

HOW PARENTAL RIGHTS AND RESPONSIBILITIES ARE AFFECTED WHEN  
A JOINT-CUSTODY PARENT WANTS TO RELOCATE TO ANOTHER  
COUNTRY WITH THE CHILDREN.

By:

JOLINE ELLOUISAH JACOBS  
STUDENT NUMBER: 48368962

Submitted in partial fulfillment of the requirements for the LLB degree

BACHELOR OF LAWS

In the

SCHOOL OF LAW

UNIVERSITY OF SOUTH AFRICA

RRLLB81 ASSIGNMENT 02

PROFESSOR T DEANE

(DUE DATE: 30 SEPTEMBER 2020)


## ACADEMIC HONESTY DECLARATION

### Declaration:

1. I understand what academic honesty entails and I am aware of Unisa's policies in this regard.
2. I declare that this assignment is my own, original work. Where I have used someone else's work, I have indicated this by using the prescribed style of referencing. Every contribution to, and quotation in, this assignment from the work or works of other people has been referenced according to the prescribed style.
3. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
4. I did not make use of another student's work and submit it as my own.

NAME: JOLINE JACOBS.

SIGNATURE:

A rectangular image showing a handwritten signature in black ink on a light-colored background. The signature appears to be 'Joline Jacobs' written in a cursive style.

STUDENT NUMBER: 48368962

MODULE CODE: RRLB81

DATE: 30 SEPTEMBER 2020.

## SUMMARY

Relocation of children with one parent to another country is a complex area of South African family law. Unfortunately South African jurisprudence in this particular area is limited to the Constitution and the Children's Act.

Courts therefore mainly focus on the principle of "the best interest" of the child to address relocation of children disputes. Factors that courts will consider are the reasons for the relocation, personal relationships between the child and the parents, and the child's emotional and intellectual needs.

Relocation of children with one parent to another country affects the parental rights and duties of the co-parent, particularly where the parents share joint custody of the children. While the effects of relocation can be minimal to children, it could also have adverse effects on the children and their relationship with the non-relocating parent.

This paper will analyze the available legislation on relocation disputes to ascertain whether adequate laws are in place to effectively deal with relocation (of children with one a relocating parent) disputes in South Africa.

**Keywords:** relocation, relocating parent, non-relocating parent, joint custody, parental rights, best interests of the child.

## TABLE OF CONTENTS

Academic Honesty Declaration.....	2
Summary and Keywords.....	3
1. Introduction.....	5
1.1) Problem Statement.....	6
1.2) Hypothesis.....	6
1.3) Research Methodology.....	8
2. The Children’s Act on relocation of children.....	8
2.1) How the Children’s Act addresses relocation issues.....	8
2.2) Relocation and how it affects parental rights and responsibilities..	9
3. General factors considered by courts.....	10
4. Approaches by the courts in relocation disputes.....	12
4.1) The pro-relocation approach.....	12
4.2) The neutral approach.....	13
5. Do South Africa have adequate relocation laws available?.....	14
6. Conclusion.....	15
6.1) Concluding statement.....	15
6.1.1) Analytical summary.....	15
6.2) Recommendations.....	15
Bibliography.....	16

## 1. INTRODUCTION

Relocation of children is a complex area of family that unfortunately is not dealt with sufficiently in South African jurisprudence.

This research paper intends to look at the area of family law related to the relocation of children to another country, with one of the parents, after a divorce. After a divorce, both parents usually have parental control and custody over the children. However, there are instances where parents may have joint custody but may be deprived of their rights to the children.

For example in *Van Rooyen v Van Rooyen*,<sup>1</sup> the court granted an order permitting the mother to relocate to Australia with her two minor children, despite the fathers' objections thereto. The court held that "*the mother's wish to relocate to Australia is bona fide and genuine, and will impact favourably on the children. And although the children's relationship with the father may suffer, they will see each other every year, as much as the fathers' financial position can allow*".

An analytic research approach will be used to look at the Constitution, the Children's Act and different case law related to the relocation of children in order to give a synoptic overview of this complex area in the field of family law to determine if sufficient legislation exists to effectively deal with relocation disputes.

Courts usually make use of either a neutral or pro-relocation approach in order to assist it in determining the best option as it pertains to the best interest of the children and parents involved.

The intention of the research is to provide advice to the client on the likelihood of the court in dispensing with Mr. Dlamini's (her ex-husband) consent to the children's departure from South Africa.

---

<sup>1</sup> *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) (hereinafter the Van Rooyen case).

### 1.1. Problem statement

Statement 1: When one parent is allowed to relocate to another country with children after a divorce, the relocating parent becomes the only parent in the children's lives. Is it in the best interests of a child to be deprived from having contact with the non-relocating parent?

Statement 2: When married, parental rights and duties are automatically conferred upon parents and remain in tact after a divorce. Therefore, can there indeed be valid justification for a court to interfere with parental rights?

Statement 3: Family law delves into the heart of family relations, with intricate and intimate personal issues being addressed. Issues like, *inter alia*, the welfare of children and psychological effects on being separated from a parent require that adequate and appropriate legislation be enacted to effectively deal with relocation issues.

Can it be said that adequate legislation exists in South African family law to deal with relocation issues?

### 1.2. Hypothesis

After a divorce, both parents continue to hold rights and responsibilities pertaining their children. This means that joint care, custody and guardianship of the children is awarded to both parents and therefore any decisions concerning the children have to be made jointly. Joint care and custody ensures that the best interests of the children are upheld when both parents are able to play an active role in lives of the children.

According to section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) "*the best interests of a child are of paramount importance in every matter that concerns the child*".

When relocation with the children is proposed by one of the parents who hold joint custody and guardianship, the other parent is well within their rights to refuse to give consent to such relocation. Only a court can then make a decision regarding the proposal for relocation involving the children.

The Children's Act 38 of 2005 (hereinafter referred to as the Children's Act), provides many guidelines for how matters involving children must be dealt with. Section 6(5) of the Children's Act provides that *"a child, having regard to his or her age, maturity or stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child"*.

Children who are older (between the ages of eleven and eighteen years of age) are considered to be of an age where they are able to comprehend what divorce is, what relocation to another country would mean for them in a personal capacity and are usually mature enough to be able to voice their opinions and emotions regarding such issues.

Section 31 of the Children's Act further provides that *"a co-holder of parental responsibilities and rights must consult and give consideration to the views of the other co-holder, as well as, the child, when making decisions that which are likely to change significantly or adversely affect the exercise of joint care and responsibilities by the parents"*.

Current legislation on relocation of children disputes in South Africa is limited. Issues involving children are mainly dealt with in the Constitution and the Children's Act. Other international instruments that have been ratified by South Africa and thus influence legislation involving the rights and protection of children are the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

As a result of the limited resources available to adequately deal with matters involving the relocation of children to another country with one parent, one can deduce that courts are therefore also limited in their assessment of such cases.

### **1.3. Research methodology**

An analytic research approach will be used to look at the Constitution, the Children's Act and different case law related to the relocation of children in order to give a synoptic overview of this complex area in the field of family law.

The research paper aims to critically analyze the available legislation on relocation of children with one of the parents, in order to find whether adequate laws exists in this area of family law.

## **2. THE CHILDREN'S ACT ON RELOCATION OF CHILDREN.**

### **2.1. How the Children's Act addresses relocation issues.**

Section 7 of the Children's Act contains the most relevant sections in the context of relocation. It looks at the personal relationship between the child and the parents, the attitude of the parents towards the child and the exercise of parental rights and responsibilities in respect of the child.<sup>2</sup>

Section 6(5) of the Children's Act states that "*a child, having regard for his or her age, maturity and stage of development, and a person who has rights and responsibilities in respect of the child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which can significantly affect the child*".

After a divorce, parents usually both continue to exercise parental rights and responsibilities over their children just as they did while married. It is only in

---

<sup>2</sup> See section 7(1)(a)(b) and (d) of the Children's Act.



exceptional circumstances, such as, where abuse of the children or the other spouse has occurred in the past, that a court would deny a divorcing parent his or her right to care, access and of guardianship over the children.

Section 31 of the Children's Act stipulates that *"a co-holder of parental responsibilities and rights must consult and give consideration to the views of the other co-holder when making decisions that would adversely affect the exercise of joint care and responsibilities by the parents"*.

According to Heaton,<sup>3</sup> *"supporters of joint care argue that it ensures a continuing personal relationship between the child and both parents, and prevents situations in which one parent assumes the dominant role in child's life, with the other parent becoming an "absent" parent"*.

Thus, in the exercise of their joint rights and responsibilities over the children, the parents are obliged to consult each other in matters that would affect the children or the rights that the other parent has over the children.

## **2.2. Relocation and how it affects parental rights and responsibilities.**

Relocation or emigration is when one parent moves with the children to another region within South Africa, or internationally to another country. In the case of joint care and custody, the non-relocating parent must give consent to the relocation of the children. If he or she refuses to give consent, then an application may be made to the High court for an order to rescind the consent required by the non-relocating parent.

Section 8(1) of the Divorce Act 70 of 1979 provides that a court may rescind or vary any an order regarding guardianship, care, contact or maintenance, or

---

<sup>3</sup> Heaton J *South African Family Law* 3<sup>rd</sup> ed (LexisNexis 2010) 171.

suspend a maintenance order or contact order made upon divorce, if there is sufficient reason for doing so.

Parental rights and responsibilities are adversely affected by the relocation of children, as it affects the child's relationship with the non-relocating parent. The non-relocating parent is not able to be a part of the child's everyday life, and do not get to play an active role in the child's life.

In *Jackson v Jackson*,<sup>4</sup> the court held that "were the children to be relocated to Australia, the consequence would be the replacement of the mother's almost equal parenting role with what in effect would be bi-annual visits of a few weeks each.

On the other hand, one may argue that a non-relocating parent may have lost the right to being a joint caregiver of the child, but he or she will retain most of the parental rights as per the law. He or she would still have to provide for the maintenance and care of the child, and will see the child as much as is possible.

Therefore, parental rights and responsibilities are affected by the relocation of the children to another country with the relocating parent, but the most basic rights and responsibilities that a parent has towards their child cannot be taken away. The parent will have limited rights in some aspects like access to the child, but other rights and duties will remain intact.

### **3. GENERAL FACTORS CONSIDERED BY COURTS.**

Relocation of children with one parent usually comes about when, *inter alia*, the relocating parent has received better employment opportunities, better education is available for the children and a lack of familial support exists in the non-

---

<sup>4</sup> *Jackson v Jackson* 2002 (2) SA 303 (SCA).

relocating parent's current circumstances. However, the courts may look at other factors pertaining more to the overall best interest of the child.

According to Domingo,<sup>5</sup> the main points that courts consider are "*the best interests of the children, reason for relocation, interests of both parents, relationship between the children and both parents, as well as, the views of the children*".

Section 9 of the Children's Act puts emphasis of the paramountcy of the best interests of the child in all matters affecting that child. Courts generally evaluate the overall effect that the relocation would have on the child. Thus, the child's age, level of maturity, relationship with both parents and general level of adaptability are all areas the courts focuses on.

In *Ford v Ford*,<sup>6</sup> the court held that "*when the imponderables are 'weighed up' against the agreed opinion of all three experts that the child's interest would be best served by remaining in proximity to both parents, and that a separation from either parent would be prejudicial to her well-being, the decision of both the trial court and majority in the full court not to permit the appellant to relocate to the United Kingdom with her daughter, cannot be faulted*".

A court will not grant an order for relocation with a child if it is of the opinion that the child would suffer adversely by being separated from the other parent. However, if the relocation would cause minimal disruption to the child and the relocating parent is *bona fide* in his or her reasons for the relocation, such application may be successful before a court.

In *H v R*,<sup>7</sup> relocation was as a result of better employment opportunities, the high crime rate in South Africa, uncertainty of social services in the country, as well

---

<sup>5</sup> Domingo W "For the sake of the children: South African family relocation disputes" (2011) 14(2) *PELJ* at 161.

<sup>6</sup> *Ford v Ford* 2006 (3) SA 42 (SCA) at para 21.

<sup>7</sup> *H v R* 2001 (3) SA 623 (C).

as, the limited opportunities for white male South Africans. The court granted the relocation stating that *“the applicant has carefully considered the move and had done everything possible to ensure minimal disruption to the child’s relationship with the father”*.

#### **4. APPROACHES BY THE COURTS IN RELOCATION DISPUTES.**

##### **4.1. The pro-relocation approach.**

The pro-relocation approach was illustrated well in the *Van Rooyen* case when the court held that *“it is trite that the interests of the children are –all else being equal- best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must best must be done in the children’s interests to structure a situation whereby access by the non-primary caregiver is curtailed, but constant between him and the children is effectively preserved”*.

The pro-relocation approach advocates for relocation of children with the relocating parent, if such relocation is, all else being measured and found equal, in the best interests of the children.

In these cases, the relocating parent becomes the primary caregiver, and the other parent has limited rights of access to the children.

However, if good structures are put in place to effectively preserve the relationship of the children with the non-relocating parent, such as regular video calls and visits, then the children would be able to continue building strong relations with the non-relocating parent.

In *Godbeer v Godbeer*,<sup>8</sup> the court held that “*if the primary caregiver 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 best interest of the child*”.

Not all courts follow a pro-relocation approach. Other courts are more neutral in their approach.

#### **4.2. The neutral approach.**

According to *Domingo*,<sup>9</sup> in the neutral approach there is neither a presumption in favour of or against relocation and a court must on a case by case discretionary basis, review a proposed move in terms of the child's welfare and interests.

By taking a neutral approach to disputes involving the relocation of children to another country, a court places emphasis on all the relevant factors regarding the particular case at hand, without merely taking the approach that relocation is best if minimal disruption to the children would occur.

In *HG v CG*<sup>10</sup>, the parents had joint care of their fourteen-year-old son and a set of eleven-year-old triplets (two boys and a girl). The parents lived in separate houses in the same housing complex to help the children maintain close contact with both parents. The mother then wanted to relocate to Dubai as she was planning on marrying a wealthy businessman who worked there.

However, the court took into account the express wishes of the children who were all of a mature enough age to comprehend what relocation would mean for them and was able to adequately express their own wishes in that regard.

---

<sup>8</sup> *Godbeer v Godbeer* 2000 (3) SA 976 (W).

<sup>9</sup> *Domingo* 2011 PELJ 157.

<sup>10</sup> *HG v CG* 2010 (3) SA 42 (SCA) at para 352.

Therefore, if the children are mature enough to make their wishes known, a court will place much weight on those express wishes of the children. It may not always lead to relocation being granted simply because the relocating parent is *bona fide* and made adequate arrangements to the children to adapt well to their new circumstances.

The neutral approach acts to determine an unbiased end result for the children involved. No one specific formula exists in determining what is in the best interests of the children.

In *Schutte v Jacobs*,<sup>11</sup> the child was only four and a half years old, and relocation would not cause serious disruption to her life, and she would be able to adapt easily to her new environment.

Thus, one may deduce that no uniform approach exists in terms of relocation disputes. What would sway a court in its decision are all the factors of relevance and the specificity of the case at hand without generalising.

## **5. DO SOUTH AFRICA HAVE ADEQUATE RELOCATION LAWS?**

Currently, it is the Constitution, and the Children's Act that deal with relocation disputes in South Africa. The Children's Act contains various sections that are relevant to relocation and focuses mainly on the principle of "the best interests" of the child.

Courts mainly look to the Children's Act and case law when it must make a ruling on relocation of a child with one parent. Therefore, it may be deduced that insufficient legislative guidelines exists to assist courts in determining the best outcome for children during relocation disputes. New legislation must be enacted to adequately address this issue.

---

<sup>11</sup> *Schutte v Jacobs (Nr 2) 2001 (2) SA 478 (W)*.

## **6. CONCLUSION**

### **6.1. Concluding statement**

Relocation of children with one parent to another country is a complex area of South African family law. The Constitution and the Children's Act are in fact the only forms of legislation enacted to deal with relocation of children disputes between parents.

Other international instruments that give guidance with regards to relocation disputes are the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child.

The courts generally follow the principle of "the best interests" of the child to determine what would result would have the least adverse effects on the child involved.

#### ***6.1.1. Analytical summary***

Case law analysis has shown that many cases involving relocation disputes have come before South African courts post-Apartheid, and with the advent of a transformative constitutionalism. The rights of children are protected by the Constitution and are set out in the Children's Act. However, there is room for more appropriate legislation to be enacted to adequately deal with relocation disputes.

### **6.2. Recommendations**

It is my recommendation that more appropriate legislative guidelines be put in place to equip courts to better deal with relocation disputes. Legislation that would operate alongside the Children's Act and with the principles enshrined in the Constitution to adequately protect the rights of children and of both parents.

## **Bibliography**

### **Books**

Heaton *Family Law* 171

Heaton J *South African Family Law* 3<sup>rd</sup> ed (LexisNexis 2010)

### **Legislation**

Constitution of the Republic of South Africa, 1996

The Children's Act 38 of 2005

Divorce Act 70 of 1979

### **Case Law**

*Ford v Ford* 2006 (3) SA 42 (SCA)

*Godbeer v Godbeer* 2000 (3) SA 976 (W)

*H v R* 2001 (3) SA 623 (C)

*HG v CG* 2010 (3) SA 42 (SCA)

*Jackson v Jackson* 2002 (2) SA 303 (SCA)

*Schutte v Jacobs (Nr 2)* 2001 (2) SA 478 (W)

*Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C)

### **Journal Articles**

Domingo 2011 *PELJ* 157

Domingo W "For the sake of the children: South African family relocation disputes" (2011) 14(2) *PELJ*

### **International/regional documents/instruments**

African Charter on the Rights and Welfare of the Child

Convention on the Rights of the Child