THE POWER OF A CUSTODIAL PARENT TO REMOVE THE CHILD FROM THE REPUBLIC OF SOUTH AFRICA AFTER DIVORCE

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1 INTRODUCTION

The purpose of this article is to look at when the custodial parent is allowed to remove the children in his/her custody from the Republic of South Africa after a custody order has been granted upon divorce. The primary focus will be upon how a balance is struck between the interests of the custodian and the interests of the non-custodian. It must always be remembered that a child’s best interests are of paramount importance in every matter concerning the child, with the result that the interests of the custodian and/or non-custodian are always subject to the interests of the child.

2 FACTORS WHICH DETERMINE THE POWER OF REMOVAL

Anne Louw shows that the power of a custodian to remove a child from South Africa is determined by four factors, to wit:

(a) Section 28 (2) of the Constitution in terms of which a child’s best interests are of paramount importance in every matter concerning the child;
(b) the provisions of the Guardianship Act 192 of 1993 which regulate the removal of legitimate children from South Africa;
(c) the extent of the common law parental power of the custodian; and
(d) the extent of the non-custodian’s right of reasonable access to the child after divorce in terms of the common law and/or the divorce order.

The position before and after the Guardianship Act 192 of 1993 will briefly be looked at before a discussion of the impact of different factors to determine whether the best interests of the children are served, will be considered.

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1 S 28(2) of the Constitution of the Republic of South Africa 108 of 1996. Hereafter referred to as the Constitution.
2 “The power of a custodian to remove a child from the country after divorce: some comments” 2003 De Jure 115 117-118.
3 Commencement date: 1994-03-01.
4 3 below.
2.1 Power of removal before the Guardianship Act 192 of 1993 or common law power of removal

Our law distinguishes between a general or undefined right of access on the one hand and a defined or specified right of access on the other hand.

2.1.1 General or undefined right of access

In terms of a general or undefined right of access the court in Theron v Theron\(^5\) formulated the power of the custodian to remove the child in the following words which is also a general formulation found in many other cases\(^6\):

“… there is no implication in the general right of access that the children, who are the subject of an order of custody, must be kept within the jurisdiction of the Court which grants the order.”

If the custodian then removes the child, “… he will not be infringing any definite right as between him and his former wife, and he will not be infringing any order of Court giving her any access.”\(^7\) However, even under these circumstances, the non-custodian has *locus standi in iudicium*\(^8\) to apply to court for an interdict to restrain the custodian from removing the child from the country\(^9\). To be successful with the application, he will have to show that the removal is not in the best interests of the child\(^10\).

2.1.2 Defined or specified right of access

\(^5\) 1939 WLD 355 362.
\(^6\) See also Etherington v Etherington 1928 CPD 220 222; Grgin v Grgin 1961 2 SA 84 (W) 85B-D where the court referred to the case of Myers v Leviton 1949 1 SA 203 (T) which is of the same view. See also Stock v Stock 1981 3 SA 1280 (A) 1284H-1285A: “As a general rule, and in the absence of any agreement or order to the contrary, the custodian spouse has the right to regulate the lives of the children and to have them with him, or her. This includes the right to remove the children from the jurisdiction of the Court which granted him/her custody of the children.”
\(^7\) Etherington v Etherington 1928 CPD 220 222.
\(^8\) See Theron v Theron 1939 WLD 355 360. Even a natural father of a child born out of wedlock had *locus standi in iudicium* prior to the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 came into operation, notwithstanding the fact that he has no *inherent* right of access or custody to the child – see in this regard *W v F* 1998 9 BCLR 1199 (N).
\(^9\) See especially in this regard *W v F* 1998 9 BCLR 1199 (N).
\(^10\) See 3.3 below.
However, a custodian’s common law right to decide where the children are to reside after divorce could be limited by a defined or explicit right of access of the non-custodian as explained in *Lecler v Grossman*11:

“Where of course the matter is further developed and the Court provides that access of a certain kind has to be given, for instance that the child may be taken away by the non-custodian spouse on certain days of the week, the Court’s order clearly goes beyond declaring the general right of reasonable access because there is an explicit statement of what in the Court’s authoritative opinion constitutes reasonable access. That is an effective ruling which must be observed until varied by consent or by the Court itself.”12

The right may also be defined in the sense that the custodian may not remove the child from the jurisdiction of the court without the consent of the non-custodian or that the child may not be removed further than a specified radius in kilometers from the court’s centre of jurisdiction. In these circumstances the child may only be removed if the consent is obtained or if the order in which the right of access is defined, is varied.

If consent is refused the order must be varied by the Court to be able to lawfully remove the children. This, as general rule, can only be done if “good cause”13 or “sufficient reason”14 for the removal can be produced and if it is in the best interests of the child15.

### 2.2 Power of removal after the Guardianship Act 192 of 1993

Since the Guardianship Act 192 of 1993 came into operation removal of children from the country is provided for in section 1(2) of the Act, which provides:

“(2) Whenever both a father and a mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right...

11 1938 WLD 41 44.
12 Also see *Taylor v Taylor* 1952 4 SA 279 (SR) 282D. See the same remark of Diemont JA in *Stock v Stock* 1981 3 SA 1280 (A) 1290B. It is interesting to note the approach that was followed in the majority judgement in *Johnstone v Johnstone* 1941 NPD 279 quoted by Rumpff JA in *Shawzin v Laufer* 1968 4 SA 657 (A) 663-664, but rightfully rejected by the appeal court on 666B-C, where it was held that the rights of the father are superior to the rights of the mother and children because of the fact that he as guardian has superior rights.
13 This is the common law requirement.
14 In terms of s 8(1) of the Divorce Act 70 of 1979 the order can only be varied if there is “sufficient reason”.
15 See the discussion 3.3 below.
or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of-

(a) …

(b) …

(c) the removal of the child from the Republic by one of the parents or by a person other than a parent of the child;

(d) the application for a passport by or on behalf of a person under the age of 18 years;

[Para. (d) substituted by s. 2 of Act No. 49 of 1997.]

(e) …”

The effect of the Guardianship Act 192 of 193 on the power of the removal of children from the country can be summarized in the following points:

(a) Both parents’ consent is required for the removal of children, whether they have agreed on this or not if both have guardianship.

(b) If a parent has no guardianship, his consent in regard with removal of children from the country in terms of the Act is not required, but that parent still has locus standi iudicii in terms of the common law to protect his right of custody or his right of access. For example if a court separates guardianship and custody and awards custody to one spouse and sole guardianship to the other spouse, the spouse with custody has no guardianship, but if the spouse with guardianship wants to remove the child from the country, the consent of the spouse with custody is still required, not in terms of the Guardianship Act, but in terms of the court order because the spouse has custody.16

3 OPPOSITION TO REMOVAL OR CONSENT TO RELOCATE REFUSED

The structure that follows and the discussion that is presented, are gathered from case law that have been studied. The structure is my interpretation of the case law and is presented as a tool by which the different factors that may impact upon the applicant’s application can be systematised.

16 See Anne Louw “The power of a custodian to remove a child from the country after divorce: some comments” 2003 De Jure 115 122-124.

17 See for example Van Rooyen v Van Rooyen 1999 4 SA 435 (C) especially at 437E-438A.
Structure if the removal is opposed/if the consent for removal is not obtained

Traditional approach  New approach

Preliminary issues:

Procedural matters  Motivation/reason

Mala fides  Bona fide

Many and different reasons

“good reasons”  “sufficient reasons”
(common law)  (S 8(1) of Act 70 of 1979)

Principle issue: best interests of child(ren)

Many and different factors inter alia

Custodial parent  Non-custodial parent  Wishes of children

All equal

Non-custodial parent

Custodial parent
All equal

Custodial parent  Non-custodial parent

Final remarks

Trends  The right to parental care  The Hague Convention

Non-custodian’s interests  Child’s wishes

These factors will be discussed and explicated in more detail in the following paragraphs.

3.1 Introduction

As the heading of this paragraph indicates it deals with the case where a spouse is opposed to the removal of the children from the country or where the required consent to remove the children is refused. Under both circumstances an application must be brought to Court and in both applications, the structure given above\(^\text{18}\) can serve as a tool to apply and indicate the impact and function of the different factors.

3.2 Preliminary issues

According to the case of \textit{Van Rooyen v Van Rooyen}\(^\text{19}\) two preliminary issues arise in applications for removal/relocation. The first relates to procedural matters and the second to the motivation (or reason) for the relocation. These two matters are subsequently discussed in the paragraphs that follow.

3.2.1 Procedural matters

\(^{18}\) 3.  
\(^{19}\) 1999 4 SA 435 (C) 437G-438A.
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The rule, as in civil matters, is that the onus is on the applicant to show on a balance of probabilities good cause why the application must be successful\textsuperscript{20}. However, the court needs not to consider itself bound by this rule and may mero motu call upon evidence irrespective of the wishes of the parties and that in substance the application is an investigation by the court acting as upper-guardian of the children\textsuperscript{21}. There is also no need to introduce new facts or changed circumstances since the custody order was made to show “good reason/cause” or “sufficient reason” to be successful to have it changed\textsuperscript{22}.

The evidence of an expert in the field of psychology or psychiatry must be well informed “… that he is there to assist the Court [and]\textsuperscript{23} [i]f he is to be helpful he must be neutral.”\textsuperscript{24 25}

3.2.2 Motivation/reason for removal/relocation

At the start of the application it must be determined what the reason or motivation for the removal is. It must be determined whether the reason for removal is mala fide or bona fide.

If the motivation for the relocation is mala fide, the application is dismissed\textsuperscript{26}. The reason is regarded mala fide if the parent is primarily influenced by vindictiveness and spite towards the other parent’s right of access in his/her decision to remove the child\textsuperscript{27}.

The motivation is regarded as bona fide if there is a genuine subjective belief that the relocation is in the best interests of the child\textsuperscript{28}. Many different reasons may be tendered for

\textsuperscript{20} Bailey v Bailey 1979 3 SA 128 (A) 136C; Jackson v Jackson 2002 2 SA 303 (SCA) 307G.
\textsuperscript{21} Shawzin v Laufer 1968 4 SA 657 (A) 662H-663A; “Also, from a procedural point of view, an application to vary an agreement is different from the ordinary application, in that the Court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show good cause, depart from the usual procedure and act mero motu in calling evidence, irrespective of the wishes of the parties. In the result, it could be said that, while in form there is an application for the variation of the order of Court, in substance there is an investigation by the Court, acting a upper-guardian; ….”. Referred to with approval by the court in Stock v Stock 1981 3 SA 1280 (A) 1290C-D. See also W v F 1998 9 BCLR 1199 (N) 1202D. Applied by the court in H v R 2001 3 SA 623 (C) 628A (also reported as Heynike v Roets [2001] 2 All SA 79 (C)). See also Jackson v Jackson 2002 2 SA 303 (SCA) 307G/H. See also Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437G where the court says: “It is that there is no onus in the conventional sense of the word. The court will evaluate, weigh and balance the many considerations and competing factors which are relevant to the decision whether the proposed change to the children’s circumstances is in their best interest.”
\textsuperscript{22} See in this regard Du Preez v Du Preez 1969 3 SA 529 (D) 532C-G approved by Bailey v Bailey 1979 3 SA 128 (A) 135136A-C. See also Havenga v Havenga 1988 2 SA 438 (T) 445C.
\textsuperscript{23} [and] – my addition.
\textsuperscript{24} Stock v Stock 1981 3 SA 1280 (A)1296E.
\textsuperscript{25} “The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him.”. Stock v Stock 1981 3 SA 1280 (A) 1296E/F. In Ford v Ford [2004] 2 All SA 396 (W) 403 the court was impressed by the fact that the expert witnesses were “… unbiased, honest and as having taken into account only what they believed was in the best interests of S.”
\textsuperscript{26} Theron v Theron 1939 WLD 355 360; Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437J-438A.
\textsuperscript{27} Lecler v Grossman 1939 WLD 41; Theron v Theron 1939 WLD 355 360; Bailey v Bailey 1979 3 SA 128 (A) 143D-E; Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437I-J.
\textsuperscript{28} Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437I.
removal. As indicated the test for *bona fides* is a subjective test. The following reasons have in cases been presented for relocation - education prospects for the children\(^{29}\); employment opportunities or prospects for the custodial parent and/or spouse\(^{30}\); strong family ties/loving and caring parents and siblings\(^{31}\); complete breakdown of communication since their divorce and the harmful effect of this upon the children\(^{32}\); owner of fixed property and holder of interests in a trust abroad\(^{33}\); bequests by family abroad to child\(^{34}\); family is not in South Africa\(^{35}\); continuing antagonism and lack of consideration\(^{36}\); assistance of family and friends would create a stable home which is in the interests of the child(ren)\(^{37}\); lack of appropriate accommodation\(^{38}\); inability to maintain children and custodial parent\(^{39}\); marriage to a person outside South Africa by the custodial parent\(^{40}\); unacceptably high crime rate\(^{41}\) and concern for safety of children\(^{42}\) in South Africa; uncertain state of the South African economy\(^{43}\) and future of the country in general\(^{44}\); overburdened social services in South Africa\(^{45}\); the increasingly limited opportunities for white male South Africans\(^{46}\); impact of AIDS in South Africa\(^{47}\); no chance of reconciliation and therefore the wish to leave the country and make home elsewhere\(^{48}\); excellent\(^{49}\), better and cheaper\(^{50}\) and extremely affordable\(^{51}\) medical services;

\(^{29}\) *Kerr-Cross v Kerr-Cross* 1939 WLD 168; *Bailey v Bailey* 1979 3 SA 128 (A) 133C, 137D-138H; *Stock v Stock* 1981 3 SA 1280 (A) 1292B; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 438F; *Godbeer v Godbeer* 2000 3 SA 976 (W) 979F-G; *Latouf v Latouf* [2001] 2 All SA 377 (T) 380d; *H v R* 2001 3 SA 623 (C) 626B-C; *Jackson v Jackson* 2002 2 SA 303 (SCA) 309D.

\(^{30}\) *Theron v Theron* 1939 WLD 355; *Grgin v Grgin* 1961 2 SA 84 (W) 87B; *W v F* 1998 9 BCLR 1199 (N) 1203B; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 438 B-C, E-F; *Godbeer v Godbeer* 2000 3 SA 976 (W) 979B-D; *Latouf v Latouf* [2001] 2 All SA 377 (T) 380a; *H v R* 2001 3 SA 623 (C) 626A, H; *P and Another v P and Another* 2002 6 SA 105 (N) 110H-I; *Ford v Ford* [2004] 2 All SA 396 (W) 399.


\(^{32}\) *Bailey v Bailey* 1979 3 SA 128 (A) 133H-139C, 139H; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439B.

\(^{33}\) *Bailey v Bailey* 1979 3 SA 128 (A) 137A-D.

\(^{34}\) *Grgin v Grgin* 1961 2 SA 84 (W) 87B/C.

\(^{35}\) *Grgin v Grgin* 1961 2 SA 84 (W) 87C/D.

\(^{36}\) *Bailey v Bailey* 1979 3 SA 128 (A) 133A-B; *Stock v Stock* 1981 3 SA 1280 (A) 1292D-F, 1294A. This can be a reason to relocate and to alleviate friction. However, this is a drastic move and has a negative impact upon the right of access of the non-custodial parent.

\(^{37}\) *Bailey v Bailey* 1979 3 SA 128 (A) 139H-140C; *Ford v Ford* [2004] 2 All SA 396 (W) 399.

\(^{38}\) *Stock v Stock* 1981 3 SA 1280 (A) 1292A; *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 438F.

\(^{39}\) *Stock v Stock* 1981 3 SA 1280 (A) 1292B.

\(^{40}\) *Shawzin v Laufer* 1968 4 SA 657 (A) 659F/G; *W v F* 1998 9 BCLR 1199 (N) 1203F.

\(^{41}\) *Latouf v Latouf* [2001] 2 All SA 377 (T) 380c; *H v R* 2001 3 SA 623 (C) 626A; *Jackson v Jackson* 2002 2 SA 303 (SCA) 309B/C, 322E; *Ford v Ford* [2004] 2 All SA 396 (W) 399.

\(^{42}\) *Godbeer v Godbeer* 2000 3 SA 976 (W) 978B-979A; *Ford v Ford* [2004] 2 All SA 396 (W) 399.

\(^{43}\) *H v R* 2001 3 SA 623 (C) 626A/B; *Jackson v Jackson* 2002 2 SA 303 (SCA) 322E.

\(^{44}\) *Godbeer v Godbeer* 2000 3 SA 976 (W) 978B.

\(^{45}\) *H v R* 2001 3 SA 623 (C) 626B.

\(^{46}\) *H v R* 2001 3 SA 623 (C) 626B.

\(^{47}\) *H v R* 2001 3 SA 623 (C) 626B; *Jackson v Jackson* 2002 2 SA 303 (SCA) 309C/D, 322E.

\(^{48}\) *Taylor v Taylor* 1952 4 SA 279 (SR) 281A-B.

\(^{49}\) *Jackson v Jackson* 2002 2 SA 303 (SCA) 309E.
better long term financial prospects\textsuperscript{52}; social security structure\textsuperscript{53}; standard of education in Government schools is deteriorating\textsuperscript{54}.

The reason for removal must not only be \textit{bona fide}; it must also be “good” or “sufficient”. To qualify in this regard it must be in the best interests of the child\textsuperscript{55}. The best interests of the child are determined by many different factors that are discussed below\textsuperscript{56}. This brings to the fore that the motivation for relocation does not stand isolated. It bears upon whether it also is in the best interests of the child. Therefore a reason for relocation may for example relate to the employment of the custodial parent and/or his/her spouse. But this motivation may also reflect on the wellbeing and interests of the child\textsuperscript{57}. The interests of the child is the principle issue to determine whether relocation will be allowed or whether relocation will refused. In the following paragraph, this issue will be further addressed.

It is also important to bear in mind that the reasons given for removal must not be false or exaggerated. If, however, this is the case “…, doubt is cast both on the respondent’s motives and her credibility.”\textsuperscript{58} This in appropriate cases may lead to converting the erstwhile \textit{bona fide} reason into a \textit{mala fide} motive or it may result in reasons for removal not being considered in the best interests of the child and therefore not “good” or “sufficient”\textsuperscript{59}.

3.3 Principle or fundamental issue: best interests of child(ren)

\textsuperscript{50} Latouf v Latouf [2001] 2 All SA 377 (T) 380d/e.
\textsuperscript{51} Ford v Ford [2004] 2 All SA 396 (W) 399.
\textsuperscript{52} Ford v Ford [2004] 2 All SA 396 (W) 399.
\textsuperscript{53} Ford v Ford [2004] 2 All SA 396 (W) 399.
\textsuperscript{54} Ford v Ford [2004] 2 All SA 396 (W) 399.
\textsuperscript{55} See Stock v Stock 1981 3 SA 1280 (A) 1290G.
\textsuperscript{56} 3.3.1.
\textsuperscript{57} See for example 3.3.1.(a) below.
\textsuperscript{58} Stock v Stock 1981 3 SA 1280 (A) 1293A/B.
\textsuperscript{59} See in this regard Stock v Stock 1981 3 SA 1280 (A) 1293B-H.
The fundamental issue is whether relocation is in the best interests of the child. The best interests of the child in regard with custody and access arrangements are primarily concerned with “... which of the parents was better able to promote and ensure the child’s physical, moral, emotional and psychical welfare.” This issue is not introduced by the Constitution, but was the common law or traditional approach of our courts. A bona fide reason will be regarded “good” or “sufficient”, if it is in the best interest of the child. A reason may therefore be bona fide but not “good” or “sufficient” if it is either not in the best interests of the child or if the reason is a so-called neutral factor. To determine whether a bona fide reason is in the best interests of the child, the reason must be judged in the circumstances of the case and never in vacuo. This could mean that in one case a reason may be in the best interests of the child whilst in another case the same reason may be either against the best interests of the child or may be regarded a so-called neutral factor. Accordingly different factors may serve to determine whether a relocation is in the best interests of the child. In the following paragraph the different general factors are mentioned and where necessary discussed.

3.3.1 Different factors

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60 See Cats v Cats 1959 4 SA 375 (C) 379D-E; Grgin v Grgin 1961 2 SA 84 (W) 85G where Lecler v Grossman 1939 WLD 41 44 is quoted with approval; Shawzin v Laufer 1968 4 SA 657 (A) 662G/H; Bailey v Bailey 1979 3 SA 128 (A) 140H; Stock v Stock 1981 3 SA 1280 (A) 1290F-G; Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437E; P and Another v P and Another 2002 6 SA 105 (N) 110C-D; Jackson v Jackson 2002 2 SA 303 (SCA) 307H-308A, 317E/F, 318E, 326C; Ford v Ford [2004] 2 All SA 396 (W) 397. See Godbeer v Godbeer 2000 3 SA 976 (W) 981B-G: “Matters like the quality of their schooling, the relative standard of living and so forth, are in my view, quite peripheral in the present case. Whether they live in this country or in the United Kingdom, they will be properly provided for as far as housing, sustenance and education is concerned. … For indeed it is the respondent’s access to the children which is, in my view, the only material consideration that weighs against the applicant’s decision. … Furthermore, I do not approach the issue from the perspective of the respondent, for whom it will undoubtedly, and quite naturally, be a deeply traumatic experience to be deprived of the comfort which he derives from the company of his children. I approach the matter rather from the point of view of the children, who will be deprived of the comfort of their father’s ready presence. There is no doubt that there will be a material reduction in that presence … It is also one which has weighed heavily in the conclusion to which I have come.” In Schutte v Jacobs (Nr 2) 2001 2 SA 478 (W) 481H/I Wunsh J says that besides the interests of the child, the court must also consider two other considerations to wit the right of the custodial parent to proceed with his/her life and the effect of the emigration on the right of access of the non-custodial parent. This view is also approved in Latouf v Latouf [2001] 2 All SA 377 (T) 385i.

61 See McColl v McColl 1994 3 SA 201 (C) 205E/F and applied in Soller NO v G and Another 2003 5 SA 430 (W) [54]-[55]. See also Deijl v Deijl 1966 4SA 260 (R) 261H.

62 S 28(2). And it is also the principle factor introduced by numerous legislation prior to the Constitution, which are not considered necessary to mention now.

63 See in this regard eg Etherington v Etherington 1828 CPD 220 222; Shawzin v Laufer 1968 4 SA 657 (A) 662G-H, 666C; Bailey v Bailey 1979 3 SA 128 (A) 135H; Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 437F; Stock v Stock 1981 3 SA 1280 (A) 1290F; H v R 2001 3 SA 623 (C) 627H; Ford v Ford [2004] 2 All SA 396 (W) 397.

64 See Shawzin v Laufer 1968 4 SA 657 (A) 663B; Bailey v Bailey 1979 3 SA 128 (A) 143A-145A; Stock v Stock 1981 3 SA 1280 (A) 1291H-1299B where the different “bona fide” reasons applicable to these cases, are considered whether they can be regarded as being in the best interests of the children.
Different factors or circumstances are observed and evaluated to determine whether the removal will be in the best interests of the child. These circumstances are subsequently discussed.

(a) Atmosphere within the family and the over-all wellbeing of the child. As explained earlier\(^{65}\), the reason(s) to relocate/remove the children must be “good” or “sufficient”. Therefore a reason for relocation may for example relate to the employment of the custodial parent and/or his/her spouse. But this motivation must also reflect on the wellbeing and interests of the child to be regarded as “good” or “sufficient”. In \(H \text{ v } R^{66}\), the reason for relocation was the flourishing career of the husband of the custodial parent and if they were not allowed to relocate would lead to general frustration of not being able to achieve their (the husband as well as the custodial parent’s) potential in their fields of career and would accordingly also influence the atmosphere in the family and the over-all wellbeing of the child\(^{67}\).

(b) Relationship between the non-custodial parent and the child(ren). This relationship as factor in determining whether the relocation is in the best interest of the child is without saying also important\(^{68}\).

(c) Custodian competent and caring. This is an important factor\(^{69}\) that will be discussed further below\(^{70}\).

(d) Male guidance and discipline. It is important to keep in mind that guidance\(^{71}\) and discipline\(^{72}\) of the father or other male is considered important for a young boy.

(e) Wishes of the children. The general rule is that weight should be given to the wishes of the children if the court is satisfied that the child has the necessary intellectual and emotional maturity to be able to give a genuine and accurate reflection of his/her feelings\(^{73},^{74}\). However, in \(Etherington \text{ v } Etherington^{75}\) the wishes of the children of 13

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\(^{65}\) 3.2.2.

\(^{66}\) 2001 3 SA 623 (C).

\(^{67}\) At 627F-G.

\(^{68}\) Especially see 3.2.2 below. See also Shawzin \text{ v } Laufer 1968 4 SA 657 (A) 668H-669A; Bailey \text{ v } Bailey 1979 3 SA 128 (A) 132A, 133G-H, 140E-H; Stock \text{ v } Stock 1981 3 SA 1280 (A) 1296G-H, 1298B-F; Van Rooyen \text{ v } Van Rooyen 1999 4 SA 435 (C) 439C-E; H \text{ v } R 2001 3 SA 623 (C) 627A.

\(^{69}\) Grbin \text{ v } Grbin 1961 2 SA 84 (W) 86G; Van Rooyen \text{ v } Van Rooyen 1999 4 SA 435 (C) 438G/H.

\(^{70}\) 3.3.2.1.

\(^{71}\) Bailey \text{ v } Bailey 1979 3 SA 128 (A) 132A.

\(^{72}\) Van Rooyen \text{ v } Van Rooyen 1999 4 SA 435 (C) 438H-439B.

\(^{73}\) See I \text{ v } S 2000 2 SA 993 (C) 997E-F where the court referred with approval to and applied this principle of McCall \text{ v } McCall 1994 3 SA 201 (C) at 207H.

\(^{74}\) See Bailey \text{ v } Bailey 1979 3 SA 128 (A) 133D, 140C-E where the court could not make a finding on the wishes of two of the three children. The third child did not wish to leave South Africa. However, the wishes of the
and 14 years of age respectively to remain with their mother in South Africa (who had no access order), were regarded as factors that the court must take into consideration, but they were not sufficient to refuse the father from removing them from South Africa. Usually the wishes of children are regarded as persuasive factors, and seldom as the determinant factor. It may, however, be considered the determinant factor. Soller NO v G and Another is an example of such an extraordinary case. In this case the minor son of 15 years suffered from the so-called “parental alienation syndrome” which is essentially a post-divorce alignment with one parent at the cost of affection for the other parent. Notwithstanding the fact that the mother was dignified, mature, practical, intelligent, wise and forgiving and the father presumptuous, obsessive where his interests were concerned, dishonest and without insight to the impact of his behaviour on the family and contemptuous of authority, the son wished to live with his father. The court expresses the dilemma it has to deal with in the following words:

“[65] I have been extremely concerned throughout these proceedings that this and other Courts are and have been held ransom by Mr G with K as his surrogate. … Clearly, this behaviour cannot be approved or rewarded. It is,
however, more problematic to punish K as the perpetrator. Can K be sent to prison – the answer is obviously ‘no’. Should K be sent to a place of safety – this is a probability but undesirable. Can K be returned to his mother – the answer is ‘yes’ but there is every indication he will not stay there. Can he be physically restrained at his other’s home – this is both impractical and undesirable. It would destroy what family life there is at Mrs G’s home.”

The court eventually ruled that the current custody order remains in force but that the son lives with the father, under supervision of the mother as custodian. The decision was given notwithstanding the fact that the mother is regarded “… a parent who can offer direction, insight and appropriate care …” and from whom the child can benefit, whereas the father’s “… behaviour inspires no confidence whatsoever in his moral character or suitability as a role model.” There are love and affection and other emotional ties between the father and the son, and he is capable of providing in the physical needs of the child, but there exists doubt whether he is capable of insight into the emotional and psychological needs of his son.

(f) Inadvisable to separate siblings. As a general rule it is inadvisable to separate siblings. In other words it is not advisable to relocate some siblings and to deny relocation for other siblings.

(g) Effect on younger children. A variation of a custody order will have a more lasting effect on the younger children than on the older children who will become independent sooner and “[f]or this reason more weight may have to be given to the effects on the younger children of an amendment of the custody arrangements in the case where the relative ages warrant this.”

(h) Interest of one child versus interests of other children. The interests of one child may be seriously prejudiced if a removal is allowed in comparison to the slight advantage the other children may receive. In such circumstances the prejudice of the one child may be a weightier consideration than the slight benefits of the other children.

82 [72] - [73].
83 [61].
84 [61].
85 [62].
86 Stock v Stock 1981 3 SA 1280 (A) 1290H; Van Rooyen v Van Rooyen 1999 4 SA 435 (C) 439E.
87 Stock v Stock 1981 3 SA 1280 (A) 1290H-1291A.
88 Stock v Stock 1981 3 SA 1280 (A) 1291A-B.
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(i) Prospective advantages or disadvantages for child. The effect of the removal on the future advantages or disadvantages with regard to *inter alia* a child’s future employment must also be given sufficient weight.

(j) Standard of living. Although it is important to live in a decent home, maintenance of a standard of living equal to what the children were used to in South Africa is not that an important factor. Happiness of children should in their formative years depend on other things in life.

(k) New school, new culture and new friends. The adaptation to a new school, new culture, new friends, new environment and new climate (weather conditions) can be disruptive. However, children, particularly young children, do adapt.

(l) Serious personality conflicts. Serious personality conflicts between the non-custodial parent and his or her spouse may also be regarded not to be in the interests of the child where an application is brought to vary the current custody order to prevent the custodian from removing the child from the country.

(m) Freedom of religion.

(n) Constitutional and political situation abroad.

(o) Quality of life abroad versus quality of life in South Africa. Marais JA holds the view that it is an invidious task to make a finding in this regard. However, if the main motivation for relocation is the better quality of life abroad compared to the quality of life in South Africa, then the task is unavoidable.

3.3.2 All equal

3.3.2.1 Custodial parent

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89 *Stock v Stock* 1981 3 SA 1280 (A) 1297B-1298A especially 1298A. However, in *Etherington v Etherington* 1928 CPD 220 222 the Court did think that it would be better for the children to remain in South Africa with regard to *inter alia* prospects in life and their health and retaining their friends “… but that is my opinion and I cannot force it upon their father.” It must also be remembered that this was a case where no access order at divorce was made and could be described as a general or undefined right of access – see 2.1.1 above.

90 See *P and Another v P and Another* 2002 6 SA 105 (N) 110E where the court considered cramped accommodation not in the best interests of a child who is accustomed to a better living environment.

91 *Shawzin v Laufer* 1968 4 SA 657 (A) 669A-B.

92 *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439F-G; *H v R* 2001 3 SA 623 (C) 627B-F.

93 *P and Another v P and Another* 2002 6 SA 105 (N) 110E.

94 *Grigin v Grigin* 1961 2 SA 84 (W) 87G, 88G.

95 *Grigin v Grigin* 1961 2 SA 84 (W) 88E-G.

96 *Jackson v Jackson* 2002 2 SA 303 (SCA) 325G.

97 *Jackson v Jackson* 2002 2 SA 303 (SCA) 325G/H.
If the factors which have been considered to determine whether the relocation is in the best interests of the child are equal, cases have been inclined to favour the interest of the custodial parent and would therefore allow removal of the child. King DJP in Van Rooyen v Van Rooyen$^{98}$ puts this view, which I refer to as the “traditional approach”, in the following words:

“It is trite that the interests of the children are – all else being equal – best served by the maintenance of a regular relationship with both parents. Sadly, however, children of divorced parents do not live in an ideal familial world and the circumstances necessitate that the best must be done in the children’s interests to structure a situation whereby access by the non-custodial parent is curtailed but contact between him and the children is effectively preserved.”$^{99}$

McDougall AJ in $H v R$$^{100}$ says that according to the conclusion of Carol S Bruch and Janet M Bowermaster$^{101}$, the State Supreme Courts in the United States of America generally give preference to custodial parents to remove/relocate their children because, and quote$^{102}$ from the New York Court of Appeals in Tropea v Tropea$^{103}$:

“Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the non-custodial parent’s accustomed close involvement in

$^{98}$ 1999 4 SA 435 (C) 439G-H.
$^{99}$ In Shawzin v Laufer 1968 4 SA 657 (A) 669B-C Rumpff JA says: “To take them [two boys aged 11 and 8] away from their mother, who has looked after them since their birth, would obviously have serious psychological consequences. They are still of an age when they would call for their mother first if something were to happen to them.” In Bailey v Bailey 1979 3 SA 128 (A) Schock J in the court a quo, quoted by Trengove JA on 142A-F with approval, also tend to follow the Van Rooyen approach and I quote: “I have no doubt that applicant will be in a position to provide the children with a happier and more stable home in England than if she remains here, a lonely and discontented person longing to return to England. If in England, the children will also have the advantage of contact with other members of the family. … Despite the fact that the children will lose the undoubted benefit of more frequent an easier contact with their father I am satisfied that the children will on balance not be adversely affected by a change of residence … I certainly do not minimise the importance of this factor. However, this factor has got to be considered in the light of all the circumstances. First of all, applicant … is going to retain custody … Moreover, respondent’s position is such that he will be able to have the children with him from time to time … his right of access will certainly not be rendered nugatory.” However, in this case all factors were not equal because there also were other factors besides this one, in favour of the custodial parent to remove the children – see 144F-145A.
$^{100}$ 2001 3 SA 623 (C) at 628D.
$^{102}$ At 299.
$^{103}$ 665 NE 2d 145 (NY 1996).
the children’s everyday life at the expense of the custodial parent’s efforts to start a new life or to form a new family unit.”\textsuperscript{104}

The principle which follows from these cases, is that if the parent with the custody \textit{bona fide} and with good reason decides to relocate the children to another country, the interests of the custodial parent will be superior to the interests of the non-custodial parent (keeping always in mind that the best interests of the child is the paramount consideration), provided that the non-custodial parent’s access is only or at the most curtailed and not totally terminated. In other words the court allows relocation if the relationship between the non-custodial parent and the children is respected and fostered, even if the relocation results in the access being curtailed\textsuperscript{105}. However, there are cases which in my view introduced an approach that favours the interests of the custodial parent in even stronger terms. This approach, which I would like to call the “new approach”, finds good expression in the case of \textit{Godbeer v Godbeer}\textsuperscript{106}. The “new approach” differs from the so-called “traditional approach”, outlined above, in so far as that the motivation(s) or reason(s) for the relocation of the custodial parent is (are) presumed to be in the best interests of the child\textsuperscript{107}. To use the words of Nugent J in \textit{Godbeer v Godbeer}\textsuperscript{108}:

“Undoubtedly, the welfare of all children is best served if they have the good fortune to live with both their parents in a loving and united family. In the present case that was not to be. The respondent and the applicant considered that it was in the best interests of themselves, and no doubt the children, that they should live separate lives,\

\textsuperscript{104} Mc Dougall AJ in \textit{H v R} 2001 3 SA 623 (C) 627F-G also says and this strengthens this view: “I understood that what tilted the scales, …, that R be permitted to relocate to London with his mother and stepfather was the attendant negative \textit{sequela} if they were compelled to remain in South Africa, ie curtail AH’s flourishing career, the general frustration of not being able to achieve their potential in their chosen fields, the frustration of living in a place they really did not wish to live in. The aforementioned, …, would affect the atmosphere in the family and the overall wellbeing of the child.” See also 3.3.1.(a) above.

\textsuperscript{105} See \textit{Van Rooyen v Van Rooyen} 1999 4 SA 435 (C) 440E.

\textsuperscript{106} 2000 3 SA 976 (W).

\textsuperscript{107} See also the article by two American authors Kelly & Lamb “Developmental Issues in Relocation Cases Involving Young Children: When, Whether and How?” 2003 \textit{Journal of Family Psychology} 193-205 quoted by Weiner AJ in \textit{Ford v Ford} [2004] 2 All SA 396 (W) 407-408 especially 408 where reference is made to the Californian case of \textit{In re: Marriage of Burgess} (1996) where the “best interests of the child standard” according to the authors was replaced by a rebuttable presumption in favour of the custodial parent, the so-called “best interests of the custodial parent’s standard” on account of the Wallerstein brief where the “primary psychological parent” doctrine which focuses upon the stability and continuity of a “family unit” comprising the primary custodial parent and the child(ten) is emphasised.

\textsuperscript{108} 2000 3 SA 976 (W) 982C-983A.
... I do not think the applicant can be expected to tailor her life so as to ensure that the children and their father have ready access to one another. That would be quite unrealistic. The applicant must now fend for herself in the world and must perforce have the freedom to make such choices as she considers best for her and her family. She is undoubtedly fully aware of the value to be placed on the close contact between the children and their father and I think that is borne out by the nature of the access arrangements which have existed until now and the ease with which they have been exercised.109 ... The fact is that the applicant is the custodian parent and primarily must decide upon the circumstances in which she and the children of the parties should live. While this court is the upper guardian of all minors and may insist in appropriate cases upon limiting the freedom of choice of the custodian, I do not think that should be translated into this Court imposing its own subjective whims upon the children of the parties concerned.110 ... The applicant is the custodian of the children. She has given mature and rational thought111 to the matter and has exercised a value judgement as to where their best interests lie. I cannot say that the choice she has made is the wrong one. What I can say is that, in my view, the best interests of the children are served by enabling them to live with the custodian parent in a manner which will enable the remnant of the family to live a fulfilled life. In my view, it is in the best interests of the children that they be permitted to do so and withholding of consent is accordingly unreasonable.”112

The custodial parent makes the decision and if the custodian has given “mature and rational thought” to the matter, the presumption is that it is in the best interests of the child. The court is not allowed to replace this decision by its own “subjective whims”.113 The reason why the

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109 My italics.
110 In Ford v Ford [2004] 2 All SA 396(W) 412 the court makes the following comment on the passage quoted above up to this point: “I do not believe that … Nugent J intended those dicta to be elevated into “rules of law” applicable in all situations.”
111 Bold – my emphasis.
112 The words in italics were also quoted with approval in Latouf v Latouf [2001] 2 All SA 377 (T) 385i.
113 See also Schutte v Jacobs (Nr 1) 2001 2 SA 470 (W) 475A-D where Wunsh J quotes with approval from the English case of Re H (Application to Remove from Jurisdiction) [1999] 2 FCR 34 (CA) 40d-h where the last mentioned court quotes from Chamberlain v De la Mare [1983] 4 FLR 434: “The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible. One might postulate a situation where a boy or girl is well settled in a boarding school or something of that kind and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. I merely take that as an example. Short of something like that the Court in principle should not interfere with the reasonable decision of the custodial parent. ...
court should not lightly interfere with the decision of the custodial parent is described in the
words of Ormrod LJ in *Chamberlain v De la Mare*:

“The reason why the Court should not interfere with the reasonable decision of the
custodial parent, …, is as I have said, the almost inevitable bitterness which such an
interference by the Court is likely to produce.”

The “new approach” was, however, short lived. In *Jackson v Jackson* the Supreme
Court of Appeal, Cloete AJA holds the following view in this regard:

“The fact that a decision has been made by the custodian parent does not give rise to
some sort of rebuttable presumption that such decision is correct. The reason why a
court is reluctant to interfere with the decisions of a custodian parent is not only
because the custodian parent may, as a matter of fact, be in a better position than the
non-custodian parent in some cases to evaluate what is in the best interests of a child
but, more importantly, because the parent who bears the primary responsibility of
bringing up the child should as far as possible be left to do just that. It is, however, a
constitutional imperative that the interests of children remain paramount. That is the
‘central and constant consideration’. Accordingly, the reason why the ‘custodian
parent’s decision and the emotions or impulses which have contributed to it’ require
examination is because that decision may be egocentric or prompted by a desire to
deny the non-custodial spouse access to the child – both of which may not be in the
best interests of the child itself.”

Consequently in ordinary sensible human terms the Court should not do something which is *prima facie*
unreasonable unless there is some compelling reason to the contrary. That, I believe, to be the correct approach.”

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114 [1983] 4 FLR 434 as quoted by Thorpe LJ in *Re H (Application to Remove from Jurisdiction)* [1999] 2 FCR 34 (CA) 40f-h and approved by Wunsh J in *Schutte v Jacobs (Nr I)* 2001 2 SA 470 (W) 475C-D as well as by Cloete AJA in *Jackson v Jackson* 2002 2 SA 303 (SCA) 315D/E.

115 See also Sachs LJ in *P (LM) (otherwise E) v P (GE)* [1970] 3 All ER 659 (CA) 662b approved and quoted by Wunsh J in *Schutte v Jacobs (Nr I)* 2001 2 SA 470 (W) 476B: “…, this Court should not lightly interfere with such reasonable way of life as is selected by the parent to whom custody has been rightly given. Any such interference may, …, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to an new marriage of that parent.” Approved of by Cloete AJA in *Jackson v Jackson* 2002 2 SA 303 (SCA) 314J-315A.


117 See also the majority judgment of Scott JA in *Jackson v Jackson* 2002 2 SA 303 (SCA) on 318E-H: “It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be *bona fide* and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not
The best interests of the child are, however, a constitutional imperative and must remain the paramount consideration\(^{118}\).

Scott JA\(^{119}\) refers to the following passage from the judgment of Jappie J in the court of first instance:

“The defendant [the mother] is a good parent and she is devoted to the welfare of her children. There is a strong bond between the girls and the defendant. However, she is the non-custodial parent\(^{120}\). As already stated, the plaintiff [the father] who is the custodial parent\(^{121}\) has decided to emigrate with the girls to Australia. His decision to emigrate is based on factors which he considers to be in the best interests of the girls. He has come to his decision in good faith. It is a settled principle of our law that a Court will not readily interfere with the responsibly and reasonably made decisions of a custodial parent.”

Scott JA then states\(^{122}\):

“This passage requires comment. As previously indicated, the inquiry in each case is what is in the best interests of the children. … In the passage quoted, the Judge refers to the fact that the mother is a good and devoted parent and that there is a strong bond between mother and children, but proceeds to dismiss this as a relevant factor or at least afford it less weight because the mother is the non-custodian parent. To afford less weight to something as important as the relationship between mother and young daughters simply because the former is the non-custodian parent is to prefer the rights of the custodial parent over the interests of the children. That is the

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\(^{118}\) See also the article by the American authors Braver, Ellman & Fabricius “Relocation of Children after Divorce and Children’s Best Interests: New Evidence and Legal Considerations” 2003 Journal of Family Psychology 206-219 quoted by Weiner AJ in Ford v Ford [2004] 2 All SA 396 (W) 408-409 where the authors criticise the “Wallerstein brief” referred to earlier and emphasise once again the best interests of the child as the paramount criterion that must be applied in relocation cases.

\(^{119}\) In Jackson v Jackson 2002 2 SA 303 (SCA) as quoted on 322H/I.

\(^{120}\) My emphasis.

\(^{121}\) My emphasis.

\(^{122}\) On 322J-323C.
wrong approach. It is particularly so on the facts of the present case, where both parents continued to exercise a more or less equal parenting role and where there had been no real separation between children and the ‘non-custodian’ parent.”

3.3.2.2 Non-custodial parent

In *Stock v Stock*¹²³ Diemont JA remarked:

“I have said that the appellant is deeply concerned about his children and he told the Court that he feared that if they went to France he would not see them again. … Appellant’s fears that he would not see his children, or if he saw them, that his access would be curtailed or made difficult was not without foundation since the respondent candidly stated in cross-examination that it would be better for the children to be away from her husband, that he was not a nice man and that he was a bad parent. It was alleged by appellant that problems had already arisen in Cape Town when he wished to communicate with the children; his problems may well be compounded in a foreign country and he may have practical difficulties in enforcing his access rights.”

These remarks confirm that if the relocation would result in the non-custodial parent’s right of access being terminated, the relocation will not be allowed¹²⁴.

In regard to a factual situation that was tantamount to joint custody Cloete AJA¹²⁵ remarked:

“[23] … The access to the children which the respondent currently has is extensive … [25] The presently existing extensive rights of access have facilitated a considerable amount of joint parenting by the parties up until now, but they cannot be regarded as a continuing point of departure in assessing the best interests of the children as they grow older - … I have little doubt that, as the children grow older, even alternate weeks will prove irksome and disruptive to them as their educational, sporting, cultural, recreational and social horizons expand.”

¹²³ 1981 3 SA 1280 (A) 1298B-E. For the same reason the removal was denied in *Grigin v Grigin* 1961 2 SA 84 (W) 89A/B
¹²⁴ See also 3.3.2.1 above especially the reference to *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) 439G-H.
¹²⁵ *Jackson v Jackson* 2002 2 SA 303 (SCA) 313A-314B.
In answer to this Scott JA\textsuperscript{126} said:

“The first is the contention that the present arrangement cannot in any event be maintained indefinitely and that as the girls grow older they will find it irksome and increasingly disruptive. The answer is that whatever changes might have to be made … for the present is not in issue; nor was it properly investigated.”

Scott JA is, however, of opinion that the fact that there has not really been any separation between the mother and the children, the relocation of the children would cause a great deal of pain and trauma to them and as far as the youngest is concerned there is at least a real risk of psychological harm\textsuperscript{127}.

He also emphasises that to afford less weight to the relationship between the non-custodial parent and the children just because the former is the non-custodial parent, is to prefer the rights of the custodial parent over the interests of the children, and this is the wrong approach\textsuperscript{128}.

In \textit{Ford v Ford}\textsuperscript{129} Weiner AJ refers extensively to the evidence of three experts on the effects which the removal from South Africa to the United Kingdom will have on the girl. Dr Stroud’s view, one of the experts, is quoted with special approval by the court where the court states that “[i]n Dr Stroud’s view, neither parent is ever free from the parental obligations to their children. In my view, these obligations should include not underestimating the importance of the child’s relationship with the non-custodial parent. This might result in one of the parents being ‘shackled’ to a particular place if it is in the best interests of the child that the child not be separated from the other parent. In his view ‘society expects parents to sacrifice their needs for their children’.”\textsuperscript{130} Dr Stroud refers \textit{inter alia} to an article by Braver, Ellman and Fabricius\textsuperscript{131} where the authors state that not a single empirical study could be found where research has been done on what the effects of parental moves on the wellbeing of children on divorce are. They, however, did find that there was “a preponderance of negative effects associated with parental moves by mother or father … as compared with divorced

\textsuperscript{126}Jackson v Jackson 2002 2 SA 303 (SCA) 320D-F.

\textsuperscript{127}On 322C.

\textsuperscript{128}On 323B/C. See also 3.3.2.1 above.

\textsuperscript{129}[2004] 2 All SA 396 (W) 408-409.

\textsuperscript{130}On 407.

families in which neither parent moved away”. They suggest, notwithstanding the fact that the data are not conclusive because of other variables, that courts “should not assume that children benefit from moving with their custodial parent to a new location that is distant from their other parent whenever the custodian parent wishes to make the move.”

In conclusion Weiner AJ makes the following statement:

“I am in agreement with the emphasis that he [Dr Stroud] places upon the importance of the ongoing and uninterrupted relationship with the non-custodial parent especially in cases where the parents have in effect exercised shared parenting and equal access time. This view is confirmed by the SCA in the *Jackson* case ([2004] 2 All SA 396 (W) … at 322J).

This approach is a deviation from previous decisions in matters of this nature in which the custodian parent’s decision (if reasonable and rational) was usually held to be sufficient to justify relocation. The interests of the non-custodian parent and the obvious disruption to the relationship with the child have largely been ignored until the decision in the *Jackson* case (…). It has now been accorded its proper place in being a priority in decisions of this nature.”

# 4 FINAL REMARKS

## 4.1 Trends

At least two trends become visible from the discussions above. They can be categorised in the subsequent two paragraphs.

### 4.1.1 The interests of the non-custodial parent

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133 Quoted by Weiner AJ in *Ford v Ford* [2004] 2 All SA 396 (W) 409. On the same page the court also refers to an article by Marion Gindes in 1998 *American Academy of Matrimonial Lawyers* where the writer writes that divorce can significantly undermine children’s sense of security and stability and that from a child’s perspective the best of all possible worlds includes *inter alia* if the parents after divorce can live close enough to each other so that the child can have the same playmates when with either parent.
134 On 415.
135 [Dr Stroud] – my addition.
136 [[2004] 2 All SA 396 (W)] – my addition.
From the discussion above it becomes apparent that the interests of the non-custodial parent receive more weight and importance than in the past. The interests of the non-custodial parent are not considered less important than the interests of the custodial parent. This trend comes to the fore in what I would like to call a reaction against the “new approach”. It corresponds well with another trend that is also receiving greater approval in the South African law, to wit joint custody orders granted upon divorce. In Krugel v Krugel De Vos J expresses her thoughts towards approving of joint custody orders in *inter alia* the following words which I think are also of great importance to the topic under consideration:

“If one considers the changing roles and responsibilities of parents coupled with the relatively new concept of children’s rights within the family structure, *rights which include the maximum amount of contact with both parents*[^140], I am of the view that a more liberal approach to the granting of joint custody may not be inappropriate. I do not believe that general hostility between the parents should be a bar to a joint custody order.”

This trend changes the impact of the *Van Rooyen*[^141] decision on whether a relocation will be allowed dramatically and drastically.

4.1.2 Interests of the child and the child’s wishes

The child’s best interests have always been the fundamental issue under the common law in regard to matters concerning the child. However, today the best interests of the child are a basic human right in every matter concerning the child[^142]. This fact without having been acknowledged expressly, I think, has resulted in the wishes of children receiving more attention and protection than previously[^143].

4.2 The right to family or parental care

[^137]: I speak of “interests” of the non-custodial parent, knowing well that the best interests of the child are the paramount consideration and that perhaps it is ambiguous to talk of “interests” of the parents because the modern trend in family law is to talk rather of the rights of children and parental responsibility than of parental authority or power.

[^138]: The “new approach” is discussed 3.3.2.1 above.

[^139]: 2003 6 SA 220 (T).

[^140]: Italics my emphasis.

[^141]: 1999 4 SA 435 (C) referred to 3.3.2.1 above.

[^142]: S 28(2) of the Constitution of the Republic of South Africa 108 of 1996.

[^143]: See for example *Soller NO v G and Another* 2003 5 SA 430 (W); *Ford v Ford* [2004] 2 All SA 396 (W) especially 410.
I have indicated above⁴⁴ that the non-custodial parent’s interests are taking a central position in answering the difficult question whether removal can be approved of or not. The answer to this question becomes, however, more difficult where the reason for the custodial parent’s relocation is marriage with a foreigner whose home is abroad. The motivation for removal is *bona fide* and if everything is equal as far as the interests of the child are concerned, it becomes apparent that the answer to allow relocation is not that simple. It must be remembered that this scenario differs from the *Jackson* and *Ford* cases because the reason for removal in the last two cases was entirely grounded upon the best interests of the child according to the view of the custodial parent, whereas now the reason for removal is primarily based upon the personal interests of the custodian.

The Constitution of the Republic of South Africa 108 of 1996 provides in section 28(1)(b) that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. Does this human right awarded to a child in terms of our Constitution provide for the granting of an interdict not to prohibit the removal of the child, but *to prohibit a custodian parent to leave the country if such move of the custodian parent is not in the best interests of the child and would result in the loss of physical love and affection or in the diminution of love and affection?* The answer to this question will most probably be in the negative. In *Jooste v Botha*⁴⁵ the court mentions that a parent-child relationship has two aspects. One is referred to as the economic aspect and the other the intangible aspect of providing in the psychological, emotional and developmental needs of the child⁴⁶. As far as the last mentioned aspect is concerned the court shows upon the common law position where it could not have been enforced⁴⁷. The court then considers whether the Constitution does not provide for the enforcement of these intangible aspects of the parent-child relationship. The court is of opinion that what section 28(1)(b) envisages, is that a child is entitled to a situation where he/she (the child) is in care of somebody who has custody over him or her⁴⁸ and that it sets out vertical socio-economic rights against the State without deciding to what extent they are justiciable in that context⁴⁹. The court emphasises that in the certification process of the Constitution, the Constitutional Court⁵⁰ did not have

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⁴⁴ 3.3.2.2 & 4.1.1 above.
⁴⁵ 2000 2 SA 199 (T).
⁴⁶ On 201E.
⁴⁷ On 206D-G. Remember also that the intangible aspects created by the *consortium vitae* between spouses are not enforceable – see 206B-D and the authority cited.
⁴⁸ On 208F.
⁴⁹ On 209E.
regard to the possible horizontal application of the paragraph 151. The court, however, is of the opinion that the provision does not provide for the enforcement of love and affection etc because of the maxim *lex non cogit ad impossibilium* 152. I quote the words of Van Dijkhorst J 153:

“The law will not enforce the impossible. It cannot create love and affection where there are none. Not between legitimate children and their parents and even less between illegitimate children and their fathers. That fact compellingly leads to the conclusion that the drafters of the Constitution could not have intended that result.”

If the custodial parent cannot be prohibited from leaving the country to start a new life with his or her new wife or husband, must the custody of the parent also be terminated? The answer is not obviously yes. Perhaps the safest approach would be to refuse relocation of the child and let the custodial parent decide whether he or she is prepared to leave the country without the child. If the parent decides to leave, then I think the correct decision for refusal has been made. If the custodial parent decides not to leave then it is also to the advantage of the child. This approach reminds of the view expressed by Dr Stroud and referred to by Weiner AJ in *Ford v Ford* 154 where he is quoted as saying 155:

“This might result in one of the parents being ‘shackled’ to a particular place if it is in the best interests of the child that the child not be separated from the other parent. In his view ‘society expects parents to sacrifice their needs for their children’.”


If a child has been wrongfully removed 156 from South Africa, an application can be made for the immediate return of the child in terms of the Hague Convention on the Civil Aspects of

151 On 209F.
152 On 209G.
153 On 209G-H.
154 [2004] 2 All SA 396 (W).
155 On 407.
156 According to Van Heerden “Judicial Interference with the Parental Power: The Protection of Children” in Van Heerden et al Boberg’s Law of Persons and the Family 2nd ed (1999) 580-581 the right of a parent to prevent removal of the child from the country or at least to withhold consent to such removal, “… is a right to determine where the child is to live and hence falls within the ambit of the concept of ‘rights of custody’ in articles 3 and 5 of the convention. Thus, the custodian parent who removes the child from the Republic or allows
International Child Abduction Act 72 of 1996\textsuperscript{157}. This aspect, however, is not further considered, but for mentioning that the Act removes difficulties encountered in \textit{inter alia} the case of \textit{Cats v Cats}\textsuperscript{158} with special reference to the loss of jurisdiction of the court that issued the custody order.

\begin{footnotesize}
\begin{itemize}
\item a third to do so without the consent of the other parent (…) commits a breach of ‘rights of custody’ of the other parent within the meaning of the convention and hence a ‘wrongful removal’.”
\end{itemize}
\end{footnotesize}


\textsuperscript{158} 1959 4 SA 375 (C).