

ARTICLE

**[Re]Location, [Re]Location, [Re]Location:
Considering the Relocation of the Non-Applicant Parent
alongside the Child and Applicant Parent in a
Relocation Dispute**

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Relocation law is one of the most difficult and controversial areas of family law. In determining the outcome in a relocation case, the New Zealand courts currently consider three options: the applicant parent and child relocate without the non-applicant parent, no parties relocate, or the applicant parent relocates without the child and non-applicant parent. This article advocates for a fourth solution: relocation is permitted but the non-applicant parent relocates alongside the child and applicant parent. As courts have discretion to adopt their own proposals in relocation cases, the power already exists to consider this alternative. This alternative is justified according to the paramountcy principle in s 4(1) of the Care of Children Act 2004: the child's welfare and best interests are the first and paramount consideration. This article argues that the mobility of the non-applicant parent should be a mandatory consideration by the court in every relocation case because it has the potential to be the outcome that is in the best interests of the child. This proposal is justified on both theoretical and legal grounds. Parents have ethical duties to put their child's interests above their own. These duties exist post-separation, as parenthood binds ex-partners together post-divorce. Additionally, applicant parents' freedoms are unequally restricted compared to those of non-applicant parents. The relocation of all parties reconciles the competing "best interests factors" in a relocation case, fulfilling many common best interests principles. In particular, it reconciles the principle that it is usually in the child's best interests to have a relationship with

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both parents with the principle that the wellbeing of the applicant parent affects the wellbeing of the child. Thus, this alternative has the potential to be the best solution in relocation cases. Courts that do not consider this option fail to inquire truly into what is in the best interests of the child. As this is the only role of the court in parenting cases, this represents an injustice to New Zealand children.

I Introduction

We all know what is best for children. It is best that they are brought up in happy homes with both parents. But, unfortunately for children, life is not like that.

—Mary Hayes¹

Happy families do not go to court. It is only when relationships between family members break down beyond repair and joint decisions become impossible that they litigate their cases. In the courtroom, parties are placed in a hostile adversarial system and forced to argue over the most intimate parts of their lives. This high-pressure, emotionally charged experience makes it difficult to find good or easy solutions. Perhaps nowhere is this more prominently seen than in the area of child relocation, widely seen as one of the most controversial and challenging dilemmas in family law.² Relocation cases involve a parent, post-separation, seeking to move with their child to a new location with their ex-partner opposing the proposed move. Relocation disputes are the so-called “San Andreas Fault” of family law: an area of extreme stress where a major earthquake is likely to occur.³ Cases often involve two parents who genuinely care about the wellbeing of their child, both having legitimate interests that will be affected by the decision. Regardless of the legal “fairness” of the outcome in a relocation case, at least one party will see it as an unjust result.⁴

The Care of Children Act 2004 (COCA) governs the law on relocation in New Zealand. The Family Court of New Zealand is required under s 4 to consider the welfare and best interests of the child as the “first and paramount consideration” in determining the outcome of cases involving children such as relocation. Unfortunately, the search for the outcome in the “best interests” of a child often dissolves into a quest for the “least detrimental alternative” a court can conjure up, because an applicant parent almost never wishes to relocate exclusively for the child’s benefit.⁵ Against this backdrop, relocation cases are often described as a “dilemma rather than a problem: a problem can be solved: a dilemma is insoluble”.⁶ There is no “best answer” a judge can discover. It would likely be

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- 1 Mary Hayes “Leaving the Loved: Children of a Shrinking World” (2010) 20(1) AFL 25 at 25.
 - 2 Nicola Taylor, Megan Gollop and Mark Henaghan *Relocation Following Parental Separation: The Welfare and Best Interests of Children* (Centre for Research on Children and Families and Faculty of Law, University of Otago, June 2010) at 4.
 - 3 Patrick Parkinson, Judy Cashmore and Judi Single “The Need for Reality Testing in Relocation Cases” (2010) 44 Fam LQ 1 at 1.
 - 4 Tim Carmody “Child Relocation: An Intractable International Family Law Problem” (2007) 45 Family Court Review 214 at 214.
 - 5 W Dennis Duggan “Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation” (2007) 45 Family Court Review 193 at 198.
 - 6 Standing Committee on Legal and Constitutional Affairs *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (Parliament of the Commonwealth of Australia, August 2005) at [2.72].

best for the child if their parents stayed together in a happy relationship and lived in the same location. However, this is not an option in a relocation case. The decision will hugely affect the child's upbringing and development; because of this, finding the best solution is crucial. Due to the complexities of families and wisdom on what is best for children, there are necessarily high levels of judicial discretion, and judges can come to opposite, yet reasonable, conclusions on the same facts.

This article argues that in a relocation dispute, the court must be required to consider the option of a non-applicant parent's relocating alongside the child and applicant parent. This is justified because in some cases all three parties moving to a new locality could be in the best interests of the child. At present, relocation disputes are usually framed as a choice between two alternatives: the applicant parent relocates to the new locality with the child, or relocation is denied and the child stays in the present locality with the applicant parent. Occasionally, a third option arises where the applicant parent relocates without the child and day-to-day care transfers to the non-applicant parent. However, there is another viable alternative: all parties relocate. This alternative is rarely considered and often swept aside without sufficient deliberation. This article argues that this blunt dismissal is a mistake, and that judges and families are disregarding a viable alternative to the current treatment of relocation disputes that could be best for the child.

Part II of this article discusses how the courts currently deal with relocation cases, and the increasing prevalence of relocation in New Zealand. It justifies the paramountcy principle in relocation cases, which states that the child's best interests and welfare are the first and paramount consideration because of the inherent vulnerability of children.

Part III discusses the discretion the court has in relocation cases, including its ability to adopt its own proposal. It outlines the status in New Zealand relocation law of the consideration of the non-applicant parent's mobility. It also argues that the non-applicant parent's relocation alongside the other parties in a relocation dispute is a realistic proposal that the court could, and should, adopt.

Part IV deals with the theoretical justifications for making the non-applicant parent's mobility a mandatory consideration in overseas relocation cases. The unique nature of the role of "parent" bestows ethical duties onto parents that require them to put the needs of children before their own interests. Parenthood extends beyond parental separation and the courts and families must understand the retention of the family unit post-separation, and look for solutions that keep that unit functioning in the best interests of the child. Additionally, it is argued that by failing to consider the mobility of the non-applicant parent, the court is treating the day-to-day care and contact of parents unequally, at the expense of finding an outcome truly in the best interests of the child.

Finally, Part V explores the relationship between the mobility of the non-applicant parent and the paramount consideration. It is argued courts should be required to consider the mobility of the non-applicant parent because it could be in the best interests of the child. This Part assesses various factors in a best interests inquiry that could be satisfied by the non-applicant parent's moving with the applicant parent and child. Notably, the non-applicant parent's relocation has the potential to reconcile s 5(e) of COCA—the continued relationship with both parents—and the improved wellbeing of the primary caregiver. This Part highlights that this proposal has the potential to be the "least detrimental" solution to an extremely complicated area of the law.

It is worth noting that this article is confined to theoretical and statutory justifications for considering the non-applicant parent's mobility. This alternative comes with many practical difficulties outside the scope of this article (not least the court's inability to compel

a non-applicant parent to relocate). This article limits itself to arguing for the *consideration* of this alternative option in relocation disputes, where it could be in the best interests of the particular child in the case.

II Relocation Law in New Zealand

A *Relocation: a growing issue*

Relocation disputes are a central issue in modern child law.⁷ Multiple factors have led to an increase in relocation disputes in recent years. First, there has been an increase in relationships between people from different localities. This could be due to the fact that mobility has increased to and from New Zealand.⁸ More New Zealand residents are born overseas and more New Zealand-born citizens travel overseas, in part due to the cheaper cost of travel.⁹ Advancements in technology have made it easier to communicate across distances, making entering and sustaining relationships easier with people in different localities.¹⁰ When a relationship breaks down, a person from a different country may wish to return “home”. Secondly, changes in the nature of the family unit have led to an increase in relocation cases. Most importantly, there is an ever-increasing number of relationship breakdowns.¹¹ This results in more litigation and, when paired with population mobility, more relocation applications. Further, a societal shift towards shared care has resulted in fathers being more involved in their children’s lives both pre- and post-separation, which has in turn resulted in increased litigation over care arrangements when parents separate.¹² This litigation includes disputes over proposed relocation.

B *Current law in New Zealand: Care of Children Act 2004*

It is important to have a clear understanding of how the law operates to comprehend how judicial consideration of the non-applicant parent’s mobility would function. COCA governs relocation law in New Zealand. There is no provision referring to or defining “relocation”. However, it is generally defined as a child’s change of residence. Both parents are usually joint guardians of the child with the right to determine important matters affecting the child, including their place of residence.¹³ Relocation fits neatly within this provision, as it is a proposal to change a child’s residence. Parents must act jointly in regard to their child;¹⁴ therefore, one cannot unilaterally decide to relocate when it would frustrate the relationship the child enjoys with the other parent. If parents cannot agree on a guardianship matter, they can apply to the court to exercise its discretion under s

7 Rob H 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” (2012) 24 CFLQ 110 at 110.

8 Pauline Tapp and Nicola Taylor “Relocation: a problem or a dilemma?” (2008) 6 NZFLJ 94 at 98.
9 At 94.

10 Patrick Parkinson *Family Law and the Indissolubility of Parenthood* (Cambridge University Press, New York, 2011) at 152.

11 Tapp and Taylor, above n 8, at 94.

12 Frances Judd and Robert George “International Relocation: Do We Stand Alone?” [2010] Fam Law 63 at 63.

13 Care of Children Act 2004, ss 17, 16(1)(c) and 16(2)(b).

14 Section 16(5).

46R(1) to make any order it thinks proper.¹⁵ Additionally, in certain circumstances, a guardian may apply for relocation via a parenting order under s 48.

C *The paramount consideration*

(1) Welfare and best interests in child law

The overriding principle in child law is articulated in s 4(1) of COCA: “The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration.” This consideration is often seen as a “trump” over all other considerations.¹⁶ The focus in judicial determination is on the *child’s* care, not the parents’ rights.¹⁷ Thus, prima facie, the parent’s wishes and needs are irrelevant, except where they affect the child.¹⁸ In relocation cases, it is important to remain focused on the paramount consideration. When judges or commentators lose this focus, they subvert the paramountcy principle and thus undermine the cornerstone of child law in New Zealand and many other jurisdictions.

(2) Justification for the paramountcy principle

The primacy of best interests in child law is justified because children are inherently vulnerable. Mark Henaghan is a strong advocate of the paramountcy principle because in family law disputes it is the child who is the most vulnerable person and thus most likely to be exploited or overlooked.¹⁹ Children, especially young children, have little to no perception of what decision will be in their best interests in the short and long term as they are still growing and so require protection from interferences in their wellbeing. They are uniquely vulnerable in a way that adults are not.

Relocation decisions can make children particularly vulnerable. While relocation can be framed positively, especially for the applicant parent who is often returning to their home country with better family support and employment opportunities, it is truly *dislocation* for the child.²⁰ The applicant parent returns to the place they are most comfortable, but the child is often moving away from their life, routine and support network.²¹ Research shows that high mobility for children can result in higher risks of social and behavioural problems.²² This vulnerability can be mitigated, but it requires the court’s focus to be on the child and their best interests, as there may be no one else to concentrate on them. In relocation cases, there is the possibility that the child could suffer from consequences of a permitted relocation through the loss of stability and damage to their relationship with the non-applicant parent. Equally, without this focus, a denial of relocation by an overly cautious judge may force a child to stay in a locality with a primary caregiver who cannot give them the support they need. In order to prevent negative

15 Section 46R(4).

16 Paul von Dadelszen “Relocation: the First and Paramount Consideration” [2011] IFL 63 at 64.

17 Taylor, Gollop and Henaghan, above n 2, at 64.

18 Mark Henaghan and others *Family Law in New Zealand* (17th ed, LexisNexis, Wellington, 2015) at 58.

19 Mark Henaghan “Legally rearranging families: Parents and children after break-up” in Mark Henaghan and others (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 307 at 331.

20 Parkinson, above n 10, at 178.

21 At 178.

22 At 178.

consequences for the child, the court must focus on these best interests because the child cannot do so for themselves.

This vulnerability has led to the New Zealand (and Australian)²³ courts adopting what Richard Chisholm terms the “strong view” of the paramountcy principle.²⁴ This requires judges to consider only factors that are *directly* relevant to the best interests of the child; in effect, the trump against all other considerations.²⁵ Jonathan Crowe and Lisa Toohey argue that for the strong view to be legitimate, there must be justification for its departure from the law’s commitment to equality because the strong view places the interests of one group (children) above everyone else.²⁶ The strong view is justified based on the vulnerability of children. Children cannot articulate or advocate for their own interests, they are often subject to decisions of other parties (guardians and courts), and they are at a stage of development where any changes in their upbringing can have severe and long-lasting consequences. As such, the strong view is justified on the basis that children are intrinsically vulnerable and must be protected by the courts, despite the apparent contradiction to the law’s commitment to treating all groups of people equally.

(3) Best interests in relocation decisions

Because children are involved, relocation disputes are governed by the paramountcy principle. A relocation inquiry is a question of whether it is in the *child’s* best interests to relocate, not whether the parent should be allowed to relocate.²⁷ However, the child-focused nature of the inquiry is “often overlooked in the heat of relocation battles” and it can become an arena for parents’ rights and interests.²⁸ Adults are parties to the proceedings, and they have legitimate interests that are affected by the outcome. Parents’ lives are intimately connected to their children’s, potentially blurring the line between understanding what is good for the child and what is good for the parent. This can skew the focus of a relocation case, directing it towards adults’ interests. Adult-focused judicial decisions can result in outcomes that are “not detrimental to” the child, rather than outcomes that are in the child’s best interests. For instance, a proposed relocation may not harm the child significantly, but it may bring significant disadvantages to an applicant parent’s right to freedom of movement, their mental wellbeing and support networks. If a court allows relocation based on these factors, it may not be in the child’s best interests, although it may not be detrimental to them. The child may actually be best remaining in the locality with both parents. Even if this hinders the applicant parent’s freedom of movement, it is the correct result based on the paramountcy principle and the child focus of the inquiry. This reasoning was used to deny relocation in the leading Australian relocation case of *U v U*.²⁹ The majority confirmed that the role of the court was to figure out what care arrangements would serve the best interests of the child.³⁰ Although the

23 Jonathan Crowe and Lisa Toohey “From Good Intentions to Ethical Outcomes: The Paramountcy of Children’s Interests in the Family Law Act” (2009) 33 *Melb U L Rev* 391 at 396.

24 Richard Chisholm “‘The paramount consideration’: Children’s interests in Family Law” (2002) 16 *AJFL* 87 at 89.

25 Crowe and Toohey, above n 23, at 395.

26 At 393.

27 Peter Boshier “International Family Justice from a New Zealand Perspective” [2008] *IFL* 149 at 152.

28 Taylor, Gollop and Henaghan, above n 2, at 65.

29 *U v U* [2002] *HCA* 36, (2002) 211 *CLR* 238 at [82].

30 At [82].

mother had a legitimate interest in returning to India, where her wellbeing would improve, relocation was not what was best for the child and was thus denied.³¹

(4) How the court determines “best interests”

Family law is fact-specific. It is “*this* child with *this* father, *this* mother, ... and *these* particular surrounding circumstances”.³² It is the court’s role to ascertain what outcome is in the best interests of the child in their particular circumstances.³³ Case law in this area is generally unhelpful as each inquiry has different questions and facts that must be examined afresh. New Zealand courts have confirmed “[t]here is no room for a priori presumptions” in relocation law.³⁴ Accordingly, the New Zealand Court of Appeal has distinguished relocation decisions from the English and Welsh courts that give a priori weighting to the applicant parent’s wellbeing.³⁵

(a) Considerations

The fact-specific nature of relocation cases allows judicial discretion to determine what is in the best interests of the particular child in a case. While judges do not rely on precedent or rigid tests, certain factors are used to ascertain what is in the child’s best interests. New Zealand courts approach relocation law by weighing factors that affect the child’s best interests to determine the appropriate outcome.³⁶ These factors are the principles listed in s 5 of COCA, as well as any other considerations the court deems relevant to the child’s best interests.

The s 5 principles are as follows:

- (a) a child’s safety must be protected and, in particular, a child must be protected from all forms of violence ... from all persons ...
- (b) a child’s care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, ...
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child’s identity (including, ... culture, language, and religious denomination and practice) should be preserved and strengthened.

In a leading New Zealand relocation case, *Kacem v Bashir*, the Supreme Court confirmed no s 5 principle has more weight than any other; rather, the weighting depends on the specific circumstances of the case.³⁷ In *Kacem*, the mother appealed on the ground that

31 At [82].

32 Henaghan and others, above n 18, at [6.112].

33 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [19].

34 *D v S* [2002] NZFLR 116 (CA) at [33].

35 At [47].

36 Boshier, above n 27, at 152.

37 *Kacem v Bashir*, above n 33, at [21].

the Court of Appeal erred in giving more weight to the factors in ss 5(b) and 5(e) of COCA (now ss 5(e) and 5(a)).³⁸ The majority of the Supreme Court held that the Court of Appeal did err, but that it was not material.³⁹ They held that the only exception to equal weighting is when the child is at risk of violence.⁴⁰ This is based on the law's zero tolerance towards violence against children.

Henaghan identifies additional factors to take into account in a best interests inquiry from *Stadniczenko v Stadniczenko* and *D v S*,⁴¹ the two leading cases prior to *Kacem*: the wellbeing of the applicant parent when it affects the wellbeing of the child;⁴² the reason for the move and distance of the move;⁴³ the importance of freedom of movement (although this cannot trump best interests);⁴⁴ physical, mental and emotional welfare, which must all be taken into account;⁴⁵ the absence of gender bias;⁴⁶ and the longevity of existing arrangements.⁴⁷ The court must consider all these factors. However, two factors have become more prominent in relocation law than others: the importance of the continuing relationship of the child with the non-applicant parent, and the effect of the applicant parent's wellbeing on the child's wellbeing.⁴⁸ These factors will be discussed in Part V.

(b) Difficulties

The inquiry into what is in a child's best interests in a relocation case is fraught with difficulties as there is an overabundance of variables and discretion. This results from the fact that judges never truly "know" what is in a child's best interests.⁴⁹ In determining what is best for the child, both the immediate needs of and long-term benefits to the child should be considered.⁵⁰ This is a predictive assessment.⁵¹ However, it is impossible for judges to predict what will happen to a particular child in future circumstances. In the words of Judge W Dennis Duggan:⁵²

The law pretends that we can determine with some high degree of predictive accuracy whether a move by a child with one parent away from the other parent will be in a child's best interest—we can't. The truth is this: there is no evidence that our decisions in these types of cases result in an outcome that is any better for the child than if the parents did rock-paper-scissors.

Relocation disputes involve many variables, and outcomes depend on the emotions and whims of parties. This makes it even harder to predict what is in the child's best interests, especially when judges must compare very different alternatives for the child's care.

38 At [6].

39 At [45].

40 At [47]. See Care of Children Act, s 5(a).

41 *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (CA); and *D v S*, above n 34.

42 *Stadniczenko*, above n 41, at 500.

43 At 500.

44 *J v C* [1970] AC 668 (HL) at 710–711; and *D v S*, above n 34, at [30].

45 *D v S*, above n 34, at [32].

46 At [34].

47 At [35].

48 Lord Thorpe "Relocation: The Search for Common Principles" [2010] IFL 241 at 242.

49 Tapp and Taylor, above n 8, at 95.

50 Taylor, Gollop and Henaghan, above n 2, at 65.

51 *D v S*, above n 34, at [33].

52 Duggan, above n 5, at 193.

Judges are often unable to rely on research, as research on what is in a child's best interests is scarce.⁵³ The sheer number of resources required to predict what is best for the child magnifies the harm caused by sparse information.⁵⁴ With minimal research and a lack of resources, in addition to the fact-specific nature of the inquiry, it is understandable that judges have difficulty in determining relocation cases. This is compounded by the constant change in knowledge of what is in the child's best interests.⁵⁵ To aid judges in this inquiry, more frequent and substantial research is needed. Currently, there are no follow-up procedures to evaluate the consequences of these decisions.⁵⁶ Because it is a difficult area of the law with scarce resources, it is important that the court considers all alternatives in a relocation case. Otherwise, it risks missing a valuable solution to a relocation case that could be in the best interests of the child. In some cases, this solution could be that the non-applicant parent relocates with the applicant parent and child.

III The Non-Applicant Parent's Mobility

This article argues that in relocation cases the court should be required to consider the option that the non-applicant parent relocates with the applicant parent and child.

A Judicial discretion

(1) Judicial discretion regarding best interests

There is wide judicial discretion in family law due to its fact-specific nature and the inability to rely on rules or precedent.⁵⁷ The term "best interests" is extremely broad and there is wide scope for discretion.⁵⁸ To determine best interests, judges weigh the importance of each factor and determine which override others to come to an outcome *they* believe is in the child's best interests.

Judicial discretion can be a double-edged sword in relocation law. Patrick Parkinson argues that "child's best interests" is a rhetoric used to mask policy positions on the weight adults' interests should be given.⁵⁹ In this way, judicial discretion can be used to manipulate the best interests exercise into an inquiry as to which parent's rights should prevail. Adults' interests are cloaked in the language of "best interests" and appear to conform to the paramountcy principle. The test in the English case of *Payne v Payne* uses "best interests" as a mask for the policy position that the applicant parent's wellbeing is the most important consideration.⁶⁰ This creates an illusion that courts follow the paramountcy principle, while they illegitimately promote adults' interests over those of children. As long as judges can frame their considerations with reference to the child's interests, they have discretion to come to whatever outcome they wish. This can be dangerous to outcomes that are truly in the best interests of the child.

53 Taylor, Gollop and Henaghan, above n 2, at 7.

54 Tapp and Taylor, above n 8, at 94.

55 Hayes, above n 1, at 32.

56 Taylor, Gollop and Henaghan, above n 2, at 7.

57 Hayes, above n 1, at 30.

58 Crowe and Toohey, above n 23, at 393.

59 Parkinson, above n 10, at 165.

60 *Payne v Payne* [2001] EWCA Civ 116, [2001] 1 FLR 1052.

However, judicial discretion in relocation law can be genuinely exercised to incorporate the legitimate consideration of the mobility of the non-applicant parent. There are no rules prescribing what considerations judges can and cannot take into account. When used legitimately, judicial discretion allows relocation law to remain adaptable and new considerations to be made a routine part of the best interests inquiry.

(2) Court's discretion to adopt its own proposal

Moreover, in relocation cases, the court has discretion to adopt its own proposal. It is not limited to those put forward by the parties. This discretion is especially important when considering the proposal that the non-applicant parent relocate alongside the child and applicant parent. This is because, in reality, neither parent is likely to put the mobility of the non-applicant parent at issue in the proceedings. Considering this option would be a legitimate exercise of judicial discretion and may benefit the child if it is in their best interests.

In relocation cases there are generally four proposals for the court to consider:

- (1) The child relocates with the resident parent.
- (2) Neither the child nor resident parent relocates.
- (3) The child does not relocate and there is a change of resident parent.
- (4) The child relocates with the resident parent and the contact parent also relocates.⁶¹

The court's role is to decide which option it believes is in the child's best interests. Unfortunately, relocation cases usually disintegrate into a contest between the first and second options. The third option is sometimes considered if the applicant parent's wish to relocate is strong and they are committed to moving with or without the child. However, it is the fourth option—the one for which this article advocates—that the court barely considers. This is despite the fact the court can, theoretically, consider and adopt it. Even when the court does consider this option, it does not usually deem it a viable solution.

In his concurring judgment in leading Australian case *U v U*, Hayne J contends it would be wrong for judges to consider only the proposals put forward by the parents.⁶² To do so would confine the best interests inquiry to what the *parents suggest* are in the child's best interests, and skew the focus of the inquiry to the parents' wishes.⁶³ Parents' own interests often inform their proposals to the court, and the court may not consider an outcome that is actually in the child's best interests if it is not put forward by either of the two litigating parties. This would undermine the court's responsibility to uphold the paramountcy principle.

Moreover, to confine the inquiry to what the parents propose assumes the non-applicant parent will remain in the same locality, which is misguided. In *U v U*, all three proposals considered by the majority assumed the father would remain in Australia.⁶⁴ This explicitly contradicts the rule against a priori presumptions.⁶⁵ It is wrong to assume a non-applicant parent could not also relocate to be near their child and to continue their relationship with them.⁶⁶ While on the facts of some cases the non-applicant parent's

61 Garry Watts "Can we go or must we stay? Being able to relocate with the children" (2002) 40(10) LSJ 66 at 67–68.

62 *U v U*, above n 29, at [171].

63 At [171].

64 At [173].

65 *D v S*, above n 34, at [33].

66 *U v U*, above n 29, at [175].

mobility may be practically impossible, this should not be an assumption; the non-applicant parent's mobility should still be considered a legitimate option.⁶⁷ The non-applicant parent should be required to justify with good reason their need to remain in the current locality,⁶⁸ similar to the way an applicant parent is required to provide good reasons for the proposed relocation. Hayne J argues that, just as an applicant parent is asked what they will do if relocation is not permitted, the *non-applicant* parent should be asked what they will do if relocation *is* permitted.⁶⁹ Such questions should be put to the non-applicant parent so the court has maximum information when considering all *four* alternatives in a relocation dispute. This is in line with the court's jurisdiction to adopt its own proposal in relocation cases, as long as it is in the child's best interests. Failing to consider all alternatives potentially deprives the child of a solution that is in their best interests.⁷⁰ Judges have the ability to take into account a wide variety of factors when deciding relocation cases, and this includes the ability to consider the mobility of the non-applicant parent.⁷¹ More than that, the wide discretion embedded in a true best interests inquiry to find the best solution for the child actually *requires* judges to consider the non-applicant parent's mobility.

The main basis for requiring the court to consider all alternatives, including the non-applicant parent's mobility, is the paramountcy principle. Proper adherence to the paramountcy principle could result in an outcome where it is deemed best for the child that all three parties relocate. If all three parties relocate together, the child gains the benefits of relocation while maintaining a relationship with the non-applicant parent without the need for extensive travel.⁷² This is discussed further in Part V.

B Proponents of considering the non-applicant parent's mobility

Although discussion of the consideration of the non-applicant parent's mobility is scarce in literature and case law, it does have several prominent proponents. Most notably, Gaudron and Hayne JJ of the High Court of Australia refer to this consideration in *U v U*.⁷³ While neither judge's comments had any decisive impact on the case itself, Australian courts are now required to examine whether the non-applicant parent also has the ability to relocate.⁷⁴

Merle Weiner is a strong advocate for the non-applicant parent's relocation with the applicant parent and child.⁷⁵ She argues that parties should have to show as part of the best interests inquiry that the non-applicant parent either should or should not also relocate.⁷⁶ Leading English relocation law academic Robert George has also indicated his support for considering the mobility of the non-applicant parent in relocation decisions.⁷⁷

Despite this support, however, the non-applicant parent's mobility is still not sufficiently considered in the New Zealand courts. A few New Zealand judges have

67 At [174].

68 At [175].

69 At [175].

70 Merle H Weiner "Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation" [2007] 40 UC Davis Law Review 1747 at 1750.

71 At 1815.

72 At 1750-1751.

73 *U v U*, above n 29, at [35] and [175].

74 Parkinson, above n 10, at 163.

75 Weiner, above n 70.

76 At 1817-1818.

77 George, above n 7, at 118.

considered the possibility that the non-applicant parent could relocate alongside the child and applicant parent. Judge Burns in *NW v MW* indicated that the mobility of the non-applicant parent could be considered.⁷⁸ His Honour suggested there is an onus on both parents to persuade the court of their case, and the onus on the non-applicant parent includes an obligation to show why they cannot relocate, in addition to the obligation to show why the child should not relocate.⁷⁹ While Judge Burns did not engage in any thorough discussion of this, he did wonder, in allowing relocation, whether the father (the non-applicant parent) might “actively consider shifting to the Hamilton area to be nearer the children himself”.⁸⁰ This is a positive step towards the courts considering the non-applicant parent’s mobility. Judge Burns’ comments have since been referred to in several New Zealand cases but without further analysis or discussion on the issue of the non-applicant parent’s mobility. Most judgments simply confirm there is no legal onus on either party.⁸¹

There have been other mentions of the possibility of the non-applicant parent’s relocating, but in most cases these were but brief mentions or the possibility was dismissed immediately because the non-applicant parent did not *want* to move. In *Brown v Argyll*, the father (the non-applicant parent) was asked about the possibility of moving to Whakatane but, while the court said this was technically an option, the father was unable to do so due to his being the manager of two orchards in the current locality.⁸² *DLB v DLS* was not specifically a relocation dispute, but it involved a situation where a mother had moved to a new location with her child and then wanted to stay there.⁸³ The father opposed this and desired the child to return to Hawke’s Bay.⁸⁴ The court noted it was not that the father could not move to the Waikato, but that he did not want to move there (due to the negative view the mother’s family had of him).⁸⁵ In *Abbott v Blair*, the child had frequent contact with both parents under the status quo.⁸⁶ The mother wished to relocate and the judge noted the father would likely eventually have to move from the present locality to further his employment opportunities.⁸⁷ The judge indicated the non-applicant father’s ability to relocate to Hamilton as well could ameliorate the loss in relationship between father and child that would occur if relocation were permitted.⁸⁸ The judge refused to accept that the non-applicant parent’s relationship with the child was less important than his career or other relationships.⁸⁹ In this sense, the judge appreciated that a non-applicant parent would consider moving in some cases because of their love and devotion to their child. The non-applicant parent’s wish to maintain a meaningful parent-child relationship may convince them to relocate with the applicant parent and child in some cases. In the unusual case of *TEJ v ROJ*, the court only considered two options: both parents remain living with the children in New Zealand, or both return to the United States with the

78 *NW v MW* [2006] NZFLR 485 (FC) at [10].

79 At [10].

80 At [31].

81 *NW v MW*, above n 78, at [10]; *V v F* HC Wellington CIV-2006-485-1573, 1 December 2006 at [131]; *F v F* (2007) 26 FRNZ 370 (FC) at [33]; and *R v M* [2009] NZFLR 915 (FC) at [37].

82 *Brown v Argyll* [2006] NZFLR 705 (HC) at [22].

83 *DLB v DLS* [2007] NZFLR 263 (HC) at [11].

84 At [20].

85 At [74].

86 *Abbott v Blair* [2013] NZHC 2358 at [7].

87 At [4].

88 At [9].

89 At [9].

children.⁹⁰ Although relocation was denied, the case discussed the benefits of all parties relocating to a jurisdiction together.⁹¹

This selection of cases discusses the extent to which the non-applicant parent's mobility has been considered in relocation cases in New Zealand. While brief mentions have been made of the possibility, and the benefits the child could receive from it, it has yet to be properly considered as an alternative solution. There has been no full consideration of the issue and no discussion of how the non-applicant parent's mobility could be in the child's best interests. It is important that this change.

C A realistic proposal?

(1) Non-applicant parents do relocate

It is misguided to assume that taking the non-applicant parent's mobility into account is unrealistic based on the argument that the non-applicant parent would not contemplate moving with their ex-partner and child to the proposed relocation destination. Nicola Taylor, in her study of relocation in New Zealand, found that in a number of cases where the court permitted relocation, non-applicant parents subsequently moved to the relocation destination to be near their child.⁹² A study at the University of Sydney found six out of 24 surveyed parents moved to the relocation destination with their ex-partner and child.⁹³ Non-applicant parents can be just as devoted to their children as applicant parents, and they can make significant efforts to be near their children. The law should not assume the non-applicant parent would not move, because, first, there should be no a priori presumptions and, secondly, that is not true of all non-applicant parents.

(2) Courts consider the possibility

In most jurisdictions, the issue of whether a non-applicant parent should move with the applicant parent is "rarely, if ever, considered".⁹⁴ For the relocation of all parties to be a realistic alternative, judges must consider it and normalise it in relocation disputes. In the state jurisdictions of New Jersey, New York, Texas, Louisiana, Washington and Florida, all judges explicitly consider the non-applicant parent's mobility as a factor in relocation cases.⁹⁵ New Jersey is a good example of a jurisdiction that has successfully adopted consideration of the non-applicant parent's relocation. In *Rampolla v Rampolla*, the Appellate Division of the Superior Court of New Jersey emphasised that replicating the status quo in a new locality is an alternative that could benefit all parties.⁹⁶ The Court held that the non-applicant parent's mobility is a factor that must be considered in every relocation case.⁹⁷ Subsequently, the New Jersey Supreme Court outlined factors the court should consider in relocation disputes, including the question of the non-applicant parent's relocation.⁹⁸ While, realistically, most non-applicant parents may not be in a

90 *TEJ v ROJ* [2013] NZHC 511 at [144].

91 At [208].

92 Nicola Taylor "Relocation Following Parental Separation: International Research, Policy and Practice" (2013) 38 *Children Australia* 134 at 137.

93 Parkinson, above n 10, at 169.

94 Weiner, above n 70, at 1750.

95 At 1763.

96 *Rampolla v Rampolla* 635 A 2d 539 (NJ Super AD 1984) at 543.

97 At 543-544.

98 *Baures v Lewis* 770 A 2d 214 (NJ 2001) at 217.

position to relocate, that should not stop the courts inquiring into the possibility.⁹⁹ The proven success of considering the non-applicant parent's mobility in these United States jurisdictions shows it is a practical consideration New Zealand courts should not hesitate to adopt. It is merely an additional factor to consider in the best interests inquiry, and it contributes to a fuller, more multi-faceted approach to relocation—one that is still focused on the wellbeing of the child.

(3) Potential for prejudice

There is a legitimate concern for prejudice against the non-applicant parent. The consideration of the non-applicant parent's mobility may be used to prejudice the non-applicant parent by forcing them to admit they could be persuaded to relocate alongside the child. Alternatively, they may be forced to admit they would not relocate, and so risk looking like a bad parent. This is the same concern some applicant parents have currently: their agreement to stay in the current locality with the child if relocation is denied will make it more likely relocation is refused, but their admission that they will move regardless makes them look like a selfish parent.¹⁰⁰ Hayne J stresses that questions of what parents will do if the court's decision is not in their favour should not be a test of parental devotion.¹⁰¹ Judges should only consider admissions of this type as legitimate alternatives and use the information to reach a solution that more accurately reflects the child's best interests. To ensure parental devotion is not tested in this way, Gaudron J proposes that each alternative be evaluated separately so applicant parents are not prejudiced by any admissions they make.¹⁰² Further, these questions should be asked of both the non-applicant and applicant parents.¹⁰³ These measures should ensure parents are not prejudiced by their admissions in a relocation dispute. They will also make the process of deciding the child's best interests more transparent. The court will need the maximum amount of relevant information before it to make this decision.

IV Theoretical Basis for Considering the Mobility of the Non-Applicant Parent

The argument for requiring judges to consider the mobility of the non-applicant parent extends beyond the fact they have discretion that gives them the ability to do so. The argument for the mandatory consideration of the non-applicant parent's mobility in relocation decisions has several theoretical foundations. These include the ethical duties parents have to their children, the extension of the family unit after parental separation, and the unequal restriction on the freedom of the applicant parent.

A *Parental duties*

HLA Hart identifies four varieties of legal "responsibilities", one of which is "role responsibility".¹⁰⁴ A person with role responsibility occupies a place in a social organisation

99 Weiner, above n 70, at 1773.

100 *U v U*, above n 29, at [134].

101 At [175].

102 At [37].

103 Weiner, above n 70, at 1821.

104 HLA Hart "Varieties of Responsibility" (1967) 83 LQR 346 at 348.

that has specific duties attached to it to provide for others' welfare.¹⁰⁵ Specifically, a parent has a place in society with duties attached to them to provide for their child's welfare. A responsibility evokes a societal expectation of certain behaviour.¹⁰⁶ There is a broad consensus that parents have certain kinds of responsibilities (or duties) based on their role as a parent. For example, parents have a special responsibility to place their child's needs before their own interests.¹⁰⁷ Society expects parents to behave in certain ways in regard to their child, and to maximise their child's wellbeing. Moreover, the law imposes responsibilities on parents to provide for their child's best interests in this way.

A strong view of the paramountcy principle is often justified by these parental duties. Children make ethical claims on their parents that require their interests to be put first and for the parents to disregard their own interests for the sake of the child.¹⁰⁸ The High Court of Australia has made clear that parental duties can last a lifetime and curtail some freedoms and choices that parents would otherwise have.¹⁰⁹ Kirby J has stated that parents only "enjoy as much freedom as is compatible with their obligations with regard to the child".¹¹⁰ It is these duties that require parents to look after their children, provide for their welfare and wellbeing, and put their best interests first. While not always "fair" on parents, it is an innate part of the role. It is a parent's duty to do what is best for their child, and courts are required to affirm this duty by being child-focused in their decision-making in relocation cases.

Both parents have joint rights, duties and responsibilities regarding the day-to-day care of their child.¹¹¹ The continuation of these rights and responsibilities is often overlooked on separation, and it is forgotten that *both* parents retain them.¹¹² One cannot "divorce" from parenthood. The continuation of these duties and the requirement to work together as parents is both ethically based and prescribed by statute. Per s 5(b) of COCA, the care of the child is the responsibility of both parents, regardless of their relationship with each other. These common responsibilities are also prescribed by international law.¹¹³ The duties that parents have to their child require them to work together and to consider all alternatives that allow them to continue to exercise parental responsibility; this could include the relocation of both parents after separation to the same destination. It is often better for the child to have both parents close; as such, parents have a duty to consider all options that would keep both of them near the child. Additionally, to exercise parental duties together effectively, it is easier for parents to live in the same locality. Tim Carmody argues that a parent cannot discharge their parental responsibility merely because the child is in a different country.¹¹⁴ This validates the argument that the mobility of the non-applicant parent should be considered. A move by all parties keeps them close together and allows both parents to fulfil their "everyday" duties in regard to the child.

105 At 348.

106 Joanna Miles "Responsibility in Family Finance and Property Law" in Jo Bridgeman, Heather Keating and Craig Lind (eds) *Regulating Family Responsibilities* (Ashgate Publishing, Farnham (UK), 2011) 91 at 93.

107 Crowe and Toohey, above n 23, at 408.

108 At 408.

109 *U v U*, above n 29, at [92].

110 *AMS v AIF* [1999] HCA 26, (1999) 199 CLR 160 at [191].

111 Care of Children Act, s 16(5).

112 Henaghan, above n 19, at 352.

113 Convention on the Rights of the Child 1577 UNTS 3 (signed 20 November 1989, entered into force 2 September 1990), art 18.

114 Carmody, above n 4, at 229.

Parental duties—particularly the parent’s obligation to put the child’s interests above their own—may require a non-applicant parent to relocate even if they would prefer not to move. If parental duties require the parent to do whatever is best for the child, and the child would be better off relocating with the applicant parent save for the loss of relationship with the non-applicant parent, the non-applicant parent should be ethically required to assess the feasibility of relocating as well. If both parents relocate, the child would get all the benefits of relocation plus the benefit of maintaining their relationship with the non-applicant parent. Even if relocation is against the non-applicant parent’s interests, then, because of the duties they have to their child, the court should legitimately consider their mobility.

B Indissolubility of parenthood and parent partnership

The suggestion that parental duties do not end even after separation is reflected in Parkinson’s concept of “indissolubility of parenthood” and Weiner’s idea of “parent partnership”. Both theories essentially propose that parenthood does not end on separation, and parents must continue to cooperate in the best interests of the child.¹¹⁵ The theories emphasise the importance of both parents’ involvement in the child’s life and their obligations to share rights and responsibilities in relation to the child.¹¹⁶ This general idea is also found in s 5(c) of COCA, which sets out the principle that the child’s care, development and upbringing should be facilitated by the ongoing cooperation and consultation of both parents. Partnership ideology suggests that as well as having obligations to their child parents have obligations to work together in the best interests of their child.¹¹⁷ If parents are truly to work together, they must consider all options available to them. This means parents must still see themselves and their child as a family unit, despite their separation.

Marriage is dissoluble, but parenthood is not.¹¹⁸ Parents must still negotiate with each other about the logistics of financial and parenting arrangements.¹¹⁹ These continuing obligations of parenthood bind the two individuals together, despite separation.¹²⁰ Childless couples do not have these obligations. They can choose never to interact with their ex-partner again, whereas couples with a child must retain contact to handle arrangements concerning the child. Therefore, any decision by one parent in relation to the child has an impact on the other parent, such as a decision to relocate.¹²¹ While the parent proposing relocation may want to sever ties with their ex-partner, the child may not. Relocation results in less frequent contact between the child and non-applicant parent, and this can damage the relationship between them, which would usually not be in the child’s best interests.

The law should still conceive of parents as a unit—albeit a very different one from when they were together—as their individual choices have effects on the life of the other through their shared connection with the child. Often, this kind of relationship will require retaining the status quo, living in the current locality and keeping the arrangements decided upon separation. However, this is not the only option. Weiner justifies permitting relocation and

115 Parkinson, above n 10, at xii; and Weiner, above n 70, at 1808.

116 Weiner, above n 70, at 1808.

117 At 1809.

118 Parkinson, above n 10, at xii.

119 At 12–13.

120 At 13.

121 At 13.

requiring the non-applicant parent to follow if it is in the child's best interests, due to the obligation parents have to work together post-separation.¹²² She argues that considering the non-applicant parent's mobility is a natural progression from an understanding of partnership ideology as it applies to relocation disputes.¹²³ Partnership ideology recognises that parents continually have to cooperate and compromise in order to parent effectively, and this includes accommodating the other's participation in parenting.¹²⁴ This could mean agreeing to live in the same new locality to parent more effectively and create better outcomes for the child. The failure to consider the mobility of the non-applicant parent is a consequence of the pervasive view that parents should be able to live separate lives and not be tied together after separation.¹²⁵ But this is not the reality of parenthood post-separation. Considering the mobility of the non-applicant parent offers a solution to the best interests of the child dilemma and is grounded in an understanding of the reality of post-separation life for modern parents. The family is still a unit post-separation and courts should consider this when deciding what is best for the child.

C Equality of treatment of parents: freedom of movement

Children generally tend "to act as anchors" in relation to their parents' movements post-separation; while parents often move after separation, it is usually at a distance that allows them to continue to have a meaningful role in the child's life.¹²⁶ However, this is not always the case; sometimes, an application for relocation eventuates. When this happens, arguments about freedom of movement often arise.

The right to freedom of movement is important in an increasingly mobile society and should not be interfered with lightly.¹²⁷ It is a right protected in both domestic law and international human rights instruments.¹²⁸ Many individuals wish to move localities, and usually the law allows them to do so. However, ease of movement changes when a child is involved. In relocation disputes, a non-applicant parent's challenge to relocation attempts to restrict the applicant parent's freedom of movement. If relocation is denied, the court essentially forces the applicant parent either to remain in the locality or to move without their child.

Some pro-relocation commentators argue it is illegitimate for the state to force separated parents to spend their lives in the same vicinity.¹²⁹ However, New Zealand's child-focused approach to family law does not view the issue in this way. New Zealand courts recognise freedom of movement as an important right in a mobile society, but the child's welfare remains paramount, and a parent's right to freedom of movement cannot trump it.¹³⁰ A parent's freedom of movement can legitimately be restricted where it

122 Weiner, above n 70, at 1812.

123 At 1812.

124 At 1812.

125 At 1750.

126 Nicola Taylor and Marilyn Freeman "International Research Evidence on Relocation: Past, Present, and Future" (2010) 44 Fam LQ 317 at 321.

127 Carmody, above n 4, at 228.

128 New Zealand Bill of Rights Act 1990, s 18; and *Universal Declaration of Human Rights* GA Res 217A, III (1948), art 13.

129 Judith S Wallerstein and Tony J Tanke "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996) 30 Fam LQ 305 at 314-315.

130 *D v S*, above n 34, at [30].

conflicts with the obligations they have to their child.¹³¹ If it is in the child's best interests to deny relocation, the court will sacrifice the applicant parent's freedom of movement to comply with the paramountcy principle. This is the proper approach given the vulnerability of children.

While it is legitimate to restrict an applicant parent's freedom of movement if it conflicts with the child's best interests, it is important to discuss the uneven effect relocation law has in prejudicing the applicant parent's freedom of movement more than that of the non-applicant parent. It is important to explore solutions to relocation disputes that both benefit the child and uphold the applicant parent's right to freedom of movement. One such solution is the non-applicant parent's relocation.

In relocation disputes, the applicant parent is usually the primary caregiver of the child. If the applicant parent is not the primary caregiver, they usually have equal (or near equal) shared care. If a parent who is the primary caregiver wishes to relocate, they risk losing that status.¹³² After an unsuccessful relocation application, the applicant parent usually remains in the present locality to be near the child; thus, their freedom of movement is restricted. However, the non-primary caregiver, usually the non-applicant parent, remains free to move, and they can relocate wherever they choose even if relocation severs their relationship with the child. Non-applicant parents frequently do this, and courts are required to rearrange visitation routines to accommodate it without considering whether the non-applicant parent's move is in the child's best interests.¹³³ Severance or restriction of a parent-child relationship is usually contrary to the child's best interests, but the court does not have the power to restrict the freedom of movement of the non-primary caregiver. This is because the court has no jurisdiction to compel the non-primary caregiver to have any specific kind of contact with the child.¹³⁴ Thus, while the applicant parent's freedom of movement can be constrained by court order, the non-applicant parent's freedom remains intact.¹³⁵

Pauline Tapp and Nicola Taylor question why, if the law is committed to maintaining a child's relationship with both parents, it does not impose restrictions on the non-applicant parent from moving.¹³⁶ Preventing a non-applicant parent from moving away from the child would ensure contact between the parent and child is maintained, which, per s 5(e) of COCA, Parliament has determined is usually in the child's best interests. While this would not necessarily promote either parent's freedom of movement, it would rectify the inequality currently seen; both parents would be restricted from moving in the name of the laudable goal of promoting the child's best interests.

However, a better way of rectifying the inequality seen in relation to freedom of movement is to consider the mobility of the non-applicant parent in relocation disputes. A child's right to stay in contact with both parents and a parent's right to freedom of movement are not necessarily naturally in conflict.¹³⁷ If both parents move to the proposed

131 Carmody, above n 4, at 228.

132 At 163.

133 Weiner, above n 70, at 1797.

134 Parkinson, above n 10, at 51.

135 Although, in practice, due to the indissolubility of parenthood, often both parents' freedom of movement is constrained; the applicant parent's freedom of movement is restrained as a matter of law, and there is a practical restraint on the non-applicant parent, whereby they must stay within a reasonable distance from the applicant parent if they wish to remain close to the child. See Parkinson, above n 10, at 164.

136 Tapp and Taylor, above n 8, at 99.

137 Carmody, above n 4, at 230.

relocation destination, the applicant parent's freedom of movement would not be restricted and the outcome would still be in the best interests of the child. In some cases, the applicant parent's freedom of movement will be restricted if relocation is denied; in others, the non-applicant parent's freedom will be restricted if they are encouraged to relocate with the other parties. Either option could be in the best interests of the child. Even if the court decides on a traditional solution to a relocation dispute (for example, denying relocation), as long as it considers the mobility of the non-applicant parent as a legitimate option, it would not be promoting inequality. It would be *legitimately* restricting the applicant parent's freedom of movement. This is because the court would be restricting freedom of movement based on the child's best interests, to which freedom of movement must always yield, but after having fully considered an option that is consistent with the applicant parent's freedom of movement. In New Jersey, the Supreme Court, emphasising the need to ensure fairness between applicant and non-applicant parents, has required all courts in relocation disputes to enquire into the non-applicant parent's mobility.¹³⁸ There is no reason why New Zealand courts cannot do the same.

V Mobility and Best Interests

A *What is a true best interests inquiry?*

A true best interests inquiry weighs all factors relating to a child's welfare before reaching an outcome that is in the best interests of the child in their particular circumstances. Translating this into practice, courts in relocation disputes should consider all possible solutions that would serve the child's best interests, and discuss the option of the non-applicant parent's relocating alongside the applicant parent and child.

In *Kacem*, the New Zealand Supreme Court identified the tension in most relocation cases between "declining relocation because the best interests of the child are best served by the stability, continuity, and preservation of relationships" in the current locality, and allowing relocation because the child's interests would be better served in the new locality.¹³⁹ As discussed below, requiring the courts to consider the non-applicant parent's mobility has the potential to remove this tension. The non-applicant parent's relocation could remove the burden of travel on the child, promote stability for the child, and strengthen or preserve the child's cultural and linguistic identity, all of which would be in the child's best interests. The mobility of the non-applicant parent should therefore be a mandatory consideration in relocation cases.

B *Circumstances*

Each relocation case must be decided on its particular facts with no a priori presumptions, and sometimes certain factual circumstances make it more likely that the relocation of all parties would be in the best interests of the child. Such circumstances might be that the non-applicant parent is from the proposed relocation destination, that they have family and support networks there, or that they have employment opportunities there. While none of these circumstances is mandatory in order to consider the non-applicant parent's mobility, they do give more weight to the consideration.

138 *Baures v Lewis*, above n 98, at 222.

139 *Kacem v Bashir*, above n 33, at [23].

Cases in which the court has considered the non-applicant parent's mobility usually involve a non-applicant parent who is from the proposed relocation destination. Such was the case for Mr U in Australia,¹⁴⁰ Mr Lenz in the United States,¹⁴¹ and MW in New Zealand.¹⁴² In *NW v MW*, it was emphasised that both parents had originally moved from the Waikato to Auckland, and that MW still had connections in the Waikato (the proposed relocation destination).¹⁴³ Relocation is a lot easier if the non-applicant parent is from the proposed destination. It means the non-applicant parent is familiar with the place, the people, the facilities and the economic conditions, and they potentially have family and support networks there. This is the case whether relocation is domestic or international. Because the non-applicant parent would be returning to a place they previously called home, it is more reasonable to suggest they relocate alongside the applicant parent and the child.

Similarly, if the non-applicant parent has good employment prospects in the proposed relocation destination, their mobility becomes more relevant. Judge Burns found that the non-applicant parent in *NW v MW* had not made any inquiry into job opportunities in the Waikato, and had no evidence showing that he could not feasibly move to the Waikato with the applicant parent and his children.¹⁴⁴ In *Lenz v Lenz* the father, the non-applicant parent, was from Germany (the proposed relocation destination) and had employment opportunities there as well as a German business degree.¹⁴⁵ On this basis, the court noted it would be easy for the father to relocate with the children.¹⁴⁶ A non-applicant parent who can sustain their livelihood in the proposed destination will find it easier to relocate. This is an especially relevant factor where the applicant parent has limited employment opportunities in the present locality but could gain suitable, full-time employment in the proposed relocation destination. Such was the case in *U v U* for Mrs U, who was employed in Australia (the present locality) in part-time clerical and data entry work and relied on social security, but had been employed in the shipping industry, in which she was highly trained, when she was in Mumbai (the proposed relocation destination).¹⁴⁷ The juxtaposition in employment opportunities for Mr and Mrs U in the present locality, and the potential employment opportunities for both in the proposed relocation destination, made Mr U's relocation alongside Mrs U and their daughter a more likely solution. Living conditions for the child are likely to be better when both parents are economically independent. Thus, it could be in the child's best interests for both parents to move to a location where both could be gainfully employed.

Support networks are also crucial to the wellbeing of all parties in relocation cases. Lack of support network is relevant to the non-applicant parent as well as to the applicant parent. It is more appropriate to ask a non-applicant parent to consider relocating if they have friends or family in the proposed destination. Gaudron J held in *U v U* that judges should be required to consider the mobility of the non-applicant parent, particularly where that parent is from the proposed relocation destination, has professional qualifications from there, and has extended family living there—all factors that make relocation alongside the applicant parent and child a viable option.¹⁴⁸ Relocation would allow the non-

140 *U v U*, above n 29, at [2].

141 *Lenz v Lenz* 79 SW 3d 10 (Tex 2002) at 18.

142 *NW v MW*, above n 78, at [35].

143 At [35].

144 At [35].

145 *Lenz v Lenz*, above n 141, at 18.

146 At 18.

147 *U v U*, above n 29, at [13].

148 At [35].

applicant parent to live their life adequately while continuing to provide for the child's welfare and best interests.

The child's best interests are unlikely to require one parent living in a locality with no employment opportunities or support network.¹⁴⁹ Where both parents have prospects of a good life in a locality they have both previously called home, there are benefits to seriously considering the non-applicant parent's mobility. It is conceivable that a true best interests inquiry would require all parties to relocate, as both parents would be able to support the child, provide for their wellbeing, and maintain a relationship with them by having frequent contact with them. To confine solutions in relocation cases to either allowing or denying relocation prevents the court's reaching a solution that is truly best for the child and that best fulfils the court's commitment to the paramountcy principle.

C Fulfilment of best interests principles

The court's mandatory consideration of the non-applicant parent's mobility in a relocation case has the potential to fulfil many best interests principles.

(1) Relationship with both parents

A key principle in relocation cases is preserving and strengthening the relationship the child has with the non-applicant parent, and this includes considering the impact the proposed relocation may have on the closeness of that relationship.¹⁵⁰ This principle is found in s 5(e) of COCA and is used by the non-applicant parent in most, if not all, relocation cases to argue against relocation. It is the so-called "gold standard" of the child's best interests in New Zealand relocation law.¹⁵¹ Both statute and case law reinforce the idea that frequent, direct contact is the best way to facilitate the preservation and strengthening of the child's relationship with both parents.¹⁵² Despite this principle's significance in New Zealand relocation law, *Kacem* confirms it does not have a priori importance over other principles.¹⁵³ However, while there are no a priori presumptions in family law, there is nothing to prevent finding that the importance of the relationship the child has with both parents outweighs all other considerations on the facts of a particular case.¹⁵⁴ The facts of the particular case will determine the importance of the relationship the child has with their parents and the level of emotional security the child gains from that relationship.¹⁵⁵ Thus, the facts determine how much weight this factor has in the overall best interests inquiry.

Despite the fact-specific nature of the inquiry, it is accepted that most children thrive best when both parents have a parental role in their lives.¹⁵⁶ When parents separate, children tend to see both parents as equally important in their life.¹⁵⁷ Relocation frustrates the relationship a child has with the non-applicant parent because it makes it significantly

149 *Payne v Payne*, above n 60, at [52].

150 *Parkinson*, above n 10, at 171.

151 *Tapp and Taylor*, above n 8, at 98.

152 At 99.

153 *Kacem v Bashir*, above n 33, at [21].

154 *Carmody*, above n 4, at 230.

155 *Hayes*, above n 1, at 30.

156 At 25.

157 *Henaghan*, above n 19, at 380.

harder for the child to spend a substantial amount of time with that parent.¹⁵⁸ Increased distance and less frequent contact can prevent the relationship the child has with the non-applicant parent from developing.¹⁵⁹

The type of contact the child has with the non-applicant parent that results from relocation exacerbates the damage to the relationship. The loss of frequent interaction with the non-applicant parent is usually compensated with infrequent lump blocks of contact time, such as during holiday periods. However, these infrequent block visits cannot offset the loss in day-to-day activities with the non-applicant parent.¹⁶⁰ Many relocation judgments discuss the importance of children's partaking in ordinary, mundane activities with both parents, as this is a key part of the parent-child relationship.¹⁶¹ These types of activity are lost when a child relocates because the child may only see the non-applicant parent for a week or two every few months, and this can completely change the nature of their relationship. The non-applicant parent is no longer involved in certain important activities, such as helping the child prepare for school, taking them to extracurricular activities or helping them with homework. These are traditional parental tasks. Instead, the child and non-applicant parent are limited to block, "holiday"-style interactions that could change the dynamic of the parent-child relationship. Further, the loss in frequent and meaningful contact with both parents will likely affect the child's emotional wellbeing.¹⁶² This potential damage to the parent-child relationship is often a decisive factor in relocation cases and may be the reason for the court's denial of relocation, even where the applicant parent has good reasons for relocating. In *LH v PH* the court denied the mother's application for relocation despite her feeling isolated and unsupported in New Zealand.¹⁶³ The court determined she could function well as a parent in either New Zealand or Austria, and so the child's loss of relationship with the father was the decisive factor.¹⁶⁴

However, denying relocation is not the only way to fulfil this best interests principle. The non-applicant parent's relocation alongside the child and applicant parent is a solution that both prevents damage to the parent-child relationship and allows relocation. George argues that if the court is considering refusing relocation solely because of the detrimental effect it would have on the child's relationship with the non-applicant parent, it should consider whether that parent should also relocate.¹⁶⁵ Hanye J in *U v U* supported this view, and considered that in order to give effect to the principle that a child benefits from a relationship with both parents, the court should inquire into the non-applicant parent's mobility.¹⁶⁶ It is the interests of the *child* that are paramount, not the interests of both or either of the parents.¹⁶⁷ Considering the non-applicant parent's mobility has the potential to fulfil most, if not all, of the best interests principles in a particular case; therefore, the non-applicant parent's mobility is justified in being a mandatory consideration in relocation cases.

158 Carmody, above n 4, at 214.

159 Hayes, above n 1, at 25.

160 At 31.

161 Rob George "How do judges decide international relocation cases?" (2015) 27 CFLQ 377 at 392.

162 Deborah Eaton and Madeleine Reardon "Relocation after *K v K*" [2011] Fam Law 1093 at 1093.

163 *LH v PH* HC Auckland CIV-2006-404-5799, 21 March 2007 at [20].

164 At [20].

165 George, above n 7, at 118.

166 *U v U*, above n 29, at [176].

167 At [176].

There are many cases where the non-applicant parent's relocation would be the best option. In *U v U*, the counsellor's report indicated the child's interests would be best served by their having meaningful and frequent contact with both parents, but recommended relocation based on the mother's deteriorating wellbeing, which made it difficult for her to parent effectively.¹⁶⁸ No evidence was given as to whether the father could or would relocate with the mother and child to Mumbai.¹⁶⁹ This is remarkable given the finding in the counsellor's report that it would be best for the child to have a relationship with both parents, but also to relocate to alleviate the mother's distress and improve her parenting ability. This is the archetypal case in which the non-applicant parent's mobility would be an appropriate consideration—relocation is the best solution save for the loss of relationship between the child and non-applicant parent. In *U v U*, given the importance of the father-child relationship and the benefits of relocation to the child, the court, in a true best interests inquiry, should have considered the mobility of the father. Indeed, both Hayne and Gaudron JJ took this view.¹⁷⁰ The child's best interests would have been best served if all parties relocated to Mumbai. The child lost out by the court's failure to consider the father's relocation as an option.

(2) Wellbeing of the applicant parent

The “paradigm relocation case” is a case in which the court is able to reconcile the conflict between serving the applicant parent's wellbeing and serving the child's relationship with the non-applicant parent.¹⁷¹ The former is an important consideration because if the applicant parent is forced to stay in the present locality where they are severely unhappy, their wellbeing will suffer and this will in turn negatively affect the child's wellbeing.¹⁷² A child's best interests are served by their being brought up in a happy home, but this might be impaired if a parent is deeply unhappy or distressed.¹⁷³ The idea is that “[t]he parent cannot give what [they] lack.”¹⁷⁴ If a parent is not happy or stable, they are likely unable to provide a happy or stable environment for their child. Thus, a child will often benefit from relocation where relocation relieves the applicant parent of significant pressure and enables them to cope better with the demands of parenting and to contribute positively to the child's wellbeing.¹⁷⁵ The view taken by the English Court of Appeal is that for the child's best interests to be served they need an emotionally and psychologically stable primary caregiver.¹⁷⁶ Per the paramountcy principle, for the applicant parent's wellbeing to be a relevant factor, it must have a bearing on the child's best interests. New Zealand and overseas courts often believe it does.¹⁷⁷

In England, the positive effect of relocation on the applicant parent's wellbeing usually outweighs the detrimental effect of the child's loss of relationship with the non-applicant parent.¹⁷⁸ Because of this, England is seen as a “pro-relocation” jurisdiction.¹⁷⁹ However,

168 At [18].

169 At [16].

170 At [35] and [175].

171 Lord Thorpe, above n 48, at 242.

172 Hayes, above n 1, at 25.

173 Carmody, above n 4, at 221.

174 *Payne v Payne*, above n 60, at [31].

175 Carmody, above n 4, at 221.

176 Hayes, above n 1, at 26.

177 *Stadniczenko*, above n 41, at 152.

178 At 26.

179 Judd and George, above n 12, at 64.

New Zealand courts have explicitly rejected this approach.¹⁸⁰ The English view is heavily criticised as both promoting the applicant parent's rights under the guise of upholding the paramountcy principle and prioritising the applicant parent's desire to relocate over the child's relationship with the non-applicant parent.¹⁸¹ New Zealand courts instead view the applicant parent's wellbeing as a factor to be considered in a balancing exercise, without attaching to it any intrinsic weight.¹⁸²

Although it is not a principle codified in COCA, the applicant parent's wellbeing has been an important, and sometimes decisive, factor in New Zealand relocation cases. The Court of Appeal in *Kacem* held the wellbeing of the mother, who was experiencing psychological stress due to her isolation from her family, was relevant to the wellbeing of the child notwithstanding that it was not a principle in COCA.¹⁸³ Other cases confirm the parent's wellbeing as an important factor. In *S v O*, the High Court accepted that an applicant parent's wellbeing is relevant to the child's welfare and best interests because the parent's wellbeing affects their ability to parent.¹⁸⁴ In this case, the mother's wellbeing was held to be crucial to the wellbeing of her children.¹⁸⁵ In *RMB v ARZB*, the mother's depression—a result of her remaining in New Zealand—was a significant consideration because the child's best interests were linked to her psychological wellbeing.¹⁸⁶ In *K v G*, the Family Court found there was “a significant risk of deterioration to the mother's emotional state” if relocation was denied and this would affect her child.¹⁸⁷

It is usually best for the child if the applicant parent—usually the primary caregiver—is happy and secure, as this means they can provide a good environment for the child. Sometimes, this can be achieved by relocation. However, because relocation frustrates the child's relationship with the non-applicant parent, it would be in the child's best interests for the court to consider the possibility of the non-applicant parent's relocation alongside the applicant parent and child. This would reconcile two usually contrary considerations in relocation cases.

(3) Burden of travel

George argues that relocation may impose a huge burden of travel on the child.¹⁸⁸ Children in Taylor's study of relocation in New Zealand reported having to undertake not insignificant travel—by cars, buses, ferries and planes—to maintain their relationship with the non-applicant parent.¹⁸⁹ This amount of travel can be hugely strenuous for young children. The non-applicant parent's relocation alongside the applicant parent and child may alleviate this burden. The child would only have to move between two houses in the same locality. Considering the non-applicant parent's mobility for the purpose of addressing the burden of travel the child experiences is in the best interests of the child.

180 *D v S*, above n 34, at [47].

181 Taylor, Gollop and Henaghan, above n 2, at 55.

182 *D v S*, above n 34, at [47].

183 *Bashir v Kacem* [2010] NZCA 96, [2010] NZFLR 865 at [62].

184 *S v O* [2006] NZFLR 1 (HC) at [77].

185 At [103].

186 *RMB v ARZB* FC Dunedin FAM-2010-017-23, 2 November 2010.

187 *K v GFC* Dunedin FAM-2006-012-1068, 20 August 2008 at [47].

188 Robert H George “The Shifting Law: Relocation Disputes in New Zealand and England” (2009) 12 Otago LR 107 at 127.

189 Taylor, above n 92, at 138.

The child's best interests are rarely served by parenting arrangements that impose huge travel burdens.

Travel is burdensome not only for the child, but also for the parents, who bemoan the cost of travel, and this can lead to changes in contact arrangements.¹⁹⁰ There can be immense financial burdens associated with contact, and the child's transport can be particularly hard for parents who operate on budgets.¹⁹¹ Research shows that due to the financial and logistical difficulties of moving children from locality to locality, post-relocation contact arrangements are often overly optimistic and do not work as intended, costing more, in both time and money, than parents can afford.¹⁹² As a result, ambitious contact arrangements seldom remain in place for long. This further damages the relationship the child has with the non-applicant parent. The relocation of the non-applicant parent would relieve this financial and logistical stress, as the cost in time and money to travel within the same locality is far lower than that between two different localities.

(4) Stability

It is widely accepted that the child benefits most when there are fewer changes to their lifestyle post-parental separation.¹⁹³ This fact is generally used to support arguments against relocation, as relocation disrupts the status quo and affects the child's care, development and relationships.¹⁹⁴ However, as held in *Brown v Argyll*, the benefits of the status quo should not be accorded higher weight than other factors in a best interests inquiry.¹⁹⁵ If all other factors point towards relocation, it should be allowed. Moreover, it would be remiss to think maintaining the status quo is the only way to ensure stability. The relocation of the non-applicant parent alongside the applicant parent and child could allow for shared care living arrangements, which promote stability.¹⁹⁶ In some circumstances, the stability in the present locality could be recreated in the new locality if both parents are committed to working together. For this reason, the court should seriously consider the mobility of the non-applicant parent.

(5) Identity

Section 5(f) of COCA provides it is in the child's best interests that their identity be preserved and strengthened. A child's identity includes their culture and language, both of which may be enhanced if the child relocates. In cases where the child was born in a different country or whose parents are both from the same country, where the culture and language are different to those in the present locality, there would be real benefits to the child from relocating. For example, if the family were originally from Fiji, the child would benefit from relocating there because their Fijian cultural and linguistic identity would be strengthened. If all three parties relocated to Fiji, the child would reap the benefits from not only a strengthened identity, but also greater family support and maintained

190 Taylor, above n 92, at 138.

191 Parkinson, above n 10, at 174.

192 Judd and George, above n 12, at 65.

193 Hayes, above n 1, at 25.

194 *Brown v Argyll*, above n 82, at [55].

195 At [55].

196 Lawrence Berger and others "The Stability of Child Physical Placements Following Divorce: Descriptive Evidence from Wisconsin" (2008) 70 J Marriage Fam 273 at 282.

relationships with both parents. For this reason, a true best interests inquiry requires consideration of the non-applicant parent's mobility.

VI Conclusion

The court's only role in a child law case is to come to the decision that is in the child's best interests. The decision must be the best for the child out of all potential decisions. When the court fails to consider the possibility of the non-applicant parent's relocation alongside the child and applicant parent, it fails to execute this role properly. Currently in relocation cases in New Zealand, courts decide on one of the three following solutions: the applicant parent relocates with the child, all parties remain in the present locality, or the applicant parent relocates but the child does not. In enquiring only into these three options, the court may miss the solution that is in the child's best interests. This article has argued that, in some circumstances, it may be best for the child that all parties move to the relocation destination.

This article has sought to outline the justifications for the child-focused nature of relocation law and the theoretical and best interests justifications for considering the non-applicant parent's relocation. It has focused mainly on the rationale behind considering this option, and has not delved into the complications courts may face in practice. First, no New Zealand court has the power to compel a non-applicant parent to relocate with their child. As such, the court could only merely request that the non-applicant parent do what has been determined is in the child's best interests. Secondly, as briefly touched upon, issues arise as to prejudice and how the court would treat the non-applicant parent's refusal or hesitance to relocate. There would have to be mechanisms in place to ensure the court does not grant relocation simply because it assumes a devoted parent would follow their child and ex-partner to a new locality.

However, despite these practical difficulties, the mobility of the non-applicant parent should still be a mandatory consideration in determining the best outcome for the child. Normalising the inquiry into the non-applicant parent's mobility may cause the non-applicant parent to think seriously about moving and may facilitate the more effective functioning of post-separation family units. Jurisdictions such as New Jersey have shown that this consideration can have real benefits to children in relocation disputes if introduced properly.

The question of what arrangements would be best for a child post-separation is not a simple one, and experts generally have no more ability than non-experts to answer it.¹⁹⁷ Marital breakdown rarely produces ideal circumstances for the child. With so much up for debate, judges must adopt a rigorous best interests inquiry, one that requires consideration of the possibility that the non-applicant parent relocate alongside the applicant parent and child. This is the proposed "fourth alternative" in relocation cases.¹⁹⁸ In failing to consider this alternative, courts neglect their duty to protect and promote the interests and wellbeing of New Zealand children.

197 Henaghan, above n 19, at 344.

198 Watts, above n 61, at 67-68.