Children's Act already provides broad legislative guidelines regarding BIC. However, these guidelines do not adequately deal with CRDs. For instance, these guidelines do not provide a

[104] McNeely 'Lagging behind the times: Parenthood, custody and gender bias in the Family Court' (1998) 25 *Florida State University Law Review* 891 at 942.
[105] See Finlay 'Judicial discretion in family and other litigation' (1976) 2 *Monash University Law Review* 221 at 225.
[106] Eekelaar 'Trust the judges: How far should family law go?' (1984) *Modern Law Review* 593 at 596.
[107] Ibid at 595.
[108] Ibid at 597.
[109] Garrison 'How do judges decide divorce cases?: An empirical analysis of discretionary decision making' (1996) 74 *North Carolina Law Review* 401 at 511.

mechanism for how competing factors ought to be balanced. This enables judges to prefer certain factors over others to reach their desired outcomes. Murphy convincingly argues that:

> '[b]road discretion in family law decision making is detrimental to the judicial system and to the parties seeking to resolve disputes. Vesting judges with such discretion does not enhance their ability to make just decisions; instead, it jeopardizes fundamental rights of parents and children'.[110]

To address these challenges effectively, this thesis advocates for the establishment of CRDs statutory guidelines. These guidelines are necessary because family law '… is characterized by more discretion than any other field of private law. This fact is typically explained by a perceived need to tailor legal resolutions to the unique circumstances of each individual and family'.[111] However, this approach has led to similar CRDs cases that raise similar legal issues and factual scenarios being treated and reasoned differently by different judges.[112] With the establishment of adequate CRDs legislative guidelines, there would be some degree of consistency in how CRDs are decided. Any judge who deviates from such guidelines would be forced to provide some justification for the conclusion reached. This could then be challenged or confirmed on appeal or rejected by other judges in different CRDs cases.

Judicial discretion should not be unfettered. It should be constrained by legislative guidelines that can cater for already known CRDs circumstances as established by decided cases. These guidelines ought to be informed by the BIC principle, which is a standard that is '… intended to give a court authority to decide a particular case in accordance with a general principle which is flexible enough to allow the outcome to be tailored to each specific case'.[113] This would ensure that judicial discretion is not totally eliminated and where justifiable could be relied on to reach a just CRD outcome. When drafting these guidelines, the legislature should be careful with the BIC principle because standards generally confer judges with the authority to act in certain factual scenarios in accordance with their own personal judgment which often leads to legal uncertainty.[114]

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[110] Murphy 'Eroding the myth of discretionary justice in family law: The child support experiment' (1991) 1 *North Carolina Law Review* 209 at 210.
[111] Glendon op cit note 2 at 1167-68.
[112] Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (2016) 32.
[113] Ibid at 19. The principle of the best interests of the child is a well-known standard in Family Law.
[114] Pound 'Discretion, dispensation and mitigation: The problem of the individual special case' (1960) 35 *New York University Law Review* 925 at 926.

Judicial discretion is generally thought off as the preferred method that should be used to fill identified gaps in the law. It enables 'courts to adjust incrementally to changing social ideas without having to readjust legislative standards too often and too radically'.[115] There is an inherent danger with this approach, particularly in a country as diverse as South Africa which embraces varying family values that are influenced by factors such as race, politics, economics, and diverse cultural beliefs. South African judges are drawn from people of differing backgrounds. Irrespective of their backgrounds, judges are expected to preside over anyone before them irrespective of such litigants' backgrounds.

For instance, even though the Constitution recognises everyone's right to culture and tradition, nonetheless, a white conservative judge who firmly adheres to western ideals may be influenced by his or her perception of family life when adjudicating over a conservative black litigant who strongly believes in customary law ideals of the family.[116] It is possible for a judge to '… be distracted from a just result by the special but irrelevant circumstances of the particular litigant. Sometimes these can be plainly irrelevant factors, like racial prejudice'.[117] It is worth noting that if it is found that the judge was biased on any basis including race, the judge's decision can be reviewed by the higher court and overturned. In other words, apart from legislative guidelines, there are other means to deal with an individual judge's conduct. However, this route is not open to every litigant simply because '[l]itigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen'.[118]

Legislative guidelines are better suited to constantly remind judges not to be guided by their personal persuasions when resolving CRDs. First, these guidelines would enable judges to adequately balance all the factors presented for and against relocation. Secondly, they would allow for judges to properly evaluate the current living conditions of both parents and specific circumstances affecting children before them to adequately determine what would be in the best interests of such children. Thirdly, they would necessitate a proper assessment of the facts, which would in turn reveal children's primary caregivers and enable courts to properly decide CRDs having regard to the wellbeing of children. Finally, these guidelines would prevent judges from deciding cases based on traditional roles generally attributed to mothers without

[115] Schneider op cit note 100 at 2263.
[116] It is worth noting that when deciding cases, judges are supposed to take into account the Constitution and the cultures and traditions of those before the court, but only if such cultures and traditions are not inconsistent with the constitution.
[117] Schneider op cit note 100 at 2250.
[118] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 52.

properly assessing the role of the specific father before the court in the child's life, who, upon proper assessment of the facts might be established as the child's primary caregiver.

2.3.4 JUDICIAL DISCRETION IN CRDs IN SOUTH AFRICA

In 2015, the South African Law Reform Commission's (hereafter SALRC) advisory committee on 'family disputes: care of and contact with children' was tasked with 'the development of an integrated approach to the resolution of family disputes'.[119] The advisory committee's objective was to investigate methods that could enhance the efficiency of the judicial system in order to ensure that children have access to justice.[120] The SALRC identified the relocation of children as one of the family disputes that South African courts find difficult to resolve. The SALRC identified four common outcomes in CRDs, which are that the court may: allow relocation; refuse relocation; disallow relocation thereby forcing the parent to relocate without the child and primary care of the child to be transferred to the non-relocating parent; or may allow relocation and the non-relocating parent may decide to also relocate to the destination of the relocating parent.[121] Some parents make it clear that if courts refuse them permission to relocate with their children, they will not relocate.

To reach any of these outcomes, the judge will be confronted with various competing factors that ought to be balanced when exercising judicial discretion. These factors range from individual parents' personal interests and preferences, their economic and social advantages, current or future employment or business opportunities, available communal or family support, children's educational and recreational opportunities, potential for new families, viability of contact between children and their non-relocating parents, psychological impact of the move on children, as well as the real motives of relocating parents.[122] These factors influence judges when determining what is in the BIC in CRDs.

As it will be illustrated in chapter three of this thesis, judges often do not adequately balance and assess various factors that parents rely on to make out their cases for and against relocation. Judges tend to isolate certain factors and place undue weight on such factors to arrive at their desired outcomes. When judges concentrate on some factors while ignoring or minimizing the value of other factors, this results in judge-created 'super factors' which are

[119] 'Family dispute resolution: Care of and contact with children' Project 100D Issue paper 31 (December 2015) vi.
[120] Ibid.
[121] Ibid 64.
[122] Ibid.

used to justify their decisions. In effect, judges' reliance on some factors rather than others prevents them from holistically assessing competing factors. This is not in the BIC.

The broad discretion afforded to judges when adjudicating CRDs allows them to elevate certain facts as 'super factors' from the evidence before them to reach their desired outcomes. This broad discretion was succinctly captured by Nugent J (as he then was) in *Godbeer v Godbeer* when he correctly opined that in approaching a CRD he was '… required to accord paramount consideration to the welfare of the children … but that is itself a relative concept which can only be judged within the context of their particular circumstances'.[123] This broad judicial discretion enables judges to criticise or disregard factors that do not assist them to reach their desired outcomes. As will be shown in the discussion of CRDs cases in chapter three, judges' choice of 'super factors' are to some extent influenced by the judges' personality, background, ideological positions and perhaps their unconscious biases. This thesis argues that judges' discretion should be constrained by clear judicial guidelines which prevent reliance on selected 'super factors' of the judges' personal choosing.

3 CONCLUSION

This chapter discussed the role of judicial discretion in CRDs. It illustrated the shift regarding the care and nurturing of children wherein the importance of both parents in their children's lives is duly considered. It further showed that South Africa has not yet embraced this shift in thinking in as far as CRDs are concerned. This chapter illustrated that there is a need to limit judges' discretion through legislative guidelines to prevent non-judicious factors influencing judges' interpretation of the facts and the outcome of cases. It was argued that the proposed legislative guidelines would go a long way in ensuring that like cases are treated alike to promote predictability and consistency in the adjudication of CRDs.

[123] 2000 (3) SA 976 (W) at 981.

3 CHAPTER THREE: SOUTH AFRICAN INCONSISTENT JUDICIAL APPROACHES TO CRDs

3.1 INTRODUCTION

Life circumstances such as failed relationships, job or education opportunities, pursuing new romantic relationships, or even crime may induce a person to relocate from one place to another. If the contemplated relocation involves children,[1] such a decision is likely to be opposed by the non-relocating parent leading to acrimonious litigation. One of the major reasons that often triggers the objection to child relocation is the non-relocating parent's desire to maintain regular contact with the child and thus, influence the child's development. The parties look to the courts to decide on the proposed relocations, resulting in disputes which courts generally find difficult to adjudicate.[2]

This chapter examines how South African courts have approached CRDs where one parent wishes to relocate to either a different place in South Africa or to a different country. In South Africa, given the distance between provinces and metropolitan areas, courts generally apply the same principles for national and international relocations. While this is a factor that the court may consider, nonetheless, in most of the decided internal relocation cases in South Africa, both the parents and courts did not focus much on the time non-relocating parents might take to visit their children after relocation. It will be shown in this chapter that the disputes turned on the ability, from a financial point of view, of non-relocating parents to maintain contact with their children by visiting them. This has also been a major factor in relation to international relocations. While some non-relocating parents argued that they will be unable to make frequent visits because of the costs involved, nonetheless, generally they have been found to have the means to travel by air. However, there might be other non-relocating parents from underprivileged backgrounds who may not be able to travel by air or road to exercise their contact rights post relocation due to lack of financial resources. This is one of the factors that must be considered when determining CRDs.

The purpose of this chapter is to illustrate, through decided cases, that individual judges use their discretion to pick and choose factors that lead to their desired outcomes. Further, that these judges overemphasise their selected factors and render as insignificant, factors that may

[1] Bruch 'Sound research or wishful thinking in child custody cases? Lessons from relocation law' (2006) 2 *Family Law Quarterly* 281 at 282.

[2] See Austin 'Relocation, research, and child custody disputes' in Kuehnle & Drozd (eds) *Parenting Plan Evaluations: Research for the Family Court 2012* (540-559) 540.

have been relied heavily upon either by a trial judge dealing with the same facts or a different judge in a different case dealing with similar facts. It will also be shown that when the same case is heard by three different courts: the high court; the full bench of the high court; and the Supreme Court of Appeal (SCA), different judges who preside in these courts are able to rely on their preferred factors to reach their intended outcomes, leading to an inconsistent development of CRDs jurisprudence in South Africa. Different trial and appeal judges continually use different methods when adjudicating CRDs, making the law less predictable. Due to a lack of legislative guidelines, individual judges tend to inflate some factors into 'super factors' while ignoring other relevant factors.

The inconsistency highlighted in this chapter is not in relation to the outcome of CRDs cases, but the reasoning adopted to reach such outcomes. It is disappointing that most of the cases that were decided after the promulgation of the Children's Act neither referred to the factors listed in section 7 of this Act nor indicated their usefulness in the context of CRDs.[3] It will be argued that the absence of specific legislative guidelines relating to CRDs makes it possible for judges to rely on their discretion when determining the BIC which makes this area of law inconsistent and unpredictable. It is the assertion of this thesis that legislative guidelines are necessary to prevent this problem.

3.2 CASES DECIDED BEFORE 1993

3.2.1 GENERAL OVERVIEW

This section outlines the history of CRDs jurisprudence in South Africa throughout the 20th century and into the 21st century. To a large extent, child relocation cases reflected the prevailing attitudes to custody and access in South Africa. As indicated in chapter two, courts developed the CRDs jurisprudence using legal principles relating to child custody and access. Before 1993, there was no legislation that referred to the relocation of children. Courts had to develop their own approaches when resolving CRDs, such as assessing the reasonableness and good faith of the relocating parent as well as favouring custodial parents, majority of whom were mothers. Some of these approaches continued to be followed by South African courts post 1993.

[3] 38 of 2005. See also Sisilana 'The best interests of the child; a critical evaluation of how the South African court system is failing to use section 7 of the Children's Act' (unpublished LLM Dissertation, UCT 2016) 46, where it is shown that there are courts that have failed to use the section 7 factors and opted to rely on the common law precedent.

As it will be made clear from the cases discussed below, initially, a parent who was awarded custody had no obligation to keep the child within the jurisdiction of the court.[4] The custodial parent could independently decide to relocate with the child without consulting the other parent, unless the court ordered the child to be kept within its jurisdiction. The development of custody law, in line with the concept of reasonable access, restricted custodial parents' power to unilaterally remove children from the courts' jurisdictions. Parents who wished to exercise contact rights usually approached courts to oppose the relocation.[5] In court, non-custodial parents' usually argued that the intended relocations were intended to frustrate their right to contact their children or that the proposed relocations were not in the BIC.[6] They also sought to illustrate that either the proposed relocations were *mala fide* attempt to defeat their right of access or that despite being *bona fide*, they were unreasonable.[7]

Good faith or the reasonableness of the proposed relocation was usually assessed by determining the genuineness of the decision to relocate.[8] This was to evaluate whether the decision was taken merely to prevent the non-custodial parent from accessing the child.[9] Judges did not provide guidance on how one should go about determining the genuineness of the decision. It appears to have been taken for granted that the facts of the case would indicate whether the decision was made in good faith. With regards to reasonableness, it seems that the non-custodial parent had to provide some special reason to convince the court of the unreasonableness of the other parent's decision to remove the child from the jurisdiction of the court. Relocation that was motivated by the non-custodial parent's refusal to reconcile with the custodial parent was viewed as a retaliatory tactic aimed at punishing the non-custodial parent, and thus unreasonable.[10]

Before 1993, judges in CRDs cases placed more emphasis on the custodial parent's right, as a custodian parent, to determine where the child should reside. Custody rights entitled the custodial parent to make major decision regarding the child such as: where the child should attain education; which religion the child should observe; and whether to take the child to a different place, be it within South Africa or abroad. Since custody was mostly awarded to mothers, fathers played less significant role in decisions that affected their children.

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[4] See generally *Kerr-Cross v Kerr-Cross* 1939 WLD 168 at 170; *Theron v Theron* 1939 WLD 355. 362; *Etherington v Etherington* 1928 CPD 220; and *Lecler v Grossman* 1939 WLD 41 at 43.
[5] See generally *Johnstone v Johnstone* 1941 NPD 279; *Argall v Argall* (1945) 2 PH B57 (W) and *Taylor v Taylor* 1952 4 SA 279 (SR).
[6] *Lecler and Etherington* supra note 4.
[7] *Theron* supra note 4.
[8] See generally *Van Wijk v Creighton* 1925 (5) PH B21.
[9] See generally *Theron* supra note 4.
[10] See *Taylor* supra note 5.

3.2.2 CASES DECIDED BEFORE STATUTORY RECOGNITION OF RELOCATION OF CHILDREN

Pre-1993 cases demonstrate the development of South African CRDs jurisprudence and illustrate the inconsistency of individual judges who overemphasised certain factors and treated them as 'super factors' while disregarding competing factors which were regarded as decisive in previous similar cases. These cases will be used in this chapter to demonstrate the point that different judges weighed and interpreted competing factors differently to reach their desired outcomes.

In the 1928 case of *Etherington v Etherington*,[11] the court did not use its discretion but rather followed an inflexible firm rule which favoured custodial parents which was applicable at the time. As indicated in chapter two, this inflexible rule was a presumption in favour of custodial parents.[12] This presumption prevented the court from adequately assessing the circumstances of both parents and the children before the court to determine what would be in the BIC. This thesis neither recommends the establishment of fixed rules nor totally abolishing judicial discretion. It does, however, recommends the establishment of adequate legislative guidelines that will require judges to properly assess, weigh and balance competing factors when adjudicating CRDs.

In *Etherington*, the court awarded custody of the children to the father who wished to take them to England despite the mother's objection. In permitting the father to relocate, the court was of the view that the father, as the custodial parent, had not done anything that justified being prevented from relocating with the children.[13] It was the court's impression that providing the mother with the right to access the children would have a real impact of restricting the father's decision to relocate, which decision he was entitled to make as the custodial parent.[14] The court did not assess the roles of both parents in their children's lives and the quality of their parenting. It implemented the presumption in favour of the custodial parent without useful analysis and balancing of all the factors relied upon by both parents.

Cases that followed were not decided based on any fixed rules, but judges started applying their discretionary powers to rely on factors that led to their desired outcomes. Nonetheless, some judges restricted their discretion by deciding cases based on custodial rights.

[11] 1928 CPD 220.
[12] See the discussion under subheading 2.3.
[13] *Etherington* supra note 4 at 222.
[14] Ibid.

In case of *Theron v Theron,*[15] the father applied to the court to restrain the custodial mother from relocating to Nairobi with the children to protect his access rights. The mother had already taken the children to Nairobi before the court could deal with this matter. The father also sought an order for the children's return on the basis that the mother acted unreasonably and in bad faith when she removed them from the court's jurisdiction. The father's main argument was that the children were, at the time, being cared for by their maternal grandparents and not their mother.[16] Both parents were not spending much time with their children. In dismissing the father's application, the court turned factors that supported the mother's case into 'super factors' which were used to reach the judge's desired outcome. The court noted that the mother was employed in Nairobi and that it would be expensive for her to commute between Nairobi and South Africa. Further, that the father failed to prove that the removal of the children was detrimental to their welfare or calculated to injure them.[17] The court was also of the view that the father had failed to prove that, the mother, by removing the children, acted in bad faith with an intention to frustrate his access rights.[18]

The court chose to place emphasis on the mother's good faith in removing the children and held that the decision to relocate was reasonable because it was becoming expensive for her to travel by air back to South Africa. The court downplayed the father's right to have reasonable access to the children which the father had exercised while the children were still in South Africa. Finally, it is worth noting that at the time this case was decided, there was no law that required custodial parents to seek permission from other parents to relocate with children and that the Hague Convention was not yet in existence. However, given the father's interest in the children, the court should have considered the fact that the father's contact with the children was restricted without his input as well as how that impacted on the BIC.

The minority judgment of the full bench in the 1941 case *Johnstone v Johnstone,*[19] is another important judgment that demonstrates the importance of adequately balancing competing factors in the absence of legislative guidelines. In this case, the mother was the primary caregiver. She wished to relocate from Durban to Cape Town for remarriage. Given the fact that at the time of the application, the father was in military service, the trial court allowed the mother to relocate with the children. The father appealed to the full-bench. The factors that were considered by the trial court were the same as those considered by the full-

[15] 1939 WLD 355.
[16] Ibid at 358.
[17] Ibid at 360.
[18] Ibid.
[19] 1941 NPD 279.

bench, but the judicial understanding of those factors was different in both courts. Hathorn JP on behalf of the full-bench, in setting aside the trial court's decision, held that the mother's decision to remarry did not change the father's rights to the children and was not a decisive factor justifying the proposed relocation.[20] Whereas the trial court was of the view that in any event the father was not around the children since he was in military service.[21]

Selke J dissented and held that '… the [c]ourt would not be doing its duty as upper guardian if it were to make an order affecting their custody or possession without satisfying itself that the order was not detrimental to the children's interest and welfare'.[22] Selke J evaluated the reasons which were advanced against the proposed relocation such as: the children's loss of contact with their paternal relatives; the possibility of the children's estrangement when raised by a stepfather which might lead them to lose interest in their father; the children's exposure to serious breaks in their schooling; and that they would not grow up in the father's '… home town amongst his friends and in the neighbourhood in which the bulk of his own family reside[d]'.[23] He then correctly held that this must be balanced against possible advantages that will be derived from having the constant attention and care of their mother within a new family environment.[24]

Even though Selke J reached the same conclusion as the lower court, his approach was different from that of the lower court. Selke J assessed the prevailing circumstances and dealt with what was practicable in the BIC under the circumstances. He evaluated the factors against relocation and attempted to balance them with those that favoured relocation. This case illustrates the role of judicial discretion, wherein you have four different judges evaluating the same facts in the absence of legislative guidelines and adopting different reasoning to reach different or similar conclusions.

In 1968, the Appellate Division (AD) in *Shawzin v Laufer,*[25] was presented with an opportunity to craft the South African approach to CRDs and thereby set a precedent for all other courts. The AD did not use the phrase 'child relocation' but determined the dispute from a custody-access point of view. Before the matter went on appeal to the AD, the high court had permitted the mother to relocate with her new family to Canada. The high court held that the

[20] Ibid at 288.
[21] Ibid at 283.
[22] Ibid at 297.
[23] Ibid at 304.
[24] Ibid.
[25] [1968] 4 All SA 455 (A).

mother, as the custodial parent was entitled to have the children with her because they were much better off with their own mother than with anyone else.[26]

The father appealed to the AD to reverse the high court order. Rumpff JA (as he then was) delivered a precedent setting unanimous decision for the court. Unlike all the decisions of the lower courts on the removal of children from South Africa which were to a lesser or larger extent more interested in the reasonableness or good faith of the relocating parent, Rumpff JA's analysis did not at all reflect on the reasonableness or good faith of the mother's decision to relocate but instead decided the matter based on the mother's custodial rights. When deviating from the established reasonableness and good faith approach, Rumpff JA recognised that the lower court considered '… issues before it … in the light of the reasonableness of the father's attitude and the interests of the children'.[27]

However, Rumpff JA made it clear that BIC were 'predominant'.[28] The usage of the word predominant signified that the BIC should be taken as paramount. Declaring the BIC as predominant was an important development but equally troubling because in dismissing the father's appeal, Rumpff JA when establishing the BIC emphasised the importance of the mother in her children's lives given their tender age. To his mind, it would be more detrimental to the children to be forced to live without their mother than it would be to have only limited access to their father. Rumpff JA was convinced that removing children from their mother '… would obviously have serious psychological consequences'.[29] Rumpff JA in this case appears to have looked at the mother not only as the custodial parent but as a person who performs a critical function that children in their tender age need. He appears to have decided this case in favour of the custodial parent based on her sex because of the stereotype regarding the role that mothers generally play in their children's lives. In fact, Rumpff JA expressly said that the children '… are still of an age when they would call for their mother first if something were to happen to them. A stepmother, with her own children, even if willing and able to look after them, as is the case here, cannot generally speaking, match the devotion of a natural mother'.[30] The court was no longer addressing custodial rights but was now dealing with the role of the mother as a biological mother to her children. This is a clear demonstration that in the mid-1960s in South Africa, there was a genuine maternal preference approach from our courts. It may be true that in other jurisdictions, before the shift to shared care, courts favoured custodial

[26] *Laufer v Shawzin* [1968] 2 All SA 551 (W).
[27] *Shawzin* supra note 25 at 459.
[28] Ibid at 459.
[29] Ibid at 466.
[30] Ibid at 466.

parents, most of whom were mothers as opposed to maternal preference. However, the wording used by some of the South African judges such as Rumpff JA provides a clear illustration that in South Africa, tender-age and maternal preference doctrine were used to limit the courts discretion when determining CRDs. This prevented courts from holistically assessing competing factors with a view to adequately weigh and balance them to determine what would be in the BIC before them. The legislative guidelines proposed in this thesis are intended to prevent judges from deciding cases solely on factors such as the sex of the litigants, but rather to also consider the actual proven roles played by the respective parents in their children's lives. The proposed guidelines are in line with the shift in thinking regarding parenting which advocates for shared parenting.

In the *Shawzin* case, the court was faced with two loving parents who wished to be closer to their children and influence their lives. The father wanted to influence the children's religious education and had created a new family for himself. He also had a general mistrust of the mother's new husband. All the father's factors for objecting to his children's relocation were rendered insignificant. While the court relied on the mother's custodial rights to allow her to relocate, it nonetheless, also used motherhood as a super factor to justify its decision. It was clear from the facts that the mother's new family was experiencing financial challenges. However, this factor was rendered insignificant to the extent that the court did '…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'.[31] This is a factor that some judges, in later cases, overemphasised to allow mothers permission to relocate.[32]

In 1979, the AD in *Bailey v Bailey*[33] had another opportunity to clarify South African law regarding CRDs. In this case, there were four judgments dealing with the same facts by the high court, full bench of the high court and the AD. The AD was split three to two, with Trengove JA delivering a majority judgment, with which Rumpff CJ and Kotzé JA concurred. Trengove JA confirmed that in child related cases, the BIC is the paramount consideration.[34] However, he did not explain how this principle should be assessed in relation to other factors. Trengove JA considered the mother's factors for relocation and held that they

[31] *Shawzin* supra note 25 at 466.
[32] See *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008).
[33] 1979 (3) SA 128 (A).
[34] Ibid at 111. In relation to custody cases generally, it was held in *Du Preez* v *Du Preez* 1969(3) SA 529 (D& CLD) at 532C-G that '… when the paramountcy of the child's welfare in such a conflict between the parents is borne in mind, it is obvious that the burden upon the applicant (who in this instance happened to be the non-custodian parent) dare not be magnified'.

were reasonable and indicated her good faith, thus basing his reasoning on the reasonableness and good faith approach. The mother's reasons for relocation were: family ties in England;[35] interests she and the children had in certain family trusts;[36] the desire for the children to attend England universities;[37] avoidance of friction between the parties;[38] as well as difficulties to cope after the divorce in South Africa.[39] Trengove JA overemphasised the mother's unhappiness in South Africa due to her resentment towards the father, whom she blame[d] for their breakup'.[40] Without balancing all the competing factors, Trengove JA elevated the mother's factors to the status of 'super factors' and used them to justify his decision to allow her to relocate.

In his minority judgement, Diemont JA (with Jansen JA concurring) did not assess the reasonableness of the mother's decision to relocate; rather he evaluated the reasonableness of the father's decision to refuse to consent to the removal of the children from the country to England.[41] He found that the father was justified in objecting to the proposed relocation because the mother's reasons for relocating were unconvincing. In particular, Diemont JA was of the view that friction is normal between divorced parents and that an attempt to avoid friction by relocating to another country where only one parent would have access to the children was a drastic remedy.[42] Diemont JA further held that '… cogent reasons should be advanced before it can be said that a father, who has been given generous access to his children is acting unreasonably if he objects to the removal of the children to another country, so distant that his access will be severely curtailed if not lost'.[43] Diemont JA used the father's loss of access to the child as a super factor that influenced his reasoning.

It is interesting to note that the full bench was of the view that the friction between the parents affected the mother's happiness, and ultimately BIC.[44] Further that relocation would restore the mother's happiness, which would be to BIC.[45] The mother's happiness was the super factor that the full bench relied on to allow relocation. The approach of the full bench was different to that of the trial court. In refusing the mother permission to relocate, the trial court

[35] Ibid at 136.
[36] Ibid at 137.
[37] Ibid at 137.
[38] Ibid at 139
[39] Ibid at 143.
[40] Ibid at144.
[41] *Bailey* supra note 31 at 106.
[42] Ibid at 108.
[43] Ibid at 107.
[44] See generally *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C).
[45] *Bailey* supra note 33 at 119.

compared the conditions under which the children were to be raised in England with those that they were exposed to in South Africa. The trial judge found that the 'children [we]re at least as well off in this country as they would be in England'.[46]

Trengove JA in the AD deliberately rendered the factors that the father relied on, insignificant. The father relied on the disruption of the children's studies[47] and his curtailment of access to the children as his main factors. Trengove JA held that the father was a '… man of substantial means and [could] well afford to visit the children in England or arrange for them to visit him in this country, from time to time'.[48] While Diemont JA accepted that the mother would be happier among her family and old friends, he nonetheless, emphasised that relocation would inevitably lead to estrangement between the children and their father.[49] This case is a clear illustration of how different judges use different factors to justify their desired conclusions. None of these judges reflected on the value (if any) that children would derive from shared parenting. They did not examine alternatives which could have enabled both parents to continue to play a significant role in their children's lives.

Like Rumpff JA in *Shawzin,* Diemont JA's reasoning was also influenced by sex related assumptions. He was of the view that the children needed the male guidance and companionship of their father and that it would be best for them to have their father to turn to.[50] To him, the presence of fathers in the lives of young boys was important for their wellbeing and development. Diemont JA also looked at the children's state of happiness and found that there was no evidence pointing to their unhappiness in South Africa. He emphasized that they attended '… good schools and live[d] in comparatively affluent circumstances'.[51] There was a third minor child who was a girl and Diemont JA did not refer to her at all. This was surprising given that this was another general sex related role stereotype that courts adopted at the time regarding young girls, which was central in *Shawzin*, which Diemont JA neither referred to nor applied.

Two years later, Diemont JA presided in *Stock v Stock,*[52] wherein the custodial mother wished to relocate to France with four children and the father objected. One of the reasons which the mother advanced in support of her application was that she wanted to relocate to reunite with her mother in France. She also argued that the children would receive financial

[46] Ibid at 107.
[47] Ibid at 143.
[48] Ibid at 120.
[49] Ibid at 109.
[50] Ibid at 107.
[51] Ibid at 107.
[52] 1981 (3) SA 1280 (A).

assistance from the state and her family in France. The father argued that the children would be seriously prejudiced if they were to be relocated. They would struggle to learn French, which would make them fall behind with their studies. Diemond JA used the father's factors as super factors and refused the mother permission to relocate with children. He criticised the evidence of the mother and did not subject the father's evidence to the same scrutiny. He held that the father did not act unreasonably by objecting to the proposed relocation.[53] This is a clear deviation from the approach that favours custodial parents, most of which are mothers. Diemond JA decided in favour of the father because of the value that he believed generally fathers contribute to their children's lives.

This judgment could strengthen the view that Diemont JA was generally against the separation of children from their fathers through relocation. That he went out of his way to find 'super factors' that he relied upon to refuse the mother permission to relocate. For instance, he quoted part of the record where the mother was cross-examined which seemed to suggest that the mother was personally unhappy with the father, suggesting that this was the reason she wanted to relocate. In the quoted portion, the father's counsel asked: '[s]o you say he is a bad parent?' and the mother's quoted answer was: '[w]ell, he doesn't understand really what is a child, he has never had brothers and sisters and he didn't even know what is a woman'.[54] The question was about parenthood, and the mother was quoted where she also referred to her thoughts with regard to the father's relationship with her. The clear reason for isolating this portion of the record was solely to support the decision to refuse the mother permission to relocate.

Diemont JA also quoted from the drafted papers where the father accused the mother of acting out of self-interest as opposed to what was in the BIC.[55] Diemont JA carefully scrutinised the mother's testimony and held that '[i]f the reasons for the move to France are false or exaggerated, doubt is cast both on the [mother's] motives and her credibility' and concluded that she had '… given a number of reasons which were shown in cross-examination to have been untrue'.[56] Diemont JA was also of the view that the mother's case was contrived and crafted in similar terms to those of the mother in *Bailey,* in terms of which she was projected as unhappy, which unhappiness was said to have an 'adverse effect on the children and that it was accordingly in their interests that she should be allowed to escape from her

[53] Ibid at 1290.
[54] Ibid at 1292.
[55] Ibid.
[56] Ibid.

unhappy life in South Africa …'.[57] Diemont JA then considered some of the reasons advanced by the father against the proposed relocation; such as his fear of losing contact with children, as well as the fact that they were born in South Africa and he saw no reason for them to be relocated.[58] He accepted these reasons without subjecting them to the same scrutiny as he did those advanced by the mother, thus treating them as super factors which justified his decision.

Diemont JA's approach was not helpful in that it did not shed any light as to what the South African approach to CRDs was or should be. The argument advanced in this thesis is not based on sex related roles, but on what is in the BIC in relation to the unique facts before the court irrespective of whether the court permits relocation or not and which parent is allowed to relocate or restricted from relocating. Legislative guidelines should be gender neutral and prevent courts from unwittingly elevating certain factors while downplaying the significance of other factors when adjudicating CRDs. Legislative guidelines would assist judges to adequately assess and balance competing interests and factors to determine what would be in the BIC before the court. But most importantly, when crafting these guidelines, the legislature should consider the approaches of countries such as Australia which have demonstrated the value of shared parenting in children's care and development. These guidelines should enjoin courts to adequately assess the role of both parents in their children's lives and determine whether relocation justifies children losing shared parental care.

The *Shawzin, Bailey* and *Stock* judgments clearly demonstrate how two judges of the AD viewed CRDs between 1960 and 1981. On the one hand, Rumpff JA's reasoning favoured custodial parents as evident in *Shawzin* and *Bailey* where he agreed with the majority judgement, the reasoning in *Bailey* thereof is like his reasoning in *Shawzin*. This demonstrates that, generally, Rumpff JA believed that children should be raised by their mothers and that he was prepared to either allow the mother to relocate with children or refuse the father permission to relocate with their children. On the other hand, Diemont JA's position of ensuring that fathers did not lose access to their children is reflected in his minority judgment in *Bailey* and majority judgment in *Stocks.* In the absence of legislative guidelines, these judges were able to adopt principled, but different positions on CRDs based on their conception of parenting.

While the AD in both *Bailey* and *Shawzin* made it clear that the main consideration is the BIC, however, these two cases approached the establishment of the BIC differently. In *Shawzin,* the AD approached the BIC by looking at the age of the children and the role of their

[57] Ibid.
[58] Ibid at 1298.

mother in their lives independently of the mother's thought processes and state of happiness. However, in *Bailey*, the AD did not pay too much attention to the 'connection' between the children's age and the importance of their mother in their lives. The focus was more on the mother and her thought processes with a view to assessing the factors that influenced her to wish to relocate to determine whether the decision to relocate was taken reasonably and in good faith. These are two different approaches by the highest court in South Africa at the time used by different judges of that court who reached different conclusions to establish what would be in the BIC. This made it difficult for legal practitioners to determine where the real emphasis should be when dealing with the BIC in CRDs.

The inconsistency in these judgments is apparent from the way the BIC in the CRDs was determined. It is apparent from all the cases discussed thus far, that the principles of reasonableness and good faith are merely legal justifications that have been skilfully used through judicial discretion to reach decisions that individual judges regard to be in the BIC based on their own conception of how the child should be raised. It is clear from all these cases that when a judge wishes to allow relocation s/he relies on factors that are aligned with any of these principles as justification of what is in the BIC.

Judges who considered the important role that mothers play in their children's lives seem to be motivated by conservative gendered roles that are usually observed in child rearing and completely disregarded the fathers' influences in children development. Whereas, judges who insisted that fathers' roles should be considered, do accept the importance of mothers in children's lives but do not accept that fathers should be rendered meaningless in their children's lives. They see value in children having both their parents around, something which is usually impossible in CRDs. This represents a shift in thinking that has been adopted by Australia and Canada as will be demonstrated in chapter five of this thesis. The cases discussed thus far, demonstrate that South African judges before 1993 did not engage the concept of shared parental care.

3.3 STATUTORY RECOGNITION OF RELOCATION OF CHILDREN

In 1993, for the first time in the history of South Africa, the legislature made it a legislative requirement for non-custodial parents to provide consent for the removal of their children from South Africa. This was a significant development that prevented custodial parents from independently removing their children from South Africa without the consent of non-custodial

parents. Section 1(2)*(c)* of the now repealed Guardianship Act,[59] provided that 'a custodian parent may not remove a child in his or her custody from South Africa without the consent of the other parent, in the absence of a court order'.[60] This provision granted non-custodial parents a legislative right to consent or object to their children being removed from South Africa to a foreign country.

As will be shown below, judges were legislatively obliged, after the promulgation of this statute, when consent had been withheld to assess the reasons as well as the impact of relocation on non-custodial parents' right to have contact with their children. Since 1993, all CRDs cases made it clear that there are two approaches to relocation that have been followed by South African courts, the pro-relocation approach and the neutral approach which is a more balanced approach.[61] In terms of the pro-relocation approach, courts generally assess the custodial parent's case and authorise relocate, unless it can be shown that relocation would not be in the BIC. The pro-relocation approach is a traditional approach which assumes that custodial parents naturally know what is best for their children.

The Guardianship Act was repealed by Children's Act which was enacted in 2005. Section 18(3)*(c)(*iii) of the Children's Act provides that '... a parent or other person who acts as guardian of the child must ... give or refuse consent required by law in respect of the child, including consent to the departure or removal from the Republic …'.[62] Unless a competent court orders otherwise, consent of all persons who have guardianship of a child is necessary in respect of the departure or removal of the child from the country.[63]

In practice, both the legislature and courts have not drawn a distinction between internal children relocations and international children relocation where parents are relocating to different jurisdictions. The same child relocation disputes principles are applied in South Africa irrespective of whether the proposed relocation is national or international. There are internal relocations that may make it easier for non-relocating parents to exercise their contact rights, particularly where relocating parents relocate to places which are not far from places where

[59] 192 of 1983.
[60] See also Bonthuys 'Clean breaks: Custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486, who pointed out that '[a]ccording to the Guardianship Act 192 of 1993, in situations where both parents of a legitimate child retain guardianship after divorce, permission of the non-custodian parent or the High Court is necessary when the custodian parent wishes to remove the child from the country'.
[61] Domingo '"For the sake of the Children": South African family relocation disputes' 14 (2011) 2 *PER* 148 at 153.
[62] Section 18 (4) of the Children's Act provides that '[w]henever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship'.
[63] Section 18 (5) of the Children's Act

non-relocating parents reside i.e. relocating from Johannesburg to Pretoria. It takes about 35 minutes to drive between the two cities. However, given the breadth of South Africa and socio-economic reasons, there are child relocations that can create significant hurdles to the maintenance of meaningful relationships between non-relocating parents and their children i.e. where children are relocated from Polokwane to Cape Town. It takes approximately eighteen hours to drive from Polokwane to Cape Town and three and half hours to fly between the two cities. This can make it difficult for children to regularly spend alternative weekends with non-relocating parents due to the strain involved in travelling. Some parents may not afford the associated travel costs given the socio-economic realities in South Africa.[64]

Section 18(3)*(c)(*iii) of the Children's Act only makes provision for consent to be required for international relocations in line with the Hague Convention. There is no legislative provision that regulates internal relocation of children. This seems to suggest that the custodial parent can unilaterally decide to relocate within South Africa without the consent of the non-relocating parent. This view seems to be fortified by section 18(4) of the Children's Act, which provides that any of the child's guardian can independently and without the consent of the other parent exercise any right or responsibility arising from such guardianship.

However, the content of guardianship is limited as opposed to custodial rights which involves the day-to-day care and control of the child. Thus, major decisions such as relocation cannot be taken based on guardianship because they fall within the purview of care which is a parental responsibility and right in South Africa. This entails that when a decision to relocate is taken, irrespective of the intended destination, the non-custodial parent must be consulted. This is made clear by section 31 of the Children's Act, which provides that co-holders of parental responsibilities and rights must be consulted when decisions which are likely to adversely impact on their exercise of parental responsibilities and rights in respect of their children are taken. It is also possible for the divorce decree to award contact rights and order that non-relocating parents must maintain contact with their children post the divorce.[65] Parents can also conclude a settlement agreement wherein they agree that the non-relocating parent must consent to the relocation of their children, which agreement can be incorporated into the court order. The Children's Act prioritises the cooperation of guardians of children to decide important matters regarding children such as their relocation to foreign jurisdictions but does

[64] See Gelb 'Inequality in South Africa: Nature, causes and responses in African development and poverty reduction: The micro-micro linkage (Forum Paper 2004) 2, where the composition of inequality and poverty is examined based on factors such as race, gender, and region.
[65] See section 6(3) of the Divorce Act 70 of 1979.

not explicitly foster cooperation between parents in relation to the care of children in a form of shared care, as is the case in Australia and other jurisdictions that have embraced the concept of shared parenting.

It is important to note that unmarried fathers who have automatically acquired parental responsibilities and rights in terms of section 21 of the Children's Act must also be consulted when relocating parents take decisions to relocate with their children. If however, the unmarried father has not met the requirements of section 21, which includes living with his child's mother at the time the child was born, consented to be identified as a father, or contributes to the upbringing of the child, there will be no need for the relocating mother to require his consent. Relocation affects non-relocating parents' contact rights, who must be consulted to express a view on the contemplated relocation. If the non-relocating parent objects to the proposed relocation, the relocating parent may approach the high court to obtain permission to relocate with the child.

Section 45(3)*(d)* of the Children's Act confers the high court with jurisdiction over 'the departure, removal, abduction of a child from the republic'. Apart from these provisions and inadequately broad factors in section 7 of the Children's Act, courts do not have sufficient legislative guidelines to consult when adjudicating CRDs. Courts are left with enormous discretion when adjudicating CRDs, resulting in the development of subjective judicial approaches that lead to inconsistencies in the way CRDs are reasoned and approached. While section 1 of the Children's Act provides the definitions of care and contact, it nonetheless, does not define the phrase 'child relocation'.

The way section 18 of the Children's Act has been drafted, suggests that both parents should be involved in major decisions affecting their children. The fact that one parent has been awarded the residency of the child, neither entails that they possess the monopoly of wisdom on what would be in the BIC nor absolves the other parent of their care duties. Nonetheless, earlier CRDs cases were approached '… from the premise that the custodian parent has a right to decide where the children should live, and that, unless the non-custodian can illustrate that it would be clearly detrimental to the children, relocation would be authorised'.[66] The traditional approach did not regard 'access rights' of the non-custodial parent as relevant to the decision of whether the child should be relocated.[67] However, if the non-custodial parent could establish that the intended relocation had nothing to do with the children but was orchestrated

[66] Bonthuys op cit note 60 at 488.
[67] See *Bailey v Bailey* 1939 WLD 136.

to frustrate their rights to contact the children, then relocation could be refused. Lack of adequate legislative guidance has allowed some judges to express a view that 'if the primary caregiver parent makes a decision to move and has given mature and rational thought to the matter, then the presumption is that the relocation is in the … [BIC]'.[68] Other judges have held that these cases should be dealt with by acquiring an overall impression in order to bring a fair mind to the facts set up by the parties and assess them in a balanced fashion in order to render a finding of mixed fact and opinion, then provide a structured judgment about what the court considers will be in the BIC.[69] Various judges elevate certain factors to the status of super factors and use them to justify their reasoning and disregard certain factors that other judges may regard as decisive. The 'culture' of placing emphasis on some factors while disregarding others is a direct consequence of judicial discretion where there are no legislative guidelines on how to balance competing factors.

The South African approach regarding CRDs is not clear. There is however, consensus that each case should be dealt with on its own merits.[70] Dealing with individual cases on their own merits allows judges to depart from precedent or recognised legal principles. Judges are free to apply their minds to the facts before them to reach decisions that they deem to be in the BIC. This leads to unfettered judicial discretion that results in decisions that reflect the views and preferences of individual judges. Specific CRDs legislative guidelines are necessary to limit the ambit of judicial discretion when adjudicating these disputes. These guidelines should provide a mechanism that will enable judges to adequately balance conflicting factors before them.

CRDs decided both in South Africa and foreign jurisdictions have established some of the common factors relied upon by parents when applying for, and objecting to, relocation such as: weighing the child's interest with those of other family members; the children's age and how the proposed relocation would affect them; the children's wishes where they are able to express them; the expected standard of living as opposed to the current standard of living; the children's possible adaptation to new environments; the quality of life abroad; freedom of movement; an assessment of perceived and real advantages and disadvantages of relocating with children; employment and education opportunities for relocating parents; issues relating to the non-relocating parent's contact with the children; issues relating to religion, reconnecting

[68] *Godbeer v Godbeer* 2000 (3) SA 976 (W) 982C-983A.
[69] *Cunningham v Pretorius* 31187/08 2008 ZAGPHC 258 21 August 2008 (unreported), *HG v CG* 2010 (3) SA 352 (ECP) paras 7-10.
[70] *Jackson v Jackson* 2002 (2) SA 303 (SCA).

with family members; as well as routine, culture and politics. The discussion of cases below will illustrate that individual judges evaluate these and other factors and inflate some of them to super factors to reach their desired outcomes. Judges often do not adequately balance their super factors with other competing factors. The fact that there has never been a single South African judge that has provided guidance on how these and other factors ought to be adequately balanced is indicative of the difficulty experienced by courts when adjudicating CRDs.

3.4 CASES DECIDED POST 1993

3.4.1 GENERAL OVERVIEW

Since 1993, there have been several CRDs cases decided by various divisions of the High Court and only two cases by the SCA. These cases illustrate that individual judges generally overemphasise the role of mothers as primary caregivers without properly evaluating the actual involvement of fathers in their children's lives. Even if mothers are in fact primary caregivers, there is a need to properly ascertain the role of fathers and how their presence advance the BIC. The review of South African cases before 1993 which were decided by the AD, with few exceptions, reveals that judges were more concerned with custodial rights and decided cases in favour of custodial parents, which in practice are mostly mothers. Judges who decided these cases did not focus on the importance of both parents in their children's lives and did not evaluate whether shared parenting was possible on the facts before them.

Judges who decided cases after 1993 also placed more emphasis on custodial parents' rights and used their discretion to selectively rely on factors before them to decide cases in favour of custodial parents, most of whom are mothers. However, it will be show below that some judges were able, where fathers were custodial parents, to deviate from the rights of the custodial parent approach to deliberately favour mothers thus, demonstrating a clear gender based maternal preference. These judges would creatively demonstrate that failure to allow relocation would unduly restrict mothers' right to freedom of movement; freedom to marry and form new families; the freedom to pursue desired career opportunities; and the right to reconnect with other family members. There is no child relocation case in South Africa where any judge has raised these constitutional rights in favour of fathers. It can be argued that non-custodial fathers are often free to relocate without their children, but for those who wish to relocate with their children, the enjoyment of their constitutional rights is also restricted if relocation is denied.

3.4.2 CHERRY PICKING FACTORS BY HIGH COURT JUDGES

One of the first cases that provides a clear judicial isolation of some factors while others were treated as super factors is *Van Rooyen v Van Rooyen.*[71] In this case, the mother was an Australian national and wished to relocate with her children to Albany, Western Australia. The father refused to grant the legislatively required consent which would have enabled the mother

[71] 1999 (4) SA 435 (C).

to remove the children from South Africa. The mother was awarded custody and spent more time with the children than the father. This case was decided after the enactment of the Constitution but before the promulgation of the Children's Act. The court noted that this was an application in terms of section 1(2)(*c*) of the Guardianship Act for leave to remove two children from the jurisdiction of the Court.[72] It held that there was a need to '… evaluate, weigh and balance the many considerations and competing factors which are relevant to the decision whether the proposed change to the children's circumstances is in their best interests'.[73] This was an important observation which highlighted the need for a proper judicial analysis in order to determine what, in the circumstances, would be in the BIC. The court noted the importance of individual justice in relation to the children before the court. This would only be possible if the court was open minded and willing to adequately consider competing factors before it.[74] When evaluating what would be in the BIC, the court adopted the reasonableness test and further assessed the genuineness of the custodial parent's reasons for relocation.[75] However, King DJP failed to adequately consider and balance competing factors. He relied heavily on personal circumstances of the custodial parent, who was the mother and tied these up with what he believed was in the BIC. In justifying his decision to allow the mother to relocate, King DJP considered the mother's right to freedom of movement which was likely to be limited by refusing her permission to relocate with her children. He rendered factors such as the mother's unhappiness, lack of friends, better employment opportunities in Australia as super factors which were decisive in this case. He accepted that the mother had a genuine belief that the BIC would be best served by relocating.[76]

King DJP rendered as insignificant all the factors that the father relied on when objecting to the proposed relocation such as his: commitment to the children; an interest in their lives; his employment; a new family with his fiancé; a strong bond with his children; and his ability to discipline them.[77] King DJP accepted that it will be good for the mother to relocate because, due to the divorce, she felt distressed, alone, isolated, and thus generally unhappy in South Africa.[78] The court did not hold the fact that the mother had not acquired employment in Australia against her but accepted that her employment prospects in Australia were better than

[72] Ibid at 437.
[73] Ibid at 437-438.
[74] Ibid at 437-438.
[75] Ibid at 438, where the court held that the mother's intention to relocate 'illustrate not only the genuineness but also the reasonableness of [her] desire to relocate to Australia and provide compelling reasons for her to do so'.
[76] Ibid at 437I
[77] Ibid at 439.
[78] Ibid.

in South Africa.[79] Factors raised by the father should have been properly weighed and balanced with those raised by the mother.

King DJP completely rendered insignificant the fact that the father's life was more stable because he had a business and had already started a new family for himself. Further that the father was able to instil discipline in his children, an aspect with which the mother struggled. While recognising the father's ability to discipline the children, the court nonetheless, did not evaluate the role (if any) that the father played in children's lives. King DJP also failed to ascertain how relocation would affect the children's schooling schedule and routine. However, without assessing the children's family ties in South Africa and the impact of losing such ties, King DJP was convinced that '…young children do adapt and the children will be part of a large and loving family circle in Australia'.[80] According to van Schalkwyk '[t]he best interests of the child in regard with custody and access arrangements are primarily concerned with … which of the parents was better able to promote and ensure the child's physical, moral, emotional and psychological welfare'.[81] Unfortunately in *van Rooyen,* the court did not approach the BIC holistically by assessing which parent was in the better position to ensure the children's physical, moral, emotional and psychical welfare.

While most of the judges generally craft their reasoning in a way that enables custodial parent, most of which are mothers to relocate, nonetheless, there are those who have attempted to reflect on the actual circumstances of the child when making their decisions and depart from the custodial rights approach. For instance, *Wicks v Fisher*,[82] the court refused the mother permission to relocate to the United Kingdom even though the mother was the custodial parent. The court opined that '[w]hilst … a custodian parent has rights which prevail over those of a non-custodian parent, especially in respect of a child born out of wedlock, I have been reminded that the modern trend is to move away from this concept … [because] the interests of the child are of overriding importance'.[83] The court considered factors that the mother relied on such as lucrative employment that she had secured in the United Kingdom and her intention to marry her boyfriend with whom she wanted to live in the United Kingdom. The court balanced these factors with factors that were provided against relocation such as the stable family environment which the child enjoyed with both the maternal and paternal families in South Africa.[84] In

[79] Ibid at 437.
[80] Ibid at 439.
[81] Van Schalkwyk 'The power of a custodial parent to remove the child from the Republic of South Africa after divorce' 2005 *De Jure* 332 at 341.
[82] 1999 (2) SA 504 (N).
[83] Ibid at 511.
[84] Ibid at 509.

balancing these factors, the court also noted that despite securing a lucrative employment in the United Kingdom, the mother had not enjoyed stable employment, having worked for some time in Israel and South Africa. The court further noted that there was '… some indecisiveness as to whether she wished to make the United Kingdom her permanent home'.[85] The court was of the view that there was a possibility of the child being uprooted again if things did not quite work out as anticipated, which could have an unsettling effect on the child.[86] The court found that the child was '… happy in his present environment with access to all the people who share a meaningful relationship with him'[87] and thus, it was not in the BIC to lose such benefit. The court did not elaborate on the significance of meaningful relationship that the child enjoyed with other family members in the context of CRDs. Nonetheless, this was a better weighing and balancing of relevant factors which was aimed at determining what was in the BIC in the circumstances, without focusing solely on the rights of the custodial parent.

The court was further of the view that '[i]t is not only the rights of the parties which are in issue in this case, it is also … [the child's] rights which need to be given consideration, for instance his right of access to both parents'. However, the court neither dealt with the value that the child was to derive from that access nor reflect on the shift in thinking regarding parenting from other jurisdictions. The court also did not deal with the important role of both parents in the child's life and the value of shared care in the development of children, as well as the extent to which it was impractical under the circumstances. This demonstrates that while some judges recognise the role of both parents, nonetheless, the issue of shared care had not yet been embraced in South Africa.

This judgment brought into question the reliance on employment opportunities as a factor in CRDs. This is because the mother in *Van Rooyen* was allowed to relocate even though she was unemployed but the mother in *Wicks* was denied an opportunity to relocate notwithstanding the fact that she attained employment. In *Wicks*, the court sought to establish the BIC by not establishing who the primary caregiver was, but on the bond the child had with both maternal and paternal families as well as the stability of the child's life in South Africa.[88] These were super factors that the court relied on to disallow relocation. Unlike King DJP in *van Rooyen*, the court in *Wicks* did not assess the mother's reasonableness and genuineness. The court totally disregarded the mother's right to freedom of movement, which was a key

[85] Ibid at 510.
[86] Ibid.
[87] Ibid.
[88] Ibid at 509.

factor in *van Rooyen*. The court criticised the mother for failing to indicate how marrying her boyfriend and the child being exposed to her boyfriend's family care would be in the BIC.[89] The approach and reasoning in *Wicks* was totally different from that adopted in *Van Rooyen,* making the resolution of CRDs in South Africa inconsistent.

The isolation and elevation of super factors is also evident in *Godbeer v Godbeer,*[90] which was decided in 2000. In this case, the court did not refer to section 1(2)(*c*) of the Guardianship Act, which demonstrates that this section was not particularly useful in the determination of CRDs at the time. The mother was the custodial parent and the father 'enjoyed generous access' to the children. The court accepted that both of them were good parents, but failed to assess the impact on the children of losing regular contact with their father after their relocation. Unlike all the other CRDs cases in South Africa, this is probably the only case where the judge opined on the value of both parents in the child's life, but simply in passing. Nugent J (as he then was) held that '[u]ndoubtedly, 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'.[91] However, the judge did not reflect on the value of shared parental care post parental separation and the extent to which it was possible in this case. The court was merely referring to an idealistic situation where parents lived together with their child and not necessarily a situation where parents foster shared care after their separation.

In determining the reasonableness of the father's refusal to grant consent for the proposed relocation and in allowing the mother to relocate, the court flooded the judgement with all the positive factors raised by the custodial parent, the mother, which were used as super factors. The court failed to engage the father's role when determining the BIC and how he influenced the children's development. The court focused more on the mother's interests and pointed out her: lack of family ties in South Africa; lack of security; an employment offer in England; the securing of accommodation nearer to the children's school in England; and ties with other family members in England.

The court further linked the BIC to the mother's interests and held that she '… must now fend for herself in the world and must … have the freedom to make such choices as she considers best for her and her family'.[92] The court did not list any factors upon which it assessed the reasonableness of the father's refusal to consent to the proposed relocation. It was as if the

[89] Ibid.
[90] 2000 (3) SA 976 (W).
[91] Ibid at 981.
[92] Ibid at 982.

only thing that the father argued in court was that his access to the children would be curtailed.[93] While the judge took time to demonstrate how devoted the mother was, there is little or no evidence from the judgment that demonstrates the father's role in his children's lives. The court wanted to allow the mother to relocate and chose to focus solely on the mother's case and failed to properly weigh and balance competing factors.

In allowing the mother to relocate, the court in *Heynike v Roets,*[94] used as super factors: the mother's employment opportunities; family support in England; her new husband; and the fact that the mother had enrolled the child at a school with a good reputation in England; the unacceptable high rate of crime in South Africa; the uncertainty of the South African economy; the impact of AIDS; the overburdened social services in South Africa; and the perceived limited opportunities for white males in South Africa.[95] The mother was a custodial parent subject to the father's exceptionally generous rights of access to the child. The court noted that the parents informally agreed at the time of the divorce that their child would spend time between them in two-week cycles, which practically meant that in any fourteen-day period the child was with the father for six days and with the mother for eight days.[96] The court in balancing competing factors presented by the parents, did not place any significance to the time the father spent with the child. It is submitted that the court went beyond the rights of the custodial parent and identified several factors which it used as super factors to decide on behalf of the mother.

While the court noted some of the factors that the father relied on, it nonetheless, did not balance and weigh them with those raised by the mother. In fact, while the court accepted that the child had a strong bond with the father, it nonetheless, failed to assess the importance of that bond on the child's development as well as whether it was in the BIC for that bond to be sustained. The father relied on potential loss of the parental bond; the child's performance at the current school; the excellent schools available in South Africa; the bad weather in England; and the available support structure for the child in South Africa.

The court also neither entertained the tests used in previous cases such as reasonableness and genuineness, nor explained why these tests were not necessary or useful in this case. Through his discretion, the judge was able to disregard these tests because there was no legislation that required him to consider them with a view of adequately balancing the

[93] Ibid at 977.
[94] [2001] 2 ALL SA 79 (C).
[95] Ibid at 81.
[96] Ibid.

competing factors before him. Without a proper assessment of competing factors, the court simply held that the mother had done everything possible to ensure that the move would not be contrary to the child's interests and that it would not result in the relationship between the father and son being negated.[97] The judge did not provide a well-reasoned judgment explaining why relocation was in the BIC.

B v M,[98] is an example of another case where one of the judges went beyond the rights of the custodial parent and focused on the sex of the parent. This is a classic example of a case with the same facts reasoned and decided differently by different judges of the same court, one as a trial court and others sitting as a full-bench. Satchwell J wrote a unanimous decision of the full bench and overturned the trial court's decision. In this case, the parents divorced and started their own respective families with other partners. They had joint custody of their children and spent equal time with them.[99] The children spent 'approximately 16 nights out of every 28 day cycle with the [mother] and 12 nights out of each 28 day cycle with the [father]'.[100] The parents enjoyed shared or joint care of their children despite their separation, which was beneficial to the children. This factor was completely ignored by the court.

The mother wanted to relocate to Cape Town with her new husband. The father objected to the relocation on the basis that his parenting role would be reduced if the children moved to Cape Town.[101] In allowing the mother to relocate, Satchwell J, writing for the majority of the full bench, identified 'super factors' that she used to reach her desired outcome in favour of the mother. She overemphasised the value of the mother's new family in children's lives, the financial prospects, and the benefit the children would derive from a nuclear family unit that would be formed by the mother and the new husband. However, she did not analyse how the father's nuclear family was likely to benefit the children. She was satisfied that the mother's relocation was '… genuine, reasonable, undertaken for purposes associated with the best possible interest of the entire family … 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'.[102]

Given the fact that both parents were involved in children's lives and spent equal time with them, the court cautioned against moralising the quantum of each parent's parenting

[97] Ibid at 84.
[98] *B v M* [2006] 3 ALL SA 109 (W*).*
[99] Ibid para 11.
[100] Ibid para 12.
[101] Ibid para 31.
[102] Ibid para 30.

contributions. The court did not attempt to establish the primary caregiver because the facts suggested that it was the father. Satchwell J chose to render as less significant the father's factor, that the mother was working most of the time during their marriage which made him, both the father and the mother to the children. The father used this factor to establish that he was the primary caregiver. However, Satchwell J reasoned that in as much as the father cannot be criticised for being a working father, the mother should also not be criticised for being a '…working mother during her marriage and after her divorce since this, after all, contributed to the support of herself and her family'.[103] On the face of it, this appears to be a well-balanced judicial statement given the historical gender imbalances wherein women were expected to remain at home while men were working. The essence of this reasoning is that one cannot use against women a factor that men are generally revered for, that of providing for their families. It is interesting that the court started by highlighting the fact that the father was also working and that he could not be blamed for working. This was a fair reflection, but the court did not ascertain how the father balanced work with being what the father regarded as being both a mother and father to the children. Satchwell J did not attach sufficient weight to the fact that the father found time to spend with his children and created an environment wherein the children could be raised with love and care.

It is submitted that Satchwell J's approach was designed to ensure that the children were not separated from their mother. It is further submitted that she placed more emphasis on the sex of the mother as opposed to the actual roles that both parents played in their children's lives to establish the BIC. It can be argued that this approach was influenced by her ideological outlook on the disadvantages women in general experience, such as the limitations on their right of movement. This judgement clearly demonstrates Satchwell J's feminist outlook by being more sympathetic to the mother's plight.[104] This is a clear illustration of the extent to which an ideological standpoint and personal views can consciously or subconsciously affect judicial decision making and replace what should be the correct decision with what the judge subjectively, because of their ideology, regards as the correct decision.

[103] Ibid para 68.

[104] Satchwell J has publicly declared herself as a feminist. See The Helen Suzman Foundation Series Roundtable 'Guilty or not guilty: Behind bars anyway' (August 2012) 23 *Quarterly* 1-40 at 20 available at https://hsf.org.za/publications/roundtable-series/QRS23AugPR2%20-4.pdf, where Judge Kathleen Satchwell said among others '[t]he Department of Justice has an awful lot of people working on its gender desk and I have asked them what they do. It sounds odd for a feminist to ask them and clearly comes off as being a little anti. It's not a good question and they tell me that they are very concerned about women in the judiciary and I thanked them kindly'.

Unlike Satchwell J, the trial court saw this case from the father's point of view and reasoned that the 'trauma of moving to Cape Town and … 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 unit is maintained in Cape Town'.[105] The trial court did not put much emphasis on the potential financial benefits of the mother's new relationship. The trial court was of the view that the loss of contact between the father and children would be detrimental to children. In refusing the mother permission to relocate, the trial court skilfully used children's social and schooling schedules as super factors that counted against relocation to Cape Town in that their lives, should they relocate, would be disrupted. The trial court was convinced that it is generally ideal for children to keep to settled routines and not lose their friends and relationships with other close family members.[106] The different approaches by the judge of the trial court and the judges of the full-bench illustrate the inconsistent judicial reasoning and the extent of judicial discretion in CRDs that allows judges to follow judicial paths that leads to their desired outcomes. This case raises a concern that success or failure in CRDs cases is determined by which judge presides over the case and not established legal principles.

Even after the promulgation of the Children's Act, some judges continued to craft their reasoning in a manner that focused on the custodial parent, majority of whom are mothers. Section 7 of the Children's Act provides broad factors that courts should consider when determining BIC. However, there is no legislative guidance on when any of these factors should be applicable or how these and other factors ought to be balanced, making them inadequate to resolve CRDs.

Cunningham v Pretorius,[107] was the first CRDs case to be decided under the Children's Act and the judge considered some of the factors provided in section 7 of the Act. The parties were divorced and married to other people. One child had been born during their marriage. The mother was awarded custody of the child subject to the father's reasonable rights of access. The court started by providing a test which it believed must be used when determining CRDs. The court held that:

> '… the court must carefully weigh and balance the reasonableness of the custodian's decision to relocate, the practical and other considerations on which such decision is based, the competing advantages and disadvantages of relocation, and how relocation

[105] Quoted at para 115 of *B v M* judgment.
[106] Ibid.
[107] (31187/08) [2008] ZAGPHC 258 (21 August 2008).

> will affect the child's relationship with the non-custodian. The court must be guided principally by what will be in the best interests of the child'.[108]

In allowing the mother to relocate to the USA, the court highlighted several competing factors such as the child's tender age as well as language and learning difficulties. It also looked at witnesses' reports, the impact of relocation on the father as well as the maternal and paternal grandparents of the child; the practical difficulties and expenses of the father maintaining contact with the child; the potential loss of the benefit of a full relationship and contact with her yet unborn sibling. In objecting to the propose relocation, the father requested the court to consider the fact that the child was attending pre-school in Pretoria and enjoyed the support of her maternal grandparents as well as the father's new wife and his good relationship with the child.[109]

While the court noted all these factors, it nonetheless, did not use its own test to properly weigh and balance them against each other, to establish what would be in the BIC. Instead, the court assessed the financial position of the mother's husband and used it as a super factor to allow the mother to relocate.[110] The court was convinced that the lifestyle and opportunities that the successful mother's husband offered would benefit the child.[111] Further that the relatively privileged environment which the child was to be exposed, would to be of assistance in dealing with the child's language disabilities.[112] The affluence into which the mother married was the super factor that enabled the court to allow the relocation and disregard the family environment that the father had created as well as the support the child was exposed to in South Africa from the maternal grandparents. The court disregarded the value of extended family members in the child's life.

It is concerning that the court seems to have been persuaded to allow relocation not necessarily because it believed that the mother had made a reasonable decision that was in the BIC, but because of the financial means and the alleged lifestyle provided by the mother's new husband. While this might have been one of the indicators of what was in the BIC, in that the child would be raised by a well-off family, it does not necessarily follow that wealth *per se* is in the BIC, as was stated in *Shawzin v Laufer*.

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[108] Ibid para 5.
[109] *Cunningham* supra note 107 para 61.
[110] See *Shawzin* supra note 25 at 466, where money was rejected as a factor that should be looked at when deciding the CRD.
[111] *Cunningham* note 107 para 61.
[112] Ibid para 71.

It might be in the best interest of a child with language and learning difficulties to have access to financial resources that may be used for their special educational needs such as expensive private schools. However, there is no indication from the judgment that the father could not adequately provide financially for the child's needs. Apart from money, there are other aspects to consider with regard to raising a child such as parental guidance, discipline, genuine care and love, time, interest, and relationships. Financial benefits are not necessarily strong indicators of what is in the BIC. Murphy J's approach created a new difficulty in the South African CRDs jurisprudence, by implying that financial wellbeing might be enough for courts to allow relocation of children. The court neither properly evaluated the role of the non-custodial parent in the care of the child nor did it determine the extent of his interest in the child's life or even his financial position. Murphy J failed to assess whether the mother's husband would have the time to spend with the child having regard to what seemed to be his hectic schedule given the nature of his job as an attorney. This should have been balanced with the fact that the father of the child created time to spend with the child, which was instrumental to the child's emotional and psychological wellbeing.

Murphy J considered some of the factors in section 7 of the Children's Act to justify his approach. He correctly pointed out that '[s]ome of the factors identified for consideration by section 7(1) [of the Children's Act] can be immediately discounted as having no relevance to the present application'.[113] Murphy J used factors he found relevant from this provision to dismiss the strong points that the father relied on. The father argued that the proposed relocation would impact on not only his relationship with the child but also the relationship with the child's grandparents and stepmother.[114] Without explaining how, Murphy J was of the view that the loss of these relationships and attachments would be mitigated by the mother's capacity in terms of section 7(1)(*c*) of the Children's Act to provide for the child's needs including his emotional and intellectual needs.[115] Murphy J also viewed the mother's husband's wealth as a tool that would be used in terms of section 7(1)(*d*) and (*h*) of the Children's Act to secure the physical environment of the child in the form of an appropriate home in a secure environment.[116] This was not balanced with whether the father was able to provide the same benefits for the child.

[113] *Cunningham* supra note 107 para 58.
[114] Ibid 60.
[115] Ibid.
[116] Ibid 61.

Finally, it is difficult not to conclude that Murphy J also went beyond the consideration of the rights of the custodial parent and started focusing on the role of the custodial parent as a mother to a child who was in his tender years. Murphy J specifically quoted section 7(1)(g) of the Children's Act which refers to among others, age, stage of development and gender. In particular, Murphy J held that the child was four years old and '… the loss of his primary caregiver … with whom he has lived more than 95% of the time and with whom he has a healthy, unproblematic and deeply bonded relationship, would be profoundly disturbing and harmful'.[117] The court did not properly weigh and balance all the identified factors, but merely used selected factors listed in section 7 of the Children's Act not only to dismiss the father's factors but also to reach its desired outcome. While the outcome of the case might have been warranted, the approach and reasoning is, with respect, flawed because the BIC cannot be assessed primarily on financial capacity.

MK v RK,[118] is one of the cases that demonstrates that in the South African context there are judges who do not decide cases based on custodial rights but the role that mothers play in their children's lives. In this case, the court refused the custodial father who was the child's primary caregiver permission to relocate to Israel with the child. Before engaging the facts, the court held that '[f]or the applicant to succeed … [he] had to show that his decision to emigrate was both *bona fide* and reasonably and genuinely taken and that it was in the best interest of [the child]'.[119] The judgment does not deal with the mother's reasons for objecting to the relocation, making it difficult for the court to weigh and balance competing factors for and against relocation. Unlike other cases discussed thus far, the court did not treat any factor that the mother relied as a super factor, but deliberately rendered all the factors the father relied on as insignificant. The court assessed each factor that the father raised with the aim of dismissing it because it wished to ensure that the child was not removed from the mother.

In refusing the father permission to relocate, the court started by criticising the father's application for lack of details regarding the circumstances the child would be exposed post relocation.[120] This contrasts with cases such as *van Rooyen, Godbeer, Heynike, B v M* and *Cunningham,* where none of the judges presiding in those cases required mothers who wanted to relocate to provide details of the circumstances that children in those cases were to be exposed post relocation. Because the court wanted to render the father's strong points

[117] Ibid 63.
[118] (17189/08) SGHC (6 May 2009) unreported.
[119] Ibid para 13.
[120] Ibid paras 17-18.

insignificant, it assessed every factor that the father relied on without either comparing or balancing it with any factor that the mother raised. The court expressed a view that 'insufficient detail has been provided to enable '… [it] to decide whether it is in [the minor child's] best interests to be removed from her school and her friends in South Africa or that she will be better off in Israel'.[121] The court failed to equally assess whether it was in the BIC to relocate.

In support of his case, the father relied on his strong family structure in Israel, but the court dismissed this by stating that he failed to disclose details of how close the child was with the father's parents or siblings.[122] The father also relied on the difficulty of securing employment once he becomes older. The court merely brushed this aside on the basis that the father failed to disclose his qualifications and the field in which he had experience.[123] But most importantly, the father led evidence that his house in South Africa was broken into and his wife and half-sister were held up at gunpoint and that crime also influenced his decision to relocate.[124] Roos AJ held that although the father's family members were traumatised by the ordeal, 'this is something that can be dealt with by counselling'.[125] Given the reality of crime in South Africa, its violent nature and the fact that the father's family members were fortunate to survive that ordeal, Roos AJ was extremely unsympathetic to the father's concerns. Even though the court did not elevate any of the mother's factors as a super factor, it nonetheless, went to great lengths to discredit the father's factors because of its maternal care preference approach. This is a demonstration of how judges use their discretion to crush factors that do not lead to their desired outcomes.

Further evidence of the how judicial discretion and the lack of legislative guidelines have contributed to the inconsistent development of CRDs jurisprudence in South Africa are two cases, *B v M*[126] and *G v G,*[127] decided by different judges of the Gauteng Division, Johannesburg. In *G v G,* Mashile J neither referred to the full bench decision in *B v M* nor did he regard himself bound by this decision, which was decided and reasoned differently, despite the facts being similar. In *G v G,* the mother also wanted to relocate with her children from Johannesburg to Cape Town as was the case in *B v M.* In refusing the mother permission to relocate, the court relied on the Family Advocate's report which was to the effect that relocating the children '… to Cape Town … could upset their routine and bring unnecessary shock to

[121] Ibid para 17(1).
[122] Ibid.
[123] Ibid para 17(4).
[124] Ibid para 7.
[125] Ibid para 17(7).
[126] Supra note 98.
[127] (32377/12) [2015] ZAGPJHC 34 (29 January 2015).

their lives at the time when they are beginning to settle'.[128] This factor was rendered insignificant not only by Satchwell J in *B v M* but also Murphy J in *Cunningham* where both judges went beyond the consideration of custodial rights and adopted the reasoning which was more favourable to mothers due to their role as mothers.

Mashile J in *G v G,* while denying the mother permission to relocate, he neither engaged the importance of the father in the child's development nor explained the benefits of the child having both parents residing in the same place. Unlike Satchwell J in *B v M,* Mashile J in *G v G* when assessing the reasonableness, good faith and genuineness[129] of the mother's intended relocation with the child, did not place any significance on the potential family structure that the mother was likely to create for the children should she be allowed to relocate to Cape Town. The fact that her family members were available to assist her was rendered totally insignificant in this case. This demonstrates how judges pick and choose factors that suit conclusions they wish to reach.

Any legal practitioner briefed to launch or oppose a CRD application in the Gauteng Division, Johannesburg when reading *B v M* and *G v G,* may not be in the position to properly advise their client on the likely outcome of their case given the different approaches adopted by different judges of this court. Most importantly, even though the parties might not have argued this point in *G v G* and *B v M,* at the very least, these courts lost an opportunity to clarify what the South African approach relating to internal relocation should be. It appears that there was a general assumption that in these cases the approach to be followed would the same as that followed in international CRDs.

In *LW v DB,*[130] the mother wished to relocate from Vanderbijlpark to Cape Town with the child. The mother was awarded custody subject to the father's access rights. Because both parents were working, the child spent more time with both maternal and paternal grandparents. The only significant factor that the mother relied on was that she found better employment in Cape Town, a factor which was rendered insignificant in *Wicks,* which Satchwell J treated as a super factor to allow the mother to relocate. Unlike in *Wicks* where the court overemphasised the value of the relationship that the child had with maternal and paternal families, Satchwell J

[128] Ibid para 32

[129] These are principles that were often relied on by South African courts before 1993. However, the court did not follow any case from that era and did not provide guidance on how the reasonableness, genuineness and good faith of the relocating parent should be determined. See Kruger 'Emigration by a custodian parent after divorce' (2001) 64 *THRHR* 453 at 456, who argues that that good faith should not be used as a prerequisite for granting relocation orders, because even when there is doubt about the good faith of the custodial parent, the BIC might dictate that relocation be allowed.

[130] 2015 JDR 2617 (GJ).

rendered as insignificant the fact that the child in this case received the care of both sets of grandparents when parties were at work. It was shown that the child lived with her mother '… in a flat adjacent to that of his maternal grandparents [and] [w]hen he [was] with his father, he live[d] … [with his] paternal grandparents'.[131] The father demonstrated that the grandparents offered the child emotional, physical and financial support as well as guidance and joy.[132] Because this was a factor that strengthen the father's case, Satchwell J downplayed its importance. She failed to properly balance the value of the relationships the child was to lose with his grandparents and the change in the child's routine with the mother's employment interests.

Unlike Roots J in *MK v RK*, who extensively questioned the living arrangements the father made for the children to be allowed to relocate, Satchwell J in *LW v DB*, did not undertake the same exercise regarding the mother's case. Without seeking clarity on how the child was to be cared for post relocation, Satchwell J was of the view that the 'relevant issue is whether or not the child … will be looked after'.[133] She did not balance this with the way in which the child was cared for before relocation. She held that the evidence before her did not indicate that either parent was incapable of caring for the child or that it was the grandparents who sought to be declared primary caregivers.[134] Based on her ideology, Satchwell J reflected on the well-known plight of women generally, and opined that if women were to be forced to reside closer to the men they have children with, this would amount to a restriction on their mobility and abrogation of their freedom of movement which would impact more inequitably upon women than upon men.[135] By so doing, she deviated from the custodial parent preference and focused on the plight of the mother as a woman to reach a decision that favoured the mother. In cases like *MK v RK*, the restriction on the father's mobility when refused permission to relocate was not considered.

Satchwell J failed to look at the mother before her and the actual circumstances of the child at the centre of the dispute to establish what would be in the BIC in the circumstances. She treated the mother's employment as a super factor and totally disregarded the actual and important role played by both maternal and paternal grandparents in the child's life. The facts revealed that it was reasonable for the mother to relocate to Cape Town without the child because it could not have been in the child's BIC to lose the support structure to which he was

[131] Ibid at 10.
[132] Ibid.
[133] Ibid.
[134] Ibid at 12.
[135] Ibid at 18.

exposed. There was nothing preventing the court to refuse the mother permission to relocate for her to first establish herself in Cape Town and have the child join her at a later stage. Satchwell J after disregarding the important role played by grandparents in the child's life, she held that the mother's proposed relocation to Cape Town with the child was '… genuine, reasonable, undertaken for purposes associated with the best possible interest of herself and her son'.[136] It is submitted, with respect, that Satchwell J's reasoning was flawed and the outcome she reached disregarded the BIC.

While it is true that the main focus is on the rights of the custodial parents, it is submitted that the approach and reasoning of some South African judges who have determined CRDs since 1993, makes it difficult not to conclude that they followed the maternal care preference.[137] It cannot be doubted that the issue in other jurisdictions at the heart of CRDs is not maternal preference but custodial parent preference. However, when judges give priority to maternal happiness on the basis that a happy mother leads to a happy child, leading to relocation with children being easily allowed, that demonstrates a maternal preference.

South African judges have not adequately examined the benefit (if any) of the continued involvement of both parents in their children's lives post parental separation. In other words, in South Africa, unlike in other jurisdictions, the concept of shared parental care in the context of CRDs is not evident from decided cases. By and large, judges are still focusing on the custodial parents, usually mothers without assessing the importance of both parents in their children's lives. It is important that the South African legislature does not fall behind, and when developing legislative CRDs guidelines should consider the developments in other countries regarding the concept of shared parental care in the context of CRDs. According to Parkinson, '[i]n considering the value of laws that seek to encourage shared parenting, it is worth exploring the extent to which such laws can bring about significant shifts of the physical care of the children'.[138] In order words, when considering the value of shared parental care, the primary focus should be on the benefit that children will derive from the involvement of both of their parents in their lives. Shared parenting laws, in jurisdictions such as Australia, United Kingdom and Canada, are based on '… the hope that even if parents cannot or should not stay together

[136] Ibid para 23.

[137] See *M v M* (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) paras 42 and 59, where the court, in allowing the mother permission to relocation to Germany, treated her ability through the assistance of external family members to provide the children with emotional support and a home as super factors. At the same time, the court downplayed the father's ability through his external family members to do the same. See also *WJ v SC* (43927/2018) [2019] ZAGPJHC 127 (11 April 2019).

[138] Parkinson 'The payoffs and pitfalls of laws that encourage shared parenting: Lessons from the Australian experience' (2014) 37 *Dalhousie Law Journal* 301 at 304.

for the sake of the children, at least they should live apart harmoniously, cooperating in the postseparation parenting'.[139]

All the cases discussed thus far demonstrate that without legislative guidelines, individual judges are free, through their discretion to deal as they wish with factors relied on by parties before them to reach their desired outcomes. Through these cases, it was demonstrated that individual judges elevate selected factors to the status of super factors and disregard contrary factors without adequate weighing, balancing and assessment. Without legislative guidelines, judges are free to cherry pick desired factors and overemphasise such factors to either allow or disallow relocation. This enables high court judges generally and judges of the same court in particular, to disregard the earlier approaches of their colleagues without explaining why such decisions are either wrong or not useful in the determination of the cases before them, even when the facts are similar, as was the case in *B v M* and *G v G*.

3.4.3 LACK OF GUIDANCE FROM THE SUPREME COURT OF APPEAL

The SCA had an opportunity to craft the South African CRDs approach in *Jackson v Jackson.*[140] In this case, the Supreme Court of Appeal deviated from the custodial parent preference in circumstances where the father was a custodial parent to decide in favour of the mother. This case was heard and decided by nine judges in total, the judge of the trial court and those of the full bench of the high court as well as those of the SCA. Five out of nine judges who wrote different judgments in these three courts found their own super factors and used them to justify their conclusions.

After the parties' divorce, custody was awarded to the father. Just like in *B v M* which was discussed above, were both parents spent almost equal time with their children, the mother in *Jackson* was also granted generous rights of access to the children.[141] This is another case which resembles aspects of shared or joint care before child relocation order was made but issues relating to shared parental care post parental separation were not dealt with in the judgment. Like in *B v M,* the trial court allowed the custodial father to relocate with the children regardless of the time the non-custodial mother spent with them. However, the full bench disagreed with the trial court and held that the children should not be separated from their

[139] Parkinson 'Family Law and the indissolubility of parenthood' (2006) 40 *Family Law Quarterly* 237 at 253.
[140] 2002 (2) SA 303 (SCA). For an analysis of the approach of the majority judgment see Davel and Boniface 'Cross-border relocation of children and custodial parent *Jackson v Jackson* 2002 2 SA 303 (SCA)' 2003 (66) *THRHR* 138 - 145.
[141] Ibid para 4.

mother, given the fact that they also spent time with her.[142] The fact that the father spent almost equal time with the children was rendered irrelevant in *B v M*.

In allowing the father to relocate, the trial court in *Jackson* used the factors relied on by the father such as better economic prospects for engineers in Australia,[143] the rate of crime and the state of HIV in South Africa as super factors.[144] The trial court disregarded the factors that the mother relied on, such as the trauma that the children would suffer if they were to be separated from her. Based on expert testimony, the trial court held that it was unlikely that separation would be so traumatic that it would have a lasting psychological effect on the children.[145] This was an interesting factor that was raised by the mother in *Jackson*, which was not a factor that was considered in *B v M* when the father was separated from his children. On this point, the full bench did not agree with the trial court. In refusing the father permission to relocate, the full bench was of the view that the children would suffer emotional damage if they were to be separated from their mother.[146]

In the SCA, Cloete AJA, relying on the judgment of Diemont JA in *Stock*[147], wrote a dissenting judgment wherein he disagreed with the full bench on the issue of emotional trauma. He held that '[s]adly, one's sympathy for the [mother] and one's reluctance to subject the children to even temporary emotional trauma cannot be accommodated if one is convinced that the interests of the children will be served best by allowing them to emigrate with their father'.[148] Cloete AJA was convinced that the father had created a secure emotional environment for the children.[149] He endorsed the super factors relied on by the trial court and agreed with the trial court's conclusion.[150] Marais JA also agreed with both the trial court and Cloete AJA. He held that '[a] considerable body of evidence was placed before the court on the superior quality of life available to the children as compared with that on offer here and there was no rebuttal of it'.[151]

Scott JA, in his majority judgment, disagreed with Cloete AJA and used the alleged mental and psychological impact on the children as his super factor that enabled him to refuse

[142] Ibid para 3.
[143] Ibid para 32.
[144] Ibid para 10.
[145] Ibid para 12
[146] Ibid para 13.
[147] Supra note 52 at 1290H - 1291A. It was shown in this chapter that Diemont JA did not believe that children should be separated from their fathers.
[148] *Jackson* supra note 70 para 21.
[149] Ibid para 33.
[150] Ibid para 35.
[151] Ibid para 6.

the father permission to relocate. He held that it was clear from the evidence that ' … if removed from their mother and taken to Australia both young girls … will suffer "a great deal of pain and trauma"'.[152] He was convinced that there was a real risk of psychological harm to the youngest child who would view relocation as abandonment by the mother.[153] He weighed the father's factors relating to high crime rate, AIDS epidemic and a bleak economic outlook in South Africa with the potential trauma that the children were likely to suffer. He was of the view that the pain and trauma to both children and the risk of psychological harm to the youngest child far outweighed the benefits outlined by the father for relocation.[154] Scott JA totally disregarded expert evidence that Cloete AJA dealt with, which demonstrated that the psychological effect on the children was going to be temporary. He used his discretion to disregard this evidence because it interfered with his desired outcome.

Marais JA writing a separate dissenting opinion, disagreed with Scott JA's assessment of the potential psychological harm to the children. Marais JA opined that while the court should '… not be too easily dismissive of identifiable risks',[155] however, '… an existing situation should not lead a court to magnify such risks unduly … [particularly] where the children stand to benefit greatly if the risks do not eventuate'.[156]

To justify his conclusion, Scott JA placed more weight on the factors that favoured the mother and assessed those relied on by the father with a view to dismiss them. One of the major factors that the father also relied on was that he was the custodial parent. The trial court stated that '[i]t is a settled principle of our law that a court will not readily interfere with the responsibly and reasonably made decisions of a custodial parent'.[157] This is the principle followed in most cases like *Cunningham, Van Rooyen* and *B v M*, where the courts allowed custodial mothers' permission to relocate. However, this principle seems to be applied differently when fathers are custodial parents as was the case in *MK v RK* and *Jackson*. In order to justify his departure from this principle, Scott JA in *Jackson* criticised the trial court for placing less weight to the relationship between the mother and young daughters on the basis that the mother was a non-custodial parent.[158] He held that the trial court preferred the rights of the custodial parent over the interests of the children.[159] On this point, Marais JA did '…

[152] Ibid para 5.
[153] Ibid para 12
[154] Ibid para 13
[155] Ibid para 3
[156] Ibid.
[157] Ibid para 14.
[158] Ibid.
[159] Ibid. See also Barrie 'The approach of the courts regarding South African custodian parents going into the diaspora' 2009 (3) *TSAR* 562 at 567.

not think that Jappie J dismissed the fact that the respondent was a good and devoted parent and that there was a strong bond between her and the children or that he afforded it less weight simply because the respondent was the non-custodian parent'.[160] In fact, Marais JA criticised the mother for placing her interests over the BIC. Marais JA noted that the mother had conceded that it would be in the BIC to relocate to Australia, but because she was separated with the father, it no longer suited her to accompany them to Australia, meaning that they should forego the advantages of going to Australia.[161] Factors that Scott JA treated as super factors, such as the extent of access to the children which the mother exercised; the fact that the mother was a good and devoted parent; the strong bond between the mother and children; and the mother's generous access to the children were generally rendered as insignificant when argued in favour of fathers in cases like in *Godbeer, MK v RK, B v M* and *Van Rooyen.*

Scott JA and Cloete AJA also treated the issue of the amount of time the mother spent with the children differently. As was the case in *B v M* in relation to the father in that case, Cloete AJA in *Jackson* did not regard the time the mother spent with the children as decisive in this matter. However, Scott JA was of the view that this was an important factor to consider. He emphasised that the extent of the mother's access meant that the parties had *de facto* joint custody and continued to exercise their 'parenting function in relation to the ordinary day to day welfare of the children'.[162] Cloete AJA disagreed and held that the mother's extensive access to the children and the need to be consulted on issues such as their health and education did not amount to joint custody.[163] Further, that there are aspects of the children's lives that the father, as the custodial parent, could decide alone.[164] These judges were not guided by any legislative provision, and through their discretion were able to analyse the extent of the mother's access to suit their desired outcomes.

Scott JA's judgement is a clear indication of a deliberate disregard of custodial rights to decide in favour of a non-custodial parent, who happened to be the mother in this case. He sought to justify his approach by contextualising the circumstances that led to the father being granted custody. Scott JA clearly followed an approach that deliberately preferred a mother based on the perceived role that mothers are generally believed to play in their children's lives when he opined that '[i]n these circumstances, and having regard in particular to the tender age of the children, it is difficult to imagine a court ever awarding custody to the father in the

[160] Ibid para 9.
[161] Ibid para 9.
[162] Ibid para 4.
[163] Ibid para 23.
[164] Ibid.

absence of an arrangement along the lines of that agreed upon'.[165] In other words, the only way in which the court agreed to grant the father custody was because the parties agreed that the mother would have extensive access to the children. He held that '[i]t was of course on the premise that the existing relationship between mother and children be maintained that the father was awarded custody in the first place'.[166] Scott JA noted that '[i]t is trite that in matters of this kind the interests of the children are the first and paramount consideration'.[167] Scott JA's judgment clearly illustrates that he did not believe that it was in the BIC to be separated from their mother.

The SCA, in *Jackson,* missed an opportunity to provide clarity on how CRDs should be dealt with in South Africa. Cloete AJA selected factors from the case which he used, not only to agree with the trial court, but also to follow the approach of previous decisions where custodial parents, usually mothers, were allowed to relocate with children. Scott JA, in line with the full bench, selected two factors, the amount of time the mother spent with the children and the psychological harm the children were likely to suffer as super factors that he used to go against established precedent regarding the rights of custodial parents . Marais AJA, on the other hand, responded particularly to how Scott JA treated these factors, and was basically of the view that Scott JA exaggerated the importance of these factors.

Apart from the broad BIC standard, all these judges did not have any legislative guidance. They used their discretion to decide which factors were more important than others. They did not properly weigh and balance factors on which they relied with those they rendered insignificant. These different judgments by three judges of the SCA illustrate the extent of judicial discretion and the ease with which judges' views on parenting play a role in the resolution of CRDs. Different judges, faced with the same facts sitting at the SCA as well as those in the high court, reasoned differently to reach different outcomes making the law relating to CRDs difficult to understand. These judges accused each other of either overemphasising certain factors or placing less weight on other factors, without providing the criteria that should be used to weigh and balance competing factors. Additionally, the views of the children were not considered in this case.[168]

[165] Ibid para 8.
[166] Ibid.
[167] Ibid para 2.
[168] See Clark 'Post-divorce relocation by a custodian parent: Are legislative guidelines for the exercise of judicial discretion desirable?' (2003) 120 *SALJ* 80 at 89.

The second child relocation case that was heard by a total of nine judges in three different courts is *Ford v Ford,* [169] which also demonstrates aspects of shared or joint care. As stated in the trial court, it was '… common cause that … [the child] spent 50% of her time with each of her parents and that there had been no problem between the parties … [regarding] the shared parenting arrangement …'.[170] In support of her relocation application, the mother relied on factors such as lack of job opportunities for her in South Africa as compared to in England; Johannesburg not being conducive for raising a child; better quality of life and support of close family members in England; the crime rate in South Africa; affordable health care in England; better social security structure in England; and the deteriorating standard of education in South African public schools.[171] There was evidence that the mother could not find employment in her field of expertise in England.

In objecting to the proposed relocation, the father relied on the fact that the child was settled in South Africa; had a very close relationship with her day-care mother; and that there was a safe, secure and stable environment for the child.[172] It is surprising that the father did not raise a well-known fact that while government schools in rural areas and townships are generally a source of concern, the quality of government schools situated in middle-class urban areas are generally regarded as good schools.

In most of the earlier cases, mothers who placed their personal interests first, which were also meant to benefit their children such as employment opportunities, protection from crime, quality of education (or lack thereof), family support and their new family relations if they remarried, were permitted to relocate. However, the father who raised similar factors in *Jackson*, was refused permission to relocate. In *Ford*, the trial court followed the SCA's precedent in *Jackson* by refusing the custodial parent permission to relocate, notwithstanding the fact that in this case, the custodial parent was a mother.

In line with Scott JA's approach in *Jackson*, the trial court held that in considering the BIC '… a major consideration should be the consequences of interrupting a close psychological and emotional bond which the child has with the non-custodian parent'.[173] The trial court noted that the facts in *Jackson* were similar to those in *Ford,* even though the sex of the parents who wished to relocate was different. In refusing the mother permission to relocate, the trial court held that the mother could not '… make a decision (even if reasonable and balanced) to relocate

[169] [2006] 1 SA 571 (SCA).
[170] Ibid at 398.
[171] Ibid at 399.
[172] Ibid at 400.
[173] Ibid.

and in so doing pay scant regard to the fact that access which the children have to their father would be seriously curtailed'.[174] Weiner AJ assessed the facts relied upon by both parties and without focusing on the time each parent spent with the child, concluded that the child had a stable life in South Africa and a special bond with her day-carer and it would not be in her best interest if such bond was to be disturbed. This was different from Scott JA's approach in *Jackson*, who overemphasised the time the mother as a non-custodial parent spent with the children in that case.

Weiner AJ held that the BIC was not the main reason for the mother's relocation. He was of the view that the decision to relocate was not child-centred and that the mother merely wished to start afresh after the parties' divorce,[175] which she was entitled to do. He further pointed out that '[t]he interests of the non-custodian parent and the obvious disruption to the relationship with the child have largely been ignored until the decision in the *Jackson* case …'.[176] Scott JA, in *Jackson,* also saw the custodial father's relocation as advancing his interests as opposed to advancing the BIC. Sinclair and Bonthuys, without comparing Weiner JA's approach with that of Scott JA in *Jackson*, which, while favouring parents of different sexes were nonetheless similar, unfairly argued in relation to Weiner AJ who found in favour of the father that:

> '[i]n the majority of cases, therefore, the structure of the legal rules allows relocation to be determined by the wishes of the parents and not the interests of children … [and] the extreme interpretation of the best interests test in the *Ford* case [trial court] may lead courts to ignore the interests of custodian parents, who are generally mothers, from relocating to pursue career opportunities or new relationships, but not similarly restricting non-custodian parents'.[177]

If this argument is true in relation to Weiner AJ in *Ford* (trial court) who found against the mother, it is difficult to see how it cannot hold water in relation to Scott JA in *Jackson* (SCA) who found against the father. Particularly, where the non-custodial parents in both cases had extensive access to their children and there was evidence presented that the children may suffer from psychological harm if separated from their non-custodial parents. It is not surprising that Sinclair and Bonthuys, in their critique, disregarded the fact that the interests of the father were

[174] Ibid at 413.
[175] Ibid at 414.
[176] Ibid 415.
[177] 'Law of persons and family law' 2004 *Annual Survey of South African Law* 115 at 155.

not elevated by Scott JA in his majority judgement in *Jackson* (which was the most authoritative case at the time), because the outcome benefitted the mother. The fact that the mother was refused permission to relocate in *Ford* does not necessarily mean that her interests were not considered. Indeed, the mother in *Ford* had a constitutional right to move freely and pursue interests that would advance her life and contribute to the child's wellbeing. The father in *Jackson* also had the same rights, but they were totally ignored.

Sinclair and Bonthuys further assert that '… there are no rules that prevent non-custodian parents from relocating in order to preserve their relationship with children'.[178] This assertion is problematic because it creates the impression that the non-custodial parent if 'he' wishes to preserve 'his' relationship with the relocating children 'has an option' to follow the mother when she relocates. An objection to relocation is not necessarily only about the 'father's' desire to preserve the relationship with the child; it is also about the assessment of the routine and relationships which the child is accustomed at their current location and how being removed therefrom will impact on the child's life. Surely, if the custodial parent's interests are to be dominant in CRDs, courts will fail to properly assess what would be in the BIC.

In both *Ford* and *Jackson,* the children were settled in South Africa. It is thus, difficult to understand how in one case the BIC are served by refusing the custodial parent to relocate while in the other case they are served by the custodial parent being allowed to relocate in line with Sinclair and Bonthuys' critique of Weiner AJ, particularly when the facts are similar. The assertion by Sinclair and Bonthuys quoted above was based on the premise that in most instances the custodial parents would be mothers.

In *Ford*, the mother appealed to the full bench which dismissed her appeal and endorsed Weiner AJ's reasoning and conclusion.[179] It is worth noting that Satchwell J wrote a separate judgment where she disagreed with both Weiner AJ's judgment and that of Chachalia J, who wrote the majority judgment of the full bench. In particular, she acknowledged the challenge highlighted in this thesis when she stated that 'the trial court gave undue weight to certain factors and had insufficient regard to others'.[180] While this might have been an unfair criticism of Weiner AJ's judgment, it is submitted that this was a judicial concession that judges do pick and choose factors that they wish to rely on, which Satchwell J went on to do herself, in this case, to justify her intended outcome.

[178] Ibid.
[179] *Ford v Ford* [2006] JOL 16386 (W).
[180] *Ford v Ford* [2006] JOL 16676 (W) para 2.

Satchwell J opined that Weiner AJ 'did not have regard to the complexity of the "best interest" principle. In assigning "priority" to "the best interest of the non-custodian parent and the obvious disruption to the relationship with the child" the trial court overemphasised the bond of the [father] with the [child] at the expense of other interests'.[181] Satchwell J was not persuaded that the relationship the father fostered with the child was enough to prevent the mother from relocating. In advancing her maternal care preference which is evident from all the other CRDs cases she presided such as *B v M* and *WJ v SC*, Satchwell J specifically held that the child would '… be well cared for wherever she lives with her mother – in South Africa or in England'.[182] She then isolated super factors that she used in favour of the mother such as the fact that the mother cared for the child after the divorce while the father did not pay maintenance, without investigating the reasons that led to the father not paying such maintenance. Most importantly, Satchwell J did not evaluate whether the father had failed to contribute to the child's support while gainfully employed.[183] She also noted that the mother paid for school fees without receiving any contribution from the father, again without scrutinising the period of non-contribution by the father and the circumstances that led to the father's default in payment.

With respect, this was a desperate judicial attempt to allow the mother to relocate. Satchwell J, in upholding the mother's appeal, spent the better part of her judgment highlighting the mother's strong points while at the same time downplaying all the factors that the father relied on. The criticism that she levelled against Weiner AJ, of overemphasising certain points over others, is more fitting in relation to her own judgment. She overemphasised the mother's strong points at the expense of other equally important considerations such as the bond the child enjoyed with her day-carer and the maintenance of the stability of the child's life.

Dissatisfied with Chachalia J's judgment and in agreement with Satchwell J's minority judgment, the mother appealed further to the SCA, which confirmed the decision of the full bench and refused her permission to relocate.[184] The conclusion of the SCA is a bit strange and does not seem to be supported by the way it dealt with the facts and its application of the law to the facts. The way Maya AJA (as she then was) evaluated the facts and applied the law, and

[181] Ibid para 47.
[182] Ibid para 57.
[183] Ibid.
[184] *Ford v Ford* [2006] 1 ALL 571.

her assessment of various constitutional rights gave the impression that she would allow the mother to relocate. But ultimately, she refused the mother permission to relocate.

Maya AJA started by recognising that for the court to decide whether the intended relocation would be in the BIC, it must carefully evaluate, weigh and balance a number of competing factors which includes the child's wishes in appropriate cases.[185] She then correctly referred to different provisions in the Bill of Rights. But she did not refer to section 28(2) of the Constitution, which specifically addresses the BIC principle. She observed that:

> '[f]rom a constitutional perspective, the rights of the custodian parent to pursue his or her own life or career involves fundamental rights to dignity, privacy and freedom of movement'.[186] Thwarting a custodian parent in the exercise of these rights may well have a severe impact on the welfare of the child or children involved. A refusal of permission to emigrate with a child effectively forces the custodian parent to relinquish what he or she views as an important life-enhancing opportunity. The negative feelings that such an order must inevitably evoke are directly linked to the custodian parent's emotional and psychological well-being. The welfare of a child is, undoubtedly, best served by being raised in a happy and secure atmosphere. A frustrated and bitter parent cannot, as a matter of logic and human experience, provide a child with that environment'.[187]

Motherhood makes it difficult for women to continue with some of the activities they enjoyed before conceiving and giving birth. Some may be forced to relinquish attractive job opportunities because of their childcare obligations.[188] In most cases, mothers are awarded care and residency of their children while fathers are mostly awarded contact rights which relieves fathers of the burden of day-to-day care. This burden is mostly placed on mothers which might interfere with their freedom to participate fully in the workplace. Most fathers are not awarded the care and residency of their children, which enables them to take advantage of opportunities at their disposal without worrying about their children's daily care obligations. However, it does not necessarily follow that every woman who gives birth experiences the same limitations. It is important for the court to assess the real-life circumstances of the woman before it and

[185] Ibid para 10. The court also noted that '[o]ur courts have always recognised and will not lightly interfere with the right of a parent who has properly been awarded custody to choose in a reasonable manner how to order his or her life'.
[186] See sections 10, 14 and 21 of the Constitution.
[187] *Ford* supra note 184 para 11.
[188] Walby and Olsen 'The impact of women's position in the labour market on pay and implications for UK productivity' *Report to Women and Equality Unit* (November 2002) 28.

decide based on the evidence provided and not the general prejudices experienced by women currently, historically, or statistically.

While statistics relating to the pattern of discrimination experienced by women in the past and present are important, the circumstances surrounding the dispute before the court and the actual role played by the parents in their children's lives should be decisive. The focus should be on the actual disadvantages experienced by the particular mother (or father) before the court. The court must balance the competing factors and determine what would be in the BIC before the court. In *M v M,* the court correctly opined that '[i]t is not the gender[189] of a particular parent that entails him or her to be considered the primary caregiver of a child, but … the factual circumstances of each case'.[190] This, does not mean that maternity should never be considered as a factor by the court. However, the court should never elevate maternity into a 'super-factor' to the extent that it is the only consideration of importance in determining CRDs.[191]

It cannot be denied that there are women whose careers are impeded by the number of hours they devote to caring for children and other members of the household. The Global Gender Gap Report of 2020,[192] reflects challenges experienced by women in relation to access to economic opportunities, some of which are due to the time they spend on their unpaid roles as mothers. The same report highlights the progress made by South Africa regarding the emancipation of women through technological developments, labour law legislation and the Constitution generally. It is always important to bear in mind that men generally are not confronted with some of these difficulties. However, while the social and economic position of women must be considered when the facts require this, it is nevertheless, important for courts not to import the challenges experienced by women generally into their assessment of particular mothers before them, and thus disregard such mothers' personal circumstances to benefit them. If the circumstances of the mother before the court demonstrate that she is not in a better position to care for a particular child, it will not be in the BIC to allow her to relocate or refuse the father to relocate with the child. An assessment of the facts before the court in CRDs will prevent women who are not suited to care for children from relying on disadvantages that women have generally experienced in support of their cases.

[189] It is possible that the court might have used the word 'gender' incorrectly and meant to refer to 'sex' to make a point that men can also perform traditional female gender roles.
[190] (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) para 63.
[191] See *Ex parte Critchfield and Another* 1999 (3) SA 132 (W) at 143A-E.
[192] http://www3.weforum.org/docs/WEF_GGGR_2020.pdf at 315 accessed on 23 October 2015.

The SCA, in *Ford,* made it clear that courts should be sensitive to the possibility that the differential treatment of custodial parents and non-custodial parents may lead to unfair gender discrimination.[193] The SCA noted that parenting roles in South Africa are largely gender based and women are usually entrusted with caring for children. Further that the refusal of relocation applications by women can potentially restrict their mobility.[194] Kruger correctly argued that '[a]lthough the fundamental rights of the custodian parent have never been specifically considered by a court hearing an application for removal of the children from the court's jurisdiction, they are without a doubt a relevant consideration in applications like these'.[195] For instance, the need for the custodial parent's right to movement not to be unnecessarily restricted by denying them permission to relocate is one of the fundamental aspects that courts ought to consider when adjudicating CRDs.

While the assessment of available empirical evidence around the world is likely to support the SCA's reasoning, nonetheless, courts should be careful not to overemphasise the discrimination that women generally experience,[196] which may not have been personally experienced by the mother subject to the CRD before the court. Courts should properly assess whether the dispute before the court entrenches any disadvantage towards the mother. They should not use prejudices generally experienced by women to negatively impact fathers who are before courts.

More particularly, if the facts demonstrate that it would be in the BIC for the father to be successful in any child relocation case, the court should also ask what role (if any) is played by the non-custodial parent in the child's life to satisfy itself of the extent of involvement of such a parent in the life of the child before it.[197] Courts should be careful not to be overly sympathetic to women solely based on their sex and their general discriminatory experiences when resolving CRDs, thus deviating from what would be in the BIC under the circumstances.

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[193] *Ford* supra note 184 para 12.
[194] Ibid.
[195] Kruger 'Emigration by a custodian parent after divorce' 2001 (64) *THRHR* 453 at 457. Kruger quotes *Van Rooyen v Van Rooyen* at 437H where it was held that 'all the relevant factors, even the mother's fundamental right to freedom of movement, will be assessed in the context of children's best interests'.
[196] See *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) para 80, where Kriegler J held that '… the notion … that women are to be regarded as the primary caregivers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns'.
[197] *Kooverjee v Kooverjee* [2006] 4 All SA 369 (C) at 375 where the court held that it was '… very aware of the dangers of stereotyping the mothering role of women and the Court is cautious not to reinforce these roles. It is, however, important to note that the *de facto* roles of women in society today cannot be ignored and that forcing a model of formal equality onto our society, may just reinforce the existing unequal roles and hamper the achievement of true and substantive equality'.

If the facts before the court reveal that it will or it will not be in the BIC to allow relocation, the decision should be dictated solely by the facts of the case in line with the proposed statutory guidelines, should they be established. The court should weigh and properly balance competing factors to determine what would be in the BIC in the circumstances.

In *Ford*, apart from a balancing exercise, Maya AJA assessed the link between the custodial parent's interests and the BIC. She opined that previous cases indicate that:

> '… [the]children's interests are more often than not intertwined with those of their caregivers and that courts must thus properly consider the impact on the custodian parent of a refusal to remove a child in so far as such refusal may have an adverse effect on the custodian parent and in turn the child'.[198]

However, she did not engage Scott JA's view that the rights of the custodial parents should nonetheless, not be overemphasised.[199] It is important to note that the custodial parent's interests are not necessarily in the BIC by virtue of being a primary caregiver. The BIC should be assessed holistically by adequately weighing and balancing all competing factors. It is surprising that Maya AJA, in her analysis, did not examine whether the BIC in this case were more intertwined with the mother's interests.

Maya AJA's general sympathy towards the alleviation of female oppression did not inevitably lead to a decision in favour of the mother in the same way as Satchwell J did in her dissenting judgment of the full bench. Given Maya AJA's analysis which showed sympathy to the mother, it is not entirely clear from her judgment, how she came to a decision to deny the mother permission to relocate, despite the mother being the custodial parent. It appears, that she might have been of the view that the mother behaved unreasonably in that, while she was aware that the father noted an appeal on the case, she nonetheless, still went ahead and resigned from her employment, sold her house and vehicle, shipped some of her movable properties, secured low paying employment in the United Kingdom and notified the child's school that she would be leaving South Africa with the child.[200]

In *Ford*, four judges delivered judgments from three different courts: Weiner AJ as a court of first instance; Chachalia J wrote for the majority judgment of the full bench; Satchwell J wrote a dissenting opinion for the full bench; and Maya AJA delivered a unanimous judgment for the SCA. Given the similarities of the facts, Weiner AJ and Chachalia J followed Scott JA's

[198] Ibid para 17.
[199] *Jackson* supra note 70 para 15.
[200] *Ford* supra note 184 para 20.

precedent in *Jackson* when denying the mother permission to relocate. They identified the time the father spent with the child and the likely psychological impact on the child, should the child be separated from the father, as super factors to reach their conclusions. These are super factors that Scott JA used successfully to prevent the father from relocating in *Jackson*.

This outcome is contrary to Satchwell J's decisions in *B v M* and *WJ v SC*, where she allowed the mothers to relocate. Through her discretion, Satchwell J in *Ford*, deviated from the approach of Scott JA in *Jackson* because this judgment did not favour the mother, even though the facts in both cases were similar. Satchwell J did not explain why Scott JA's approach of linking the possible psychological impact on the children with their separation from the non-custodial parent was not suitable in *Ford.* Instead, she chose to criticise Weiner AJ for overemphasising certain factors while ignoring others.

Apart from noting who wrote the full bench's majority judgment and who dissented, Maya AJA did not engage with both judgements of the full bench. She dealt with the facts of the case and applied legal principles to them without indicating which parts of Chachalia J and Satchwell J's judgments she either agreed or disagreed. She, nonetheless, disagreed with Weiner AJ's correct assertion on two points. First, that Scott JA in *Jackson* deviated from previous CRDs cases where a custodial parent would be allowed to relocate if 'she' demonstrated that 'her' decision was reasonable and rational.[201] Second, that 'the interests of the non-custodian parent and the obvious disruption to the relationship with the child have largely been ignored until the decision in the *Jackson* matter'.[202]

While Maya AJA emphasised the need to properly weigh and balance competing factors, she did not juxtapose competing factors, but choose to engage constitutional principles relating to the oppression of women.[203] While she cannot be criticised for highlighting the need to consider constitutional rights when determining CRDs, she nonetheless, ought to have engaged a proper balancing exercise of competing factors to demonstrate the BIC. It is submitted that she should have evaluated the importance of both parents in their child's life and their respective roles in the child's development. There must have been a proper assessment of the advantages that the child is currently enjoying which ought to have been adequately balanced with the potential advantages of relocation. This would have placed Maya AJA in a better position to explain why refusing relocation was in the BIC under the circumstances.

[201] Ibid para 17.
[202] Ibid
[203] Ibid para 11.

It is submitted that the SCA again missed an opportunity to craft South African CRDs jurisprudence. The SCA should have emphasised the need to objectively weigh and balance competing factors. It should also have determined that the starting point should be the assessment of the possibility of shared care responsibility, particularly where both parents have shown great interest in their child's life and explained the benefits the child would derive by either refusing or granting relocation. This is a child centred approach that some jurisdictions are embracing.

3.5 CONCLUSION

Different judgments discussed in this chapter clearly demonstrate that the process of judicial assessment is driven by unconstrained discretion that enables individual judges to adopt their desired judicial analysis to reach their desired conclusions. This is a clear illustration of the inconsistent approaches adopted by South African judges regarding CRDs, making the law less predictable and uncertain. It was argued in this chapter that legislative guidelines are needed to limit this kind of discretion. Lack of legislative guidelines has enabled individual judges to decide independently on which factors they will rely to reach their desired outcomes. There is:

> '… need for some degree of conformity, since each judge inevitably has his own subjective opinion as to the degree of weight to be attached to each fact in assessing the best custodian … [and] that it is undesirable to have a system of adjudication whereby different judges would make different custody orders in the same fact situation'.[204]

In this chapter, it was shown that judges do not explain why they select some factors and ignore other factors. Further that where judges considered contradictory factors, this was done with a view of criticising and dismissing them without adequately balancing such factors with their preferred factors that they elevated to the status of super factors.

Generally, judges did not explain why they decided to attach more weight to their super factors and how such factors advanced the BIC. It was found that judges are inconsistent in the way they deal with various factors, making it difficult for future litigants to assess which factors are important to rely on in child relocation cases. This creates the impression that success or

[204] Bradbrook 'The role of judicial discretion in child custody adjudication in Ontario' (1971) 21 *The University of Toronto Law Journal* 402 at 403.

failure in child relocation litigation is determined largely by who the judge is rather than established legal principles. This is undesirable and there is a need for certainty in the resolution of CRDs. For instance, any mother would hope to have a judge who shares the same views as Satchwell J regarding the role of mothers on parenting while any father would hope for a judge like Diemont JA, who values the presence of fathers in children's lives.

It can be argued that most of the CRDs cases discussed in this chapter were not necessarily decided in favour of mothers, but in favour of primary caregivers, the majority of whom happened to be mothers. However, the reasoning of the judges in cases such as *Cunningham, WJ v SC* and *B v M* demonstrate that courts were not concerned with primary caregivers *per se,* but with the important role mothers generally play in children's lives. In these cases, children were allowed to relocate with their mothers even though the evidence presented indicated that their lives would be disrupted and were likely to lose important relationships not only with their fathers but also extended family members. This approach was also evident in *MK v RK* and *Jackson,* where the importance of motherhood was linked to the children's age.

Most of the judges used factors such as the amount of time children spent with their mothers and the psychological harm that children could potentially suffer if separated from their mothers as super factors to ensure that mothers are able to relocate or are not separated from their children by refusing fathers permission to relocate. When mothers where relocating, the issue of psychological harm to the children was never raised, but this is the factor which played an important role to deny fathers permission to relocate with children.

It is submitted that some degree of conformity can be achieved through specific CRDs legislative guidelines, which must be incorporated into the Children's Act. These guidelines will enable courts to properly weigh and balance all the competing factors when determining the BIC in CRDs.[205] These guidelines should require judges to explain why they preferred certain factors above others.

Finally, in *M v M,* the father urged the court, in its analysis, 'to be very careful not to be guided by the so-called "maternal preference rule" when a decision is made as to the primary residence'.[206] The court held that it was:

> '… well aware that when the post-divorce contact and care regime that affected children's best interests need to be determined in 2018, the appropriate care and

[205] *Cunningham* supra note 32 and *HG v CG* 2010 3 SA 352 (ECP) paras 7-10
[206] *M v M* (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) para 60.

> contact regime needs to be founded on the facts and circumstances of the case, and not on generalisations such as the "tender age" doctrine (maternal preference rule) or the principle of "preserving the status quo"'.[207]

The court correctly held that this is because:

> '… the concept of mothering is indicative of a function rather than a *persona*. It includes the sensitive attachment which flows from the attention devoted from day to day to the child's need of love, physical care, nutrition, comfort, peace, security, encouragement and support'.[208]

The BIC would be served when the court properly assesses who between the child's parents is better suited to care for the child.

[207] Ibid para 62.
[208] *Van Der Linde v Van Der Linde* 1996 (3) SA 509 (O) at 515B-C.

4 CHAPTER FOUR: THE ROLE OF EXPERT WITNESSES IN CRDs

4.1 INTRODUCTION

The purpose of thesis is to demonstrate that judges have almost unlimited discretion when adjudicating CRDs. Judges follow their inclinations when adjudicating these disputes. They analyse the facts of cases before them and interpret applicable legal principles in ways that allow them to reach their desired outcomes. There is a need for dedicated legislative guidelines that will limit judges' discretion when adjudicating CRDs. This chapter aims to demonstrate that apart from inadequate weighing and balancing of competing factors, the lack of adequate legislative guidelines enables judges to inadequately construe expert evidence provided to them to reach their desired outcomes. Expert witnesses can be used in CRDs to assist judges to understand the likely impact of the proposed relocation on children.

Expert witnesses may be requested to provide their expert testimony orally or/and through reports that contain their main findings and recommendations. Where there are two or more expert witnesses with differing views, the court must decide who, between them, has provided useful evidence that advances the BIC. The purpose of this chapter is to evaluate the extent to which expert witnesses' evidence in CRDs influences judges' discretion when deciding whether children should be relocated. But most importantly, it highlights the important role played by professionals such as psychologists, social workers, psychiatrists, and the Family Advocate in CRDs.

This chapter will review selected South African child relocation cases and assess how individual judges have used expert evidence or part thereof to decide these cases. It will be argued that legislative guidelines will restrict the arbitrariness associated with the judicial evaluation of expert testimony wherein judges are able to isolate certain parts of the expert evidence that support their intended outcomes while rejecting other aspects thereof. Further that these guidelines will also limit judges' discretion to use expert evidence to reach desired outcomes that might not necessarily be in the BIC. These guidelines should oblige judges to properly weigh and balance competing evidence provided by different experts before them to reach outcomes that are in the BIC. This chapter also reflects on selected socio-legal research that provides useful evidence that can assist not only in the development of policy and legislation dealing with CRDs but also in the way courts determine these disputes.

4.2 EXPERT WITNESSES

An expert witness is a person who, by reason of their special knowledge, experience, and skill, is better positioned than the court to express an opinion on an issue before the court which will be of appreciable assistance to the court.[1] Such opinion must be relevant and admissible.[2] Rule 9 of the Uniform Rules of the High Court enables parents, with leave of the court, to call expert witnesses to testify in court. Some practice manuals of certain courts also provide guidance on how parties should deal with expert witnesses. It is likely that when one of the parents notifies the other that they intend to call an expert witness, the other parent will also call an expert to support their case. Paragraph 6.5.5 of the Gauteng Division, Johannesburg's practice manual provides that '[i]n all trials in which the parties have opposing expert witnesses, such opposing expert witnesses must meet and reduce their agreements and disagreements to writing in joint expert minutes, signed by them …'.[3]

Expert witnesses should only be called if they will add value to the proceedings and not waste the court's time. In *Twine and Another v Naidoo and Another*, the court held that:

> '[t]he admission of expert evidence should be guarded, as it is open to abuse; the witness claiming to be an expert has to establish and prove her credentials in order for her opinion to be admitted; the expert testimony should only be introduced if it is relevant and reliable … [and] the expert witness should bring specialised knowledge to the court'.[4]

In family law disputes, there are two prominent types of expert witnesses that have been used to assist courts to determine care, residency, and contact disputes between parents in different countries. The first set of expert witnesses are generally drawn from practising professionals such as social workers, psychiatrists, and psychologists. The second set of experts are often academics, who have played a more prominent role in the USA in the adjudication of CRDs. While South African courts have used the first set of experts in CRDs cases, academics, however, have not been called as experts in these cases. As such, the role of academics as experts will not be discussed in this chapter.

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[1] See *Roman's Transport v Zihlele* [2015] ZASCA 13 (SCA) para 9.
[2] Bellengere *et al The Law of Evidence in South Africa: Basic Principles* (2013) 255. See also Barrie and De Villiers 'Revisiting the adversarial approach of dealing with expert evidence: The treatment of expert witnesses by the state administrative tribunal of Western Australia' (2017) 1 *TSAR* 59, where it is stated that '[e]xpert evidence must be particularly persuasive so as to prove or disprove particular issues before the courts'.
[3] *Twine and Another v Naidoo and Another* (38940/14) [2017] ZAGPJHC 288 (16 October 2017).
[4] Ibid para 18.

Psychiatrists as medical specialists as well as social workers and psychologists as practising professionals are usually called as experts in children cases because while '[m]ost family court judges are well educated and experienced in family law … [nonetheless, they have] little formal education in the family systems, mental health, and child development issues that underlie and often drive family disputes …'.[5] Psychologists usually assist courts to understand the individual and collective psychological profiles of different family members and the importance of the role played by these family members on the wellbeing of children.[6] Care, contact, and disputes over residency generally raises considerations such as: parents' parenting abilities; their behavioural patterns, the connections and relationships that parents foster with their children; parents' emotional stability or lack thereof; parents' patterns of thinking and their related capacity for decision making; children's ages, and children's contact with non-residential parents.[7] In accordance with their experience and training, psychologists might assist courts to understand the impact of these factors and their role in inter-parental conflicts.

It is true that 'psychological issues surrounding the relocation of custodial parents and their children are complex and interdependent',[8] and courts may need the assistance of qualified professionals to adequately understand them. To be useful in CRDs, psychologists should assess children's emerging developmental and socio-emotional needs and evaluate their parents' comparative ability to meet those needs, with a view to enable courts to adequately establish the BIC.[9]

Parents often contract psychologists who are sympathetic to their cases to advance their arguments and to discredit that of other parents. Nonetheless, psychologists are '… ethically obliged to provide fair and unbiased testimony on contentious matters'.[10] It is submitted that an expert should only be viewed as credible if he or she demonstrates the highest level of integrity and honesty by providing testimony that is designed to assist the court rather than deliberately advancing the interests of any party.

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[5] Kreeger 'Family psychology and family law - A family court judge's perspective: Comment on the special issue' (2003) 2 *Journal of Family Psychology* 260 at 261.

[6] The British Psychological Society 'Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations' (2016) 4 available at https://www.judiciary.gov.uk/wp-content/uploads/2016/05/psychologists-as-expert-witnesses.pdf accessed on 26 October 2015.

[7] Gindes 'The psychological effects of relocation for children of divorce' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 119 at 120.

[8] Ibid at 144.

[9] McCurley, Murphy & Gould 'Protecting children from incompetent forensic evaluations and expert testimony' (2005) 19 *Journal of the American Academy of Matrimonial Lawyers* 277.

[10] Strout 'Post-divorce relocation: In the best interests of the child?' (2007) 2 *South African Journal of Psychology* 223 at 225. In *Stock v Stock* 1981 (3) SA 1280 (A) 1281, the court made it clear that the evidence of an expert witness 'is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him'.

In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MbH,* the AD held that the court my call on the evidence of expert witnesses when it lacks special knowledge and skill, and is not sufficiently informed to undertake the task of drawing properly reasoned inferences from the facts established by the evidence.[11] Satchwell J in *Holtzhauzen v Roodt* also correctly observed that experts are usually called on matters requiring specialised skill or knowledge.[12] However, the court further correctly cautioned that courts should not elevate the expertise of witnesses to such heights that they lose sight of the courts' own capabilities and responsibilities.[13] Expert evidence must not usurp the function of the Court.[14] The facts upon which an expert opinion is based must be proved by admissible evidence.[15]

Witnesses should only be admitted as experts in CRDs when they have demonstrated that they possess specialised skill, knowledge, expertise, training or experience in childcare and contact evaluations that can be of assistance to the court when deciding these disputes. These experts should assist courts to understand family relationships and the interpersonal dynamics of both parents and their children. It has been argued that 'formal qualifications are not always essential, and in many instances, the practical experience of the witness may be decisive'.[16]

Irrespective of who requested an expert to provide evidence in court, such an expert must provide 'independent assistance to the court by way of objective [and] unbiased opinion in relation to matters of his or her expertise'.[17] Davis J in *Schneider NO and Others v Aspeling and Another* emphasised that an expert is not a hired gun of the party that called them to provide expert testimony.[18] Expert witnesses must always be objective and provide impartial evidence that will assist courts to determine what will be in the BIC under the circumstances.[19]

4.3 EXPERT EVIDENCE IN SOUTH AFRICAN CRDs

South African courts have admitted and considered expert testimony in CRDs. Some of the decided cases clearly demonstrate how judges used expert evidence to reach their desired outcomes. In these cases, different judges faced with the same expert evidence interpreted such

[11] 1976 (3) SA 352 (A) at 370E-G.
[12] 1997 (4) SA 766 (W) at 772.
[13] See *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 22D-E.
[14] 1997 (4) SA 766 (W) at 722.
[15] See *Davey v Edinburgh Magistrates* 1953 SC 34 at 40.
[16] Bellengere *et al* op cit note 2 at 398.
[17] Ibid at 401.
[18] 2010 (5) SA 203 (WCC) at 211.
[19] *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) para 15.

evidence using their discretion to arrive at their predetermined conclusions. In *Jackson v Jackson,*[20] a total of nine judges, one as a trial court, three on appeal as a full-bench of the High Court and five on a further appeal in the SCA, viewed expert evidence that was first presented to the trial court differently.

In providing the custodial parent permission to relocate with children, the trial court evaluated all the reports provided by various experts and rejected conclusions of expert reports that would have led it to refuse the father permission to relocate. The trial court exercised its discretion and dismissed the testimony of some of the experts who expressed a view that '… it would not be in the children's interest to permit them to emigrate with the [father]', as a mere expression of the experts' sympathy for the mother.[21] The trial court accepted the expert's contention that 'as the bond between the [mother] and the children has been firmly established, it is unlikely that a separation between the [mother] and the girls would be so traumatic that it would have a lasting psychological effect'[22] on the children.

The full bench on appeal, assessed the same expert witnesses' reports with a view to find evidence that could enable it to deviate from the traditional view that supported custodial parents, which was adopted by the trial court. In reversing the order of the trial court, the full bench was not convinced that the views of experts who testified in favour of the mother should be entirely dismissed, given the extensive experience of one of those experts who was a clinical psychologist.[23]

The father then appealed to the five-judge bench court of the SCA. There are three judgments from the SCA, two of which critically assessed the testimony of all the experts called in this matter. Cloete AJA in his dissenting judgment, because he wanted to allow the father to relocate, accepted the testimony of two psychologists who were of the view 'that no long term emotional or psychological trauma would be caused by the move; and that [the children's] long term interests would be better served by such a move'.[24] The mother called two social workers and one psychologist. Cloete AJA found that the psychologist called by the mother was biased in favour of the mother and that '[h]er undoubted expertise … as emphasised by the Full Court – cannot compensate for the partiality of her approach, which inevitably detracts from the value of her evidence'.[25] Cloete AJA's discretion enabled him to choose which expert testimony was

[20] 2002 (2) SA 303 (SCA).
[21] Ibid para 12.
[22] Ibid.
[23] Ibid para 13.
[24] Ibid para 16.
[25] Ibid para 19.

useful for his judgment and to also discredit expert witnesses who did not provide evidence that supported his desired conclusion.

Scott JA delivered a majority judgment and disagreed with Cloete AJA's assessment of expert witnesses. Scott JA held that the testimony provided by the two social workers and psychologists in favour of the mother 'undoubtedly called for more attention than it received. Neither the finding that their opinions were based on sympathy nor the finding of bias was in any way motivated'.[26] The expert witnesses that testified in favour of the mother 'were firmly of the view that the mother, rather than the father, ought to have been awarded custody at the time of the divorce'.[27] Scott JA was convinced that '[g]iven the age of children, their sex and the mother's recognised parenting capabilities, such a view was hardly unreasonable'.[28] He held that there was nothing in the record of this case that suggested that the opinions of all the experts who testified in favour of the mother were based on sympathy towards her.[29] Scott JA was of the view that allegations of bias and lack of objectivity against the psychologist that testified on behalf of the mother was a far reaching finding to make with regards to a professional witness and thus, unjustified.[30]

Scott JA was not prepared to engage the substance of the reports by the experts who testified in favour of the father. He did not engage the fact that these experts were of a strong view that children in this case had the capacity to survive relocation due to their natural resilience. He chose to rely on expert evidence that supported his own general view which comes out clearly from his judgement, that children should be raised by their mothers.

All these different judges had considered the same expert evidence but due to their own inclinations relating to the caring of children, were able to find something from the expert evidence that supported their views and used it to reach their intended outcomes. Such judicial discretion to accept or reject expert evidence can be limited if the legislature provided legislative guidelines on how to assess expert testimony in CRDs that would limit the amount of discretion judges enjoy when dealing with expert evidence.

In *B v M*,[31] expert witnesses also played an important role in the way Satchwell J exercised her discretion. She used expert evidence to criticise the approach of the trial court. There were number of experts in this case, including two psychologists who provided the court

[26] Ibid para 15.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] [2006] 3 All SA 109 (W).

with their reports.[32] The first report indicated that there were three options available to the court. First, the mother should relocate to Cape Town with her new family together with her children. Secondly, the mother should not relocate to Cape Town and thirdly, the mother should relocate to Cape Town without the children. The second report agreed that the first two options were available but highlighted that the third option should not be considered.[33] Even though these options were presented to the court, the first report sought to convince the court that relocation should not be effected while the second report was in favour of relocation.[34]

In substantiating their positions, these expert witnesses, in their respective reports, conducted various tests such as: the family relations test,[35] the kinetic family drawing test,[36] the tree test,[37] parenting style,[38] the children's primary family of reference.[39] These tests were meant to illustrate to the court: the relationship which the mother and father had with each other and how that affected the children; the impact of the parties' new families in the children's lives; the impact of the proposed relocation on the children; the impact of refusing relocation on the mother's relationship with her husband; the close emotional bonds the minor children had with both their mother and father as well as their stepmother and stepfather.[40]

Joubert AJ in the court *a quo* wanted to refuse the mother permission to relocate. He assessed the expert reports in a manner that led him to conclude that the experts who provided evidence in this case did not come up with recommendations that were firmly in support of or against relocation to Cape Town.[41] The usage of the word 'firmly' indicates what judges, because of their discretion, can do with expert evidence if that evidence does not necessarily support their desired outcome. One expert did recommend relocation, but Joubert AJ attached less significance to that recommendation and held that it was not forceful enough to convince him to order relocation.

On appeal to the full bench, Satchwell J understood the various experts' evidence differently. While agreeing with the court *a quo* that none of the experts were able to make a strong recommendation for or against relocation,[42] unlike the court *a quo*, she leaned towards

[32] There were also social workers and a family advocate.
[33] *B v M* supra note 31 para 33.
[34] Ibid para 105.
[35] Ibid para 107.
[36] Ibid.
[37] Ibid para 112.
[38] Ibid para 114.
[39] Ibid para 114.
[40] Ibid para 129.
[41] Ibid para 91.
[42] Ibid para 232.

permitting relocation. Satchwell J's understanding of the expert reports appears to have been driven by her desired outcome. She did not base her reasoning on the reports themselves but focused on what the reports did not establish to justify her decision to permit the mother to relocate. She held that '[n]either Dr Duchen nor Dr Fasser identif[ied] any "trauma" to which the children may be exposed as the result of their relocation to Cape Town'.[43] She was basically of the view that the proposed relocation was not harmful to the children's psychological wellbeing. There is nothing in Satchwell J's judgment that justifies her parting ways with the trial court on the facts, except her sympathy for the mother and what seems to be her adherence to the maternal care preference approach. Given the fact that the issue of trauma was not addressed in the reports, Satchwell J used this aspect skilfully through her discretion to make a point that if there is no trauma that can be associated with children relocating with the mother, then there can be no risk associated with the proposed relocation.

Expert testimony also played an important role in *Ford v Ford.*[44] However, unlike in *B v M,* the contents of the joint report in *Ford v Ford* provided by three experts were not extensively discussed. Maya AJA (as she then was) isolated specific aspect of the report and held that three expert witnesses agreed that it was in the BIC to have both her parents in close proximity and that separation from either parent would be deleterious to her well-being.[45] Further that one of these experts indicated that the child's relationship with her father would be affected to such an extent that the child could develop 'feelings of abandonment, deprivation, loss, shame and anger'.[46] The SCA was better placed to provide guidance on the assessment of expert testimony in CRDs in *Ford.* However, it did not provide guidance as to where, when courts are faced with contradictory expert testimonies, they should place a heavy premium on the need for children to have both parents closer to them when deciding relocation cases. Without such guidance, judges of lower courts will continue to use their discretion to isolate parts of expert evidence and use it to justify their approaches while at the same time rejecting expert evidence that does not support their desired outcomes.

In *Cunningham v Pretorius,*[47] the court had reports of no less than six expert witnesses. The court held that '[t]he reports from the social workers and the language therapists are for the most part uncontroversial. Those of the psychologists, on the other hand, have led to several

[43] *B v M* supra note 31para 230.
[44] 2006 (3) SA 42 (SCA).
[45] Ibid para 18.
[46] Ibid.
[47] (31187/08) [2008] ZAGPHC 258 (21 August 2008)

disputed submissions and contentions'.[48] One of the psychologists' was an educational psychologist who was requested to do an evaluation on whether it would be in the best interest of the child with language difficulties to relocate with the mother to the USA.[49] The court observed certain shortcomings with the report of this expert witness. First, the expert witness in this case did not conduct psychometric tests but merely conducted interviews with the parents. Second, while the expert witness observed the child's interaction with the mother, she failed to observe the child's interaction with the father. As such, the court decided not to attach much weight to this expert's report.[50]

The court found the report of the second psychologist to be more scientific and complete.[51] This psychologist, in her assessment, utilised six universally acknowledged standard psycho-diagnostic tests: sixteen (16) personality factor questionnaire;[52] a parent-child relationship inventory;[53] the Thematic Apperception test;[54] a structured objective Rorschach test;[55] an emotional profile index;[56] and Rotter incomplete sentences.[57] The court found the application of these tests useful in the sense that they '… generated a wealth of information about both parties and [the minor child with language difficulties]'.[58] This psychologist was of the view that the proposed relocation would likely be to the detriment of the child with language difficulties' psychological well-being as well as his special educational needs.[59] The conclusion of the report was that the mother should not be permitted to relocate.

While the court claimed to have appreciated this witness's expert report, it was nonetheless, not convinced that relocation should be disallowed. The court was not convinced by the expert's assertion that the mother's new marriage had not '… been tested by the day to

[48] Ibid para 25.
[49] Ibid para 30.
[50] Ibid para 31
[51] Ibid para 35.
[52] Ibid para 42. The test results can offer an insight into those aspects of a person's primary personality structure that can contribute to or impair an individual's performance within his environment.
[53] Ibid para 42, this test 'yields a quantified description of the parent-child relationship that complements other assessment procedures used in clinical evaluations of children and families. By quantifying aspects of parent-child interactions, the instrument makes it possible to verify clinical hypotheses about individual and family disturbance against a background of objective data'.
[54] Ibid para 42, this test 'qualitatively analyses stories told by the testees while interpreting pictures. The test determines the world view of the testee, perceptions regarding interpersonal relationships and the level of a person's anxiety'.
[55] Ibid para 42, this test is 'standardised for South African conditions, is aimed at obtaining psychologically meaningful data by means of which a broad overall picture of the individual can be obtained'.
[56] Ibid para 42, this test 'is designed to yield information about basic personality traits and personality conflicts in an individual's life. It is used as a supplement to the SORT'.
[57] Ibid para 42, this test '… requires the client to complete incomplete sentences to determine recurrent themes present in the sentences and language usage'.
[58] Ibid para 43.
[59] Ibid para 52.

day realities and challenges of life' in order to conclusively state that it will be to the best interests of the child'.[60] The court was also not convinced that relocation would adversely disrupt the relationships of the child with people who the child was attached to.[61] It appears as if this was not the psychological finding that Murphy J was looking for. The expert's conclusion deviated from Murphy J's view that young children ought to be raised in the presence of their mothers.

In rejecting the expert's recommendation, Murphy J made it clear that he was not bound by expert opinion and that he was duty bound to '… decide the issue of "the best interests of the child" itself and [was] free to reject any contrary opinion on that question expressed by a witness called by either party'.[62] This was even though he found this expert's report compelling. It could be argued that perhaps Murphy J was aware that psychological factors are not the only important factors that ought to be considered when determining CRDs, and that factors such as the improved financial circumstances of the mother and the mother's state of happiness should also be considered. Nonetheless, the comprehensiveness of this report and usage of acceptable psycho-diagnostic tests could have easily led any judge to accept the recommendation provided in the report and refuse the mother permission to relocate.

It is interesting that while Murphy J rejected the expert's recommendations, he was nonetheless, able to select and use aspects of the same expert's report to support his desired outcome. From this report, Murphy J gleaned that:

> 'Dr Hartzenberg assessed her to be a woman who "has the ability to control her emotional energy and can therefore follow through on planned action". She is also described as practical, conventional and careful in her approach to problems. The inference drawn by the respondent is accordingly inconsistent with the facts alleged and opinions stated by his own expert. Besides that, Dr Hartzenberg considers the applicant to be adaptable, efficient and logically versatile, and hence likely to be effective. She thus most likely will be able to counter and adapt to any unforeseen consequences arising from her decision with relative ease'.[63]

These were good points in favour of the mother from the report of the expert whose conclusions he rejected. From the report, Murphy J specifically chose factors that characterised the mother

[60] Ibid para 76.
[61] Ibid
[62] Ibid
[63] Ibid para 66.

as the most suitable parent to raise the child. This is clear evidence of how individual judges, through judicial discretion, can choose aspects of expert evidence that they will rely on while rejecting other features of the same evidence.

While expert evidence should assist courts to reach decisions that are in the BIC, cases discussed in this chapter demonstrate that individual judges tend to use expert reports to justify their own desired outcomes when deciding CRDs. They pick, choose, and rely on aspects of the expert evidence contained either in reports or oral testimonies that are in line with their desired outcomes and reject those that contradict the outcomes they wish to realise. The legislative guidelines advocated for in this thesis are meant to assist judges when adjudicating CRDs so as not to arbitrarily deal with different aspects of expert evidence before them. In relation to expert evidence, these guidelines are not intended to dictate to professionals on how to prepare their reports or present their evidence. However, once expert evidence has been compiled and presented, these guidelines should provide judges with adequate guidance on how such evidence should be evaluated. These guidelines will also be useful not only for judges, but also legal practitioners when either preparing cases or advising their clients on the likely outcome of their cases.

Contradictory evidence provided by various experts enables judges, through their discretion, to easily pick and choose which aspects of such evidence to overemphasise. To prevent this, it is suggested that the recommended guidelines should place the office of the Family Advocate at the centre of CRDs.[64] This office can play an important role in limiting judicial discretion when courts are called upon to evaluate expert evidence. Section 4(1) of the Mediation in Certain Divorce Matters Act already empowers the Family Advocate, after being requested by any party or the court in a dispute relating to the guardianship, care and contact of the child, to institute an enquiry to determine what, in the circumstances, will be in the BIC and furnish a report to the court containing his or her recommendations. While the Family Advocate is not traditionally regarded as an expert, nonetheless, when carrying out the functions of the office that she occupies, she relies on experts such as psychologists and social workers. Currently, the Family Advocate can only be involved when requested to be by either the parents or the court. It is suggested that the proposed legislative guidelines should amend section 4(1) of the Mediation in Certain Divorce Matters Act to make it a compulsory

[64] *JP v JC* [2016] 1 All SA 794 (KZD) para 34 it was held that 'the Family Advocate is invariably a qualified lawyer with sufficient experience and expertise to enable him or her to give the court extremely valuable assistance in coming to a decision'. Section 2(1) of the Mediation in Certain Divorce Matters Act 24 of 1987, provides the relevant Minister the power to appoint an officer in the public service at each division of the High Court as a Family Advocate.

legislative requirement for the Family Advocate to investigate every CRD before the high court, with a view to compile an objective expert report with the assistance of a psychologist and social worker.[65] In other words, in every CRD case, the registrar of the court should ensure that the office of the Family Advocate is involved to assist the court.

The Family Advocate, with the assistance of the family counsellor, social worker and psychologist with relevant and proven expertise, will be in a position to investigate the circumstances of the parties and provide an objective expert opinion to the court on what would be in the BIC in the circumstances. In *JP v JC*, the Family Advocate and the Family Counsellor submitted separate reports, both of which recommended that it would not be in the BIC to be relocated to the United Kingdom.[66] In determining this issue, the court referred to the factors in section 7 of the Children's Act but neither discussed them nor indicated which of them were relevant to relocation cases, which illustrates their inefficiency in CRDs.

Both the Family Advocate and Family Counsellor pointed out that the children had a strong bond with their father, which was not in their best interest to lose. The court, however, was of the view that these officials did not adequately consider, weigh and balance all the relevant factors. In particular, without dealing with the advantages that children will be losing by relocating, the court focused on the mother's personal circumstances in relation to the potential job she will be applying for and family support which was at her disposal in the United Kingdom. In rejecting the recommendations of Family Advocate and Family Counsellor, the court exercised its discretion and overemphasised the mother's interests at the expense of the BIC by failing to assess the benefit of children having both parents residing at the same place, particularly where the mother was gainfully employed in South Africa and was going to market for a job in United Kingdom.

To limit the judges' discretion, it is submitted that the proposed guidelines should further require judges to adequately consider the recommendations of the Family Advocate as contained in her report. These recommendations should be made after the Family Advocate has investigated and considered the living circumstances of both parents, their respective roles and importance in their children's lives and their ability to care for their children. They should also

[65] Marumoagae 'The role of children's views during divorce' 2012 (May) *De Rebus* 38. It is worth noting that when performing his or her functions, the Family Advocate is usually assisted by a suitably qualified or experienced social worker. The Family Advocate together with the social worker will conduct an enquiry that is aimed at enabling them to acquire information such as the parents' current living conditions, employment circumstances, relationship with the child and relationship with each other. From such information, a report will be compiled that contains recommendations by the Family Advocate relating to matters that will advance the BIC. When conducting his or her inquiry, the Family Advocate will conduct interviews with the parents and the child if able to express a view.

[66] [2016] 1 ALL SA 794 (KZD) para 7.

include evaluations made by the social workers and psychologists associated with the Family Advocate's office on what would be in the BIC in the circumstances. There is a need to capacitate the offices of the Family Advocate across the country with enough social workers and psychologists to ensure that adequate child assessments are made when requested to do so in CRDs cases.[67]

Should the legislature introduce legislative guidelines that place the Family Advocate at the centre of every CRD, given the fact that the Family Advocate would not have been contracted by any party, her report is more likely to be objective and of assistance to the court. The guidelines should further provide that the court should only deviate from the Family Advocate's report, which has expert input of a social worker and psychologist, when such report is biased in favour of either parent or is obviously not in the BIC. Further, that the court must provide reasons to justify its decision. Currently, courts are not bound by Family Advocates' reports and are able reject them.[68] Through this legislative intervention, any judge required to determine a CRD will be obliged to not only duly consider the Family Advocate's report but also not to deal with it as he or she wishes, but to follow the recommendations of the report, unless he or she can demonstrate that it would not lead to the BIC.

4.1 SOCIO-LEGAL RESEARCH RELATING TO CRDs

4.1.1 GENERAL OVERVIEW

Socio-legal research has enabled law academics and psychologists to engage the science of law and evaluate how it interacts with societal challenges that emerge when children are relocated from one place to the other by one of their parents. Socio-legal researchers have investigated how the law is or should be applied to parental decisions regarding relocation of children to different jurisdictions and the psychological impact of such decisions on both the children and their parents.[69] Some of these researchers have conducted research that enabled them to interact with parents whose decisions to relocate with their children or object to the contemplated relocation have been subjected to judicial scrutiny.[70] The results of studies undertaken by

[67] See Burman and Derman 'Deciding for children: The family Advocate and the caring professions' in Jones-Pauly and Elbern (eds) *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts* (2002) 164, where the authors provide a good account of the evolution of the Family Advocate's office and its relationship with other professionals such as social workers and psychologists when it was first established.
[68] *Celimene v Scholtz* (11/10778) [2011] ZAGPJHC 170 (16 November 2011) para 65. See also *JP v JC* para 37.
[69] As discussed below.
[70] See generally Behrens, Smyth and Kaspiew 'Australian family law court decisions on relocation: Dynamics in parents' relationships across time' (2009) 23 *Australian Journal of Family Law* 222, who in their study interviewed 38 parents who applied to relocate or opposed the relocation applications of their children's other

expert socio-legal researchers have played an important role in the development of legislation in some of the foreign jurisdictions. Most importantly, these studies have evaluated the impact of relocation on the development of children, child-parent relationships, and the disruption of important attachment relationships.[71] Some of these socio-legal researchers were directly involved in some of the most important CRDs cases where they used their research to influence the outcomes of such cases.[72]

While there are many studies dealing with child relocation, nonetheless, there is '… little empirical research evidence about relocation disputes within the context of separation and the impact they have on family members to assist with determining when an application for relocation should be supported by the court'.[73] According to Bala *et al* '… while the social science literature is growing, the quality of the research varies considerably and the conclusions are not totally consistent; as a result, the research is difficult to apply in individual cases or use for policy development'.[74] There is a need to be cautious when relying on these studies, some of which have been '… found to be methodologically weak'.[75] This caution is particularly important in the context of South Africa were there are different family dynamics. As it will be shown below, most CRDs studies focus on the relationships between parents and their children. This may not always be the case in South Africa where many South African children form a primary attachment with their grandmothers rather than with their biological parents, who may be inclined to object to the relocation of their grandchildren if it is in the BIC to do so.[76] At times, children have no attachment to their fathers due to absenteeism. There are several studies in South Africa that have highlighted the challenge of absent father in this country.[77]

parents between 2002 and 2005. This study identified some of the reasons that lead to custodial parents to wish to relocate such as unhappiness, high conflict, and abusive relationships as well as conflict over childcare roles.

[71] Kelly and Lamp 'Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?' (2003) 17 *Journal of Family Psychology* 193.

[72] As illustrated below Wallerstein's brief was instrumental in the outcome of *In re Marriage of Burgess* 913 P.2d 473 (Cal. 1996) and Warshak's brief played a pivotal role in *In re Marriage of LaMusga* 32 Cal. 4th 1072 (2004).

[73] Saini 'Critical review of social science research on parental relocation postseparation/divorce' (2013) 2 Family, Children and Youth Section Department of Justice Canada available at https://canada.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crssr-ecrss/crssr-ecrss.pdf accessed 20 June 2020.

[74] Bala *et al* 'A study of post-separation/divorce parental relocation' Presented to Family, Children and Youth Section, Department of Justice Canada (2012) 59.

[75] Saini, Allan-Ebron and Barnes 'A Critical Review of Relocation Research Specific to Separation and Divorce' 2015) 26 *Journal of Divorce & Remarriage* 388 at 404.

[76] See Sooryamoorthy and Makhoba 'The Family in Modern South Africa: Insights from Recent Research' (2016) 47 *Journal of Comparative Family Studies* 309 at 317 where it is stated that '[t]he traditional roles of members in the family have been reversed when aging members had to take the responsibility of the care of their grandchildren'.

[77] See generally Eddy, Thomson-de Boor, and Mphaka 'So where are ATN father? A study of absent fathers in Johannesburg, South Africa' available at https://www.uj.ac.za/faculties/humanities/csda/Documents/Absent-fathers-full-report%202013.pdf accessed 25 June 2020 and Fazel F 'Responding to the challenge of father absence

Nevertheless, these studies are important in the development of CRDs jurisprudence and the evidence they provide remain useful for policy formulation.

4.1.2 THE ROLE OF CUSTODIAL PARENT

There are socio-legal researchers whose research emphasised the value of the relationship between children and custodial parents in CRDs. For instance, Wallerstein and Tanke's research indicated that one of the good outcomes associated with the relocation of children was the fostering of close, sensitive relationships with psychologically intact, conscientious custodial parents, most of whom are mothers.[78] They further illustrated that '[w]hen courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent'.[79]

Bruch and Bowermaster also sought to demonstrate that children's relationships with their primary caregivers, usually mothers, is the single most important factor affecting children's welfare when parents no longer lived together.[80] They argued that children who are allowed to be raised by their custodial parents after relocation 'will rarely be endangered in any demonstrable, significant fashion' and equally rarely will the removal of children from their "primary caregivers" care alleviate the perceived dangers'.[81] The studies of these researchers overemphasised the importance of custodial parents, most of whom are mothers in the care of their children post relocation. This is in line with an outdated thinking regarding parental care which was demonstrated by some of the South African judges in some of the cases that were discussed in chapter three of this thesis.

Wallerstein's research which was included in her amici brief in *In re Marriage of Burgess,*[82] one of the major CRDs cases in the USA, influenced the court's discretion to decide in favour of the custodial mother in this case. In her brief, Wallerstein supported a presumption in favour of relocation and argued that '[a]ll our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-divorce

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and fatherlessness in the South African context: A case study involving concerned fathers from the North West Province' (2017) 3 *Stellenbosch theological Journal* 89.

[78] 'To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' (1996) 30 *Family Law Quarterly* 305 at 311.

[79] Ibid at 311.

[80] 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' (1996) 30 *Family Law Quarterly* 245 at 321.

[81] Ibid at 369.

[82] 913 P.2d 473 (Cal. 1996).

years'.[83] Wallerstein's view characterised the importance of the mother's presence in her child's life. She argued that '[f]requent and continuing contact between father and child is not a significant factor in the child's psychological development [however] does not diminish the important role of the father or of the father-child relationship in the child's growing up years'.[84]

As it will be demonstrated in chapter five, the court accepted Wallerstein's approach and this led to the amendment of legislation, wherein the legislature declared this decision 'to be public policy and the law' in the state of California.[85] This demonstrates the influential role played by socio-legal research in judicial and legislative decision making. Wallerstein's research led to the adoption of the presumption in favour of custodial parents, most of whom are mothers. As it will be shown in the next section, this approach has received severe criticism. One argument is that '[a] presumption in favour of the relocating parent, regardless of the type, frustrates [the] achievement of the ultimate goal of determining an arrangement that will serve the child's best interests'.[86] As demonstrated in chapter two of this thesis, presumptions can be inflexible and fail to take into account the circumstances of the child before the court which may justify deviation from them.[87] Presumptions can lead the court to deviate from the BIC and focus exclusively on the interests of the parent who is favoured by the presumption by creating a default position which may not necessarily be in the BIC.[88]

4.1.3 THE IMPORTANCE OF BOTH PARENTS

Since Wallerstein submitted her influential amici brief in *Burgess*, there have been several socio-legal researchers who have conducted research that contradicts her conclusions. These researchers have demonstrated the importance of both parents in their children's lives, even in the context of CRDs. Warshak criticised Wallerstein's brief on the basis that it ignored '… the broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments to both parents, and that they do best when they have the

[83] Amica Curiae Brief of Dr. Judith S. Wallerstein, filed in Case No. S046116, *In re Marriage of Burgess*, Supreme Court of the State of California, Dec. 7, 1995 at 13.
[84] Ibid at 1.
[85] See section 7501(b) of the California Family Code.
[86] Colancecco 'A flexible solution to a knotty problem: The best interests of the child standard in relocation disputes' (2009) 1 *Drexel Law Review* 573 at 584.
[87] Ibid 575, where it is argued that '… courts around the country struggle to resolve relocation disputes, often resorting to inconsistent applications of rigid thresholds and presumption that result in mechanical, parent-orientated standards'. See 2.3.1 in chapter two of this thesis, and in particular, Parkinson and Cashmore 'Reforming relocation law: An evidence-based approach' (2015) 53 *Family Court Review* 23, who argued against the adoption of presumptions in CRDs.
[88] Ibid at 585.

opportunity to establish and maintain such attachments'.[89] Warshak also demonstrated that Wallerstein's previous research, which was not made part of her brief in *Burgess*, found that both parents were central to the psychological health of their children, and where possible, divorcing parents should be assisted to make post-divorce arrangements that would ensure that children have continued relationships with both parents.[90] Some socio-legal researchers have demonstrated negative results regarding children who are separated with one of their parents such as receiving less financial support from their parents, experiencing stress due to their parents' divorce and perceived their parents less favourably as sources of emotional support.[91]

In their empirical research, Braver, Ellman and Fabricius demonstrated that '… custodial moves, even those made for good reasons, thwart the long term relationship with the parent left behind, which in turn will in some respects impair the child'.[92] They concluded that '… there is no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination she plausibly believes will improve her life, will necessarily confer benefits on the children she takes with her'.[93] In 2006, Fabricius and Brave released another study where they found that parental relocation after divorce negatively impacted children's long term relationships with their fathers, to the extent that children's relationships with their fathers are damaged by relocations.[94] A study released in 2018, has also illustrated that '… harmful consequences may arise when children doubt how much they matter to their parents'.[95] Fabricius and Brave recommended that policy makers and courts should consider the interests of children and those of the two parents who are involved in CRDs.[96]

Parkinson and Cashmore's research demonstrates the need, when dealing with CRDs, to start by evaluating the importance to the child of the relationship with the non-relocating parent to assess the extent to which such a parent embraced the responsibilities and obligations of parenthood.[97] They have proposed a model for examining what is in the best interest of individual children in CRDs that relies upon a careful assessment of among others, of the

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[89] Warshak 'Social science and children's best interests in relocation cases: Burgess revisited' (2000) 34 *Family law Quarterly* 83 at 85.
[90] Ibid at 85 quoting from Wallerstein and Kelly *Surviving the breakup: How Children and parents cope with divorce* (1980) 311.
[91] Ibid.
[92] Braver, Fabricius and Ellman 'Relocation of children after divorce and children's best interests: New evidence and legal considerations' (2003) 17 *Journal of Family Psychology* 206 at 207.
[93] Ibid.
[94] Fabricius and Braver 'Relocation, parental conflict, and domestic violence: Independent risk factors for children of divorce' in Stahl P AND Drozd (eds) *Relocation issues in child custody cases* (2006) 22.
[95] Stevenson *et al* 'Associations between parental relocation following separation in childhood and maladjustment in adolescence and young adulthood' (2018) 24 *Psychology, Public Policy, and Law* 365 at 368.
[96] Fabricius and Braver op cit note 94 at 22.
[97] Ibid at 34.

parenting quality of the non-relocating parents, who are usually fathers. Parkinson and Cashmore's approach is part of a shift in thinking regarding parental care in most jurisdictions which are now encouraging shared parental care (as was demonstrated in chapter two of this thesis) in order to avoid some of the challenges that children may face when they do not enjoy the care of both of their parents.[98]

Austin observes that available research demonstrates that relocation which forces children not to reside with both parents can lead to harm such as '… school behavioural problems, academic success, school graduation/dropout rates, teen pregnancy, age of first sexual activity, child wellbeing and the amount of idle time'.[99] He argues that this consideration has been 'overlooked by social scientists who have entered in advocacy role on legal standards appropriate for relocation in favour of an emphasis on research about the relative importance of the nonresidential parent for the child's adjustment'.[100] He also refers to research that illustrates that the frequency of residential moves has an impact on children's school achievement and behavioural problems.[101] He is of the view that '… [o]n average, children from single-parent and remarried households are at greater developmental risk for adjustment problems due to relocation, compared to children from intact families'.[102] According to Austin, a forensic risk assessment model must be used by psychologists who are called as expects in CRDs when making predictions for the courts on the likely harm that children will experience as a result of the proposed relocation.[103] He argues that this model will assist psychologists to identify several risk factors that are associated with CRDs such as the:

> 'age of the child, distance of the move, individual psychological resource of the child/individual differences/temperament/special developmental needs, degree of non-residential parent involvement, psychological resources/mental stability/coping skills of the relocating parent, parenting effectiveness of both parents, degree of inter-parental conflict/history of domestic violence, ability of the residential parent to support the relationship between the child and the non-residential parent, ability to be a responsible gatekeeper, and recentness since marital separation and divorce'.[104]

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[98] See 2.3.2 in chapter two of this thesis.
[99] Austin 'Relocation, research and forensic evaluation, Part I: Effects of residential mobility on children of divorce' (2008) 46 *Family Court Review* 137 at 140.
[100] Ibid.
[101] Ibid.
[102] Ibid at 146.
[103] Austin 'Relocation, research, and forensic evaluation: Part II: Research in support of the relocation risk assessment model' (2008) 46 *Family Court Review* 347 at 348.
[104] Ibid.

These are important psychological aspects, which the proposed CRDs legislative guidelines must mandate judges, were applicable, to adequately assess, weigh and balance with other competing factors. These proposed guidelines should also consider the likely impact of relocation on children.

The Supreme Court of California had another opportunity to clarify the relocation law in the state of California in *In re Marriage of LaMusga.*[105] This case also attracted the intervention of socio-legal researchers who submitted briefs as *amicus curie.* Unlike in *Burgess* where the Supreme Court of California was presented only with briefs that favoured custodial parents, in *LaMusga,* the court was exposed to a fairly balanced social science research which also took into account the importance of non-custodial parents, most of whom are fathers.

Wallerstein and Bruch provided their respective briefs that supported a presumption in favour of the custodial parent, who was the mother in this case. They proposed that the court should follow *Burgess* and adopt a presumption in favour of relocation.[106] Warshak also provided the court with a brief which was supported by eighteen other researchers and signed by ten mental health forensic practitioners. Warshak pointed out that Wallerstein's brief discounts the value of children's frequent contact with non-custodian parents.[107] He skilfully used Wallerstein's previous research to indicate to the court that fathers played an important roles in their children's lives and their presence enhanced children's self-esteem, which Wallerstein omitted in her brief.[108] Warshak submitted evidence that showed that '[s]tudies of children's attitudes about their parents' divorce consistently reveal that most children long for more time with each parent and wish their parents would reunite'.[109] As will be indicated in chapter five of this thesis, Warshak's brief influenced the Supreme Court of California to re-interpret the relocation law in the state of California by rejecting presumptions and evaluating the role and importance of both parents in their children's lives in CRDs. This is a clear illustration of the influence of socio-legal experts in CRDs.

It is important for the legislature in South Africa when crafting CRDs guidelines not to adopt the outdated thinking regarding the care of children which is biased towards custodial parents, most of whom are mothers which is advocated not only by Wallerstein but was also

[105] 32 Cal. 4th 1072 (2004).
[106] Amica Curiae Brief of Prof. Carol S. Bruch, filed in Case No. S107355, *LaMusga v LaMusga,* Supreme Court of the State of California, June. 9, 2003, at 15
[107] Ibid at 7.
[108] Ibid.
[109] Ibid at 40.

adopted in most South African CRDs cases. There is a need for the legislature to embrace the shift in thinking regarding parenting which requires a thorough assessment of the role of both parents in their children lives when CRDs are determined to resolve these cases in the BIC. It is submitted that the proposed legislative guidelines should also reflect on the importance and value of both parents in their children's lives. This should also be considered when courts consider, weigh, and balance all competing factors. This assessment will enable courts to determine the contribution of each parent in their child's development and wellbeing with a view to consider alternatives which will lead to both parents continuing to play their parental roles to their children post relocation.

It is worth noting however, that shared care in the context of CRDs will not always be possible or easy to foster. Some of the parents are likely to engage in post separation conflict which may negatively impact children. Gollop and Taylor have identified 'inter-parental conflict, loss of important relationships, economic hardships, poor parental adjustments and parenting competency, remarriage or repartnering, and stressful or negative life experiences, such as the initial separation, moving, or changing schools, as some of the serious consequences of CRDs.[110] Distance can also result in post relocation conflict that may also make it difficult for parents to exercise shared parental care. Research conducted by Taylor demonstrates that '[l]egal disputes over relocation … arise when the distance is much greater and will affect the child's ability to easily retain contact with their non-moving parent'.[111] These are some of the challenges that must be considered when drafting CRDs legislative guidelines.

4.1.4 INFLUENCE ON POLICY AND LEGISLATION DEVELOPMENT

The jurisprudential debate about legislative guidelines has been influenced by socio-legal research. The jurisprudential writings of legal scholars like Bala have had some influence on policy and law makers, which can also benefit South Africa when developing CRDs legislative guidelines. In 2015, Bala published a paper which, in part, influenced some of the amendments that were made to the Divorce Act in Canada. In his paper, Bala argued that there should be principles and procedures that govern CRDs cases.[112] He recommended that the Divorce Act should have provisions that govern child relocation.[113] Further that these provisions should

[110] 'New Zealand children and young people's perspectives on relocation following parental separation' in Freeman (ed) *Law and childhood studies* (2012) 221.
[111] Taylor 'Relocation following parental separation: International research, policy and practice' (2013) 38 *International Family Law, Policy & Practice* 134 at 136.
[112] Bala 'Bringing Canada's Divorce Act into the new millennium: Enacting a child-focused parenting law' (2015) 20 *Queen's Law Journal* 425 at 474
[113] Ibid at 475

specifically define relocation, deal with notice requirements and provide for onus of proof.[114] Among others, he recommended that these provisions should require courts when determining any matter involving the relocation of a child to consider 'whether the relocating parent has proposed reasonable and workable arrangements for the non-relocating parent or important persons in the child's life (including such persons as the child's grandparents) to have parenting time with the child after relocation'.[115] He also proposed that '… where the non-relocating parent has had a near equal ongoing involvement in the child's care and can provide a viable parenting alternative for care in the event of the move, there should be an onus on the relocating parent to justify disruption of this relationship'. This recommendation was in line with the need to foster relationships between children and both of their parents. While the Canadian legislature did not go as far as Bala had proposed, it nonetheless, inserted specific CRDs provisions into the Divorce Act which, as will be shown in chapter five of this thesis, deal with some of the aspects that Bala proposed such as onus of proof and notice requirements.

4.1.5 FACTORS THAT MUST BE WEIGHED BALANCED

Many cases decided in different jurisdictions have highlighted some of the common reasons and factors that lead to some of the parents to want to relocate with their children. Socio-legal researcher have also identified and analysed some of the factors that have proved important to the development of CRDs legislative guidelines in jurisdictions such as Canada and the state of Florida, as will be illustrated in chapter five. Braver, Ellman and Fabricius conducted an empirical research which demonstrates that 'some reasons for relocation are more compelling and legitimate than others.[116] Behrens, Smyth and Kaspiew conducted a study that indicated that high conflict, poor parental relationships, abusive and unhappy relationships contributed to the disintegration of most relationships which led to some parents deciding to relocate.[117] Behrens and Smyth later revealed that some parents seemed to be more or less self-focused while others were more or less child centred when deciding to relocate. [118] They also found that parental relocation was motivated by factors such work opportunities, new relationships, and

[114] Ibid
[115] Ibid at 477
[116] Braver, Fabricius and Ellman 'Relocation of children after divorce and children's best interests: New evidence and legal considerations' (2003) 17 *Journal of Family Psychology* 206 at 207.
[117] Behrens, Smyth and Kaspiew 'Australian family law court decisions on relocation: Dynamics in parents' relationships across time' (2009) 23 *Australian Journal of Family Law* 222.
[118] Behrens and Smyth 'Australian family law court decisions about relocation: Parents experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 1 at 14. See also Kaspiew, Berens and Smyth 'Relocation disputes in separated families prior to the 2006 reforms' Australian Institute of Family Studies (Family Matters No. 86 - March 2011) 77.

desire to live closer to family members.[119] Behrens and Smyth's study also revealed high conflict or abusive relationships between the parents as one of the factors that motivated the relocation of parents who were abused.[120] These factors must be weighed and balanced with the non-relocating parents' desire not to lose contact with their children.

In the South African context, researchers have identified various factors that must be weighed and balanced such as: the desire to maintain contact with the non-relocating parent; children's relationship with primary caregivers; the need for stability in children's lives; children's relationships with new family members; and the fundamental rights of the custodial parents, including the right to move freely.[121] One of the factors that has not been taken as seriously as it should by South African judges is the extent to which the distance involved in the relocation will potentially interfere with the contact rights of the non-relocating parent or even shared parenting. Wallerstein and Tanke argue that the capacity of the child to travel to visit a distant parent is one of the factors that must be considered when a court determines a CRD.[122] Similarly, the ability of the non-relocating parent to maintain constant contact with a child that leaves in a distant area must be part of the analysis. These and other factors should be included when CRDs legislative guidelines are crafted. But most importantly, the legislature must also include a balancing mechanism which will mandate courts not to pay lip service to some factors while overemphasising others as was demonstrated in chapter three of this thesis.

4.1.6 THE ROLE OF SOCIO LEGAL RESEARCH IN SOUTH AFRICA

Socio-legal evidence from other jurisdictions have been referred to by South African courts as demonstrated in chapter three of this thesis.[123] Nonetheless, there is no CRDs empirical socio-legal research that has been undertaken in South Africa that can reliably provide psychologists and family law academics, practitioners, judges, and litigants adequate information regarding the practical realities of CRDs in South Africa. Such research is needed to provide insight on the lived experiences of both parents and children who have experienced child relocation litigation. It can also provide policy and law makers as well as judges valuable evidence that can inform policy, legislation, and outcomes of CRDs cases. Such research can establish

[119] Behrens and Smyth op cit note 118 at 14.
[120] Ibid 7.
[121] See generally Albertus and Sloth-Nielsen 'Relocation decisions: Do culture, language and religion matter in a rainbow nation?' (2010) 1 *Journal of Family and Practice* 86 at 89 and Kruger 'Emigration by a custodian parent after divorce' 2001 (64) *THRHR* 453.
[122] Wallerstein and Tanke op cit note 78 at 321.
[123] See generally *B v M* 2006 (3) ALL SA 109 (W).

positive or negative variables and combination of risk and protective factors that can possibly play a role in CRDs.[124] It is important to also note that '… no research has yet been conducted to specifically identify the key risks and protective factors which can account for individual differences in outcomes for children who relocate after their parents' separation or who are subject of a relocation dispute'.[125]

CRDs is the most under researched area of the South African family law with not more than 25 published scholarly articles since 1910 in peer reviewed journals in the country,[126] none of which is empirical. Behrens correctly argues that '[t]here is a vital need for research that contributes to knowledge about the results and the effects of court decisions that restrict, or enable, relocation'.[127] Available desktop doctrinal research mirrors the already available literature of foreign countries without providing a contextual approach which is reflective of the diverse family formations and structures which South Africa can adopt. This is evident in *F v F,*[128] where the court quoted Bonthuys' article[129] which draws heavily from approaches of foreign jurisdictions. While this is useful, it is submitted that CRDs in South Africa could be understood better if funding is made available for dedicated empirical social science research. This will ensure that sound practical challenges that are unique to South Africa are identified and solutions are suggested that can assist our courts to adequately determine CRDs. Most family law researchers are white with little or no expertise on the lived family experiences of African people who constitute the majority in the country and likely to be engaged in most

[124] Taylor op cit note 111 at 136.
[125] Ibid.
[126] Bonthuys 'Clean breaks: Custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486-511; Kruger 'Emigration by a custodian parent after divorce' 2001 (64) *THRHR* 453-458; Clark B 'Post-divorce relocation by a custodian parent: Are legislative guidelines for the exercise of judicial discretion desirable?' 2003 *SALJ* 80-89; Louw 'The power of a custodian to remove a child from the country after divorce: some comments' (2003) *De Jure* 115; Van Schalkwyk 'The power of a custodial parent to remove the child from the Republic of South Africa after divorce' (2005) *De Jure* 332-352; Strous 'Post-divorce Relocation: In the best interests of the child?' (2007) *37 South African Journal of Psychology* 223-244 Barrie 'The approach of the courts regarding South African custodian parents going into the diaspora' (2009) 3 *TSAR* 562-572; Albertus 'Relocation disputes: Has the long and winding road come to an end? A South African perspective' (2009) 23 *Speculum Juris* 70-86; Albertus & Sloth-Nielsen 'Relocation decisions: do culture, language and religion matter in the rainbow nation?' (2010) 2 Journal of Family Law and Practice 86-97; Domingo '"For the Sake of the Children": South African Family Relocation Disputes' 14 (2011) 2 *PER* 148-226 and Clark B 'The shackled parent? Disputes over relocation by separating parents — is there a need for statutory guidelines? 2017 (1) *SALJ* 80 – 115. There are other relevant articles dealing with the abduction of children such as: Labuschagne JMT 'International parental abduction of children: remarks on the overriding status of the best interests of the child in international law' 33 (2000) 3 *CILSA* 333-347; Nicholson 'The Hague Convention on the Civil Aspects of International Child Abduction - pill or placebo?' 32 (1999) 2 *CILSA* 228-246; and Nicholson 'Should the Court Look at the Best Interests of Specific Children in Abduction Cases? An Examination of Central Authority of the Republic of South Africa and with Du Toit Intervening 131 (2014) *SALJ* 756-768.
[127] Behrens 'U V U: The High Court on Relocation' (2003) *Melbourne University Law Review* 572-589 at 589.
[128] [2006] 1 All SA 571 (SCA) paras 12.
[129] 'Clean breaks: Custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486-511.

child relocations. Unlike USA, South Africa does not have an overly active academia which is prepared to intervene in CRDs as *amicus curie* wherein court papers that are well researched could be provided to our courts to assist them to better adjudicate CRDs.[130]

4.1.7 CONCLUSION

This chapter demonstrated how individual judges can pick and choose aspects of expert evidence to suit their desired outcomes in CRDs. Such discretion is enabled by lack of adequate legislative guidelines that can guide judges when considering and evaluating expert evidence in CRDs. Judges are often faced with contradictory expert evidence from experts contracted by opposing parents, making it easier for judges to be selective when assessing such evidence. It was argued that to limit judicial discretion, there is a need to make it compulsory in CRDs cases for the office of the Family Advocate to submit expert reports with the assistance of psychologists and social workers that would assist courts when establishing what would be in the BIC under the circumstances.

It would also be helpful for psychologists to appreciate the important role they are required to play in the determination of CRDs. There is a need for psychologists to formulate CRDs evaluations that may be of assistance to the courts when adjudicating CRDs. Such an initiative would enable psychologists to provide information that is ordinarily not available to the courts.[131] Such information may enlighten and educate courts about specialised, technical, or research-based knowledge regarding similar cases as opposed to case-specific testimony.[132] It is important however, for psychologists when called upon to assist judges as experts not to selectively use available research to perpetuate their biases. Available research illustrates that often legal practitioners, judges and psychologists '… are at risk of being biased either for or against a move, because of their beliefs about children's best interests'.[133]

Finally, there is a need to encourage CRDs socio-legal research in South Africa that can assist the legislature to develop CRDs legislative guidelines and courts to better understand CRDs. While available foreign socio-legal research provides useful information relating to the

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[130] See for instance academic *Amicus curiae* brief in In re *In re Marriage of LaMusga* 32 Cal. 4th 1072 (2004) available at https://law.ucdavis.edu/faculty/bruch/files/lmdraft517.pdf, accessed on 22 January 2020.
[131] Foot, Stolberg and Shepherd 'Attorney and judicial perceptions of the credibility of expert witnesses in child custody cases' (2008) 33 *Journal of Divorce & Remarriage* 31 at 33.
[132] Austin, Dale, Kirkpatrick and Flens 'Forensic Expert Roles and Services in Child Custody Litigation: Work Product Review and Case Consultation' (2011) 8 *Journal of Child Custody* 57.
[133] Stahl 'Emerging issues in relocation cases' (2013) 25 *Journal of the American Academy of Matrimonial Lawyers* 425 at 443.

interaction between parents and children who are affected by relocation decisions, it is important not to adopt it as it is in South Africa because of different child/parent dynamics that may be at play in this country. While researchers did not indicate the race of children and parents who participated in their studies, nonetheless, such parents and children are drawn from western countries which do not live in accordance with African values and customs. For this reason, there is a need for socio-legal research that can draw on the diverse family experiences and dynamins of South Africa.

5 CHAPTER FIVE: CHILD RELOCATION JURISPRUDENCE IN UK, AUSTRALIA, USA, AND CANADA

5.1 INTRODUCTION

CRDs are difficult to adjudicate and might have irreparable consequences for parents and their children.[1] Parkinson correctly observed that the main challenge with CRDs is the inherent tension between the children's right to foster and maintain relationships with both of their parents and the custodial parents' right to move freely.[2] There have been major legislative amendments in some of the foreign jurisdictions, such as Australia, which have placed a high premium on the benefit that children derive from meaningful relationships with both of their parents '… and require judges to consider making orders that have the effect of sharing the parenting – substantially if not equally'.[3] There is general consensus that children benefit from joint or shared parenting arrangements (provided the relationship is not abusive or neglectful).[4] It is thus important to assess how this shift in thinking from the old custodial parent preference to the modern shared parenting impact on judges' discretion in CRDs.

This chapter is a comparative investigation of the exercise of (and limitations on) judicial discretion in CRDs in selected foreign jurisdictions. It demonstrates that judges in countries discussed herein use their discretion to resolve CRDs. Further that there are countries that have introduced legislative guidelines to assist judges when dealing with these cases. In some of the countries where there are no legislative guidelines, some judges have attempted to craft useful CRDs judicial guidelines which have been considered by other judges when adjudicating these disputes. With reference to both legislative guidelines and judicial guidelines from selected foreign countries, this chapter aims to demonstrate that it is possible to establish specific CRDs legislative guidelines for judges to follow in order to limit their discretion, with a view to making the law more predictable. The cases discussed herein illustrate that since the enactment of the 1989 Children's Act, there has been a shift from focusing on relationship between the custodial parents (usually mothers) and their children to

[1] Carmody 'Child relocation: An intractable international family law problem' 2007 (2) *Family Court Review* 214 at 214.
[2] Freedom of movement in an era of shared parenting: The differences in judicial approaches to relocation' (2008) 36 *Federal Law Review* 143 at 146.
[3] Ibid.
[4] Nunn, Jeralyn and Lawrence 'Child relocation: Case law, social science, and practice implications' (2020) 32 *Journal of the American Academy of Matrimonial Lawyers* 383.

the arrangements made by parents to meet the BIC.[5] Ideally, this necessitates shared parenting which many jurisdictions like Australia are embracing, however, this is generally not always feasible in relation to international relocations. A review of cases decided in the United Kingdom reveal that generally judges have not entertained the issue of shared parenting.

Secondly, this chapter will explore the Australian experience to assess whether South Africa can draw some useful lessons. In this part of the chapter, it will be illustrated that in Australia, there has been a dedicated effort to ensure that both parents play a meaningful role in their children's lives through shared parenting. Reference will also be made to the recommendations, which have not yet been implemented, made by the Australian Family Law Council relating to the introduction of legislative guidelines in that country.

Thirdly, the position of the USA will be discussed to demonstrate the dangers of relying on presumptions to determine CRDs. It will be shown that selected states within the USA have adopted different tests that have led to inconsistent determinations of CRDs. It will be argued that the state of Florida in particular, provides a useful case study for South Africa, because it has established CRDs legislative guidelines which can be considered when developing South African guidelines. Finally, this chapter will reflect on how the Canadian legislature sought to assist judges when determining CRDs by establishing legislative guidelines.

The experiences of the selected countries enhance the argument of this thesis that the South African Children's Act must be amended by introducing adequate legislative guidelines that will limit the judges' discretion in child relocation cases and require them to properly weigh and balance competing factors that parents often advance in support of their cases. These guidelines are intended to make the law regarding CRDs more consistent.

5.2 UNITED KINGDOM

In the United Kingdom, there are no specific CRDs legislative guidelines. Nonetheless, the Court of Appeal has provided guidance to help judges dealing with CRDs to be consistent when interpreting applicable principles in these cases. To promote consistency in the adjudication of CRDs, the leading case in the United Kingdom has emphasised that a judge adjudicating a CRD case must look at the case holistically, determine an approach that best meets the BIC and weigh up all the relevant factors.[6] Generally, in establishing the BIC, the United Kingdom courts use the reasonableness test.

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[5] Nikolina *Divided Parents, Shared Children Legal aspects of (residential) co-parenting in England, the Netherlands and Belgium* (2015) 45.

[6] *Ref (International Relocation Cases)* [2015] Civ 882.

5.2.1 REASONABLENESS TEST

The first reported judgement in the United Kingdom where the court was called upon to determine whether one parent should be allowed to leave the country with the child is *Hunt v Hunt.*[7] However, the modern child relocation law in the United Kingdom began in 1970 when the Court of Appeal handed down judgment in *Poel v Poel.*[8] The court developed the reasonableness test in line with a presumption in favour of the custodial parent whose decision to relocate was to be presumed to be reasonable. In *Poel,* the court held that leave to relocate should generally be granted where the custodial parent's proposal to relocate was genuine, practical, and reasonable and not a surreptitious attempt to cut off the non-custodial parent's contact with the child.[9] To rebut the presumption, the non-custodial parent had to provide some compelling reasons which would establish that the decision to relocate was not reasonable. This was made clear in *Chamberlain v De La Mare,* where it was held that the court needs to defer to the custodial parent and not interfere with her reasonable decision because such interference would produce her 'inevitable bitterness', unless there are compelling reasons to do so.[10]

Later, the reasonableness test was also linked to the custodial parent's state of happiness and/or distress in CRDs. In *RE F (A WARD) (Leave to remove ward out of the jurisdiction),* the Court of Appeal held that it was necessary to determine the extent to which refusing permission to relocate would impact on the custodial parent's state of happiness and how would that affect the child.[11] There was no discussion of the state of happiness or distress that the non-custodial parent may experience if the custodial parent was allowed to relocate with the child. The position was that 'where the custodial parent … ha[d] a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children'.[12] According to Young, this allows for '… a proper consideration of the factors affecting the carer's life, such as their freedom of movement, association, employment and personal relationships. These are to be weighed against any negative impacts of relocation, such as

[7] (1884) 28 Ch D 606, CA (Eng).
[8] [1970] 1 WLR 1469. See generally Geroge 'The shifting law: Relocation disputes in New Zealand and England' (2009) 12 *Otango Law Review* 107.
[9] *Poel* supra note 5. See also Bainham 'Taking children abroad: Human rights, welfare and the courts' (2001) 3 *The Cambridge Law Journal* 489 at 490.
[10] [1983] 4 FLR 434 at 443B.
[11] [1988] 2 FLR 116, CA.
[12] *Tyler v Tyler* [1989] 2 FLR 158, CA.

reduced contact'.[13] It is submitted that it is undesirable to place more emphasis on the factors provided by the custodial parent in CRDs while placing less significance to those provided by the non-custodial parent.

As it was shown in chapter three of this thesis, the reasonableness approach greatly influenced the development of child relocation law in South Africa. Judges considered the good faith and general state of unhappiness of relocating parents, usually mothers, to ascertain whether they had reasonable grounds to relocate. Both in England and South Africa, there was a judicial presumption for relocation in favour of custodian parents, most of whom were mothers, who were regarded as having a right to decide to relocate with children to any of the places they desired.

JUDICIAL FRAMEWORK

There is no provision in the Children Act of 1989 that adequately deals with CRDs. Section 13(1)(b) of this Act merely states that 'where a residence order is in force with respect to a child, no person may … remove him from the United Kingdom; without either the written consent of every person who has parental responsibility for the child or the leave of the court'. Section 1(3) of this Act provides general factors that should be considered in all disputes concerning children such as: wishes and feelings of the child before the court;[14] the child's physical, emotional, and educational needs;[15] the likely impact on the child due to the change in her circumstances;[16] the child's age, sex, background and any of the child's characteristics the court considers relevant;[17] any harm the child has suffered or is at risk to suffer;[18] the capability of the child's parents or that of any person in meeting the child's needs;[19] and 'the range of powers available to the court under this Act in the proceedings in question'.[20]

This lack of adequate legislative guidance has led to inconsistent determinations of CRDs because judges relied on their individual discretion to resolve these disputes. It was not clear from decided cases what factors courts should rely on when reaching their decisions. In some cases, the reasonableness test was relied on,[21] others relied purely on the mother's state

[13] Young 'U v U Reflections on the high court and family law' (2003) 2 *Alternative Law Journal* 78 at 81.
[14] Section 1(3)(*a*) of the Children Act of 1989.
[15] Section 1(3)(*b*) of the Children Act of 1989.
[16] Section 1(3)(*c*) of the Children Act of 1989.
[17] Section 1(3)(*d*) of the Children Act of 1989.
[18] Section 1(3)(*e*) of the Children Act of 1989.
[19] Section 1(3)(*f*) of the Children Act of 1989.
[20] Section 1(3)(*g*) of the Children Act of 1989.
[21] *Tyler v Tyler* [1989] 2 FLR 158, CA.

of happiness and/or distress,[22] whereas others considered the wishes of the children.[23] In *RE B (Minors) (Removal from jurisdiction)* the court, in refusing relocation, was of the view that particular weight should be given to the conditions in which children will be brought up abroad, how and by whom they will be financially supported.[24]

5.2.2 JUDICIAL GUIDELINES

In 2000, the Court of Appeal in *Payne v Payne*,[25] had an opportunity to pronounce on relocation law in the United Kingdom. Thorpe LJ investigated the law regarding CRDs and held that 'refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children'.[26] Thorpe LJ was describing the BIC through the circumstances of the custodial parent and linked the psychological security and stability of the child with the emotional and psychological stability of the custodial parent.[27] Thorpe LJ suggested some sort of a test which he believed may assist in adjudicating CRDs as follows:

> 'a) is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
>
> (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
>
> (c) 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?

[22] *RE F (A WARD) (Leave to remove ward out of the jurisdiction)* [1988] 2 FLR 116, *CA.*
[23] *M v A (WARDSHIP: REMOVAL FROM* JURISDICTION) [1993] 2 FLR 715.
[24] [1994] 2 FCR 309.
[25] [2001] 1 FLR 1052.
[26] Ibid para 26.
[27] Ibid para 31.

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate'.[28]

This test seems sensible in that, if properly applied, it might allow the court to consider all relevant factors that might point to what would be in the BIC in the circumstances. In particular, paragraph 'd' of the test specifically states that the overriding 'review' is that the child's welfare is paramount. When making an order affecting the child and determining the child's welfare, the court is enjoined to consider seven general factors listed in section 1(3) Children Act of 1989.

These are not specific factors dealing with CRDs in the United Kingdom, but broad factors that courts are legislatively required to consider when determining disputes that impacts children's lives. Section 1(3) Children Act of 1989 does not provide guidance on how competing factors should be weighed and balanced. Factors provided in this provision are inadequate in dealing with CRDs, hence Thorpe LJ in *Payne* considered it necessary to supplement them with a judicial test that is specific to CRDs.

Butler-Sloss P agreed with Thorpe LJ, but given the inadequacy of the 'statutory checklist' in CRDs, she suggested six factors that judges should consider when dealing with CRDs but cautioned that they are not a closed list. These factors are:

- the welfare of the child is always paramount;
- there is no presumption created by section 13(1)(b) [of the Children Act of 1989] in favour of the applicant parent;
- the reasonable proposals of the parent with a residence order wishing to live abroad carry great weight;
- the genuine motivation for the move;
- the effect upon the child of the denial of contact with the other parent
- the opportunity for continuing contact between the child and the parent.[29]

Butler-Sloss P attempted to craft these factors in gender-neutral terms, which is important because such an approach considers the fact that any parent irrespective of their gender may

[28] Ibid para 40.
[29] Ibid para 85.

apply for, or object to, the relocation of their child. She too did not provide guidance on how competing factors ought to be assessed and balanced.

Thorpe LJ's judgment and his guidelines have been noted and applied by subsequent child relocation cases in the United Kingdom.[30] Wall LJ in *Re D (Children),* stated that '… in relocation cases, the judge at first instance is duty bound to follow the guidance given in *Payne v Payne* … and other cases of the Court of Appeal on the same point'.[31] Even though subsequent child relocation cases regarded these guidelines as binding, nonetheless, these guidelines are inherently problematic when looked at holistically.

Thorpe LJ's fourth guideline in *Payne* correctly declares the child's welfare as paramount and further that it must be informed by the generic statutory guidelines in section 1(3) Children Act of 1989. However, paragraph 'c' of these guidelines suggests that a judge should as a matter of priority evaluate the impact of the proposed relocation on the custodial parent, usually the mother. This seems to direct judges determining CRDs, to not start their enquiry with a neutral mind but to focus on the impact of relocation applications on custodial parents, who are usually mothers.[32]

Hayes has correctly criticised Thorpe LJ's guidelines by arguing that on face value they appear '… relatively even handed. But a closer analysis reveals that [they] expect a judge to approach his task in a manner which is weighed towards one party'.[33] Thorpe LJ's approach to some extent reflects the traditional outdated approach to parenting that favours custodial parents, who are usually mothers. Thorpe LJ's approach appears to be custodial parent centred as opposed to child centred and does not consider the importance of the non-relocating parent's role in the child's life. In fact, at the time *Payne* was decided, there were already studies that revealed the need to investigate the nature of the relationship between the non-relocating parent and the child before the court makes a relocation decision.[34]

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[30] See generally *Emma R v Edward R FD* [2004] EWHC 2572 (Fam); In re B (Removal from Jurisdiction) [2003]. 2 FLR 1043; *In re W (Children) CA* [2009] 1 FCR 584 and *In re D (Children)* [2010] 2 FLR 16 05.

[31] [2010] EWCA Civ 50 para 10. He further held that '[t]he principles and guidelines in a decision of the Court of Appeal in a case such as *Payne v Payne* can only be altered in one of two ways. The first is by legislation: the second is by it being overruled by a decision of the Supreme Court'.

[32] See Hayes 'Relocation cases: Is the Court of Appeal applying the correct principles?' (2006) 3 *Child and Family Law Quarterly* 351 at 364, where she correctly states that paragraph c of Thorpe LJ guidelines '… leads to the outcome that a judge evaluating the impact on the mother of denial of leave does not start his investigation with an open mind … [h]e is instructed to treat the impact of his ruling on the mother as the most significant consideration'. Further that '[b]y contrast, a judge is not instructed to have any preconceptions in his mind when he carries out his investigation of the detriment [of the proposed relocation on] the father'.

[33] Ibid.

[34] See Warshak 'Social science and children's best interests in relocation cases: Burgess revisited' (2000) 34 *Family law Quarterly* 83. In this paper, Warshak also refers to earlier studies that reveal the importance of non-relocating parents on children's lives.

Thorpe LJ's guidelines requires a judge to give more attention to the proposals of the custodial parent as the 'primary carer, who, in practice, is almost always the mother, than he is to those of the other parent, in practice almost always the father'.[35] Gray convincingly argues that '[a]lthough it is predominantly mothers rather than fathers with residency of the child in these relocation cases, the focus on the "mother" serves to enforce traditional gender roles [and] … the child's interest are equated with those of the mother, while this may not necessarily be accurate'.[36]

It is worth noting however, that Thorpe LJ in his guidelines specifically refers to a ' mother' as opposed to a 'custodial parent' or 'primary carer'. Hayes has highlighted the gender bias in favour of mothers which is inherent in Thorpe LJ's guidelines which in her view '… has developed because [these guidelines are] built around the assumption that a child's relationship with his mother as the primary caring parent is of most importance to his or her welfare. But of course, depending on the circumstances of each case, such assumption, may or may not, be correct'.[37] *Payne* can also be criticised for overemphasising the emotions of the custodial parent which detracts from the importance of co-parenting.

The inherent bias in Thorpe LJ's guidelines have also been noted by other judges. For instance, Wall LJ in *Re D (Children),* noted that:

> '[t]here has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfect respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of the children by a permanent breach of the relationship which children have with the left behind parent'.[38]

McFarlane LJ in *F (A Child) (International Relocation Case)*,[39] was of the view that the guidance offered in *Payne* should only be used when context allows because it was 'redolent with gender based assumptions as to the role and relationships of parents with a child'. [40]

George, however, has argued that *Payne*'s critics are not looking at what *Payne* actually says, and that the central point of the case is that the child's welfare is paramount, with all other

[35] Hayes op cit note 32 at 362.
[36] 'Relocation, Relocation, Relocation: A comparative study of 'leave to remove' applications in England and Scottland' (2015) 2 *Dundee Student Law Review* 1 at 4.
[37] Hayes op cit note 32 at 362. See also Perry 'Payne v Payne leave to remove children from the jurisdiction' 13 (2001) 4 *Child and Family Law Quarterly* 455 at 458.
[38] Supra note 31 para 33.
[39] [2015] EWCA Civ 882 paras 21-22.
[40] Ibid paras 18.

considerations being merely factors contributing to that analysis.[41] It is submitted that George's caution does not take into account the cogency of the arguments raised against *Payne*. These guidelines are crafted in favour of custodial parents who are generally mothers and do not require a fair assessment of the impact of the proposed relocation on non-custodial parents who are generally fathers, as demonstrated by Hayes' critical analysis and McFarlane LJ's judgment. It is ideal that concerns raised by critics are addressed by future cases to improve CRDs jurisprudence in the United Kingdom in such a way that there is a proper balancing act of all the relevant factors without declaring any factor (such as the desires of custodian parents, who are mostly mothers) to be decisive even before a case is heard.

Another important CRD case in the United Kingdom is *K v K (Children: Permanent Removal from Jurisdiction).*[42] Unlike in *Payne*, the parents enjoyed a shared care arrangement in this case. The essence of this case is that there is a need to focus on the BIC as the paramount factors and not merely overemphasise the role of one parent in the child's life without assessing the value of the child having both parents in his or her life. This case was heard and decided by three judges in 2011, including Thorpe LJ. The court had to determine whether *Payne* should be understood as providing a binding legal principle or was merely providing guidance on how CRDs ought to be determined. Moore-Bick LJ criticised *Payne* for its '… failure to distinguish clearly between legal principle and guidance'.[43] Contrary to Wall LJ's approach in *Re D (Children)* where he held that the guidance in *Payne* was binding, Moore-Bick LJ was of the view that the only principle of law laid down in *Payne* was that the BIC is paramount and that further remarks made by Thorpe LJ in that decision were mere guidelines on how to approach CRDs and thus not legally binding.[44] Moore-Bick LJ emphasised the importance of judicial discretion in relation to the guidance provided in *Payne*, in that relocation decisions vary because of their complexities and that a judge '… must be free to weigh up the individual factors and make whatever decision the judge considers to be in the best interests of the child'.[45] By so doing, he was entrenching an unfettered discretion on judges.

Black LJ agreed with Moore-Bick LJ on the paramountcy of the BIC principle in CRDs and held that '[e]verything that is considered by the court in reaching its determination is put

[41] George 'Reviewing relocation? *Re W (Relocation: Removal Outside Jurisdiction) [2011]* EWCA Civ 345 and *K v K (Relocation: Shared Care Arrangement) [2011]* EWCA Civ 793' 24 (2012) 1 *Child and Family Law Quarterly* 110 at 112.
[42] [2012] Fam 134.
[43] Ibid para 86.
[44] Ibid.
[45] Ibid.

into the balance with a view to measuring its impact on the child'.[46] These two judges parted ways with Thorpe LJ's endorsement of the presumption in favour of the custodial parent and emphasised the need to properly assess all the factors before the court.[47]

It is submitted that while the assessment of the relevant factors is important in CRDs, there is also a need to properly balance them. To adequately balance competing factors with the aim of reaching a decision that is to the BIC, it is undesirable for judges to be able to make whatever decisions they consider to be in the BIC. What is in the BIC should be determined by the facts before the court. Apart from the gender concerns raised against Thorpe LJ's guidelines in *Payne*, it is further submitted that these guidelines have the effect of limiting judges' discretion.

The exposition of the law relating to CRDs by Black LJ and Moore-Bick LJ in *K v K* was adopted with approval by McFarlane LJ in *F (A Child) (International Relocation Case)*.[48] McFarlane LJ further held that '[s]elective or partial legal citation from *Payne* without any wider legal analysis is likely to be regarded as an error of law'.[49] He further held that '… a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same'.[50] This presupposes that the court should adequately assess each parent's case in order to establish what in the circumstances would be in the BIC.

It can be argued that McFarlane LJ's approach allows for a proper analysis of the facts before the court without reliance on any presumption. However, McFarlane LJ did not provide a sense of how judges should identify, weigh and balance relevant and competing factors. This approach merely reiterates that the main issue for determination in CRDs is what is in the BIC before the court. Given the fact that Thorpe LJ's guidelines have been held not to be binding, such a wide approach is not particularly helpful because individual judges will endeavour to establish the BIC before them based on their own subjective thoughts on parenting. Nonetheless, *F (A Child) (International Relocation Case)* remains the leading CRDs case in the United Kingdom.

Currently, due to lack of specific CRDs legislative guidelines in the United Kingdom, as was stated by Thorpe LJ in *Payne*, the starting point in the adjudication of these disputes is

[46] Ibid para 141.
[47] Ibid para 41.
[48] [2015] EWCA Civ 882 paras 21-22.
[49] Ibid para 27.
[50] Ibid para 31.

that the child's welfare is of paramount consideration. In assessing the child's welfare, the court must consider the general factors listed in section 1(3) Children Act of 1989. Notwithstanding, the fact that the Court of Appeal in *K v K (Children: Permanent Removal from Jurisdiction)* and *F (A Child) (International Relocation Case)* have reduced Thorpe LJ's test into mere guidelines, nonetheless, his approach is a valuable source of guidance to other judges when adjudicating CRDs.

Thorpe LJ's guidelines are applied in line with McFarlane LJ's approach in *(A Child) (International Relocation Case),* where he discouraged any bias based on gender and encouraged judges dealing with CRDs to weigh all relevant factors and look at the cases before them holistically from the point of view of the child and both parents to reach a conclusion that meets the BIC. McFarlane LJ's approach in *(A Child) (International Relocation Case)* in particular, promotes an adequate assessment of all the factors before the court without any preconceived view of how children should generally be cared for.

Apart from the gender bias inherent in *Payne* as correctly highlighted by Hayes as a commentator and McFarlane LJ as a judge of the Court of Appeal in the United Kingdom, in the absence of legislative guidelines, the guidelines provided by Thorpe LJ can be useful for South African judges. For instance, the content paragraph 'a' of these guidelines can be of valuable assistance to judges if the words 'mother' and 'father' are ignored. Instead, judges should ask whether the application of the custodial parent is genuine, realistic, and founded on practical proposals that are well researched and investigated as stated in that paragraph. However, judges should not follow the outdated view on parenting that favours custodial parents. Instead, they must embrace the modern thinking regarding parenting which promotes shared parental care on the basis that children benefit from meaningful contact with both of their parents. Available social science literature supports the modern and dominant view on parenting which advocates for shared parenting, to the extent to which such parenting is possible.[51]

If the child relocation application is genuine, realistic, and founded on practical proposals that are well researched and investigated, then it should be allowed and if not, it should be dismissed irrespective of the gender of the parent. This would limit the extent of the discretion that allows different judges to deny fathers permission to relocate or permit mothers to do so on similar facts as was the case in the South African cases of *B v M* and *Jackson v Jackson.* In these cases, the facts were almost identical as demonstrated in chapter three of this

[51] Nunn, Jeralyn and Lawrence op cit note 4 at 412.

thesis. However, the outcomes of both these cases were not in favour of the custodial parents *per se,* but rather in favour of mothers. This is because the judges who made the final decisions on appeal, to refuse the custodial father permission to relocate in *Jackson* and to allow the custodial mother to relocate in *B v M,* generally believed that children could not be raised in the absence of their mothers without an adequate assessment and weighing of the facts.

South African judges can also draw lessons from paragraph 'b' of Thorpe LJ's guideline. However, the word 'father; in that paragraph is not useful. The appropriate phrase should be 'non-custodial parent'. The courts should be able to carefully assess the reasons provided by the non-custodial parent when objecting to the proposed relocation. This thesis enjoins judges to determine whether the objection is out of genuine concern for the wellbeing of the child or some other ulterior motive. It also calls for the evaluation of the impact of the proposed relocation on the relationship that non-custodial parent has with the child if relocation is granted. This should enable the court to adequately engage factors provided by the non-custodial parent and properly balance them with those advanced by the custodial parent. However, paragraph 'b' of these guidelines is concerning because it only requires the court to examine the impact of the relocation on the child's relationship with the maternal family and does not refer to the paternal family. It is submitted that the court should be able to properly assess the child's relationship with any person who has an impact on the child's life irrespective of whether such a person is from the maternal or paternal family.

As pointed out by McFarlane LJ, paragraph 'c' of Thorpe LJ's guidelines is riddled with gender biases that favour mothers. It is submitted that South African judges should ignore this part of the guidelines as judges should adequately and fairly assess the impact of refusing and allowing relocation on both parents regardless of their gender. Paragraph 'd' of Thorpe LJ's guidelines is more in line with the current approach in South Africa. BIC is the paramount consideration in all matters that involve children, and section 7(1) of the South African Children's Act provides general statutory factors that courts may consider when determining the BIC, most of which are not directly applicable to CRDs. To date, there is only one CRD case where some of these statutory factors were considered and applied.[52] Finally, in absence of adequate CRDs legislative guidelines, judges can draw inspiration from Thorpe LJ and develop judicial guidelines that can limit judicial discretion which currently leads to inconsistent approaches in CRDs in South Africa.

[52] See *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008).

5.3 AUSTRALIA

In Australia, the Family Law Act[53] (hereafter FLA) is the main legislation governing relationships between children and their parents as well as disputes that emanate therefrom. In terms of section 60B (2)(*a*) of the FLA, children have the right to be cared for by both of their parents, irrespective of whether their parents are married, separated, never married or never lived together. In terms of section 61C(2) of the FLA, both parents have parental responsibilities even if they are separated, unless their rights have been altered by the court. Even though the FLA deals with the concepts of custody and access, it nonetheless, does not specifically address decision-making on issues of child relocation.[54]

When called upon to resolve CRDs, Australian judges rely on part VII of the FLA, which contains general provisions that deal with post-separation parenting.[55] The conclusions reached by some of these judges were driven by the unique facts of the cases with the BIC being the paramount consideration.[56] In addition to the BIC principle, judges have also looked at factors relating to the custodial parents' freedom of movement as well as compelling circumstances when making their decisions. In Australia, the same principles are applied irrespective of whether the proposed relocation is within or outside Australia.[57]

The FLA was amended on 22 May 2006 through the promulgation of the Family Law Amendment (Shared Parental Responsibility) Act 2006, which generally encourages shared parenting and requires courts to consider making orders which allow both parents to spend equal or substantial time with their children.[58] This part of the chapter evaluate the way courts in Australia have approached CRDs in light of these amendments. But first, the principles that have been laid down by courts before these amendments will be discussed.

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[53] 53 of 1975.
[54] Behrens and Smyth 'Australian family law court decisions about relocation: Parents' experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 2.
[55] See among others *Cattanach and Leavens* (1977) FLC 90-246; *Lamche* (1977) FLC 90-272; *Kuebler* (1978) FLC 94-434; *Fryda and Johnson* (1979) FLC 90-634; *R and R* (1984) FLC 91-571; *Rudolph and Dent* (1985) 10 Fam LR 669.
[56] See *In the marriage of Craven* [1976] FLR 132; *Fryda and Johnson* (1979) FLC 90-634; *Holmes* (1988) FLC 91-918 and *I and I* [1995] FamCA 42.
[57] See *In the Marriage of Holmes* [1988] 90 FLR 319 at 322. See also *In the Marriage of Armstrong* (1983) 9 Fam LR 402 at 407.
[58] Behrens and Smyth op cit note 54 at 2.

5.3.1 FREEDOM OF MOVEMENT

The amendments brought by the Family Law Amendment (Shared Parental Responsibility) Act 2006 place great emphasis on the involvement of both parents on their children's lives which may lead to a direct conflict between the BIC and relocating parents' freedom of movement.[59] It has been argued that '… the circumstances of a relocation case at least require the court to explore all the ways in which the parent's freedom of movement can be reconciled with the best interests of the child, before deciding that those interests should prevail over the parent's right to move with the children'.[60] The principles relating to freedom of movement in the context of CRDs in Australia were not materially affected by the 2006 legislative changes, which means that principles that were developed by the courts before 2006 are still largely applicable.[61]

Cases that were decided before 2006 placed much emphasis on custodial parents' freedom of movement.[62] Australian courts made freedom of movement an integral part of the CRDs jurisprudence. The thinking is that the non-custodial parent's objection to relocation with the child should not unreasonably and unjustifiably restrict the custodial parent's right to move freely. The court in *In the marriage of Craven,* held that in CRDs, the mother's '… freedom of movement and her right to choose freely where to live may itself be a factor in the welfare of children'.[63] By placing significance on the custodial parent's freedom of movement, the court was sympathetic to the fact that in general terms the custodial parents' daily circumstances would have a direct impact on the wellbeing of their children with whom they reside.

It has been argued that the court's decision 'to curtail the freedom of movement of the primary residence parent may make her bitter, frustrated and angry and further complicate access'.[64] Australian courts were generally not willing to restrict the custodial parent's movement when the romantic relationship had failed and there were compelling reasons for this parent to move to a different place.[65] In *I and I,*[66] the court reiterated that a custodial parent

[59] Parkinson 'Freedom of movement in an era of shared parenting: The differences in judicial approaches to relocation' (2008) 36 *Federal Law Review* 169.
[60] Ibid.
[61] Ibid at 150.
[62] See *Ryan* (1976) FLC 90-144 and *Armstrong* (1983) 9 Fam LR 402.
[63] *Craven* supra note 52 at 133.
[64] Christie '"There will be bloodshed" parental relocation and the Family Law Reform Act 1995' (2007) 3 *Polemic* 40 at 42.
[65] See Young 'Are primary residence parents as free to move as custodial parents were?' (1996) *Australian Family Lawyer* 31.
[66] (1995) FLC 92-604.

should be free to order his or her own life without the interference of the other party or that of the court. The court was of the view that requiring the custodial parent to remain within the country when he or she wishes to relocate would produce considerable strains, which in turn would affect the BIC.[67] The court highlighted that in CRDs, it is important that each case be dealt with on its own particular facts, and that the BIC should be the paramount consideration with the court balancing various factors without any preconceived notions.[68]

In *B and B: Family Law Reform Act,* the court cautioned that while Australian law recognised a general right of freedom of movement, that right when considered under Part VII of the FLA cannot override what should be in the BIC.[69] In 1999, the High Court of Australia, which is the highest court in Australia had an opportunity to pronounce on the law regarding CRDs in *AMS v AIF and AIF v AMS.*[70] Gleeson CJ, McHugh and Gummow JJ, in their joint majority judgment held that the 'State Family Court erroneously exercised its discretion by requiring the demonstration by the mother of "compelling reasons" to the contrary of the proposition that the welfare of the child would be better promoted by him continuing to reside in the metropolitan area of Perth'.[71] They felt that the trial court imposed an impermissible onus of 'compelling circumstances' which had the effect of restricting the mother's freedom of movement.[72]

The High Court of Australia had another opportunity to deal with CRDs in *U v U.*[73] Gummow and Callinan JJ, in their majority judgment, held that 'whatever weight should be accorded to a right of freedom of mobility of a parent, it must defer to the expressed paramount consideration, the welfare of the child if that were to be adversely affected by a movement of a parent'.[74] Gaudron J, in her minority judgment, made a point that '[a] mother who opts for relocation in preference to maintaining a close bond with her child runs the risk that she will be seen as selfishly preferring her own interests to those of her child; a mother who opts to stay with her child runs the risk of not having her reasons for relocating treated with the seriousness they deserve'.[75] The High Court in *U v U* restricted itself to the circumstances of the case before it and saw no need to revisit or even to some extent, clarify the Australian CRD law. The court

[67] Ibid at 324.
[68] Ibid.
[69] 1995 [1997] FamCA 33 para 10.65.
[70] 199 CLR 160.
[71] Ibid para 47.
[72] Ibid para 145. See also *Martin v Matruglio* (1999) FLC 92-876.
[73] (2002) FLC 93-112.
[74] Ibid para 89.
[75] Ibid para 36.

neither crafted a test nor provided guidelines on how external relocations should be approached in Australia.

Young correctly argues that the High Court's 'failure to lay down any guiding principles (save for the veto of the "compelling reason" requirement) in such a difficult area suggests a lack of consideration of the acknowledged dangers of the best interests principle'.[76] Further that the indeterminacy of CRDs leads to fears that judges are too easily able to exercise personal prejudices and that it allows undisclosed principles and policies to be applied.[77] It is submitted that the personal prejudices that judges habour in CRDs lead to different approaches in the resolution of these disputes, thus making the law inconsistent. Particularly, when judges interpret legal principles and apply them to the facts to reach their desired outcomes.

This was clearly the case in *AMS v AIF and AIF v AMS,*[78] where a judge of the lower court refused the custodial parent permission to relocate because he felt that the mother failed to provide compelling reasons. This decision was overturned by the high Court judges who were of the view that custodial parents cannot be required to demonstrate compelling circumstances to be allowed to relocate because that would infringe on their right to freedom of movement.[79] It is worth noting that the 2006 Amendments have necessitated the need to effectively balance the custodial parents' right to move with the intention to reside where they desire and children's right to maintain meaningful relationships with both their parents post relocation.[80] This balance can be achieved among others by the court enquiring whether it is reasonably practical for the non-relocating parent to also relocate. Parkinson argues that '[w]here both parents are fit caregivers, and it is not reasonably practicable for the other parent to relocate, the court has realistic alternatives and can examine the extent to which the parent who wants to relocate is being child-focused in making that decision'.[81] These alternatives may include the assessment of the arrangements that both parents are willing to make to ensure that they continue to exercise shared parental care post relocation and non-relocating parents continue to be meaningfully involved in their children's lives. While this might not apply to all non-relocating parents, there are nonetheless, those with financial resources who may be able to travel long distances or use electronic resources to effectively exercise their shared parental roles.

[76] 'U and U: Reflections on the High Court and family law' (2003) 28(2) *Alternative Law Journal* 78-82 at 81
[77] Ibid.
[78] 199 CLR 160.
[79] See also *Paskandy v Paskandy* (1999) FLC 92-878 where the compelling reasons approach was also rejected.
[80] *P and P* [2006] FMCA 518 para 25.
[81] Parkinson op cit note 59 at 164.

5.3.2 TEST FOR RELOCATION

The Full Court of the Family Court of Australia in *A and A: Relocation Approach,*[82] which was decided before the 2006 amendments and superseded by *Hepburn and Noble,*[83] provided a useful test which, even without legislative guidelines, can be considered in South Africa to properly weigh and balance all competing factors. The court suggested a three-stage analysis test to be adopted when adjudicating CRDs as follows:

> '[i]n determining a parenting case that involves a proposal to relocate the residence of a child it is to be expected that reasons for decision will display three stages of analysis and will:
> 1. Identify the relevant competing proposals;
> 2. For each relevant … factor, set out the relevant evidence and the submissions with particular attention to show how each proposal is said to have advantages and/or disadvantages for that factor and make findings on each factor as the Court thinks fit having regard to s60B [of the Federal Family Law Act];
> 3. On the basis of the prior steps of analysis, determine and explain why one of the proposals is to be preferred, having regard to the principle that the child's best interests are the paramount but not sole consideration'.[84]

In applying this test to the facts of the case, the Full Court of the Family Court of Australia, started by affirming that 'in determining a parenting case that involves a proposal to relocate the residency of a child, the welfare or best interest of the child … remains the paramount consideration but it is not the sole consideration'.[85] Further that the court cannot require the applicant for relocation to demonstrate compelling reasons.[86] In applying the first stage, the Full Court was of the opinion that the lower court failed to evaluate the competing proposals before it, and refused the mother permission to relocate by overemphasising the importance of the father's contact with the child.[87] The court sought to balance the loss of the father's contact with various factors that the mother relied on such as: the father's minimal contact with the child in Australia, the depression the mother experienced by being in Australia; that relocation would yield positive benefits for the mother's mental health, a factor the mother contended

[82] (2000) FLC 93-035 para 37. In this case, the mother, after separation with the father, wished to relocate from Australia to Portugal.
[83] [2010] FamCAFC 111.
[84] Ibid para 82.
[85] Ibid para 64.
[86] Ibid.
[87] Ibid para 112.

would be in the BIC.[88] It is worth emphasising that this case is superseded and the leading case on the general approach to the exercise of discretion in Australia currently is *McCall and Clark*,[89] which will be discussed below. Nonetheless, the three-stage analysis suggested in *A and A: Relocation Approach* provides a useful guide which can assist judges to properly weigh, assess and balance competing facts.

In relation to the second stage, the Full Court considered section 68F(2) of the FLA, and held that 'the reasons for the proposed relocation as they bear upon the child's best interests will be weighed with the other matters that are raised in the case, rather than treated as a separate issue'.[90] However, the Full Court neither dealt with, nor engaged, the reasons for the proposed relocation. The court however noted that '… courts will not necessarily restrain … [relocation applications], despite the inevitable implications they have for the child's contact with, and access to, the other parent'.[91] With regards to the third stage, the Full Court noted that:

> '[i]n determining a parenting case that involves a proposal to relocate the residency of a child, the process of evaluating the proposals must have regard to the following: (a) [n]one of the parties bears an onus; (b) [t]he importance of a party's right to freedom of movement; and (c) [m]matters of weight should be explained'.[92]

This was perhaps the first Australian case where the court took it upon itself to craft useful guidelines on how CRDs should be determined.[93] This three-stage analysis enjoins courts to not only identify all the relevant factors for and against relocation; but also to properly assess and balance competing factors in order to reach decisions that are legally justifiable. By dealing with each submitted factor, the court would be able to assess the extent to which any factor competes with another and through the evidence produced by the parties, to evaluate the advantages and disadvantages of each factor to reach its decision.

It is worth noting that these judicial guidelines do not provide guidance on what would render certain category of factors authoritative in the balancing exercise. Thus, once judges have satisfied the first step of identifying competing factors, they can use the second and third

[88] Ibid para 119
[89] [2009] FLC 93-405.
[90] Ibid para 90.
[91] Ibid para 95.
[92] Ibid para 96.
[93] See Gray 'Relocation of a child's residence: Correct approach: Guideline judgment' (2000) 6 *Current Family Law* 246.

stage to reach their desired outcomes, because these stages enhance their discretion as opposed to limiting it.

In 2010, the Full Court of the Family Court of Australia in *Hepburn and Noble,*[94] questioned the value of the CRDs guidelines that were provided in *A and A: Relocation Approach,* which was decided in 2000 before the 2006 Amendments to the FLA. It made it clear that it was important for lower courts to refer and follow guidelines and principles of the Full Court 's decisions that were decided after the amendments were made,[95] which will be dealt with below in this chapter after consideration of these legislative amendments. It is submitted that while *A and A: Relocation Approach,* appears to be superseded, nonetheless, a three-stage analysis test developed in this case provides a platform for proper consideration of competing factors and assessment of advantages and disadvantages of the proposed relocation in line with the BIC. The requirement that each factor be supported by relevant evidence and the need to substantiate why a particular proposal is preferred will enable the court to have a broader understanding of the social dynamics of the parties which make CRDs difficult to adjudicate. If performed adequately, this test can assist courts to better deal with the parents' utterly reasonable but conflicting positions, which are the relocating parent's desire to relocate to move on with 'her' life and the non-relocating parent's desire to play an active role in 'his' children's lives.

5.3.3 THE FAMILY LAW COUNCIL RECOMMENDATIONS AND 2006 AMENDMENTS

This section focuses on the legal developments that occurred from 2006 in Australia regarding CRDs. The amendments made by Family Law Amendment (Shared Parental Responsibility) Act,[96] were introduced to promote shared parenting and to ensure that children maintain meaningful relationships with both of their parents in a healthy environment free of abuse. These amendments did not have specific provisions dealing with CRDs. The first CRDs case to be decided under the amended provisions is *M and S,* where the court held that the amended provisions did not alter the previous position in relation to relocation disputes.[97]

While the actual date is not clear from the report, nonetheless, the Australian Family Law Council, which is the Australian commonwealth's independent family law advisory body,

[94] [2010] FamCAFC 111 at 100.
[95] Ibid.
[96] 46 of 2006.
[97] (2007) FLC 93-313.

released its report which dealt with CRDs in Australia in May 2006. The legislature could not have considered the recommendations contained in this report because it amended the FLA in the same month.[98] This report identified that the FLA neither defined the term 'relocation' nor does it have specific provisions dealing with relocation.[99] It argued against inserting a presumption for or against relocation in the FLA.[100] It specifically recommended draft legislative guidelines to deal with relocation disputes.[101] In its recommendations, the Family Law Council emphasised the need to consider the different proposals from both parents including details of where and with whom a child should live as well as alternatives regarding the proposed relocation.[102]

The Family Law Council also recommended that the court should assess 'whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child'.[103] It further recommended a judicial evaluation of:

> 'arrangements, consistent with the need to protect the child from physical or psychological harm, [that] can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances'.[104]

The Australian legislature has not yet implemented any of these recommendations. The initiative by the Family Law Council to drive a project of influencing legislative changes that would recognise CRDs as an independent area of family law which can be legislatively regulated on its own without reference to custody, access or parental responsibilities is a proactive initiative that could lead to consistent decision making in CRDs. Parkinson has reviewed major CRDs cases and correctly observed that there are major differences in the way

[98] Parkinson op cit note 59 at 146. He argued observed that '[a]n indication of the differences in approach is that significant differences may be observed in the patterns of outcomes between judges in different cities. The outcomes of reported cases suggest that it is very much easier to relocate to another part of Australia from Melbourne, Perth and Darwin than it is from Sydney. This may reflect different interpretations of the law and beliefs about the best interests of children among clusters of judges who work together in the same location'. See also 'A report to the Attorney-General prepared by the Family Law Council' (2006) available at https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Relocation%20report.pdf accessed on 20 January 2016.
[99] 'A report to the Attorney-General prepared by the Family Law Council' (2006) 2.
[100] Ibid 3.
[101] Ibid at 66.
[102] Ibid para 6.47(A)(1)(a).
[103] Ibid para 6.47(A)(1)(b).
[104] Ibid para 6.47(A)(2)(b)(i).

trial judges interpret and apply the 2006 amendments in relocation cases leading to the emergence of different approaches.[105] These different approaches make the law inconsistent. While Parkinson does not favour legislative guidelines and believes that judicial guidelines are more suitable to deal with CRDs, he nonetheless, recognises the urgent need for guidance in these cases, which in the absence of judicial guidelines, can be provided by the legislature. He argues that '[i]f the issues cannot be resolved by clear guidance from the appellate courts, then there may be no option but for a more prescriptive approach to be enacted by Parliament'.[106] This must be accompanied by an adequate weighing and balancing of competing factors, which, if implemented, will require judges to adequately and fairly consider the cases of both litigants before the court and determine the advantages and disadvantages of the proposed relocation and the reasons for the objection thereto with a view of establishing the BIC.

Since the 2006 amendments to the FLA, one of the most important decision regarding CRDs is *McCall and Clark*.[107] In this case, the Full Court of the family court of Australia held that these amendments changed the way courts should approach making parenting orders and require courts that proposes to make parenting orders to apply the presumption of equal shared parental responsibility unless such presumption is not applicable or is rebutted.[108] This is to ensure that both parents maintain meaningful relationships with their children post separation in order to be involved in their children's care and development. In *Sealey & Archer,*[109] the Full Court held that 'in a case which involves a proposal that there be a significant change in the place where a child lives, it is appropriate for a court in its application of … s 65DAA(5), to canvass the advantages and disadvantages of a proposal "to relocate" the child'.[110] The Full Court in *McCall and Clark* further held that when dealing with relocation applications where equal shared parental responsibility presumption applies, the court must consider:

a) whether equal time with both parents would be in the BIC;
b) and weigh up an equal time (or substantial and significant time) regime against all the factors having advantages for the child in the relocation proposal; and
c) whether an order for equal time in one location or that which allows the child to reside with one parent in a distant location should be made, together with such

[105] Parkinson op cit note 59 at 146.
[106] Ibid at 169.
[107] (2009) FLC 93-405.
[108] Ibid para 58. See also *Taylor & Barker* (2007) FLC 93-345 para 62.
[109] (2007) FLC 93-345 para 66.
[110] *McCall and Clark* supra note 107 para 58.

> orders which are aimed at maintaining the benefit of a meaningful relationship for the child if appropriate to do so.[111]

The Full Court emphasised that parents' proposals for and against relocation and statutory considerations must be assessed and weighed in accordance with the BIC.[112] It is clear from this case that there has been a shift in the way parenting is approached in Australia. The 2006 amendments to the FLA clearly demonstrate the legislature's clear intention to encourage meaningful relationships between children and both of their parents after parental separation. The FLA does not provide a definition of the phrase 'meaningful relationship'. It also does not '… purport to prescribe how that meaningful relationship is best promoted in the circumstances of any one case'.[113] The courts in Australia have interpreted this phrase with a view to provide guidance on how it should be understood. For instance, in *H & M*, it was held that meaningful relationship is not only established by the time the child spend with both of his parents but also the way the time is spent and the input of the parents during that time plays an important role in establishing whether the relationship is meaningful.[114] In *Mazorski & Albright,* the court held that '… when considering the primary considerations and the application of the object and principles, a meaningful relationship or a meaningful involvement is one which is important, significant and valuable to the child'.[115]

It appears that the quality and value of the time children spend with their parents and the overall parental contribution to children development would establish whether the relationships are meaningful. In *McCall and Clark,* the Full Court adopted what it referred to as the 'prospective approach' when interpreting the phrase 'meaningful relationship. It held that '… the court should consider and weigh the evidence at the date of the hearing and determine how, if it is in a child's best interests, orders can be framed to ensure that particular child has a meaningful relationship with both parents'.[116] This appears to be a fact-based enquiry on the parents' efforts and interests on their children which will provide evidence whether their relationship with their children is meaningful.

In denying the mother permission to relocate to Europe, the trial court in *Grella & Jamieson,* held that when determining the benefit of the child of a meaningful relationship, the

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[111] Ibid para 69.
[112] Ibid.
[113] *McCall and Clark* supra note 107 at 116.
[114] [2006] FamCA 1071 para 101
[115] *Mazorski & Albright* [2007] FamCA 520 para 26.
[116] *McCall and Clark* supra note 107 at 118 - 119.

court must consider and weigh the evidence provided by the parents during the trial and determine how it can craft an order that would ensure that the child has a meaningful relationship with both of his or her parents, if that is in the BIC.[117] This approach was endorsed by the Full Court of the Family Court on Appeal.[118]

While shared parenting and meaningful relationship approach of the 2006 Amendments does not necessarily create a presumption against relocation, nonetheless, some relocation applications will be refused if they result in some parents not being able to be meaningfully involved in their children's lives. The key consideration is that generally children must be able to continue to have meaningful relationships with both of their parents. For instance, *Ferro & Kopel,* the mother wanted to relocate to Israel with the child and the father objected. In refusing the mother permission to relocate, the court noted that both parties had a clear, meaningful and close relationship with the child and that at a certain point when the wife was sick, the father was predominantly engaged in the child's care.[119] The court reasoned that '[i]t is important that orders be made which ensure [that] there is an ongoing relationship between the child and her parents. It cannot be overlooked that the child has not known any other arrangement other than each of her parents having a significant and important involvement in her life'.[120] According to Cashmore and Parkinson '[i]n making decisions about relocation, careful assessment of the quality of the relationship between the non-resident parent and the child, and the capacity of that parent to offer consistent and positive involvement with the upbringing of the child, is critical.[121] There is a general view that courts in Australia are more likely to deny parents who wish to relocate with children permission to do so in the current legal environment which encourages orders for shared parenting.[122]

It is worth noting however, that factors such as neglect, violence and abuse may justify courts allowing parental relocations with children which have the effect of preventing some of the parents from having meaningful relationships with their children, particularly when it is clear that the time such parents spent with their children did not advance the children's wellbeing and development. Under these circumstances, the court must balance any benefit that the child may derive from having a meaningful relationship with both parents and the

[117] *Grella & Jamieson* [2016] FamCA 280 para 35.
[118] *Grella & Jamieson* [2017] FamCAFC 21 para 64 and 102.
[119] *Ferro & Kopel* [2016] FamCA 409 para 281.
[120] Ibid para 283.
[121] Cashmore and Parkinson 'Children's wishes and feelings in relocation disputes' (2016) 28 *Child and Family Law Quarterly* 151 at 173.
[122] See Behrens and Smyth 'Australian family law court decisions about relocation: Parents' experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 1 at 2 and Parkinson 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *Australian Journal of Family Law* 35.

potential risks to which the child will be exposed should the court order that the child spend time with the parent who is violent or abusive. In *Behn & Ziomek*, the court allowed the mother to relocate because the father had engaged in controlling and coercive conduct in respect of the mother and the child, which the court held to be "family violence".[123] The court accepted the mother's version that the father had assaulted the child on several occasions.[124] In justifying its decision, the court held that '[y]oung children who are exposed to abusive parental behaviour sometimes experience higher rates of mental health problems, disturbed sleeping patterns, poor concentration and restlessness'.[125] Abuse, neglect and violence provide a strong case for the parent who perpetrates such conduct not being allowed to be involved in their children's lives and for relocation to be allowed.

Finally, in South Africa, neither the courts nor the legislature have explicitly encouraged shared parenting and the exercise of meaningful relationships between children and parents post separation. The Australian approach is in line with the approaches in most jurisdictions where the issue of meaningful relationship between children and non-relocating parents is given considerable weight. Courts in South Africa should also consider possibilities that foster shared parenting and continuous contact between the child and all the parents, where this is possible. However, this should not be a default position but should be considered only if it is in the BIC, without unduly preventing relocating parents to take advantage of opportunities that would enable them to move on with their lives.

It is submitted that guidance should also be obtained from the relevant socio-legal research, some of which was discussed in chapter four of this thesis. This research is extremely useful and provides the basis upon which adequate assessment of the value and quality of relationships between non-custodial parents and their children can be made in the BIC. Some of the studies by these researchers also provide a sense of how presumptions and judicial guidelines can be used to resolve CRDs and highlight relevant factors that can be applied and balanced by the courts. Socio-legal research can play an important role in developing legislative guidelines which will enable courts to explore various options within a controlled legislative framework, without exercising unconstrained discretion.

[123] [2019] FamCA 298 para 4, 178 and 248.
[124] Ibid at para 194
[125] Ibid at para 199, the court further held that '[a]s these children grow older, such negative emotional effects can persist into adulthood and lead to higher rates of emotional distress, poor social connection and a predisposition to engage in risk taking behaviours'.

5.3.4 CONCLUDING REMARKS ON THE AUSTRALIAN EXPERIENCE

One of Australia's leading family law academics, Parkinson, reflected on the reported decisions relating to child relocation since 1 July 2006 and noted starkly different approaches to the application of the 2006 amended legislation in relation to relocation cases.[126] From these cases,[127] Parkinson observed that there are individual judges who approach child relocation disputes differently in different parts of Australia.[128] He noted that:

> '[a]n indication of the differences in approach is that significant differences may be observed in the patterns of outcomes between judges in different cities. The outcomes of reported cases suggest that it is very much easier to relocate to another part of Australia from Melbourne, Perth and Darwin than it is from Sydney. This may reflect different interpretations of the law and beliefs about the best interests of children among clusters of judges who work together in the same location'.[129]

Australian judges can approach CRDs differently because there are no specific CRDs provisions in the FLA. Nonetheless, from Parkinson's observation, it appears as if, at the very least, judges of the same court are, to some extent, following previous decisions from their jurisdiction, thereby ensuring some level of consistency in the ways in which CRDs are determined in a specific jurisdiction. There are three important lesson that South Africa can learn from Australia in its quest to limit judicial discretion by its judges. The first lesson relates to the way Australian courts are sensitive to the freedom of movement of the custodial parent. South African judges can also start to assess how refusing the custodial parent's relocation application would impact on their right to freedom of movement, particularly, where such a parent makes it clear that if permission to relocate is denied, he or she will not relocate. This is not something that South African judges have particularly emphasised even though section 21(1) of the South African Constitution provides that '[e]veryone has the right to freedom of movement' and section 21(2) provides that '[e]veryone has the right to leave the Republic'.

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[126] Parkinson op cit note 59 at 146.
[127] *Morgan and Miles* (2007) FLC 93-343; *Godfrey and Sanders* [2007] FamCA 102; *McAdam and McAdam* [2008] FamCAFC 91; *Taylor and Barker* (2007) FLC 93-345; *Goldrick and Goldrick* [2007] FamCA 1260; *D and D* [2006] FMCAfam 458; *W and P* [2007] FMCAfam 105; *Gordon and Gordon* [2007] FamCA 361; *Kenneth and Kenneth* [2007] FamCA 535; *MAS v SLC* [2007] FMCAfam 28; *Glover and Taylor* [2007] FMCAfam 926. For a detailed analysis on the differences in approaches of these and other cases, see also Parkinson 'The realities of relocation: Messages from judicial decisions' (2008) 22 *Australian Journal of Family Law* 35.
[128] Parkinson op cit note 59 at 146.
[129] Ibid at 149.

This should be one of the main factors that are assessed with all other important factors in CRDs in South Africa. This assessment should be undertaken regardless of the sex of the custodial parent.

The second lesson is the same as that which could be drawn by judges from the United Kingdom case of *Payne* which also developed judicial guidelines. Unlike the judicial guidelines provided in *Payne*, the guidelines of the Full Court in Australia are not riddled with gender assumptions. These guidelines can also be used by the South African legislature when it creates specific CRDs South African legislative guidelines. From these judicial guidelines, the South African legislature could be wiser and avoid content that could be viewed as gender specific and that which would enable judicial discretion to thrive. These judicial guidelines also emphasise the need for adequate weighing, assessment and balancing of all the competing factors. They also require judges to justify their conclusions with reasons for their chosen paths making them useful for the South African conditions wherein individual judges elevate certain factors as super factors while rendering others insignificant. They might also prevent judges from ignoring previous cases with similar facts without providing some justification for their approaches, as was demonstrated in chapter three of this thesis.

The final useful lesson is for the advisory committee of the SALRC on family dispute resolution: care of and contact with children, or any current or future advisory committee that deals with family law matters. In 2015, the SALRC released an issue paper for comments,[130] wherein it noted that the South African CRDs law is unclear and that '… general consistency in approach by our courts when dealing with relocation disputes is needed … [and] guidelines should be developed for this purpose'.[131] The SALRC explicitly noted that '[t]he main concern is the obvious lack of legislative guidelines'.[132] The SALRC further noted that '[t]he introduction of certainty will reduce the need for lengthy litigation and thus, reduce the costs associated with disputes over relocation'. However, the SALRC did not engage the issue of unfettered judicial discretion in CRDs.

The closing date of comments by stakeholders was 30 June 2016, and the commission has not yet published the outcome of its consultation process and its recommendations. Thus, the initiative of the Australian Family Law Council, which was not referred to by the commission, of recommending legislative recognition of child relocation and specific legislative guidelines is useful to the SALRC in its quest to influence the regulation of CRDs

[130] Project 100D (December 2015).
[131] Ibid para 2.3.23.
[132] Ibid para 2.3.49.

in South Africa. The SALRC should have regard to the draft legislative recommendations by the Family Law Council and take that which is useful therefrom. It is submitted that the most useful recommendation is the need for judges to adequately weigh and balance all the factors and provide reasons to support their approaches. Further that judges must consider and adequately balance the advantages and disadvantages of the proposed relocation. The SALRC should be progressive and recommend a balancing exercise in the legislative guidelines which will go a long way in limiting judicial discretion.

5.4 UNITED STATES OF AMERICA (USA)

Unlike South Africa, the USA has not yet ratified the CRC. Nonetheless, the courts in the USA do apply the BIC when adjudicating CRDs.[133] Despite its non-ratification of the CRC, the USA has played a major role not only in shaping the global understanding of the BIC, but also the development of CRDs jurisprudence around the world, thus influencing even South Africa.[134] Because of the federal system of government which constitutes fifty (50) different states, each with the power to enact its own domestic relations laws,[135] the CRDs jurisprudence is very inconsistent in the USA. CRDs between separated parents are dealt with by the courts of the individual states which are empowered to decide custody, access, and visitation rights[136] and these courts have adopted different approaches.

Some courts have adopted a presumption in favour of relocation.[137] The Supreme Court of Arkansas in *Hollandsworth v Knyzewski*,[138] announced a presumption in favour of relocation and placed a burden on the non-custodial parent to rebut the relocation presumption.[139] Other states such as Minnesota, Oklahoma, Wisconsin, Washington, California, Wyoming, Iowa and

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[133] See generally Kohm 'Tracing the foundations of the best interests of the child standard in American jurisprudence' (2008) 10 *Journal of Law & Family Studies* 1.

[134] See generally Bonthuys 'Clean breaks: Custody, access and parents' rights to relocate' (2000) 16 *SAJHR* 486, wherein she relied heavily on American jurisprudence. Bonthuys' views were adopted with approval by Maya JA (as she then was) in *Ford v Ford* [2006] 1 All SA 571 (SCA) para 12.

[135] Donovan, Smith & Mooney *State and Local Politics: Institutions and Reform* (2013) 46. See also *Ankenbrandt v Richards* 504 U.S. 689 at 703 (1992). See also *Walker v Walker* 509 F. Supp. 853 at 854 (D.C. Va. 1981) and *Barber v Barber* 21 How. 582, 584.

[136] Messitte 'Relocation of children: Law and practice in the United States: A summary' (paper presented to *The International Judicial Conference on Cross-Border Family Relocation*, 23 – 25 March 2010) at 5. See also Boshier 'Have Judges been missing the point and allowing relocation too readily?' 2010 (1.2*) Journal of Family Law and Practice* 10 at 14, where it is stated that '[t]he law on relocation is not uniform through all States that comprise the United States of America, with such matters more a matter for each State than Federal Government'.

[137] See among others *Downum v Downum* 274 (Ark. Ct. App. 2008) and *Condon v Cooper (In re Marriage of Condon)* 73 (Cal. Ct. App. 1998).

[138] 353 Ark. 470 (2003).

[139] Ibid at 476. See also Carrington 'Family law—Relocation disputes—From parent to paycheck: The demotion of the noncustodial parent with the creation of the custodial parent's presumptive right to relocate' (2004) 26 *University of Arkansas at Little Rock Law Review* 615 at 636.

Utah have also adopted a presumption favouring children relocation.[140] In these states, it is easier for a custodial parent to relocate. Some of these states have an explicit presumption in their statutes that allows relocation.[141] The relocating parent must only show that his or her decision to relocate was made in good faith.[142] Section 767.481(4) of the Wisconsin Statute makes it clear that in that state, there is a presumption in favour of the custodial parent to relocate with the child.

The state of New York has adopted the presumption against relocation, wherein the non-custodial parent's right to contact the children are protected.[143] The states of Florida and New Jersey have adopted a seemingly neutral approach by stating that there is no presumption in favour or against relocation within their jurisdiction. The law of only selected states will be discussed in this chapter.

5.4.1 EXPERIENCE OF LIMITED DISCRETION STATES

Presumptions for and against relocation forms part of the USA child relocation jurisprudence and has influenced other foreign jurisdictions like South Africa. This section aims to demonstrate how legislative and judicial presumptions in the states of California and New York have been inadequately used to limit judicial discretion. Further that while presumptions determine how judges should approach disputes, they are nonetheless, not ideal mechanisms to limit judicial discretion because they are mostly one sided and do not lead to adequate assessment of all the competing factors. Presumptions determine how judges should approach disputes. They lead to consistent outcomes for those whom they are designed to favour. For instance, as it will be shown below, the relevant statute in the state of California limits judicial discretion by providing the custodial parent the right to change the child's residence, which the court can only interfere with if the child will be prejudiced. This presumption generally favours custodial parents, who are usually mothers, without adequate consideration of the competing factors placed before the court by non-custodial parents, who are usually fathers.

In the 1980s, there was a very strong judicial presumption against relocation in the State of New York. This presumption favoured non-custodial parents, who are usually fathers, by prioritising continued contact between children and their non-custodial parents. The judicial

[140] Adams 'Avoiding round two: The inadequacy of current relocation laws and a proposed solution' (2009) 1 *Family Law Quarterly* 181 at 187.
[141] Driscoll 'In search of a standard: Resolving the relocation problem in New York' (1997) 1 *Hofstra Law Review* 176.
[142] Adams op cit note 140 at 186.
[143] E*x parte McLendon*, 455 So. 2d 863 (Ala. 1984).

desire to maintain relationships of non-custodial parents and children generally prevents courts from holistically assessing the facts before them to reach decisions that are in the BIC.

5.4.1.1 California and the presumption in favour of relocation

The State of California played an important role in the development of CRDs jurisprudence. The way courts have dealt with CRDs in California demonstrate a shift in judicial thinking from the influence of maternal happiness on the wellbeing of the children to a more balanced consideration of the role of both parents in their children's lives. This indicates that courts are willing to holistically assess what is in the BIC by evaluating the benefits (if any) that children derive from their non-relocating parents. This assessment can at times, lead to relocation being refused to foster co-parenting. Various jurisdictions have experienced such ideological changes where shared parenting after divorce is encouraged unless it is not in the BIC because of factors such as violence and abuse. It has been argued that '… many countries are currently experiencing a transcendence of the ideology of co-parenting after divorce and decreasing ideological support for the independence of the custodial family'.[144] Further that '[t]he ideology of co-parenting has also affected relocation disputes'[145] A careful study of in *In re Marriage of Burgess*[146] and *In re Marriage of LaMusga,*[147] both of which will be discussed herein reflects this change in thinking.[148]

In 2005, the legislature enacted the California Family Code, section 7501 (a) of which provides that '[a] parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child'. The first part of this section is a clear presumption in favour of relocation for the custodial parent. However, this presumptive right is subject to the second part, which appears to be a wide discretion to deny relocation applications if the court is of the view that relocation will prejudice the child. A discretion of this kind had been exercised by the California Court of Appeal in *In re Marriage of Burgess.*[149] The California Court of Appeal started by noting that '[t]he decision as to what is in the best interests of the child is … not simply what the judge thinks is in the best interests of the child but rather a balancing of criteria

[144] Glennon 'Divided parents, shared children conflicting approaches to relocation disputes in the USA' (2008) 4 *Utrecht Law Review* 55 at 66
[145] Ibid.
[146] *In re Marriage of Burgess* 39 Cal.Rptr.2d 213 (1995) (herein after *Burgess* (CA)).
[147] 32 Cal. 4th 1072 (2004).
[148] Nunn and Lawrence 'Child Relocation: Case Law, Social Science, and Practice Implications' (2020) 32 *Journal of the American Academy of Matrimonial Lawyers* 383.
[149] *Burgess* (CA) supra note 146.

in an attempt to further the objectives of the Family Code'.[150] The court then formulated a test that must be used to resolve child relocation cases. The first step of this test is to determine:

> '… whether the proposed move by the parent with the child would substantially disrupt the objecting parent's "established patterns of care" of the child, and whether, as a result of such disruption, the quality of the relationship and the "emotional bonds" between the child and the objecting parent will be detrimentally impacted to a significant extent'.[151]

If the non-custodial parent successfully proves the disruption of patterns of care and emotional bond that he or she has with the child, then the second step is to evaluate whether the proposed relocation is necessary.[152] The necessity to relocate must be determined by:

> '… whether or not moving would impose an unreasonable hardship upon a career or upon the individual because of the length of the commute or some other discernible imposition that it is unreasonable to expect the individual to endure or because there is a discernible benefit that it is unreasonable to expect the individual to forego'.[153]

The California Court of Appeal further held that the necessity of the move will only be assessed when '… there is some demonstration that the move realistically diminishes or impacts the nature and amount of contact the non-moving parent had maintained or can be expected to maintain'.[154] If it is found that the proposed relocation is necessary, the third step is for the court to determine '… whether the benefit to the child in going with the moving parent outweighs the loss or diminution of contact with the non-moving parent'.[155]

The test that the California Court of Appeal suggested appears to have neutralised the first part of the presumption provided for in section 7501 (a) in favour of relocation, which was in force before the 2003 amendments. It started by providing the non-custodial parent an opportunity to convince the court that the proposed relocation will interfere not only with the current care of the child but will also negatively impact on 'his' contact with the child. Based on this test, the trial court was instructed to carefully consider and place weight on the factors that the non-custodial parent presents before the court. If the non-custodial parent was

[150] Ibid at 220-221.
[151] Ibid at 227.
[152] Ibid at 225 and 227.
[153] Ibid.
[154] Ibid at 225.
[155] Ibid at 230.

successful in proving the negative impact of the proposed relocation, the onus shifted to the custodial parent, who had to prove the necessity of the proposed relocation.

The trial court was required to consider the hardships likely to be experienced by the custodial parent on 'her' interests such as pursuit of a career and the benefits that would result from relocating. While the court did not state this, it is inherent in the test itself that the trial court must adequately balance the facts provided by the non-custodial parent with those relied on by the custodial parent. In so doing, the trial court would be able to determine whether relocation with the custodial parent outweighs loss of contact with the non-custodial parent. Not only does this test place the BIC at the centre of the enquiry, but it also puts an onus on the courts determining CRDs to carefully assess the current care patterns of the child and the role of the non-custodial parent in the child's life by evaluating the quality of 'his' contact with the child. This test required a fair assessment of the interests of the custodial parent and how they will add to the BIC. The test formulated by the California Court of Appeal appears to be sensible because it leads to a proper weighing and balancing of competing factors. It has the potential to encourage judges to follow cases with similar facts, unless they can clearly show that in such cases this test was incorrectly applied. To some extent, the proper application of this test would limit unfettered judicial discretion making it difficult for judges to ignore previous decisions with similar facts which they do not agree with.

However, the test formulated by the California Court of Appeal appears to be a deviation from section 7501(a), before it was amended in 2003. The statute demanded that relocation be denied only when prejudice to the child had been shown. The majority in the California Supreme Court reversed the decision of the California Court of Appeal in *Burgess(CA)* on the basis that there was no prejudice shown in this case.[156] The Supreme Court restricted the discretion which the California Court of Appeal sought to introduce. The majority started by confirming that in the State of California and in terms of section 7501 of the Family Code, the custodial parent has a presumptive right to change the residence of children, provided the removal would not be prejudicial to their rights or welfare.[157] The Supreme Court declined to impose a burden of proof on a parent seeking to relocate with children to establish the 'necessity' of the move.[158] It clarified that in CRDs, the main issue is not whether relocation is

[156] *In re Marriage of Burgess* 13 Cal. 4th 25 (Cal. 1996) (herein after *Burgess* (SC)).
[157] Ibid at 32. See also Wallerstein and Tanke 'To move or not to move: Psychological and legal considerations in the relocation of children following divorce' (1996) *Family Law Quarterly* 305.
[158] *Burgess* (SC) supra note 156 at 36.

'… "essential or expedient" either for the welfare of the custodial parent or the child, but whether a change in custody is "essential or expedient for the welfare of the child"'.[159]

The case of *Burgess,* clearly illustrates that even with a clear legislative presumption, where there are no clear legislative guidelines different judges can deal with the same facts differently. In this case, California Appeal Court was of the view that it was important for the non-custodial parent's rights of contact to be maintained because the children were in regular contact with their father.[160] The court viewed the mother's desire to relocate with the child in order to pursue a career as insignificant and remarked that 'the reality here is that in moving, [the mother] primarily gained convenience'.[161] These were the main super factors that the California Appeal Court used to deny the mother permission to relocate.

In agreeing with the trial court, the Supreme Court also had its own super factors that it relied on. It highlighted the issue of the mother's employment and said that it will be in the BIC for the mother to relocate to pursue her career. It said that even though the father saw the children regularly, nonetheless, the children resided with their mother, thus making her their 'primary caretaker'.[162] While the Supreme Court clearly followed the statutory provision and was not bound by the test laid out by the California Appeal Court, it is difficult to conclude that had it applied this test it would have still allowed the mother to relocate. Particularly, having regard to Baxter J's dissenting judgment where he opined that '… section 7501 cannot be read to mean that a relocating parent may retain custodial "rights" which no longer suit the child's "best interests" so long as the move causes the child no positive harm'.[163]

Burgess has been criticised for heavily relying of *amicus* briefs which argued that the stability and continuity in the custodial relationship are determinative factors in the children's post-dissolution psychological adjustment and that the BIC are served by maintaining the continuity of established parent-child relationships.[164] In making a case for the presumption to relocate, the two *amicus* briefs in *Burgess,* that of Wallerstein[165] and to some extent that of Bruch and Bowermaster[166] which the court relied on, asserted that children generally suffer

[159] Ibid.
[160] *Burgess* (CA) supra note 146 at 223.
[161] Ibid at 227.
[162] *Burgess* (SC) supra note 156 at 33.
[163] Ibid at 42.
[164] Gould 'California's move-away law: Are children being hurt by judicial presumptions that sweep too broadly?' (1998) 3 *Golden Gate University Law Review* 527 at 541. See also Warshak 'Social science and children's best interests in relocation cases: "Burgess" Revisited' (2000) 1 *Family Law Quarterly* 83 at 85.
[165] Amica Curiae Brief of Dr. Judith S. Waller stein, Ph.D., filed in Cause No. S046116, *In re Marriage of Burgess*, Supreme Court of the State of California, Dec. 7, 1995.
[166] See Arnica Curiae Brief of Scott Altman, Janet Bowermaster, Carol S. Bruch, Jan C. Costello, Joan Heifetz Hollinger, Lisa C. Ikemoto, Janice E. Kosel, Frances Olsen, and Kelly Weisburg at 23-25, *In re Marriage of*

greater harm when a custody modification results in reduced contact with the custodial parent than with the non-custodial parent. These academics submitted that when relocation is likely to result in a substantially enhanced quality of life for the custodial parent, often the BIC are indirectly, but genuinely served.[167]

However, Warshak argued that '[t]he *Burgess* brief[s] ignore the broad consensus of professional opinion, based on a large body of evidence, that children normally develop close attachments to both parents, and that they do best when they have the opportunity to establish and maintain such attachment'.[168] It has been argued that 'by following the recommendations in these amicus briefs, the court in *Burgess* '[elevated] a parent's right to relocate above the children's need for frequent and continuing contact with both parents'.[169] According to Gould, the court in *Burgess* neglected to thoroughly evaluate the nature of the relationship that children have with noncustodial parents.[170]

The *Burgess* decision attracted mixed reactions of praise,[171] criticism[172] and at times confusion.[173] In particular, there were those who were sceptical of the reliance on the social research provided by academics in CRDs.[174] Nonetheless, as was illustrated in chapter four of this thesis, the *Burgess* decision led to the amendment of section 7501 of the Family Code. Cal. Stats 2003 ch. 674 § **I** (SB) which was promulgated in 2003 and provided that '[i]t is the intent of the Legislature to affirm the decision in *In re Marriage of Burgess*... and to declare that ruling to be the public policy'.

In 2004, Supreme Court of California had another opportunity, after *Burgess,* to reflect on the state's child relocation law in *In re Marriage of LaMusga.*[175] In reversing the decision of the California Court of Appeal to allow the mother to relocate, which was made in line with the statutory presumption in favour of relocation, the Supreme Court of California stated that child relocation '… is not amenable to inflexible rules … [and trial courts judges must be]

Burgess, 913 P.2d 473 (Cal. 1996) (No. S046116). See also Bruch and Bowermaster 'The relocation of children and custodial parents: Public policy, past and present, (1996) 2 *Family Law Quarterly* 245 at 265.

[167] Altman *et al*'s amica brief.

[168] Warshak op cit note 164 at 85.

[169] Gould op cit note 164 at 541.

[170] Ibid at 54. This approach is very different to the approach of the New York Court of Appeals in *Tropea v Tropea* 665 N.E.2d 145 (N.Y. 1996) which provided a list of factors to be considered when determining relocation cases.

[171] See Wallerstein and Tanke op cit note 157 at 305 and Bruch & Bowermaster op cit note 166 at 245.

[172] Warshak op cit note 164 at 83 and Gould op cit note 160 at 527.

[173] Denton 'Does *In re Marriage of LaMusga* open a new chapter or close an old one in the move-away controversy?' 16 (2007) *The Journal of Contemporary Legal Issues* 267 at 269.

[174] Oliphant '*Relocation Custody Disputes-A Binuclear Family-Centered Three-Staged Solution'* Working Paper No. 16 May 2005, Legal Studies Research Paper Series at 30.

[175] 32 Cal. 4th 1072 (2004).

guided by statute and the principles … announced in *Burgess* … to exercise their discretion to fashion orders that best serve the interests of the children in cases before them'.[176]

The Supreme Court of California awarded the parties joint legal custody of the minor children, with the mother granted the primary physical custody, subject to the father's increased visitation rights.[177] This was significant because while the Supreme Court of California acted as if it was following its earlier decision of *Burgess*, it nonetheless, deviated from it by recognising the important role of the non-relocating parent, which was ignored in *Burgess*. According to McCartney '… the Court in *LaMusga* is not following Burgess, but is instead changing the analysis for determining the best interest of the child in regards to move-away cases'.[178] In taking this approach, the Supreme Court of California was persuaded by the brief submitted by Warshak[179] which, as was demonstrated in chapter four of this thesis, emphasised the benefits of continued involvement of both parents in their children's lives post separation. In *LaMusga*, the Supreme Court provided a balanced approach by rejecting the presumption in favour of custodial parents, usually mothers and suggested several factors that should be considered when determining CRDs.

According to McCartney, *LaMusga* weakened '… the presumptive right of the custodial parent to move by allowing any possible effect on the non-custodial parent's relationship with the child to be a detriment to the child's welfare'. The factors that the Supreme Court of California suggested included among others, the relationship between both parents and their children; parents' ability to communicate and cooperate effectively; parents' willingness to put the interests of the children above their individual interests and the wishes of the children.[180] This was a clear shift in approach which is in line with jurisdictions like Australia which encourages shared parenting responsibilities.

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[176] Ibid para 16.

[177] *In re Marriage of LaMusga* 32 Cal. 4th 1072 (2004) at 1076.

[178] 'In re marriage of LaMusga: Redefining "move-away" cases in California' (2005) 1 *Whittier Journal of Child and Family* Advocacy 253- 275 at 263.

[179] Amica Curiae of Dr Richard A. Warshak *et al* filed in Case No. *LaMusga v LaMusga,* Supreme Court of the State of California, June. 9, 2003, at 7.

[180] *In re Marriage of LaMusga* 32 Cal. 4th 1072 (2004) at 1105. See also *Winternitz v. Winternitz* 235 Cal.App.4th 644 (2015), where the Court of Appeal suggested further factors which must also be considered such as: the distance of the move; the age of the minor(s); the relationship between the parents including, but not limited to, whether the parents can effectively communicate with one another and their willingness to put the needs of their children above their own when it comes to encouraging and aiding in the continuance and growth of the bond between the child and the other parent; and the reasons for the proposed move.

5.4.1.2 New York and the presumption against relocation

In the 1980s, the courts in the state of New York appear to have guarded the non-custodial parent's visitation rights jealously through the adoption of the presumption against relocation. The approach was that the non-custodial parent should not be deprived of reasonable and meaningful access to the child or children unless visitation '[was] inimical to the welfare of the children or the parent has in some manner forfeited his or her right to such access'.[181] This presumption was not inserted in any legislation but was crafted by the courts. In *Weiss v Weiss,*[182] the highest court in the state of New York, the New York Court of Appeals refused the mother permission to relocate with her child from New York to Las Vegas. In reaching its decision, the court placed much reliance on how the proposed relocation would affect the child and the father. The court used the limitation of visitation hours and expenses involved in the travelling for the purposes of the father's access to the child as super factors to deny the mother permission to relocate.[183]

The Appellate Division of the Supreme Court of New York, in *Daghir v Daghir*[184] followed *Weiss v Weiss* and denied the custodial parent permission to relocate and emphasised that the non-custodial parent has a right to have a meaningful contact with his child through frequent and regular visitation in order to play a positive role in the child's life.[185] The court was of the view that 'a parent may not be deprived of his or her right to reasonable and meaningful access to the children … unless exceptional circumstances have been presented to the court'.[186] In confirming the presumption against relocation, the court further held that:

> '[i]ndeed, so jealously do the courts guard the relationship between a non-custodial parent and his child that any interference with it by the custodial parent has been said to be "an act so inconsistent with the best interests of the child as to, *per se,* raise a strong probability that the offending party is unfit to act as [a] custodian parent'.[187]

[181] *Strahl v Strahl* 66 A.D.2d 571 (1980) at 574.
[182] 52 N.Y.2d 170 (1981) 172.
[183] Ibid at 176.
[184] *Daghir v Daghir* (1981) 82 A.D.2d 191.
[185] Ibid at 194.
[186] Ibid, the court further held that '[t]he term "exceptional circumstances" or "exceptional reasons" is invariably associated with a situation where either the exercise of such right is inimical to the welfare of the children or the parent has in some manner forfeited his or her right to such access'.
[187] Ibid.

The court overemphasised the non-custodial parent's visitation rights and did not adequately balance them with the fact that the mother wished to relocate because her new husband was transferred by his employer to work in France, and she wanted to be with him. Additionally, the court did not sufficiently weigh and balance the benefits that the child enjoyed in the court's jurisdiction with those that he could gain by being relocated. The court also did not comprehensively evaluate the interests of both parties but merely opined that '[c]ustodial parents have rights as well. Among them is the right to remarry, and … the obligations of a new marriage may legitimately, if rarely, require even "a dramatic change of locale"'.[188] However, the court held that:

> '[t]he decision to bear children, … entails serious obligations and among them is the duty to protect the child's relationship with both parents even in the event of divorce. Hence, a custodial parent may be properly called upon to make certain sacrifices to ensure the right of the child to the benefits of visitation with the non-custodial parent'.[189]

The mother unsuccessfully appealed to the New York Court of Appeals, which confirmed the order of the Appellate Division of the Supreme Court of New York.[190] In *Radford v. Propper,* Appellate Division of the Supreme Court of New York confirmed that:

> '… a custodial parent relocating to a distant place must now show, as a threshold, that exceptional circumstances exist warranting that relocation, since such move will, in and of itself, be detrimental to the relationship which the child can have with a noncustodial parent'.[191]

In other words, because relocation will impact on the contact rights of the non-custodial parent, the custodial parent had the onus to prove exceptional circumstances that justify the proposed relocation. The court further held that '… in the absence of exceptional circumstances a custodial parent may not, by relocating to a distant locale, deprive the non-custodial parent of his fundamental right to reasonable visitation'.[192] The court noted that there is a need to balance the custodial parent's economic and other interests with the non-custodial parent's right to

[188] Ibid at 194.
[189] Ibid.
[190] *Daghir v Daghir* 56 N.Y.2d 324 (1982).
[191] 190 A.D.2d 93 (1993) at 94.
[192] Ibid at 98.

visitation.[193] However, the court clearly demonstrated that, due to the presumption against relocation, the balancing exercise is skewed in favour of the non-custodial parent. Nonetheless, the court held that '[a] non-custodial parent who has demonstrated a sincere interest in the child and who has exercised his or her regular and frequent visitation must be able to continue to enjoy frequent, regular and meaningful contact with his or her children'.

5.4.1.3 An attempt to move away from presumptions

While the states of California and New York started with strong presumptions in favour of or against relocation, they both later attempted to develop neutral approaches that do not follow any presumption. In 1996, the New York Court of Appeals in *Tropea v Tropea,*[194] started its analysis by outlining that in CRDs:

> '… the interests of a custodial parent who wishes to move away are pitted against those of a non-custodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents'.[195]

The court then observed that since its decisions in *Weiss v Weiss* and *Daghir v Daghir*, lower courts in decisions like *Radford v. Propper* '… have developed a series of formulae and presumptions to aid them in making their decisions in these difficult relocation cases'.[196] The court explained the three-tiered test that lower courts have followed thus:

> '… whether the proposed relocation would deprive the noncustodial parent of "regular and meaningful access to the child". Where a disruption of "regular and meaningful access" is not shown, the inquiry is truncated, and the courts generally will not go on to assess the merits and strength of the custodial parent's motive for moving. On the other hand, where such a disruption is established, a presumption that the move is not in the child's best interest is invoked and the custodial parent seeking to relocate must demonstrate "exceptional circumstances" to justify the move. Once that hurdle is overcome, the court will go on to consider the child's best interest'.[197]

[193] Ibid at 99.
[194] 665 N.E.2d 145 (N.Y. 1996).
[195] Ibid at 736.
[196] Ibid.
[197] Ibid at 737.

The court held that this test was problematic and unsatisfactory because it was difficult to apply and '… it erect[ed] artificial barriers to the courts' consideration of all of the relevant factors'.[198] Most importantly, the court stated that:

> '[m]ost moves outside of the noncustodial parent's locale have some disruptive effect on that parent's relationship with the child. Yet, if the disruption does not rise to the level of a deprivation of "meaningful access", the three-tiered analysis would permit it without any further inquiry into such salient considerations as the custodial parent's motives, the reasons for the proposed move and the positive or negative impact of the change on the child. Similarly, where the noncustodial parent has managed to overcome the threshold "meaningful access" hurdle, the three-tiered approach requires courts to refuse consent if there are no "exceptional circumstances" to justify the change, again without necessarily considering whether the move would serve the child's best interests or whether the benefits to the children would outweigh the diminution in access by the non-custodial parent'.[199]

The court was simply highlighting the fact that by implementing any presumption, the court effectively prevents itself from identifying competing factors which it can reasonably weigh and balance. The court expressly stated that:

> '[i]n reality, cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are simply too complex to be satisfactorily handled within any mechanical, tiered analysis that prevents or interferes with simultaneous weighing and comparative analysis of all of the relevant facts and circumstances'.[200]

With presumptions, courts are forced to dispose of the matters relying on only one factor while ignoring other factors. For instance, with a presumption against relocation, once the non-custodial parent's regular and meaningful access is disrupted and the custodial parent fails to establish exceptional circumstances justifying relocation, relocation will be refused. Alive to this fact, the court held that '… no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome'.[201] Most importantly, the court

[198] Ibid.
[199] Ibid at 738.
[200] Ibid.
[201] Ibid.

correctly opined that '… given the variety of possible permutations, it is counterproductive to rely on presumptions whose only real value is to simplify what are necessarily complicated inquiries'.[202]

The New York Court of Appeals in *Tropea v Tropea* rejected this three step meaningful access exceptional circumstances test and held that 'each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with the predominant emphasis being placed on what outcome is most likely to serve the best interests of the child'.[203] The court opined that '[w]hile the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered, it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decisions to divorce and are the least equipped to handle the stresses of the changing family situation'.[204]

The court went on to provide a long list of factors that should be considered in CRDs such as the reasons to relocate and the good faith of parents who wish to do so, the quality of the life that the child would have if the proposed move were permitted or denied and the quality of the relationships between the child and the custodial and noncustodial parents. [205] While the court's approach requires the judicial identification of all competing factors, however, the court did not provide guidance on how the identified factors ought to be weighed and balanced.

Markert correctly argues that the court failed to 'provide guidelines to ensure uniformity and predictability in relocation cases'.[206] Holtz correctly points out that '[w]ithout [adequate] legislative standards or an explicit framework to follow, the judge resolving a move-away custody dispute is vested with essentially unbridled discretion'.[207] Such discretion would allow judges (with their backgrounds, experiences, and biases for certain parental views) to reach conclusions that conform to their individual perspectives of how such cases should be resolved.[208] Nonetheless, the requirement that courts should carefully consider the facts of both parties fairly without any predetermined view, is a positive step that would ensure that the respective cases of both parents are duly and fairly compared and assessed.

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[202] Ibid.
[203] Ibid at 739.
[204] Ibid.
[205] Ibid.
[206] Ibid at 542.
[207] 'Move-away custody disputes: The implications of case-by-case analysis & the need for legislation' (1994) 1 *Santa Clara Law Review 3*19 at 322
[208] See *Speelman v. Super. Ct.,* 199 Cal. Rptr. 784 (Ct. App. 1983) at 786, where the judge said '[f]rankly, I'm not too much in favo[u]r of a military upbringing for a child and of this age .... I think that he has a better opportunity here in California than he has in Massachusetts at the moment'.

5.4.2 FLORIDA AND THE USE OF LEGISLATIVE GUIDELINES

In 2006, the state of Florida promulgated the Florida Relocation Statute 61.13001.[209] This statute was amended in 2009 and again in 2015. Unlike inadequate broad legislative factors dealing with children generally that have been provided in the South African Children's Act and the United Kingdom's Children Act of 1989 used to determine the BIC, the state of Florida has provided useful statutory provisions that are specific to CRDs. These statutory provisions do not only deal with factors to be considered for relocation decisions, but also contain detailed and clear legislative guidelines dealing which among others: the definition of relocation; notice requirements; requirements for objections to relocation; factors that courts must consider when making their decisions; and how the burden will shift between parents in CRDs. These provisions provide a useful guide for South Africa on how CRDs can be legislated.

Currently, the Florida Statute Chp 61.13001 provides that as far as relocation by consent is concerned, parents or persons entitled to have access to the child must sign a written agreement which reflects consent to the relocation; details access or the time-sharing schedule for the non-relocating parent; and describes any transportation arrangements related to such access or time sharing.[210] Parents who wish to relocate with children are obliged to serve notice of their intended relocation on non-relocating parents and every other person who is entitled to share time with the children.[211] Should the non-custodial parent (or any person who is legally entitled to have access to the children) fail to timeously file a response to object to the proposed relocation, it will be presumed that the relocation is in the BIC and it will be allowed.[212]

There is no presumption in favour of, or against, relocation in Florida and all its child relocation specific factors are worth being cited in full to illustrate how they guide judges in the assessment of CRDs. In Florida, a court determining a CRD must consider and evaluate following specific factors:[213]

> (a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent or other person proposing to relocate with the

[209] See *Arthur v Arthur* 54 So. 3d 454 (Fla. 2010). See also some of the most important CRDs cases in Florida such as *Mize v Mize* 621 So. 2d 417 (Fla. 1993), *In re Marriage of Condon* 62 Cal.App.4th 533 (1998) and *Russenberger v Russenberger* 669 So. 2d 1044 (Fla. 1996). See also Valdespino 'Relocation: A moveable feast?' (2015) 8 *The Florida Bar Journal* 34 at 36.
[209] See *In re Marriage of Condon* 62 Cal.App.4th 533 (1998).
[210] The 2015 Florida Statutes Chp 61.13001 (2).
[211] The 2015 Florida Statutes Chp 61.13001 (3)(7)(b).
[212] The 2015 Florida Statutes Chp 61.13001 (3)(7)(d).
[213] The 2015 Florida Statutes Chp 61.13001 (7).

child and with the nonrelocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the nonrelocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the nonrelocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent or other person once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent or other person seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons each parent or other person is seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best interests of the child or as set forth in s. 61.13'.[214]

Generally, any broad list of factors provided to determine the BIC leads judges to select and rely on those factors that lead to their desired outcomes and entrench their discretion. However, the first of these specific CRDs factors specifically requires any judge dealing with CRDs to holistically look at all the factors before her. The judge must start with an evaluation of the relationship of all the parents with the child and assess how such relationships impact the child's life. Thereafter, the judge is required to look at the impact of the relationship that the child has with any other person and how the decision to deny or allow relocation will impact that relationship. This requirement makes it easier for any decision, made by a judge who overemphasised some factors while ignoring other equally important factors, to be overturned on appeal and can lead to more consistent decision making.

The third factor is equally important in encouraging consistency in CRDs. It requires the judge to enable parties to explore logistical alternatives that would encourage meaningful participation of both parents in their child's life. The fifth to ninth factors require judges to take serious note of the interests of both parties and duly consider, compare, and balance unique factors that parents rely on for relocation and objection to relocation. The first to the tenth factors prevent judges from lazily and arbitrarily picking and choosing their desired factors. They instruct judges to seriously consider the case of each of the parents with a view to establish the BIC. These factors enforce a neutral approach and provide clear guidelines relating to what judges should focus on when adjudicating CRDs.

In *Ness v Martinez,* the court started by confirming that '[w]hile there is no presumption in favo[u]r of or against allowing relocation, the party seeking to relocate carries the burden to prove the move is in the child's best interest'. [215] In denying the custodial parent permission to relocate, the court assessed the benefits and detriments of the proposed relocation. The court applied the above statutory factors and had regard to the custodial parent's assertion that the child has always done well under her care. It also considered her wish to relocate because she had secured better employment and that there would be financial benefits that could be derived by the child due to relocation.[216] The court weighed and balanced these factors with the non-custodial parent's evidence that the proposed relocation had the effect of removing the child

[214] The 2015 Florida Statutes Chp 61.13001 (7)(a)-(k).
[215] (Fla.App 1 Dist. 2018) 755 para 2-4.
[216] Ibid para 2.

from not only the non-custodial parent but also extended family members. Further that relocation was going to impact on the child's educational opportunities.

The court also considered the bad faith with which the custodial parent dealt with the entire matter by relocating without securing a written consent from the non-custodial parent or filing a formal petition for relocation.[217] The court held that despite the financial benefits that the custodial parent would derive, nonetheless, 'substantial evidence supports the conclusion … that relocation would remove the child from extended family members … [and] would not increase the child's educational opportunities'.[218]

This case demonstrates that judges in Florida, are obliged to holistically assess each case and not only determine the advantages and disadvantages of the proposed relocation, but also to look at the impact and value of the relationships that children have fostered with other family members when assessing the BIC. Florida provides a useful case study in relation to what judges should be legislatively required to assess when determining CRDs in South Africa. The way the relocation provisions are drafted, provides the procedural requirements that could be useful when drawing up South Africa's own legislative guidelines. Provisions relating to petition requirements with or without agreement between the parties, notification requirements, objection requirements, time limits and the rejection of presumptions offers useful lessons for South Africa and how to regulate CRDs through legislation. Most importantly, the crafting of ways in which courts are required to consider, assess, and balance relevant factors, demonstrates the legislative intention to encourage judges not to arbitrarily deal with CRDs, but instead to carefully consider competing facts placed before them by disputing parents and duly deal with their respective interests to determine how they add to the BIC. As demonstrated in chapter three of this thesis, such a deliberate assessment strategy is missing in South Africa, leading to different approaches by different judges.

5.5 CANADA

5.5.1 JUDICIAL FRAMEWORK

Historically, fathers in Canada were regarded as natural custodians of their children and in general, would only lose custody if the court was provided evidence of the possibility of the father's gross impairment of the child.[219] Later, custody after divorce was based on the guilt

[217] Ibid para 9.
[218] Ibid para 5.
[219] *Seddon v Seddon* 2 Sw. & Tr. 640 at 642.

principle, and the innocent party was awarded custody of the children.[220] The principles relating to the law of custody played an important role in the development of child relocation law in Canada. Courts were called upon to balance the interests of custodial parents who wished to relocate with those of non-custodial parents who objected to the proposed relocation.

In child relocation cases, Canadian courts initially adopted the 'maternal and tender years' doctrine,[221] but later followed a presumptive right in favour of custodial parents to relocate with their children.[222] In 1990, the Ontario Court of Appeal rejected the view that the custodial parent should have a presumptive right to relocate with the child in favour of a broad BIC test for relocation.[223] In *Carter v Brooks,*[224] the mother wished to relocate to a different province in Canada with the child and her husband who had acquired a business opportunity in that province. The court found the various presumptions which had been adopted in several jurisdictions relating to CRDs to be unsatisfactory.[225] The court held that CRDs cases should be decided based on what is in the BIC before the court.[226] Further that it was preferable when the court is assessing the BIC to weigh and balance relevant factors '… without any rigid preconceived notion as to what weight each factor should have'.[227]

The court's approach was a clear protection of the discretion that courts have when assessing competing factors in CRDs. The court appears to have been of the impression that guidance on how competing factors should be assessed would lead to predetermined outcomes. However, judicial or legislative guidelines are not necessarily rigid, unless they prescribe presumptions which usually lead to a preconceived notion of the weight that should be placed on specific factors. Legislative guidelines that do not prescribe any presumption would enable judges to fairly and holistically assess and balance competing factors without placing more weight on certain factors. Legislative guidelines should mandate judges to consider all the evidence carefully and fairly without any bias for or against any parent to determine the BIC.

In *Carter v Brooks,* the court was not convinced that the determination should '… begin with a general rule that one of the parties will be unsuccessful unless he or she satisfies a

[220] See generally *Youngs v Youngs* [1948] O.J. No 343. See also Bayda 'Procedure in child custody adjudication: A study in the importance of adjectivelLaw' (1980) 3 *Canadian Journal Family Law* 57 at 65.
[221] *Re Orr* [1933]2D.L.R. 77 (CA).
[222] *Wright v Wright* (1973), 12 R.F.L 2000 (Ont. CA) at 202. See also *Field v Field* (1978), 6 R.F.L. (2d) 278 (Ont. HC) at 280. See also Bala and Harris 'Parental relocation: Applying the best interests of the child test in Ontario' (2006) 22 *Canadian Journal of Family Law* 127 at 133.
[223] Bala and Harris op cit note 222 at 133.
[224] (1990) 2 O.R. 3d 321 (Ont. CA).
[225] Ibid para 25.
[226] Ibid para 22.
[227] Ibid para 26.

specified burden of proof'.[228] It was convinced that there was a need to strive to reach an outcome that is in line with the BIC.[229] The court identified some of the factors that may shed light on what would be in the BIC such as: the day to day care of the child; the nature of the relationship between the child and the access parent; the reason for the move; the distance of the move; and the child's views.[230] In Canada, some judges believe that as a general rule, children should be with their mothers,[231] while other judges believe that the non-custodial parents' rights to access and visitation where children have a positive relationship with such parents are more important.[232] Even with the application of the BIC principle, where there are no adequate legislative guidelines, various judges will tend to adopt the interpretative tools that enable them to rely on their preferred factors to reach their desired outcomes.

In 1995, different judges of the Ontario Court of Appeal in *MacGyver v Richards,*[233] adopted a completely different approach from that followed by different judges of the same court in *Carter v Brooks.* The appeal court criticised the trial court for placing too much emphasis on the relationship between the non-custodial parent and the child while failing to attach enough weight to the relationship between the child and the custodial mother. The appeal judges adopted a view that there 'should be a presumptive deference to the needs of the responsible custodial parent who deals with the reality of decisions relating to custody and access'.[234]

Abella JA (with Grange JA concurring) in allowing the mother to relocate held that, firstly in determining CRDs in a manner that will minimise future stresses, 'the court should be overwhelmingly respectful of the decision-making capacity of the person in whom the court or the other parent has entrusted primary responsibility for the child'.[235] Secondly, the court '… must also forcefully acknowledge that the custodial parent's best interests are inextricably tied to those of the child. The young child is almost totally dependent on that parent, not on the parent seen during visits'.[236] The court was effectively relying on the 'maternal and tender years' doctrine which was rejected in *Carter v Brooks.*

[228] Ibid para 26.
[229] Ibid.
[230] Ibid para 27-31.
[231] See generally *Wright* supra note 222.
[232] See for instance *Appleby v Appleby* 21 R.F.L. (3d) 307 (Ont H.C) and *Monaghan v Monagham* (1988), 14 R.F.L. (3D) 308 (Ont. HC). See also Bala and Harris op cit note 222.
[233] [1995] W.D.F.L. 895.
[234] Ibid, see the summary.
[235] Ibid para 36.
[236] Ibid para 37.

Abella JA further held that '[t]he child's best interests must be assessed not from the perspective of the parent seeking to preserve access, but from that of the child entitled to the best environment possible'.[237] The court failed to balance competing factors as was proposed in *Carter v Brooks.* In fact, it did exactly what it accused the trial court of doing, by relying heavily on the rights of the custodial mother and disregarding factors that were relied upon by the non-custodial father. It is problematic to automatically align the interests of the child with those of the custodial parent because this will inevitably lead the court to disregard anything contrary to that which it regards as being in the best interest of the custodial parent. While it is possible for the custodial parent's best interests to shed the light on what is in the BIC in a particular case, it does not necessarily follow that what is in the custodial parent's best interest is automatically in the BIC.

In 1995, the Supreme Court of Canada had an opportunity to clarify the Canadian jurisprudence relating to CRDs in *Gordon v Goertz.*[238] The court was called upon not only to determine the disputes between the parties, but also to establish the principles in line with the BIC that should be applicable when one parent wishes to relocate leading to the other parent being unable to see their child as they used to. The court observed that both parents enjoyed a warm and loving relationship with their child. On their divorce, the mother was awarded interim custody whereas the father was granted reasonable rights of access to the child.[239] It was revealed that the father had spent more time with the child than the mother after their separation.[240] The court had to determine whether the trial court had erred in allowing the mother to relocate to Australia with the child. The mother argued that the court's determination of the dispute should start with a presumption in her favour as a custodian parent, an argument which was rejected by McLachlin J. The court noted that this presumption leads to a predetermined outcome which fails to consider the specific circumstances of the child before the court.

McLachlin J made it clear that the court was entrusted with the duty to safeguard the best interests of the particular child who is unique, with a special relationship with his parents, siblings, friends and community.[241] This appears to be an acknowledgment by the court that the BIC is not only reflected by the interests of the child's parents but also the environment in which the child is raised as well as the relationships that the child has fostered with persons

[237] Ibid para 38.
[238] [1996] 2 SCR 27.
[239] Ibid para 2.
[240] Ibid para 3.
[241] Ibid para 44.

other than her parents. This approach mirrors some of the factors provided for by the legislature in the state of Florida which requires courts to also look at the role played by persons other than parents in the child's life and evaluate how losing such relationships will impact on the BIC. This is one of the important lessons that South Africa should bear in mind when drafting its CRDs legislative guidelines.

The court was also uncomfortable with the decision relating to the BIC being deferred to the parent as was suggested in *MacGyver v Richards,* holding that this shifts the focus from the BIC to the interests of the parents.[242] Nonetheless, the court in *Gordon v Goertz* made it clear that despite the rejection of the presumption in favour of the custodial parent, such a parent's views should be respected and seriously considered because of 'her' responsibility for the child's daily activities.[243] Finally, McLachlin J held that when determining the BIC in CRDs, the court may consider factors such as the desirability of maximizing contact between the child and both parents; the views of the child; the custodial parent's reason for moving and the possible disruptions to the child's life.[244] McLachlin J did not provide guidance on how these and other factors should be balanced. Lack of legislative guidance on how to balance competing factors widens judges' discretion thereby enabling them to overemphasise some factors over others.

La Forest and L'Heureux-Dubé JJ in their concurring judgment, emphasised that the test in CRDs '… is whether there is any reason to believe that the move would not be in the best interests of the child'.[245] They held further that courts, when assessing the BIC should consider and balance the child's physical, emotional, social and economic needs with the quality of the child's relationship with both parents, their ability to look after the child, and if matured enough, the child's wishes and preferences.[246] They recognised the need for various factors not only to be considered but also to be balanced. They were of the view that the non-custodial parent's right to have access to the child should not be a decisive factor that justifies refusing the custodial parent permission to relocate with the child. They held that for '… access to overweigh all other considerations, substantial evidence of a net detriment accruing to the child as a result of such change must be adduced by the non-custodial parent'.[247]

Research conducted on behalf of the Department of Justice in Canada revealed that '[a]lthough *Gordon v Goertz* has been criticized for … the unpredictability that it creates, the

[242] Ibid para 46.
[243] Ibid para 48.
[244] Ibid para 49.
[245] Ibid para LXIV.
[246] Ibid para LXV.
[247] Ibid para LXIX.

Supreme Court is apparently not inclined to revisit this issue, dismissing leave to appeal in a number of relocation cases from across Canada over the past decade and a half'.[248] Nonetheless, the Canadian legislature has amended the Divorce Act,[249] the federal law regulating divorces, in order to introduce among others, specific CRDs legislative guidelines in Canada.

5.5.2 LEGISLATIVE FRAMEWORK

Before the amendments to the Divorce Act, the Canadian Bar Association expressed its displeasure with the Canadian CRDs jurisprudence and wrote a formal letter to the Minister of Justice requesting the amendment of the Divorce Act. This letter convincingly argued that:

> 'There is inconsistency in how the law is applied and significant unpredictability in this area. As a result, it is difficult for lawyers to advise clients about relocation issues. Parents experience significant frustration in planning their affairs and children's interests are negatively affected. Unnecessary litigation results because of uncertainty in the law. We believe that clearer guidance about the 'best interests test' and how it applies to relocation cases would facilitate earlier resolution, promote settlements and reduce costs for litigants. It would contribute to greater fairness and predictability, and help parents move on to make post-separation plans for their children'.[250]

This letter captures the essence of the problem identified in this thesis regarding the inconsistencies associated with CRDs because of unfettered judicial discretion. Most importantly, it illustrates the plight of legal practitioners when advising their clients on the prospects of their CRDs cases. These problems are not unique to Canada. South Africa is also desperately in need of adequate legislative guidelines that will assist not only litigants but also judges on how to approach CRDs. Apart from this letter, Bala wrote an influential paper titled 'Bringing Canada's Divorce Act into the new millennium: Enacting a child-focused parenting

[248] Department of Justice 'A study of post-separation/divorce parental relocation' available at https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/spsdpr-edpads/p4.html accessed on 22 February 2016.
[249] R.S.C. 1985, C. 3 (2nd Supp).
[250] A letter written by the chairperson of the Canadian Bar Association, Mr Lawrence Pinsky on behalf of the association on 22 December 2017 available at https://www.cba.org/CMSPages/GetFile.aspx?guid=3d971e0a-d597-4055-90ac-5a52d57cbb98 accessed on 22 February 2016.

laws',[251] which proposed several statutory reforms, some of which were considered by the legislature.[252]

5.5.2.1 Amendments to the Divorce Act

Bill C-78 which amended the Divorce Act passed through both houses of Parliament and received Royal Assent on 21 June 2019. The new legislation came into force on 1 July 2020.

5.5.2.1.1 The Best Interests of the Child

In Canada, the BIC was first statutorily recognised in section 35(1) of the Ontario's c2 Family Law Reform Act of 1978, which provided that '[u]pon application, the court may order that either parent or any person have custody of or access to a child in accordance with the best interests of the child and may at any time alter, vary or discharge the order'. The BIC was later made applicable nationwide when it was incorporated into section 16(5) of the Divorce Act in 1985.[253]

The BIC have been described as involving the process of establishing a conducive '… environment in which a particular child has the best opportunity for receiving the needed care and attention.[254] The Canadian Bill is like section 7 of the South African Children's Act in that it provides explicit provisions in the Bill relating to the BIC. There are two specific clauses that deal with BIC. In 2019, the Divorce Act was amended by inserting section 7.1 which provides that:

> '[a] person to whom parenting time or decision-making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child'.

Section 16(1) also provides that '[t]he court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order'. This will effectively

[251] (2015) 40 *Queen's Law Journal* 425.
[252] See Bala 'Brief on Bill C-78: Reforms of the parenting provisions of the Divorce Act' 1 available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf accessed 25 June 2020.
[253] R.S.C. 1985, c. 3 (2nd Supp.).
[254] *AB v Bragg Communications Inc* [2012] 2 S.C.R. 567 para. 17.

elevate the BIC principle to be the sole standard that must be used by courts when making orders relating to the care of children. It is submitted that the usage of the word 'only' in this section effectively makes the BIC principle the paramount test that must be used by the courts.

In South Africa, section 28(2) of the Constitution mandates that the BIC are paramount in matters concerning that child. To eliminate doubt as to whether the BIC is paramount in cases involving children or should merely be regarded as a primary consideration, the Canadian legislature should have made it clear that the BIC are of paramount importance.

The Bill also inserted section 16(3) into the Divorce Act. Section 16(3) provides eleven (11) different factors that the court must consider when determining the BIC. Like section 7(1) of the South African Children's Act, section 16(3) merely provides several broad factors and does not provide guidance on how judges should select and balance competing factors. This will leave judges with an extremely broad discretion because it allows them to subjectively emphasise those factors which suit their desired outcomes while downplaying other factors that might lead to different conclusions. Legislative factors that are not accompanied by adequate guidance on how those factors should be weighed and balanced will lead to inconsistent judgments.

Section 16(2) of the Divorce Act provides that when the court is considering factors identified in section 16(3) it should '… give primary consideration to the child's physical, emotional and psychological safety, security and well-being'. This is in line with McLachlin J's approach in *Gordon v Goertz* that an analysis of the BIC should be focused on the child and not the parent. It is not the parent's physical, emotional and psychological needs that should take precedence, but those of the child. This is also underscored by section 16(8) of the Divorce Act which explicitly provides that when making a custody order, '… the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child'. This section demonstrates the legislature's intention to place the BIC principle at the centre of children's wellbeing in Canada.

5.5.2.1.2 Relocation guidelines

The Bill further inserted sections 16.9(1) to 16.96(4) into the Divorce Act. These sections deal specifically with child relocation. Section 16.9(1) starts by making provision for the relocating parent to notify the non-relocating parent of the contemplated relocation with the child. This section uses the word 'shall', which indicates that it will be peremptory for the custodial parent

to notify the non-custodial parent when wishing to relocate with the child. The section prescribes that such notice must be made in writing within a period of sixty (60) days before the contemplated relocation and must inform the non-custodial parent of the expected relocation date. Section 16.9(2) prescribes the form and content of the required notice to the non-custodial parent.[255]

In terms of section 16.91(1), after the non-custodial parent has been notified, the custodial parent can only relocate when authorised to do so by the court,[256] or when the non-custodial parent does not object to the proposed relocation,[257] and there is no order prohibiting the relocation.[258] With these provisions, it is now a legislative requirement for the relocating parent to notify the non-relocating parent. The parties can only litigate when they cannot agree on the proposed relocation.

If non-relocating parents do not agree to the proposed relocation of their children and courts are required to adjudicate CRDs, courts are obliged to have regard to sections 16.93 (1), 16.93 (2) and 16.93 (3) which have also been inserted into the Divorce Act. These sections prescribe the burdens of proof applicable in CRDs in Canada. In terms of section 16.93 (1) of the Divorce Act, where the children spend substantially equal time with their parents, the relocating parent bears the burden of proving that the proposed relocation would be in the BIC. This is in line with international trends, and in particular, the 2006 amendments in Australia and the decision of the California Supreme Court in *LaMusga,* where it was emphasised that the role of the non-relocating parent and 'his' importance in the child's life must be assessed by the court. If the non-relocating parent plays a significant role in the child's life by not only spending time with the child, but also showing interest in the child's activities, it appears that this section requires the relocating parent to justify why the child should 'lose' such benefit. In the process, the relocating parents must indicate benefits the child would derive by being relocated. This approach appears to be more child centred. It would be interesting however, to see how Canadian courts will balance this provision with the relocating parent's right to freedom of movement and entitlement to pursue employment and relationship opportunities. It appears that the relocating parent will be left with difficult decisions which are customary in CRDs such as deciding not to relocate, thereby forgoing personal benefits to be with the child or relocating without the child.

[255] Section16.9(2)(a).
[256] Section 16.91(1)(a).
[257] Section 16.91(b)(i).
[258] Section 16.91(b)(ii).

In terms of section 16.93 (2) of the Divorce Act, if children spend 'the vast majority of their time' with relocating parents, non-relocating parents bear the burden of proving that the relocation would not be in the best interests of children. It is not entirely clear what is meant by the phrase 'the vast majority of their time' and how the question of time would be quantified when the matter goes to court. Thompson has noted that there is no guidance as to how "time" should be calculated, thereby asking whether it should be overnights, days, part days or hours.[259] He argues that some guidance can be sought from section 16.92(1)(*c*) of the Divorce Act which requires the court to consider the amount of time children spend with both their parents and the level of involvement of both parents in their children's lives.[260]

Nonetheless, the parent who spend less time with the child must satisfy the court that the proposed relocation is not in the BIC. It is submitted that the interpretation of this provision will be challenging, particularly for non-relocating parents with clear court orders that prescribe the time they must spend with their children. Particular, if despite such orders that forces them to spend prescribed time with their children, they are nonetheless, involved in their children's lives. It appears as if this provision is an invitation to non-relocating parents to detail the level of their involvement and interests in their children's lives.

Section 16.93 (3) of the Divorce Act provides that '[i]n any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child'. While this is useful in mandating a child centred discussion, nonetheless, these guidelines appear to be vague, and thus, not providing adequate guidance to the parties. It is not exactly clear what evidence would be regarded as establishing the BIC. The legislature did not provide factors that courts can use to assess whether any parent who carries the burden has either succeeded or failed to discharge such burden. This will be left to the discretion of the judges which will lead to inconsistent reasoning and outcomes.

These provisions demonstrate a clear shift from the presumption that it would be in the BIC for the child to be with the relocating parent to a serious engagement with the nature of the relationships the child has fostered with both parents to factually determine what would be in the BIC.

Over and above the factors proposed in section 16(3), section 16.92(1) of the Divorce Act provides seven (7) specific CRDs factors that must be considered by the court when

[259] Thompson 'Legislating about relocating Bill C-78, NS. and BC.' (2019) 38 *Canadian Family Law Quarterly* 219 -258 at 240
[260] Ibid.

deciding whether to permit the custodial parent to relocate, in its determination of the BIC. These factors are:

> a) 'the reasons for the relocation;
> b) the impact of the relocation on the child;
> c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
> d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
> e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
> f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
> g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance'.[261]

It is worth noting that the child relocation provisions in Canada do not provide a mechanism that will assist courts to adequately select, weigh and balance competing factors. However, the way identified factors have been crafted, to some extent does create a platform for a balancing exercise. For instance, the first factor deals with the reasons for relocation. For a court to properly weigh and balance competing factors, it would be ideal for the court to also have regard to the reasons against relocation.

While the legislature did not expressly require the non-relocating parent to provide reasons for objecting to the proposed relocation, nonetheless, the sixth factor, that requires the proposed relocation to be reasonable, can be used by the non-custodial parent to object to the relocation. The sixth factor will enable the non-relocating parent to provide reasons to substantiate his objection by illustrating that the proposed relocation is not reasonable.

[261] Section 16.92(1)(a)-(g).

The second factor deals with the impact of the relocation on the child. This should also be assessed in conjunction with the facts that would establish some of the disadvantages that may result if the child is permitted to relocate. The third factor points to the interest that the child's parents have shown in the child's life. If the non-custodial parent has played a major role in the child's life by physically being available and participating in the caring and extra-mural activities of the child, this must be considered by the court.

The fourth factor deals with the notice requirements that must be complied with by custodial parents. The fifth factor requires the court to consider if there is any order that has been granted by the court of the place where the child is to be relocated. This mandates an assessment of whether there are already in place, any legal obligations regarding the child that may be affected by the relocation order.

By directing judges to consider these seven specific CRDs factors, the legislature has attempted to limit the courts' discretion by guiding them to consider competing factors making it necessary on the one hand for judges to consider the reasons for relocation; and on the other hand, to evaluate the reasonableness of such a decision by considering all competing factors. These two considerations empower litigants to place their versions before the court and for the court to assess whether it is reasonable for the custodial parent to relocate without preconceived conclusions. Finally, section 16.92(2) of the Divorce Act provides guidance on a factor that the court ought not to consider. It specifically prohibits the court from considering 'whether the person who intends to relocate the child would relocate without the child if the child's relocation was prohibited'.[262]

Given the fact that these guidelines only came into effect on 1 July 2020, it is not yet clear how the Canadian courts will interpret them. However, Canada has demonstrated that it is possible to limit judicial discretion by including provisions regulating CRDs in a single piece of legislation, an example that South Africa could emulate.

5.6 CONCLUSION

This chapter demonstrated that the jurisdictions discussed herein also experience some of the same challenges that South Africa experiences relating to unfettered judicial discretion in CRDs. It demonstrated that the absence of legislative guidelines enables judges to overemphasise their preferred factors and render competing factors insignificant to reach their

[262] Section16.92(2).

desired outcomes. In all the jurisdictions discussed in this chapter, neither the legislatures nor courts critically considered the impact of unfettered judicial discretion in CRDs and the fact that it encourages different judicial approaches which makes this area of law unpredictable. It was shown that generally, judges in different countries do recognise that there are competing factors in CRDs but they are generally constrained from properly weighing or balancing them because of their inclinations on parenting or prevailing presumptions in their jurisdictions.

Given the difficulty often associated with CRDs and the absence of legislative guidelines, it was illustrated that *Payne v Payne* in the United Kingdom, the *A v A: Relocation Approach* in Australia and the California Court of Appeal in *In re Marriage of Burgess* provided useful judicial guidelines that South Africa can draw lessons from. The guidelines in *Payne* were problematic because they contained gender stereotypes. However, if these stereotypes were to be removed, these guidelines can assist judges to properly weigh and balance competing factors. The Court of Appeal later pointed out that these gender stereotypes are unsustainable and CRDs must be approached in a gender-neutral way. While the approach in *Payne* was later declared to be a mere guideline and not binding, nonetheless, every CRD case in the United Kingdom still derives guidance from *Payne.*

It was further argued that the guidelines issued in *A v A: Relocation Approach* are more useful because they are crafted in gender neutral terms and require judges to provide reasons for their approaches. This is something that is generally lacking in South Africa were judges can ignore certain factors or the approaches of other judges in similar cases without providing any justification for doing so as was illustrated in chapter three of this thesis. The Australian approach also offers useful constitutional guidance regarding the need not to infringe on the custodial parent's right to freedom of movement. The Australian Family Law Council's attempt to influence the enactment of CRDs provisions is something that the SALRC can emulate. The SALRC can influence legislative amendments that will see the incorporation of specific CRDs provisions into the South African Children's Act. Currently, the relevant advisory committee of the SALRC merely recognised the challenges brought by CRDs without any concrete recommendations to counter them.

The California Court of Appeal in *In re Marriage of Burgess* also developed a test which requires the court to carefully consider the impact of relocation on the child and determine whether relocation is reasonably necessary. This test allows the relocating parent to show the necessity of relocation while also providing space to the non-relocating parent to adduce evidence to demonstrate that the proposed relocation is ill-conceived and unnecessary. This obliges the court to weigh, assess and balance competing factors to reach a decision that is in

the BIC. This chapter also reviewed the position of the USA and demonstrated that it is clouded by presumptions for or against relocation. It was shown that presumptions are rigid and have the effect of limiting judicial discretion. It was argued that presumptions do not adequately limit judicial discretion but operate in a manner that favours one parent without a proper evaluation of competing factors. They also enable judges to completely ignore important competing factors.

Nonetheless, the discussion of the states of New York and California offer relevant lessons on the dangers of presumptions and provide some justification why South Africa should not adopt any presumption when crafting its CRDs legislative guidelines. It was further shown that the state of Florida and Canada have developed specific CRDs legislative guidelines. The state of Florida has provided comprehensive provisions dealing with CRDs as well as specific factors that the court must consider when determining these disputes. It was shown that the court can use these provisions to holistically assess and balance competing factors. But most importantly, these factors require judges to not only focus on the competing parental interests, but also to consider the impact of the relationships that the child has with other people when assessing the BIC. This is an important lesson for South Africa, given the fact that in most cases, such relationships are not accorded much weight by South African judges.[263] There are circumstances where other external family members also play a pivotal role in children's lives and it would not be in the BIC to lose their care and support. The assessment of the influence of such care and support in children's development would provide a clear picture of what children would lose should they relocate. The relocating parent would have the burden of justifying why 'she' believes the child should lose such support and what would the child gain by relocating. In South Africa, particularly from African communities, there are children who are raised by grandparents (mostly grandmothers) and their importance in children's lives should not be ignored in CRDs.

Finally, legislative guidelines provided for in Canada are also significant for South Africa because the way they are drafted can assist in limiting judicial discretion and prevent predetermined decision making. They require the provision of reasons for relocation and an assessment of the reasonableness of the decision to relocate. This would require both parents to place their respective cases before the court and for the court to duly assess, weigh and balance the competing factors to make a decision that is in the B

[263] See *LW v DB* 2015 JRD 2617 where the judge treated as insignificant the child's relationship with the maternal and paternal grandparents who resided in the court's jurisdiction and *Ford v Ford* [2006] 1 SA 571 (SCA), where the child's relationship with the day-carer was treated as insignificant.

6 CHAPTER SIX: AN ARGUMENT FOR THE INSERTION OF THE CRDs CHAPTER INTO THE CHILDREN'S ACT

6.1 INTRODUCTION

Judges are, to some extent, influenced by their own perspectives and experiences when adjudicating CRDs.[1] According to Eekelaar, the subjective nature of judges' discretion allows them to consider almost any factor that could possibly have a bearing on children's welfare and assign it whatever weight they choose.[2] It was demonstrated in chapter three of this thesis that judges are capable of relying on certain factors to reach their desired outcomes and totally disregard equally important competing factors. In the context of Australia, Parkinson has also demonstrated that, in the absence of judicial guidelines (and legislative guidelines) judges have followed different approaches when adjudicating CRDs and have also interpreted applicable principles differently.[3] Through their wide discretion, judges are able to develop different approaches which render this area of the law inconsistent and unpredictable. Bala has argued that the extent of discretion and lack of direction afforded to trial judges by the BIC principle make CRDs less predictable and more difficult to settle.[4]

It was demonstrated in chapter two that while different scholars recognise the importance of judicial discretion in the resolution of CRDs, they are nonetheless, in agreement that this discretion must somehow be constrained. On the one hand, Parkinson and Cashmore favour authoritative judicial guidelines and argue against legislative guidelines which establish presumptions in that they create bright lines rules.[5] On the other hand, Thompson and Bala are of the view that judges' discretion should be limited by rebuttable presumptions which will mandate judges to adequately evaluate the facts before them to reach decisions that are to the BIC.[6]

In chapter four of this thesis, it was demonstrated that socio-legal research has played an important role in the formulation and development of CRDs policy and legislation in

[1] *D v S* [2012] NZFLR 116 para 37.
[2] 'Trust the judges: How far should family law go?' (1984) *Modern Law Review* 593 at 595.
[3] Ibid at 149.
[4] Bala *et al* 'A study of post-separation/divorce parental relocation' Presented to Family, Children and Youth Section, Department of Justice Canada (2012) 59.
[5] Parkinson and Cashmore 'Reforming relocation law: An evidence-based approach' (2015) 53 *Family Court Review* 23.
[6] See Thompson 'Presumptions, burdens, and the best interests in relocation law' (2015) 53 (1) *Family Court Review* 40 and Bala 'Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf, accessed 23 June 2020.

Canada, where Bala's jurisprudential writings (influenced by social science research) have had some influence on policy making. It was also demonstrated in chapter two that Australian legal scholars such as Parkinson, Cashmore and Behrens have also incorporated the findings of social scientists and psychologists into their jurisprudential approaches regarding how courts should resolve CRDs.[7] These legal researchers have heeded the findings of social scientists and evaluated the impact of relocation on the development of children, child-parent relationships, and the disruption of important attachment relationships, consideration of which may assist the legislature in South Africa when developing CRDs legislative guidelines. These scholars have also identified relevant factors that must be considered such as: the importance of both parents in children's lives post separation; psychological challenges that may arise as a result of relocation; judicial guidelines that have been crafted by courts in different jurisdictions; factors that influence the decision to relocate such as, employment, new relationships, education, and reuniting with family members; as well as the impact of violence, neglect and abuse.[8] But most importantly, studies conducted by socio-legal researchers underscore the shift in thinking regarding parenting in various jurisdictions from custodial preference to shared parenting and encouragement of meaningful relationship between children and both of their parents.[9]

This thesis recognises the need for judicial discretion but argues that it should be limited by CRDs legislative guidelines that will restrict judges from delivering judgments that mirror their own conceptions of appropriate child rearing and parenting. The purpose of this chapter is to recommend draft CRDs legislative guidelines which, if implemented, would provide guidance that may lead to consistent CRDs judicial approach in South Africa. Bala and Wheeler correctly argue that '[h]aving clearer guidance for relocation cases would be of great assistance to the courts, lawyers and families, facilitating judicial resolution, promoting settlement and reducing costs'.[10] Failure to provide guidance to the courts will allow the current situation where different judges are able to decide CRDs as they please without any legislative guidance.

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[7] Kelly and Lamp 'Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?' (2003) 17 *Journal of Family Psychology* 194.

[8] See among others Behrens and Smyth 'Australian family law court decisions about relocation: Parents experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 14, Braver, Fabricius and Ellman 'Relocation of children after divorce and children's best interests: New evidence and legal considerations' (2003) 17 *Journal of Family Psychology* 207, Taylor 'Relocation following parental separation: International research, policy and practice' (2013) 38 *International Family Law, Policy & Practice* 136 and Austin 'Relocation, research, and forensic evaluation: Part II: Research in support of the relocation risk assessment model' (2008) 46 *Family Court Review* 347 at 348.

[9] See Parkinson 'Freedom of movement in an era of shared parenting: The differences in judicial approaches to relocation' (2008) 36 *Federal Law Review* 169.

[10] 'Canadian relocation cases: Heading towards guidelines, 2011: User guide' (2013) available at https://qspace.library.queensu.ca/bitstream/handle/1974/7861/relocation-user-guide.pdf;jsessionid=848A87EAB4D402167A8AD24EBCEC89C8?sequence=3, accessed on 22 February 2016.

This may lead to more litigation and greater costs through appeals until the party finds a judge that will see the facts the way that party wants them to be seen.[11]

The South African Children's Act has 22 chapters that deal with various child related matters.[12] It is recommended that the Children's Act should be amended by inserting a comprehensive part dealing with CRDs in chapter 17, which currently deals with child abduction. It is submitted that the existing provisions in chapter 17 should constitute Part I of the chapter and the recommended draft CRDs provisions constitute Part II thereof. In order not to disturb the natural flow of various provisions of the Children's Act, it is recommended that the draft CRDs provisions should be provided under the new section 280 with an accompanying relevant capital alphabet, subsections, paragraphs, and sub-paragraphs where necessary i.e., section 280A or section 280B(1)(*a*)(i). The draft CRDs provisions recommended in this chapter of the thesis will be accompanied by commentary aimed at contextualising each suggested provision.

6.2 ACADEMIC PROPOSAL FOR LEGISLATIVE GUIDELINES

In 2015, the SALRC observed that cases dealing with CRDs are inconsistent and recommended that guidelines should be developed to guide courts to promote some consistency in decision making.[13] Clark has argued that '… greater legal certainty could be achieved by the legislative framing of guidelines, whilst preserving the ultimate discretionary power of the High Court as upper guardian of all minors within its jurisdiction'.[14] She further argued that such legislative guidelines should be drafted having regard to some of the factors listed in the Washington Declaration on International Family Relocation.[15] She believes that these factors must guide the court's judicial discretion.[16] She also argued that statutory guidance may incorporate specific rules on the giving of notice of a proposed relocation and direction on how courts should consider various factors in line with the BIC.[17] Clark neither explained how her

[11] Henegham 'Relocation cases- the rhetoric and reality of the child's best interests- a view from the bottom of the world' (2011) 23 *Child and Family Law Quarterly* 226 at 228.
[12] These chapters deal with: interpretation, objects, application and implementation; general principles; parental responsibilities and rights; children's courts; protection of children; child in need of protection and care; contribution order; alternative care; foster care; child and youth care centres; drop-in centres; adoption; inter-country adoptions; child abduction; trafficking in children; surrogate motherhood; enforcement of the Act, administration of the Act and miscellaneous matters.
[13] 'Family disputes resolution: Care of and contact with children' Issue Paper 31 Project 100D (December 2015) at 69.
[14] Clark 'Post-divorce relocation by a custodian parent: Are legislative guidelines for the exercise of judicial discretion desirable?' (2003) 120 *SALJ* 80 at 89.
[15] See 1.4.4.2 of this thesis.
[16] Ibid at 110.
[17] Ibid.

suggested legislative guidelines should be framed nor did she provide a clear synopsis of how statutory guidelines should accommodate the courts' discretionary power when adjudicating CRDs. It is submitted that the better approach is for the suggested legislative guidelines to limit the exercise of judicial discretion in CRDs as a way of promoting predictability and consistency in their determination.

In 2009, Albertus also recommended '…that legislation dealing specifically with relocation should be promulgated' and noted that '[i]t is impossible to design legislative provisions to cover all eventualities, but some legislative guidance would be welcome'.[18] Albertus suggested some of the provisions which she thought should be contained in the proposed child relocation legislation such as: definition of relocation; factors identified by South African courts such as the need for the custodial parent to pursue employment, education and marriage as well as the need for the non-custodial parent to maintain contact with the child; approach to temporary relocation applications; approach to relocation within the country; and guidance to mediation processes.[19]

Unlike Clark, Domingo does not link her recommendation for legislative guidelines to the court's judicial discretion. In fact, she does not deal with the issue of judicial discretion at all. She does, however, highlight that South African courts have been inconsistent in the way they have approached CRDs. Hence, she is calling for certainty and consistency in the way courts deal with CRDs. To achieve this, Domingo suggests that there should be legislative guidelines or alternatively, standalone legislation dealing with CRDs.[20] Domingo also suggests that the standalone relocation legislation should incorporate the definition of relocation; objections to relocation; factors to be considered; and the burden of proof.[21] Even though Clark, Albertus and Domingo agree on the desirability for legislative guidelines, none of them addressed how courts should attempt to balance competing factors when adjudicating CRDs, as discussed at length in this thesis.

When drafting the proposed legislative guidelines, direction should be sought not only from international instruments, foreign legislation and foreign CRDs cases, but also socio-legal studies, some of which are empirical. Studies that have been conducted reveal several reasons for wanting to relocate such as: relocating parents wanting to return home to a familiar environment where they had access to extended family support; moves to be with new partners,

[18] Albertus 'Relocation disputes: Has the long and winding road come to an end? A South African Perspective' (2009) 2 *Speculum Juris* 70 at 85.
[19] Ibid at 85.
[20] '"For the sake of the children": South African family relocation disputes' (2011) 14 *PER* 148 at 166.
[21] Ibid.

to make a fresh start in new places; to have a better lifestyle or financial prospects; education opportunities and to escape violence.[22] In their study, Behrens and Smyth identified, poor relationships between parents, high conflict, violence and abuse in romantic relationships as some of the factors that induce some of the parents to want to relocate with their children.[23] Some of the studies have '… established that children of all ages are adversely affected by conflict between parents that is frequent, intense, and poorly resolved', a problem which is prevalent in CRDs.[24] These are some of the factors that the South African government should consider when developing CRDs legislative guidelines.

Some of these studies challenge law and policy makers to adequately consider the impact of relocation on children post parental separation. For instance, Braver, Ellman and Fabricius' study found that there is a 'preponderance of negative effects associated with parental moves by mother or father, with or without the child, as compared with divorced families in which neither parent moved away'.[25] Some studies illustrated that these negative consequences for children after relocation are not as a result of relocation *per se*, but due to the children's separation from their non-relocating parents.[26] These studies represent the dominant view in child care which advocates for shared parenting and meaningful involvement of both parents in their children's lives.[27]

One of the most important aspects that should be considered when developing specific CRDs legislative guidelines is the role of the views and wishes of children who are at the centre of these disputes. As illustrated in chapter one of this thesis, Article 12(1) of the CRC, Article 4 of the African Charter, and section 10 of the South African Children's Act make provision for children not only to participate in matters that involve them but also to provide their views and wishes when they are able to. While children who can express their views must be provided space to participate in CRDs, nonetheless, their participation must be treated with caution given the potential of the dominant parent influencing them. Warshak argues that '… children do not always know what is best for them. Particularly during family turmoil, children's attitudes often

[22] See for instance, Taylor and Freeman 'International research evidence on relocation: Past, present, and tee future' (2010) 44 *Family Law Quarterly* 317 at 330.
[23] 'Australian family law court decisions about relocation: Parents experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 1 at 7-8.
[24] Taylor and Freeman 'International research evidence on relocation: Past, present, and tee future' (2010) 44 *Family Law Quarterly* 317 at 318.
[25] 'Relocation of children after divorce and children's best interests: new evidence and legal considerations' (2003) 17 *Journal of Family Psychology* 206 at 214.
[26] Stevenson et al 'Association between parental relocation following separation in childhood and maladjustment in adolescence and young adulthood' (2018) 24 *Psychology, Public Policy and Law* 365 at 367.
[27] Braver, Ellman and Fabricius op cit note 25 at 214.

are temporary, transient, or fluctuate.'[28] This however, should not be a bar to establishing children's desired outcomes which may not necessarily be the ultimate outcomes reached by the courts. Children are different and not all of their wishes and views regarding CRDs may be influenced by their parents. It has, nonetheless, been pointed out that in relation to CRDs, children wishes and views are unlikely to be grounded on experience of the intended place to which they will be relocated, which makes them difficult to evaluate.[29] The South African legislature must determine the best way in which children can be assisted to air their wishes and views. According to Bala '… there is growing appreciation of the importance of taking account of the perspectives and preferences of children who are the subject of disputes between their parents, as this promotes better outcomes for children, respects their rights, and often facilitates settlement'.[30]

Studies conducted by socio-legal researchers clearly indicate that there are many variables to the question of child relocation which merits adequate consideration by legislators and policy makers. Behrens and Smyth cautions that '… it would be wrong to assume when designing law and policy on relocation that judicial decision-making will take place largely in a context where the dispute between the parties is about relocation only'.[31] They argue that these disputes '… often involve families with multiple issues where the relocation dispute is one of many sources of conflict'.[32] This is particularly the case in South Africa where people of different races, tribes and clans are subjected to the same legal principles. There is a need to craft specific CRDs guidelines that are tailor-made for South African conditions. While it is not suggested that all the African countries should implement the recommendations of this thesis, nonetheless, the draft CRDs provisions can assist other African countries when reviewing their own CRDs laws.

The proposed legislative guidelines are aimed at promoting the BIC which are of paramount consideration. They will assist courts to foster and preserve relationships that non-relocating parents have with their children after the proposed relocation. Most importantly, the objective of these guidelines is to ensure that whatever decision the court makes, such decision should as far as is reasonably possible promote stable, caring, supportive and loving

[28] 'Payoffs and Pitfalls of Listening to Children' (2003) 52 *Family Relations* 373 at 374.
[29] Cashmore and Parkinson 'Children's 'wishes and views' in relocation disputes' (2016) 28 *Child and Family Law Quarterly* 151 at 173
[30] Bala 'Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act' 9 available at https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10152765/br-external/BalaNicholas-e.pdf, accessed 23 June 2020.
[31] 'Australian family law court decisions about relocation: Parents experiences and some implications for law and policy' (2010) 38 *Federal Law Review* 1 at 10.
[32] Ibid.

relationships between the child and each parent to the fullest extent possible.[33] These guidelines must have regard to the relocating parent's right to freedom of movement, which must be balanced with the right of the non-relocating parent to exercise his or her parental responsibilities and maintain a meaningful relationship with the child.[34]

6.3 DRAFT RELOCATION PROVISIONS WITH COMMENTARY

It is recommended that section 1 of the Children's Act should be amended by inserting the definition of the phrase 'child relocation', which should be defined as follows:

> *The permanent removal or intended permanent removal of a child by the child's parent or any person who is legally authorised to care for the child to another jurisdiction, irrespective of whether the intended jurisdiction is within South Africa or abroad, where this removal will result in a disturbance of the usual contact between the child and a non-relocating parent.*

It is submitted that this definition should be the starting point for courts dealing with CRDs. Thereafter, various provisions of the proposed guidelines can be considered to assist courts deciding CRDs to strike an appropriate balance between BIC and the parents' interests in relation to their children.

CHAPTER 17 PART II: CRD

280A JURISDICTION

(1) Any division of the High Court shall be competent to determine any child relocation matter arising within its area of jurisdiction on application by any interested party.

(2) A court shall have jurisdiction over a child relocation matter if the application is made by:

(a) a parent or any person who is legally authorised to care for the child and currently residing with the child within the court's area of jurisdiction.

[33] Richards 'Resolving relocation issues pursuant to the ALI family dissolution principles: Are children better protected?' (2001) 3 *Brigham Young University Law Review* 1133 at 1111.
[34] See generally De Boer 'Parental relocation, free movement rights and joint parenting' (2004) 4 *Utrech Law Review* 73.

(a) If the parent bringing the relocation application has not been awarded the care and residency of the child, he or she should first show cause why the court should interfere with the current care and residency of the child.

Commentary

Even though there is no legislative provision that prescribes that only the High Court should determine CRDs, in practice, CRDs are heard by different divisions of the High Court. The proposed section 280A of the Children's Act is aimed at making it explicitly clear that the High Court should have exclusive jurisdiction over CRDs given the complexities associated with these disputes.[35] Unlike magistrates' courts, high courts are not often pressured to deliver their judgments on the same day, and the volume of work at the high courts is, in some respect, less than that of the magistrates' courts. As such, judges will generally have more time to deal with these cases than magistrates would generally have. This would contribute to the development of sound jurisprudence in this area of law.

The proposed section would allow both parents, irrespective of whether they are currently residing with their child(ren), to approach the court for the permanent removal of the child from the jurisdiction of the court. If the application for the relocation of the child is brought by the parent who has not been awarded the care and residence of the child, that parent must first lead evidence that demonstrates why the court must change the status *quo* by awarding them the care and residency of the child. For instance, such a parent may lead evidence that demonstrates that the child is abused, neglected, and not well cared for and further that the child will receive better care should the court grant permission for the child be relocated to a different place. This will be the basis upon which the court can interfere with the existing care and residency arrangements.

280B NOTICE

(1) Subject to section 18(3)(c)(iii) of this Act, the parent who wishes to relocate with the child(ren) should notify the other parent or any person who exercises parental

[35] See Boshier 'Have Judges been missing the point and allowing relocation too readily?' (2010) 1.2 *Journal of Family Law and Practice* 10. Our courts have also endorsed this view, see for instance, *M v M* (15986/2016) [2018] ZAGPJHC 4 (22 January 2018) para 42.

responsibilities and rights over the child of the intended relocation with the child 60 (sixty) days before the date of the intended relocation.

(2) The notice contemplated in (1) should adequately inform the other parent or the person who is legally authorised to care for the child of:

(a) the reasons for the relocation;

(b) the place to which the child will be relocated;

(c) the arrangements made to enable the other parent to have contact with the child;

(d) arrangements made to minimise the disruption of the child's life;

(e) the conditions under which the child will be cared for;

(f) any other relevant information that would enable the other parent or the person who is legally authorised to care for the child to adequately apply their mind to the intended relocation.

(3) The notice contemplated in (1) should be made directly to the other parent or the person who is legally authorised to care for the child by any written means which would enable adequate, proper, and reliable record of such notice.

(4) If there is a response to the notice contemplated in (1) such reply should also be made by any written means which would enable adequate, proper, and reliable record thereof. This applies regardless of whether the reply is an objection or consent to the proposed relocation.

(5) The requirements to provide notice may be dispensed with only under exceptional circumstances if it can be shown that either the parent or the child would suffer significant harm should such notice be provided.

(6) If there is any objection to the proposed relocation, such should be made within 30 days (thirty) of receipt of the notice, failing which it will be assumed that consent for the proposed relocation has been granted.

Commentary

In terms of section 18(3)(*c*)(iii) of the Children's Act, 'a parent or other person who acts as guardian of a child must give or refuse any consent required by law in respect of the child, including consent to the child's departure or removal from the Republic'. This provision does

not deal with relocation within the country, which can equally lead to litigation.[36] The proposed section does not distinguish between domestic and international relocations and requires that notice be provided irrespective of where the child will be relocated to. All the cases where custodial parents wished to relocate within South Africa, the intended destinations were so distant that it would require expenses for non-relocating parents to exercise their access rights to the children when traveling to such places. It is submitted that if relocation of children would require non-relocating parents to travel long distances, even within the country to see their children at great expenses, they should be notified of the intended relocation. However, such notice should be dispensed with where both relocating parents and children are faced with exceptional circumstances such as violence and abuse.

In 2012, the American Bar Association adopted a Model Relocation of a Children's Act and urged USA states to adopt it.[37] The commentary to this Model Act observes that different American states, in their respective state legislation provide different notice periods for the proposed relocation such as: 30 days; 45 days; 60 days; and 90 days. Nonetheless, section 4(a) of this Model Act recommended that notice should be provided at least 45 days before the proposed relocation. Notice enables the parent who will be left behind to consider their options should they object to the proposed relocation. It is submitted that for the South African environment and in line with the proposed Canadian amendments, 60 days' notice would be more appropriate. This would allow the non-relocating parent to consult with family members and obtain legal assistance if they intend to oppose the proposed relocation.

It is important that relocation notice is made in such a way that there would be record thereof. Section 452.377(2) of the 2013 Missouri Revised Statutes on Domestic Relations,[38] provides that notice should be made in writing by certified mail and return receipt should be requested which would be adequate proof of notice. In South Africa, registered mail can provide reliable proof of service because recipients are obliged to sign for it upon collection. Electronic mail can also be an effective method of service.

The information required in the notice, as set out in the proposed subsection (1) will enable the non-relocating parent to know where the child will be residing and how they could maintain contact with the child. According to Thompson, the requirement for the relocating parent to notify the other of the intended relocation is to ensure 'that relocation of a child should

[36] See for instance *Joubert v Joubert* [2008] JOL 219229 (C) para 35. See also Elrod 'National and international momentum builds for more child focus in relocation disputes' (2010) 3 *Family Law Quarterly* 341 at 342.
[37]https://www.americanbar.org/content/dam/aba/publishing/abanews/13285666982012mm104.authcheckdam.pdf accessed on 22 February 2016.
[38] Chapter 452 Dissolution of Marriage, Divorce, Alimony and Separate Maintenance.

generally not be unilateral, should be planned and orderly, and should only occur after a reasonable period of time to work out new arrangements'.[39] This information would be crucial in the non-relocating parent's decision to either consent or object to the proposed relocation. The proposed subsection (6) requires the non-relocating parent to communicate their response within 30 days to the relocating parent. Should the non-relocating parent fail to do so, they will be presumed to have consent to the intended relocation.

There are exceptional circumstances that may justify a parent's wish/need to relocate with the child without complying with the notice requirements, such as when the safety or health of the relocating parent or the child may be unreasonably put at risk by a prolonged stay within the jurisdiction of the court.[40]

280C PRESUMPTION AND BURDEN OF PROOF

(1) There shall be no presumption against or in favour of relocation of a parent who intends to relocate with the child.

(2) There shall be an appropriate weighing up of the facts placed before the court by the parties when determining child relocation disputes.

(3) The court must determine every child relocation dispute by considering all the relevant factors to reach a decision that will advance the best interests of the child while having regard to the interests of all interested parties.

(4) Where both parents spend substantially the same amount of time with the child, the parent applying for relocation shall prove that it will be in the best interest of the child to be relocated by demonstrating the benefits the child will derive and providing reasons why it is justifiable for the child to forgo benefits he or she is currently enjoying.

(5) Where the child is spending more time with one parent, the parent who spends less time with the child shall prove why it is not in the best interest of the child to relocate by demonstrating the benefits the child is currently enjoying and providing reasons why it will not be in the best interest of the child to forgo such benefits.

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[39] Thompson 'Legislating about relocating Bill C-78, NS. and BC.' (2019) 38 *Canadian Family Law Quarterly* 219 at 221.

[40] 'American Academy of Matrimonial Lawyers' Proposed Model Relocation Act: An At relating to the relocation of the principal residence of a child' (1998) 15 *Journal of the American Academy of Matrimonial Lawyers* 1-24 at 11.

Commentary

The dangers of presumptions were discussed in chapter three of this thesis, wherein it was recommended that South Africa should not adopt any presumptions. This section aims to ensure that there is no presumptive right for or against child relocation in South Africa. The section will ensure that parties start on an equal footing, and judges adequately assess, weigh, and balance all competing factors without any rigid approaches that lead to predetermined conclusions. This draft section draws from the 2019 amendments made to the Canadian Divorce Act which introduced a burden of proof which requires relocating parents to demonstrate why it is in the BIC to relocate and non-relocating parents to demonstrate why it is not in the BIC to relocate.

280D RELOCATION FACTORS

(1) To decide any child relocation dispute:

(a) The party making an application for relocation must place relevant facts before the court;

(b) If the other parent or the person who is legally authorised to care for the child objects to the proposed relocation, they must also place facts before the court outlining the basis for their objection.

(c) The court should not place undue emphasis on factors that support the case of one party while unreasonably rejecting those advanced by the other party.

(2) Should the objecting parent or person who has been extensively involved in the care of the child fail to place their facts before the court in accordance with the prescribed rules of civil procedure, the court may make an order without their facts being placed before the court.

(3) The court can only make an order contemplated in (2) after receiving a report from the Family Advocate assisted by any expert in child psychology, or psychiatry and social worker based on their investigations of what would be in the best interests of the child concerned.

(4) In making its order, the court must assess and adequately balance various factors advanced by the parties such as:

(a) The reasons for relocation and objections to relocation; including but not limited to:

(i) career opportunities

(ii) educational opportunities

(iii) new relationships

(iv) returning to the country of birth

(v) extended family support or lack thereof

(vi) concerns regarding crime

(vii) Health concerns

(b) Employment and economic conditions of the party before and after the proposed relocation;

(c) Employment and economic conditions of the non-relocating parent;

(d) The current living conditions and circumstances of the child and the obligations of the parties before the court to maintain the child;

(e) The parties' relationships with the child and the child's relationship with other family members, including the parties' new partners (if any);

(f) The involvement and level of interest of the non-relocating parent in the child's life;

(g) The needs of the child;

(h) The child's age and stage of development;

(i) The likely impact that the proposed relocation will have on the child;

(j) The difficulty or ease of maintaining the relationship and contact between the child and the non-relocating parent;

(k) The child's views and wishes;

(l) The quality of both the relocating parent's and child's lives or anticipated quality of their lives post relocation, including:

(i) educational opportunities and facilities,

(ii) health care services,

(iii) family support structures,

(iv) availability of extra mural facilities,

(v) financial stability before and post relocation

(vi) employment opportunities,

(vii) viability of new family structures,

(viii) emotional, physical and financial wellbeing,

(ix) the child's child psychological and emotional wellbeing,

(m) The likely disruption to the child's daily activities and routines;

(n) The constitutional right of the relocating parent to move freely and make independent decisions; and

(o) The right of the non-relocating parent to maintain contact with his or her child.

(5) The court should assess various factors to determine which amongst them are likely to lead to the stability and/or instability of the child's life:-

(a) In making such a determination the court should be informed by:

(i) the likely impact on the quality of the child's life should relocation be permitted;

(ii) the likely impact on the quality of the child's life should relocation be refused;

(iii) the likely support the child will enjoy or lose should relocation be permitted or denied;

(b) The court should also have regard to the relationship of the child with both parents as well as the parents' respective conduct in advancing or impairing the child's best interests.

(c) When weighing and balancing competing factors, the court, in its assessment of every factor, should equally have regard to a corresponding and competing factors.

Commentary

Factors referred to in the proposed section 280D are some of the common factors that have been considered by various courts dealing with CRDs. Some of the proposed factors are largely influenced by the Florida Statute referred to in chapter five of this thesis.[41] The recommended 280D will enable courts to evaluate whether positive factors that each party places before it will advance or impair the BIC. The study conducted by Austin reveals that in CRDs, not only do courts have to consider, weigh and balance competing factors but are also presented with '… the painful realities of change and loss associated with the alteration in the parent-child and other family relationships'.[42] Available empirical research demonstrates that factors such as: new employment; abusing relationships; desire to reconnect with family members and friends;

[41] The 2015 Florida Statutes Chp 61.13001 (3)(7)(d).

[42] 'Relocation, research, and forensic evaluation, Part 1: Effects of residential mobility on children of divorce' (2008) 46 *Family Court Review* 137 at 138 -139.

education; potential loss of contact with non-relocating parents; the importance of non-relocating parents on the children's wellbeing; and children's potential loss of relationship with non-relocating parents; are some of the most important factors that courts must weigh and balance.[43] In *F v F*,[44] the SCA made it clear that '[i]n deciding whether or not relocation will be in the child's best interests the court must carefully evaluate, weigh and balance a myriad of competing factors, including the child's wishes in appropriate cases'. The proposed section 280D provides factors that must be adequately weighed and balanced, to the extent to which they are applicable in any given case. The need to adequately balance competing factors and provide sound reasons why certain factors are preferred and others are not will oblige judges to '… construct a narrative account of their choices which weaves together their findings and conclusions within the legal framework so as to allow the decision to be understandable, coherent, and (ideally) with minimal scope for appeal'.[45]

The court adjudicating CRDs should also be able to evaluate whether negative factors will lead to the instability of the child's life and thus impair the child's best interests. Each party should be able to argue and demonstrate to the court why their positive factors should be relied upon. Equally so, each party should be able to demonstrate how the other party's negative factors will destabilise the child's life and impair the child's best interests. This will enable the court to have a clear picture of the parties' dispute and how the intended relocation will impact on the BIC.

280E BALANCING EXERCISE

(1) When identified factors compete, the court must:

(a) Assess how each factor would be advantageous or disadvantageous to the best interests of the child:

(b) Determine and explain why one or more factors are preferred over others.

[43] Taylor 'Relocation following parental separation: The welfare and best interest of children' Research Report' 76-82 (June 2010) available at https//www.otago.ac.nz/cic/otago630000.pdf accessed 28 May 2020.
[44] [2006] 1 All SA 571 (SCA) para 10.
[45] George 'How do you decide international relocation cases?' (2015) 27 Child and Family Law Quarterly 377 at 393.

Commentary

This is a useful balancing exercise that was developed by the Australian Full Court.[46] This test obliges courts to adequately assess, evaluate, weigh and balance various factors relied upon by the parties. Most importantly, judges will be mandated to justify why they relied on certain factors and disregarded others. If the judge chooses to disregard factors that were relied on in previous cases, such a judge would be obliged to provide reasons for the approach adopted.

280F PRESERVATION OF RELATIONSHIP

(1) If the court permits the relocating parent to relocate with the child, such parent:

(a) Must provide a plan that demonstrates their efforts to ensure that the child maintains a relationship and regular contact with the non-relocating parent. This plan must include:

(i) Contact details;

(ii) Reasonable visit schedules that will not place an unnecessary financially burden on the non-relocating parent;

(iii) Regular updates to the non-relocating parent of the child's health and development, including but not limited to all the child's important activities such as education, sport, and recreation;

(iv) Celebration of important dates like birthdays, religious holidays, and the child's achievements;

(b) The non-relocating parent should not make unreasonable demands relating to their right to maintain contact with the child post the child's relocation with the other parent.

Commentary

In most of the cases discussed in chapter three of this thesis, there was no requirement for relocating parents to provide non-relocating parents with detailed information relating to the children's lives post relocation. This section aims to make it a legislative requirement that the bond between the children and non-relocating parents be maintained by arrangement of contact

[46] *A v A: Relocation approach* para 82.

schedules and celebration of important dates in a year. It also seeks to ensure that non-relocating parents are adequately informed of the developments in their children's lives.

280G EXPERT WITNESSES

(1) Each party to the child relocation dispute may call one or more expert witnesses.

(2) Any person called to testify as an expert witness must satisfy the court of his or her expertise and must possess:

(a) specialised knowledge and skill which the court does not possess;

(b) the necessary education and training; and

(c) the relevant experience.

(3) The court must request the office of the Family Advocate to investigate how parties' relocation dispute has affected or will potentially affect the child, and produce a report.

(4) Every expert witness called to testify in a child relocation dispute should provide testimony based on their independent evaluation of the child and the child's relationship with both parents, siblings, and if necessary other extended family members;

Commentary

As discussed in chapter four, there are instances where the court may feel that it lacks some specific professional expertise in relation to CRDs and may rely on the expertise of professionals such as psychologists, social workers, psychiatrists, who are called by the parties before the court. This thesis recommends that notwithstanding, any parent calling their own expert witnesses who may be biased to their cause, it must be a legislative requirement in every CRD case that the Family Advocate conducts an independent enquiry to furnish the court with an objective report which would assist the court to reach a decision which is in the BIC. This provision aims to not only provide legislative guidance to all experts but also to assist courts to allow only those experts that have personally evaluated children to give testimony in CRDs.

280H CHILD PARTICIPATION

(1) Every child must be informed of the decision to be relocated from the court's jurisdiction to enable the child to express their views.

(2) If the child is of the age, stage of development and maturity to express their views and wishes about the contemplated relocation, the expressed views and wishes must be considered.

(3) To enable the child to participate in child relocation cases:

(a) A competent person may be appointed as an intermediary to enable the child to express their views to the court through electronic means; or

(b) *If the child is of an age, stage of development and maturity to be able to express their views, the court may interview the child to ascertain their views.*

(c) *Such interviews should be conducted by the court in chambers or any appropriate place where the child will feel comfortable to speak to the judge in the absence of the parents but in the presence of:*

(i) the stenographer; and

(ii) interpreter (if necessary); and

(iii) Social worker, psychologist or psychiatrist.

Commentary

The proposed section should be read with section 10 of the Children's Act which provides the child with a right to participate in any matter concerning them if the child is of suitable age and stage of development. This section will require judges to determine whether children before them are able to express their views. If they can, then they should be given an opportunity to do so in line with the CRC and the African Charter. This, however, does not mean that children's views will be authoritative because children can be influenced by their parents or be biased towards the parent, they like the most. Warshak cautions that '… [t]he more weight accorded [to] children's stated preferences, the greater the risk of children being manipulated or pressured by parents'.[47] The possibility of undue parental influence should not be a reason to fail to inform and consult the children about their possible relocation. Age should not be the sole criterion for child participation in CRDs, because children develop and mature differently. Children who have developed to such a stage where they can express their view should be allowed to do so.[48]

[47] Warshak 'Payoffs and pitfalls of listening to children' (2003) 4 *Family Relations* 373 at 375.

[48] See generally Barratt 'The child's right to be heard in custody and access determinations' (2002) 65 *THRHR* 556-573.

The proposed section 280E(2) of the Children's Act proffers two alternative ways in which children can participate in CRDs in court. The first is the appointment of an intermediary who is usually appointed in terms of section 170A(1) of the Criminal Procedure Act[49] for child witnesses who experience mental stress or suffering during criminal trials. An intermediary can be any of the experts discussed in chapter four. An intermediary takes questions directly from the court and reformulates them for the child, and also takes the child's responses and communicates them to the court.[50] It is submitted that the concept of an intermediary should be utilised in CRDs to assist children who may experience stress when required to express their views to the court. Children should be placed in different rooms from their parents so as not to feel pressured to say things that might be pleasing to one parent. This will mitigate the risk of children receiving 'the parental look' that might impact on their views in court. When children are afforded an opportunity to express their views, there should be no need for examination, cross-examination or re-examination by their parents.[51]

Alternatively, the court may interview the child to ascertain their views and wishes. Some judges in South Africa have shown some interest in interviewing children[52] when determining care, residency and contact disputes[53] while others do not see the need to do so.[54] Those judges that do not see any benefit in interviewing the child, often raise the fact that they are not equipped for such interviews[55] or that young children cannot make decision about their lives because their views are more likely to change.[56] It is submitted that courts will generally benefit from interviewing children and make fair and just decisions that are informed by their first-hand experience of the children's attitudes towards the proposed relocation.

The judge should make the environment suitable for the child to have a conversation with him or her. It is ideal not to allow parents to be present during such interviews to enable children to speak freely to judges.[57] To ensure some level of impartiality, it may be necessary to have a professional such as a social worker who will ensure that the interests of the child are not

[49] Act 51 of 1977.
[50] Bellengere *et al The law of evidence in South Africa: Basic Principles,* (2013) 53.
[51] See generally Fambasayi and Koraan 'Intermediaries and the international obligation to protect child witnesses in South Africa' (2018) 21 *PER/PELJ* 1, regarding the protection of children witnesses in court.
[52] See for instance *McCall v McCall* 1994 (3) SA 201 (C), *Soller NO v G & Another* 2003 (5) SA 430. (W) and *T R M v E M* (2540/2007) [2013] ZANWHC 62 (8 August 2013).
[53] See *McCall v McCall* 1994 (3) SA 201 (C) at 208.
[54] See for instance *Greenshields v Wyllie* 1989 (4) SA 898 (W); *Ford v Ford* [2006] 1 All SA . 571 (SCA) and *B v D* (30377/2008) [2010] ZAGPPHC 612 (27 May 2010).
[55] See *Ford v Ford* [2006] 1 All SA 571 (SCA) para 24.
[56] See *B v D* (30377/2008) [2010] ZAGPPHC 612 (27 May 2010) para 13.
[57] Bala *et al* 'Children's voices in family court: Guidelines for judges meeting children' 47 (2013) 3 *Family Law Quarterly* 379 at 395, where the authors highlight that these proceedings can be recorded and the results can be provided to parents.

compromised during the interview. The child should be able to speak on their own behalf directly with the judge. It is submitted that children should not be forced to participate in judicial interviews, particularly when they feel uncomfortable with judges owing to barriers such as anxiety, class, race, or ethnicity which might also influence the judge's ability to understand the child's views. These proceedings, however, should be recorded if they do take place. Currently, there are no legislative provisions regulating the conduct of judicial interviews in South Africa, and individual judges have discretion on whether to interview children when dealing with care, residency, and contact disputes generally.

6.4 CONCLUSION

The Children's Act in its current state does not adequately regulate CRDs in South Africa. This has enabled courts to draw on foreign jurisprudence when determining these disputes, which has not assisted in developing a uniquely South Africa approach to these disputes. Section 18(3)(c)(iii) of the Children's Act which deals with consent for child relocation and section 45(3)(d) of the Children's Act, dealing with the high court and divorce court's exclusive jurisdiction in matters relating to the removal of children from the Republic are the only provisions which seem to address child relocation issues in South Africa.

These provisions are hopelessly inadequate to address some of the complex issues that usually arise in CRDs. The proposed Part II to Chapter 17 of the Children's Act is aimed at providing a workable legal framework relating to CRDs that will provide South African courts with the necessary guidance on how to determine these disputes. The recommended guidelines are intended to '… serve the child's interests by decreasing litigation, increasing stability in the custodial relationship, preserving, and fostering the child's relationship with each parent, and providing limited judicial discretion when necessary to protect the child'.[58]

[58] Richards 'Resolving relocation issues pursuant to the ALI family dissolution principles: Are children better protected?' (2001) 3 *Brigham Young University Law Review* 1105 at 1133.

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