



RELOCATION

The reunite Research

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The views expressed in this report are those of the author and those contributing to the research, and are not necessarily shared by the Ministry of Justice (nor do they represent Government policy).

Foreword

This research provides a valuable adjunct to the growing debate on the topic of relocation: what should be the approach adopted by courts faced with one parent's opposed application to make their home, and that of a child or children living with them, abroad.

The outcome can become, and in practice for all sorts of reasons often is, the loss to the child of the other parent. As is aptly if starkly stated:

Relocation cases are the closest relations in private law proceedings to care proceedings in public law, or adoption proceedings.

In England and Wales the formulation adopted by the Court of Appeal in *Payne* holds sway, but not without criticism both from academics, and sections of the general public, and inferentially from the courts of those other jurisdictions which have adapted its messages or rewritten new ones of their own.

In the van of the extra-forensic debate has been Lord Justice Thorpe, who gave the leading judgment in *Payne*, from his helm as Head of International Family Justice for England and Wales driving forward the discussion in many contexts and at a number of international judicial and practitioner conferences. The quest is on to attempt to find some basis for consistency of approach acceptable to the jurisdictions participating in the discussion. It is linked to a considerable extent with the re-evaluation of the operation of the Hague Abduction Convention in the area of Transfrontier Contact. As between EU States (but for Denmark) article 9 of the Brussels II Revised Regulation enters the list of impacting considerations. And, now this side of the horizon after so many political pit-stops, the Hague Child Protection Convention rapidly races towards implementation date next year and will add its own octanes to the heady mix.

It remains to be seen to what extent these initiatives and innovations will redefine either starting grid or finishing line for relocation applications in this and other jurisdictions. But yet again (as most recently in 2006 in *The Effects of International Child Abduction*) the interview-based research undertaken by Dr Marilyn Freeman for reunite allows a human face (and more particularly the face of the child) to be discerned through a glass frosted by the inconsistencies of the laws of different nation states.

Read on to find out why so far as this jurisdiction is concerned the conclusion advanced is that there may - the author would say 'should' - emerge some readjustment to the 'pro-relocation' stance routinely adopted here.

Mr Justice Singer

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1. INTRODUCTION

Our earlier research into the effects of international child abduction¹, in which parents spoke of their disquiet over the way in which relocation issues are addressed², provided the impetus for this current project which considers the links between these areas, and the relocation jurisdiction in general. We are grateful to the Ministry of Justice for their support in this undertaking.

reunite is concerned at the distress that relocation often creates for the families involved in these matters³, and at the increasing number of cases with which it is dealing⁴ where parents, usually mothers, wish to relocate with the child(ren) of a relationship following its break down. These cases concern both married and unmarried parents⁵ and occur for a variety of reasons⁶. Very often, as with cases of abduction⁷, those wishing to relocate are returning home where they can receive comfort and practical support at a time of emotional stress⁸. Sometimes, the relocating parent wants to be with a new partner who comes from the country to which she wishes to move; in other cases the relocating parent simply wishes to start afresh in a new country, with which she has no connections, sometimes with the offer of employment, schooling for the children, and accommodation to tempt her. It is also possible that the relocating parent wishes to escape the obligations of co-parenting with the other parent and is prepared to, quite literally, go to the other side of the world in order to do so. There will be some amongst them who have justification for wishing to do so, reflecting the same inability for some women and children to be fully protected by the legal systems in their States of habitual residence which has been seen in cases of child abduction⁹. Others, however, will merely seek to lead independent lives, away from any practical connection with the other parent in both their own, and their child's, lives.

Nearly all cases involve sacrifice and readjustment for the left-behind parent and family. In many of them, such parents will bear those emotions with resigned realism as they face the fallout of a failed relationship. However, in some cases, the grief and despair are too much to

¹ International Child Abduction: The Effects (hereafter *The Effects*) May 2006 www.reunite.org.

² *The Effects* at pp 16, 28, 53.

³ In one extreme case with which **reunite** was involved, the father had been denied contact with the children for approximately one year during the time when the mother had abducted the children, and following their return under The Hague Convention, pending the leave to remove hearing. He had been advised by his legal representative that, in most cases, mothers are awarded leave to remove. He complained of feeling that he was "at the end". Tragically, the father killed the mother after she obtained leave to remove the children to Australia.

⁴ In the period January – December 2008, 122 cases were reported to the **reunite** advice line which related to 183 children. This represented an increase of 74% from the previous year.

⁵ See further 5.2 below.

⁶ See 5.3 (vii) below.

⁷ See further - *The Outcomes for Children Returned Following An Abduction* (hereafter *Outcomes*) September 2003 at p20 which details the reasons for abduction in the research sample for that project - www.reunite.org.

⁸ In our current sample, this was the largest category, see 5.3 (vii) below.

⁹ e.g. see *Outcomes*, p 35 which details the violence faced by one mother having returned with her child under the Hague Convention following her abduction of her child, notwithstanding her well-founded expressed fear of violence from the father should the child be returned. See also Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 *Fam LQ* Volume 38, Number 3, Fall 2004 at p534 "...[T]he statistics on recidivism indicate that courts are seriously misguided when they assume that the judicial system of the habitual residence will be able to protect the victim or – even worse – that a denied return order in abuse cases will offend the state of habitual residence because it suggests that the country's ability to prevent violence is imperfect. Of course every legal system is imperfect in this regard". Also see Ofsted reports into CAF/CASS post which note the inadequate treatment of domestic violence in some cases.

bear, resulting in a complete loss of the parent-child relationship. The consequences that may result from the relocation of much loved children may impact as seriously and as negatively on the children as a mother's unhappiness in being where she does not want to be. These are two sides of the same story. The equation is, perhaps, most clearly seen in cases of joint/shared residence, but relates to all cases where there are two involved parents, both wanting to follow different paths in their lives following the failure of their relationship, both wanting their children, and both likely to suffer significantly if their plans are not accepted. Both outcomes have the potential to negatively, and severely, impact on the child's life. Although in most cases, parents are able to reluctantly manage the situation, many parents speak of their emotions in terms which suggest that extreme thoughts of self-harm and violence are in no way unusual.

We can no longer afford to turn a blind eye to the potential impact of relocation on the lives of the families it affects.

2. THE GLOBAL CONTEXT

We recognise that we are only part of a global awareness of the problems associated with relocation. We are grateful for the comradeship offered to us during this project by the researchers in Australia and New Zealand who are involved in these issues¹⁰.

¹⁰ The 3 year New Zealand research project, being undertaken by the Centre for Research on Children and Families (Professor Mark Henaghan, Dr. Nicola Taylor, Megan Gollop, Research Fellow), University of Otago, is funded by the New Zealand Law Foundation. The research report is due on 31st December 2009 and will include longitudinal data following in-person interviews with families, including children aged over 7 years, whose relocations have been tracked in terms of ongoing changes which have occurred in both residence and contact patterns. Family members are being interviewed twice, with a 12-month gap between interviews. The project involves 100 families and concerns cases where a parent has sought to relocate with the children when that move would have a significant impact on contact arrangements with the other parent, whose relocations have occurred across a relatively long period of time, i.e. some many years before, and some more recently, and including some who have had no legal or court involvement, and those where the relocations did not proceed. The criterion for inclusion is that there was a significant dispute between the parents about relocation whether or not there needed to be any Family Court involvement. Resolution of the issue could have occurred through negotiation between the parents or their lawyers, or via Family Court counselling, mediation or a defended hearing. Families were only interviewed after their case was resolved to avoid the research interfering with any live proceedings within the Court. Where possible, the family interview data will be compared with the court judgement to assess the success of the court decision. See Relocation after Parental Separation in New Zealand: The Welfare and Best Interests of Children. ANU College of Law The Australian National University, Relocation Disputes in Australia, Symposium Proceedings, 18th April 2008, 131, hereafter Canberra.

A major prospective and longitudinal study is being conducted in Australia by Professor Patrick Parkinson, Dr. Judy Cashmore, Professor Richard Chisolm, and Judi Single, Research Fellow, at the University of Sydney. The team is considering the outcomes for both parents and children, and for family relationships, of allowing a parent to relocate with the children, or refusing that permission, when the dispute between the parents has resulted in litigation. The study was commenced in early 2006 (after the Shared Parenting reforms – see further below) with a sample of 80 parents and 19 children. The project has been funded for a 6 year period. An initial interview was conducted, followed by a second stage of follow-up interviews to investigate changes in the 18 months in between. The extended funding of this project means that the researchers will be able to follow the families from shortly after the relocation decision for five or six years. The criterion for inclusion in the sample was that there was a significant dispute about relocation that was settled whether by the court or by consent in the previous six months. This differs from the New Zealand and United Kingdom research whose samples fall within a longer time span. Professor Parkinson noted the very significant differences between outcomes in different cities, saying: “[i]t is much harder to persuade a judge to allow a relocation out of Sydney and Parramatta than out of Melbourne or Perth. Our study also shows a strong likelihood of being allowed to relocate if the matter is heard by judges based in Brisbane”. The **reunite** study has focused on cases of relocation from a much smaller geographical base than those in the Australian project. It would, therefore, be interesting to

Relocation cases are, in practice, some of the most difficult cases facing the family law system. The challenge presented by these cases has been recognised by the judiciary in various jurisdictions. The Hon Diana Bryant, Chief Justice of the Family Court of Australia described relocation cases in terms of being a dilemma, rather than a problem - a problem being capable of being solved, a dilemma being unsolvable¹¹. The Hon Dennis Duggan¹² spoke of the law of child relocation in The United States: “[t]he most nettlesome relocation cases involve the low to mildly conflicted parents who are both fully involved in their children’s lives and are competent caretakers. The law of relocation has no answer for these parents.” Similarly, Lord Justice Thorpe has acknowledged the difficulties of such cases in the courts of England and Wales when he said¹³ that “[T]hese cases.. are very, very difficult cases for the trial judges. Often the balance is very fine between grant and refusal”¹⁴. In New Zealand, in a case¹⁵ in which the Court of Appeal found that the High Court Judge was materially and wrongly influenced by Payne v Payne¹⁶ by giving too much weight to the impact of the mother’s decision to return to Ireland and her need to fulfil her role as a mother in Ireland, the court commented on “[H]ow difficult relocation disputes are and the anxious consideration which the judges have given to them”.

Practitioners are similarly concerned. Relocation was the subject of a debate at The Law Society by Resolution¹⁷ in September 2005 at which the motion, that leave to remove is too easily granted, was carried by 77 votes to 19 with 10 abstentions¹⁸. At the time of the debate, Resolution estimated that there were 1,200 cases a year involving relocation applications. Speakers in favour of the motion were Stephen Cobb Q.C and Dr. Mark Berelowitz. Speakers against the motion were James Turner Q.C and Carolynn Usher, a respected and experienced family law solicitor. Mr Cobb argued that the courts apply an unspoken presumption that the applicant will succeed and that they unduly elevate the threat of disappointment to the applicant parent should their application fail. Dr. Berelowitz, a child psychologist, argued that the well-being of a child following the divorce of his parents was best served if the child could maintain a substantial relationship which must be robust, with room for conflict, discipline and ups and downs. He also noted the paucity of research into this subject, and

consider this finding in relation to other countries within the European Union so that information may be obtained on any variations that exist on this matter between our close neighbours. The Australian researchers also report that several mothers were rethinking the move and others had either returned or were planning to do so within 3-12 months of having made the move (Canberra, p78) raising the question of better professional advice being required earlier on in order that people may make the best informed decisions possible, particularly with respect to the burden of travel, especially on young children.

Additionally, the Australian National University (ANU) is conducting a retrospective study, considering the pre Shared Parenting reform period - Dr. Juliet Behrens, Dr. Bruce Smyth, Dr. Jeromey Temple (ANU), Dr. Rae Kaspiew and Nick Richardson, Senior Research Officer (Australian Institute of Family Studies).

¹¹ House of Representatives Standing Committee on Legal and Constitutional Affairs. Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (August 2005) 22.

¹² Rock-Paper-Scissors: Playing the Odds With the Law of Child Relocation (2007) 45(2) *Family Court Review* pp 193-213 at 19 – hereafter Rock. Cited by Tapp and Taylor, Relocation: Are we trying to do too much, too late, with too few appropriate resources? NSFLJ 6(4) December 2008 94-104 hereafter Relocation.

¹³ re G (Leave to Remove) [2008] 1 FLR 1587 at para 19.

¹⁴ See also Thorpe L.J. Relocation – The Search for Common Principles: The Problem, 4th World Congress on Family Law and Children’s Rights, Cape Town, South Africa 2—23 March 2005 which poses the question whether common principles can be agreed internationally in relocation cases - hereafter Common Principles.

¹⁵ D v S [2002] NZFLR 116. See further below.

¹⁶ [2001] 1 WLR 1826 [2001] EWCA 166, hereafter Payne.

¹⁷ Formerly The Solicitors Family Law Association (SLFA).

¹⁸ See Longrigg, The Leave to Remove Debate, [2005] Fam Law 911.

emphasised that the consequences on the child of a mother being distressed in the sense of sub-threshold depression (distress, rather than clinical depression) had not been researched in any detail. Mr. Turner suggested that limiting the freedom of the mother should not be taken lightly, especially as she might only be in the jurisdiction because of the father of the child, and that perhaps these were occasions when the father should move to the new location. This was echoed by Mrs. Usher who recognised the potential for a bitter period of continued litigation if a mother was compelled to stay. Mr Turner questioned whether, if the mother was the most appropriate carer and had been appointed as such, and if she wanted to go abroad, should contact with a non-resident father trump that. He suggested that it should not if the mother had a good reason to relocate, to which Dr. Berelowitz commented that it depended on what is meant by a good reason, and that relocation was not a treatment for either distress or depression

3. THE LEGAL POSITION

i) England and Wales

If a residence order is in force, the person in whose favour it is made can only take a child out of the jurisdiction for up to one month without the consent of the other parent with parental responsibility¹⁹. For longer periods, and thus in cases of relocation, the consent of the other parent with parental responsibility must be obtained, failing which the permission of the court must be sought and received. Where no residence order is in force but more than one parent has parental responsibility, permission must be forthcoming from the other parent in order to remove the child from the jurisdiction for any period of time. Again, if that permission is not forthcoming, recourse must be made to the court. Where only one parent has parental responsibility for a child, that parent may usually relocate without requiring permission from anyone else. However, care must be taken because caselaw has indicated that there are circumstances where, even absent the formal grant of parental responsibility, a parent may be deemed a de facto primary carer²⁰, (therefore making the removal of the child from the United Kingdom without that parent's permission a criminal offence under the Child Abduction Act 1984, or, where the court is seized of proceedings concerning the child, the removal may be a breach of the court's right of custody²¹ and, therefore, constitute an abduction under the terms of the 1980 Hague Child Abduction Convention.

¹⁹ S13 Children Act 1989.

²⁰ See re B (A Minor) (Abduction) [1994] 2 FLR 249 where Waite J expressed the view that, provided the aggrieved parent was, at the time of the wrongful removal or retention, exercising functions in the requesting State of a parental or custodial nature, he could be regarded as having "rights of custody" without the benefit of any court order or official custodial status. Re B was relied upon in re O (Abduction:Custody Rights) [1997] 2 FLR 702. However, in re W re B (see below) Hale J recognised the difficulty in reconciling these decisions with the House of Lords' decision in re J (A Minor)(Abduction:Custody Rights) [1990] 2 AC 562, where a child was living with both the unmarried parents at the time of removal. The court held that the father who, under the then Western Australian Law, had no formal rights, had no rights of custody within the Convention. The distinguishing factor of re B and re O is that, unlike re J, the applicant was exercising responsibility either alone or with someone who did not have custodial rights. Re C (Child Abduction)(Unmarried Father:Rights of Custody) [2002] EWHC 2219 where Munby J concluded that the authorities show that there can be circumstances in which an unmarried father will acquire rights of custody even if he is not the sole primary carer of the child and even if he is sharing care with another person *other* than the mother. See further, Bromley, 10th edition, p641 which states that the inchoate rights concept has been accepted in New Zealand but not, for example, in Ireland.

²¹ Re W; re B (Child Abduction:Unmarried Father) [1998] 1 FLR 146 where there had been pending proceedings before the family proceedings court which the court had been seized of for a long time and which

Although there seems to be a common conception that relocation does not require permission in this jurisdiction unless it involves a move abroad, that is, in fact, not the case.

Internal relocations (those which do not involve an international move) may still require the consent of the other parent or the leave of the court. This is because providing a home for the child is an aspect of parental responsibility²² which can be exercised by either parent²³. It is then open to a parent, who does not agree with the action of another parent in providing that home, to make an application to the court for the matter to be decided²⁴. That may include, and in our sample does include, cases where the move is entirely within the same country, as well as those which involve moves to other parts of the United Kingdom.

In his research project: *Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction*²⁵, Foley²⁶ categorised jurisdictions as “pro-relocation”, “anti-relocation” and “neutral”. England and Wales falls within the pro-location category²⁷. He describes Lord Justice Thorpe’s suggested discipline in *Payne v Payne*²⁸ which involves asking whether the primary carer seeking to relocate with their child or children can first establish that the move is realistic and not motivated by selfish reasons, that is, a desire to exclude the father from the child or children’s life. The motives of the contesting parent must also be examined²⁹. Assuming the relocation is motivated by good faith, the parent must then establish the proposed relocation is reasonable, including the logistics of the move, career opportunities, education, availability of housing and distance from current residence. The court will also consider the child’s relationship with the primary carer and the present and future contact arrangements with the non-primary care giver and the impact of the future arrangements on their relationship. The child’s wishes will be taken into account where

the mother’s behaviour had been calculated to frustrate. In those circumstances the removal of the child from the jurisdiction without the leave of the court was a breach of the rights of custody attributable to the court. The removal of the children was wrongful within the meaning of the Hague Convention. Per curiam: unmarried parents should be advised that removal by the mother of a child who is habitually resident here will be wrongful under the Hague Convention if: (a) the father has parental responsibility either by agreement or court order; or (b) there is a court order in force prohibiting it; or (c) there are relevant proceedings pending in a court in England and Wales; or (d) where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.

²² S3 Children Act 1989.

²³ S2(7) Children Act 1989.

²⁴ under S8 Children Act 1989.

²⁵ There is an obvious link between the problems of abduction and relocation – see *Transfrontier Contact Concerning Children, General Principles and Guide to Good Practice*, Hague Conference on Private International Law (Transfrontier), Family Law, 2008, at 38 and para 7.3 of the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22-28 March 2001): “[c]ourts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention”.

²⁶Foley, Lawyer to the Court of Appeal, Civil Appeals Office, October 2006.

²⁷ as do France, Spain, South Africa, probably Scotland, and certain States of The United States including Connecticut, New Jersey, Washington and Minnesota. New Zealand, Sweden and certain States of The United States including Pennsylvania, Alabama, Virginia fall within the anti-relocation category. The neutral category includes Canada, Germany, Belgium, certain States of The United States including New York, California, and Florida. Foley includes Australia in the neutral category but see Legal Position (iii) Australia below which suggests otherwise.

²⁸ Supra at para 40.

²⁹ Ibid para 40(a) (b).

appropriate depending on age and maturity³⁰. The third limb of the discipline is to consider the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal. Lord Justice Thorpe explains: [i]n suggesting such a discipline, I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor³¹. He stated³²: “[t]hus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother’s future psychological and emotional stability”. Lord Justice Thorpe summarised the position when he said that the primary carer will be granted leave to remove unless that move is incompatible with the best interests of her children³³.

Foley noted that decisions since Payne have reflected a strong trend in permitting the requesting parent’s application to permanently relocate with their child, which, he states, are almost invariably made by mothers³⁴.

There has however been a change in the way that residence orders are made in that the court now favours joint residence orders even where the parents live at significant distances from each other, those homes are in different countries, or on different continents³⁵. It may be thought that relocation is less likely to be allowed where shared residence exists, but this has not proved to be the case.

³⁰ Foley, supra, at para 2.3.

³¹ Payne para 41. Mary Hayes questions whether this is a gloss on the welfare checklist, Relocation Cases: is the Court of Appeal applying the correct principles? [2006] CFLQ 351. One of the lawyers responding to our request for comments on the relocation process described the principle in practice. In one of her cases, the mother, who had been refused leave to remove at her first attempt, was successful when she re-applied and demonstrated the worsening effect of being separated from her new husband who had already relocated. This was notwithstanding the mother’s evident hostility towards the father which had concerned not only the father and his lawyer, but also CAFCASS and the court at the first hearing.

³² Ibid at para 32. In 2005, he referred to this statement, saying: “[i] still hold to the views there expressed” – see Common Principles at p10.

³³ Ibid at para 26 in which Lord Justice Thorpe states the two propositions upon which relocation cases have been consistently decided over the course of the last thirty years, i.e. (a) the welfare of the child is the paramount consideration; and (b) refusing the primary carer’s reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

³⁴ Foley 2.6. See also Thorpe L.J. Common Principles supra at p6 “[a]lmost without exception the applicant is the mother and the primary carer of the child”. Our research findings support this statement – see findings post.

³⁵ See, e.g., re D (Leave to Remove: Shared Residence) [2006] EWHC 1794 (Fam) where the court allowed a mother to return to The United States, subject to a joint residence order to the father in this country. For a critique of shared residence, see Gilmore, Court decision-making in shared residence order cases: a critical examination, *Child and Family Law Quarterly*, 18(4), 2006, pp.478-498. The article assesses the law in the light of research evidence on shared residence and child well-being. Gilmore states that “[A] generally negative approach to [shared residence orders] does not appear to be justified by research evidence. This does not mean, however, that the research evidence supports a presumption in favour of shared residence .. some research shows that shared residence is often associated with a particular demographic profile, which suggests that it may be suitable for some families and not others. Some studies have found a wide variation in child outcome within shared residence arrangements, with a number of children finding the arrangement (or aspects of it) burdensome. .. a study .. found that “when parents were in high conflict (or low cooperation), dual-resident adolescents were more likely than sole-resident adolescents to report feeling caught between their parents, and that such feelings were related to higher levels of child depression/anxiety and deviant behaviour”.

A challenge to Payne v Payne was made In The Matter of G (Children)³⁶ on the basis that the decision in Payne was no longer in step with the current practice regarding shared residence, and that it is wrong to apply principles based upon a status of sole residency and sole primary care. The Court of Appeal did not accept this submission and confirmed the approach as stated in Payne, explaining that the case of D v D [2001] 1 FLR 495, which had been decided some months before Payne, emphasised that joint residence orders were not to be labelled as exceptional and that the shift in position had therefore been in the mind of the court in Payne when making the decision.

ii) New Zealand

The Care of Children Act 2004 (COCA)³⁷, which was implemented in July 2005 and which replaced the Guardianship Act 1968, requires guardians of a child to agree to the relocation of a child, failing which consent must be obtained from the Family Court. This includes moves that are relatively close to each other where the child's relationship with parents or guardians may be affected by the move³⁸. The child's welfare and best interests are the first and paramount consideration³⁹ but the importance of preserving and strengthening familial relationships for the child is one of the principles which the court must take into account in determining the child's best interests⁴⁰. Obtaining the court's permission to relocate since the implementation of COCA has been increasingly difficult⁴¹ although some relocations are still being allowed⁴². Tapp and Taylor⁴³ describe the "strong view" taken of the paramountcy principle by the New Zealand courts which regard adult interests as relevant only when those interests can be shown to impact on the child's welfare, rather than a "weak view" in which the court takes into account other interests (such as freedom of movement or the relocating parent's interest in residing with a new partner and child).

The current position in New Zealand is as set out in the Court of Appeal case of D v S⁴⁴ in which the removal of children from New Zealand to Ireland was refused and where the English decision of Payne v Payne⁴⁵ was reviewed. The court found that the clear emphasis of the English case on only one of the relevant factors to be weighed when considering a relocation application (the detrimental effect on the welfare of the children by refusing the primary caregiver's reasonable proposals for relocation), was inconsistent with the wider all-factor child-centred approach required under New Zealand law. The law in New Zealand requires the reasonableness of a parent's desire to relocate with the children to be assessed in relation to the disadvantages to the children of reduced contact with the other parent, along with all other factors⁴⁶. In B v B⁴⁷ the Court of Appeal affirmed this approach. The sole

³⁶ [2007] EWCA Civ 1497.

³⁷ See further fn 52 below.

³⁸ S16(2)(b) COCA 2004.

³⁹ S4(1) COCA.

⁴⁰ S5 COCA.

⁴¹ See, e.g. S v L [Relocation] [2008] NZFLR 237 where the mother's appeal against refusal to allow relocation was dismissed by the court which held that there was ample evidence to conclude that the child's welfare and best interests would be served by remaining in New Zealand where she could continue to develop her relationship with the father; Downing v Stamford [2008] NZFLR 678. See Boshier, *Relocation Cases: An International View from the Bench*, Association of Family and Conciliation Courts, 20th May 2005.

⁴² See, e.g. AT v JD [Relocation] [2008] NZFLR 1121; RN v SM [Relocation] [2008] NZFLR 995.

⁴³ Relocation, *supra*.

⁴⁴ [2002] NZFLR 116 CIV-2007-4-4-5016, High Court of New Zealand, Auckland Registry, Judgment of Duffy J. 14th March 2008.

⁴⁵ [2001] 2 WLR 1826.

⁴⁶ Stadniczenkov v Stadniczenko [1995] NZFLR 493.

ground in this case for granting the relocation order (the parenting order) at first instance was that it would avoid psychological harm to the mother, who felt imprisoned and without support in New Zealand. The Family Court judge found that it would be psychologically harmful for the mother if she were to be required to remain in New Zealand, and her happiness was in the interests of the child as she was the primary carer. No psychological evidence was provided. The Court of Appeal⁴⁸ discussed the difficulty in maintaining, let alone continuing, the relationship between the four year old child and his father if the child relocated to England, and dismissed the mother's appeal.

Sections 4 and 5 COCA⁴⁹ contain the principle that a child's welfare is promoted by a continuing relationship with both parents. Tapp and Taylor explain⁵⁰ that the social science research of Joan Kelly⁵¹, which favours the frequent, regular contact between the child and both her parents, is currently favoured by the New Zealand courts⁵².

⁴⁷ CIV-2007-4-4-5016, High Court of New Zealand, Auckland Registry, Judgment of Duffy J. 14th March 2008.

⁴⁸ At para 60.

⁴⁹ S4 COCA Child's welfare and best interests to be paramount

- (1) The welfare and best interests of the child must be the first and paramount consideration—
 - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
 - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.
- (3) A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interests.
- (4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.
- (5) In determining what best serves the child's welfare and best interests, a Court or a person must take into account—
 - (a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
 - (b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.
- (6) Subsection (5) does not limit section 6 (child's views) or prevent the Court or person from taking into account other matters relevant to the child's welfare and best interests.

S5 COCA Principles relevant to child's welfare and best interests

The principles referred to in section 4(5)(b) are as follows:

- (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
- (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationships with his or her family, family group, whanau, hapu, or iwi, should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents);
- (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child;
- (d) relationships between the child and members of his or her family, family group, whanau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing;
- (e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whanau, hapu, or iwi, or by other persons);
- (f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

⁵⁰ Relocation, *supra*.

⁵¹ Kelly & Lamb, "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children", 38 *Family and Conciliation Courts Review* pp 297-311.

⁵² For example, see Bruch, "Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law", (2006) 40 *Family Law Quarterly* 281-314. Bruch refers to Hetherington and Kelly, "For Better Or For Worse: Divorce Reconsidered" 88(2002) at 134 who states that it is the quality of the relationship between the non-residential parent and child rather than sheer frequency of visitation that is most important. Hetherington explains at 136-7 that the only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time. Bruch states at p292/293: "[t]he research literature .. does not substantiate assumptions or assertions that maximizing a non-custodial father's time with a child is necessary to preserve that parent's influence or the child's welfare. To the contrary, the quality of the parent-child relationship is neither a function of duration nor of frequency of visits. More importantly, neither has been

The relocation caselaw in New Zealand shows that, in spite of the research demonstrating that quality, and not quantity, contact is required to ensure a benefit to the child, the courts prefer a structure of frequent, direct contact in achieving the required continuing relationships, rather than less frequent, indirect contact. Tapp and Taylor conclude that more resources are required to enable parents to resolve their relationship issues, to understand the economic, practical and emotional realities of relocation, to consider whether more assistance may mean that the parent wishing to relocate is prepared to remain in the current location, and to assist parents about ways of maintaining meaningful relationships (not necessarily optimal) post separation. These authors consider different proposals for solutions to the difficulties of relocation. These will be considered in this report's conclusions.

iii) Australia

The Family Law Amendment (Shared Parental Responsibility) Act 2006 creates a presumption that it is in a child's best interests for each parent to have a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child⁵³ and that parents jointly share parental responsibility⁵⁴. Clearly, these presumptions may cause a tension with the relocation jurisdiction⁵⁵. Best interests of the child is the court's paramount consideration⁵⁶ and the court must consider the matters set out in 60CC(2)(3) in determining those best interests. These include (2) *The primary considerations* which are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. There are also (3) *Additional considerations* which include: (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis. 61DA contains a presumption of equal shared parental responsibility when making parenting orders relating solely to the allocation of parental responsibility for a child; 65DAA provides for a presumption about the amount of time the child spends with each of the parents and requires the court to consider the child spending equal time or substantial and significant time with each parent in certain circumstances.

Whether this means that obtaining court permission to relocate is, in fact, more difficult now than pre 2006 reforms is not clear⁵⁷ although Patrick Parkinson has said that: "[m]y sense of it is that comparing the reported decisions and the preliminary findings of our study with earlier studies, we are seeing fewer relocations being allowed under the new law than the old"⁵⁸. As contact is now a primary consideration, it may be envisaged that this could well make it more difficult to obtain permission. This, in turn, might affect the perception of parents who are seeking to relocate and encourage them to offer unrealistic contact arrangements so that the other party, and the court, will agree⁵⁹. If this is so, it cannot be said to be in the best interests

shown to have a measurable favourable effect on the child's emotional well-being. Instead, as might be expected, it is the *quality* (original emphasis) of the child's relationship with its father that matters".

⁵³ 60B(1)(a).

⁵⁴ 60B(2)(c).

⁵⁵ *B v B* [2006] Fam CA 1207 the court recognised the "delicate interplay of concepts".

⁵⁶ 60CA.

⁵⁷ Our appreciation to our practitioner commentators for their comments on the position in Australia.

⁵⁸ Canberra, part 2, p72.

⁵⁹ The lack of compliance found with contact arrangements, has led the researchers in Professor Parkinson's team to believe that unrealistic contact arrangements are often agreed as a means of securing the relocation, Canberra, part 2, p72.

of the child who may end up losing contact with the left-behind parent because of the lack of realism in the contact order.

Some commentators have noted the willingness of the court to consider orders requiring contact parents to relocate. In Sampson & Hartnett⁶⁰ the court considered the power to make an order requiring a parent to move to a different location to place the children in closer proximity to the other parent. Referring to B and B: Family Law Reform Act 1995 [1997] FLC 92-755 the Full Court touched tangentially on the difficulty in making orders which affect parental choices. Discussing the hypothetical issue of whether a contact parent could be inhibited from relocation, the Full Court concluded at 10.62 that there was power to make an order that may have an indirect effect of restricting the movement of the contact parent. The Full Court said however: “[w]e are not aware of any such order ever having been made in Australia and we think it unlikely that in the exercise of its discretion a court would do so”.

4. METHODOLOGY

Our one-year research project, funded by the Ministry of Justice, commenced in June 2008. It is **reunite’s** experience that many contact orders break down within the first 2 years of relocation⁶¹. Our intention was to consider this, as well as the other main issues arising in relocation cases as we understood them to be, subject to the limitations of our funding budget.

Our aim was to interview a broad representative sample of parents who have been involved in relocations, including those which were resolved between the parties without court intervention. The criterion for inclusion was that a relocation issue had arisen between the parents which caused one or both of them to have contact with one or more of the agencies through which we made contact with the parents. Our initial plan was to restrict our sample to cases where leave to remove from the United Kingdom had been sought from January 2006 to the present time. We were also planning to include *successful* relocations into the United Kingdom during the same period as we were hoping to be able to include interviews with the children of the latter category. However, we expanded the range, both because of the difficulties in obtaining a sample within the original parameters, and our recognition of the advantages of being able to obtain data across a broader spectrum of dates, thus providing a better indication of the longitudinal outcomes of relocation, and being able to include both retrospective and prospective considerations. The final range of cases is the 10 year period 1999 – 2009. Although we were ready to consider documentation provided to us, especially court judgements, this was not a requirement of our research as our primary interest was in the data produced by the semi-structured interviews, rather than corroborating evidence which could not be scientifically evaluated without full forensic investigation of both parties’ evidence.

In order to obtain our sample, we hoped to be able to access the court files of the Principal Registry⁶², and to use our contacts with United Kingdom lawyers to source additional cases,

⁶⁰ (No 10) [2007] Fam CA 1365 (22 November 2007).

⁶¹ Families Need Fathers estimate that between 40 and 50 per cent of men lose contact with their children within two years of separation – see Griffin Stone, “When your wife kidnaps your child”, *The Spectator*, 24th August 2002.

⁶² In the event, this did not prove possible although a very helpful meeting was held with the Senior District Judge on 23rd June 2008. We also attempted to engage with CAFCASS but were unable, on this occasion, due to both the limited funding and time available for this project, to undertake the process which would have allowed such collaboration to take place. It is hoped that both these avenues may be pursued in a future project.

as well as those which were available to us through the **reunite** database. Our intended method of reaching parents through lawyer contacts, as in our past research, was to use the lawyers as “post boxes”, forwarding our correspondence to any clients who they thought might be interested in participating, and leaving the client to make contact with us, through a stamped addressed envelope, only if they wished to do so. In that way, confidentiality is maintained and we would only achieve contact with the prospective interviewee if they chose to enable it.

Eighty nine letters were sent to lawyers in July 2008 which included those in Scotland⁶³ and Northern Ireland. We then forwarded invitation packs, consisting of invitation letters, explanatory materials and stamped addressed envelopes, to those lawyers who had responded positively to our original request for help. We sent a second wave of letters in September 2008 to the same cohort of lawyer contacts but, on this occasion, seeking their views and experiences, rather than the referral of cases, and received some helpful contributions from the practitioners.

We conducted a consultation process with organisations with a significant interest in relocation matters who responded to a consultation document which sought their experiences and views. A notice was posted on the **reunite** website to invite parents to contact **reunite** if they wished to participate in the research, which some did. Finally, our sample also consisted of those with whom contact was made directly by our Research Unit.

As a consequence of cost considerations, it was decided that the interviews with those who formed our sample would be conducted by telephone with the author, as principal researcher. As previously, where we were able to work with the abducted children and involve them in our research, we remain committed to such involvement both in terms of the significance of the understanding that is thereby provided for us, and as a tangible demonstration for the children of the proper regard paid to their views. We are hopeful that we will be able to develop this aspect of our research in our future work.

Our final sample comprised 36 interviewees. We were able to interview both parties in 2 cases, therefore our sample concerned 34 separate cases in total. One of the 34 cases involved a relocation from jurisdictions outside of the United Kingdom but we included it because of its specific interest, the applicant being the father.

The sample of 36 interviews comprised:

25 interviews with fathers, in 2 of which the fathers were the parent seeking relocation, one such application was granted and one was refused. In all the remaining 23 father interviews, the mother had sought relocation (NB In 2 of these cases, the mothers were also interviewed. See below). 15 of these mother applications were granted outright, 1 was granted retrospectively, 1 application was withdrawn after vigorous opposition from the father, 5 were refused (but one mother abducted after the refusal), 1 did not proceed to a final hearing as the mother abducted in advance of the hearing.

⁶³ Our anecdotal understanding is that relocation is not easily granted in Scotland and that applicants have “an uphill struggle” to be awarded leave to remove. An increasing number of fathers are consulting lawyers about the possibility of acquiring leave to remove but, in the event, do not pursue the application because of the perceived weaknesses in their cases.

11 interviews with mothers. All the mothers interviewed were the parent seeking relocation in their case. 7 applications were granted, 4 were refused.

The applicant for relocation was therefore the mother in 32 of the 34 cases in the sample (94.11%).

It is not surprising that there is a much higher incidence of father than mother participants in our sample as fathers are more usually the left-behind, and therefore disappointed, parent in relocation cases⁶⁴, and are willing participants in research of this type. This causes an almost inevitable imbalance in such studies as those who are satisfied with whatever process is being considered are less likely to wish to participate. Those likely to be satisfied are those who have relocated which are likely to be mothers. Therefore, the information provided by mothers who have relocated, and those who have been refused permission to relocate, has been especially welcome.

We used a semi-structured interview format, based on a questionnaire devised to address the issues which we understood to be of greatest interest and concern in relocation cases. However, the format allowed for the interview to be expanded and/or changed in order to deal with the matters which the interviewee parent felt to be of significance in their own relocation case. The data produced by the interviews was then analysed in terms of the categories of issues which form the findings below.

5. FINDINGS

i) Jurisdictions, and outcomes to the application

Our sample included 3 interviews concerning domestic relocations⁶⁵, in all of which relocation was permitted, although one appeal is still pending.

The remaining 33 interviews concerned international relocations, 4 of which concerned incoming relocations to England and Wales, 28 of which concerned outgoing relocations from the United Kingdom (but within the outgoing international category we had interviewed both parties in 2 cases, therefore these interviews concerned 26 separate cases), and 1 case which was outgoing from another jurisdiction. Of the 27 outgoing cases, relocation was permitted in 16 cases (59.2%).

The largest number of outgoing cases (7 cases, representing 25.9% of the 27 outgoing cases considered) involved relocations to The United States. There were 3 cases to Germany (11.11%), 2 cases each to Sweden, Spain, The Netherlands, and New Zealand (7.40% each). The other jurisdictions which involved one case each, were:

India	Japan
Tanzania	Australia

⁶⁴ See our finding that 94.11% of applicants in our sample were mothers.

⁶⁵ By this we mean intra-United Kingdom cases, i.e. between England and Wales, Northern Ireland and Scotland. Notwithstanding the separate legal jurisdiction in Scotland, these cases do not attract an application of the principles set out in Payne v Payne but are decided instead under the criteria in S8, The Children Act 1989, usually as a residence order or a prohibited steps order.

Brazil
South Africa
Singapore

Malaysia
Hong Kong

The 4 incoming cases were from the following jurisdictions, 3 were successful, 1 application from Italy was not granted:

Switzerland
Italy x 2
France

Therefore, 22 of the 34 (64.70%) cases considered resulted in relocation being permitted. Of the remaining 12 cases, 1 (from Italy to England) was not granted, 8 from the United Kingdom were not granted and the parent seeking relocation remains in this jurisdiction, 1 was not granted but the parent seeking relocation (the mother) went anyway in contravention of the court order and remains in the other jurisdiction. In one case leave to remove was granted retrospectively to the mother who had failed to honour an agreement to return to this jurisdiction. The final case concerned a mother who left before the relocation hearing took place and while the children remained wards of the English court, and who remains in the other jurisdiction.

ii) Marital status and ages of children

Twenty seven cases involved married parents, the remaining 7 cases involved unmarried parents. The sample concerned 52 children. At the times of the relocation, or the application for relocation where it was not granted, the children fell into the following categories:

Under 2 years old	6 children	7-8 years old	6 children
2-3 years old	5 children	8-9 years old	3 children
3-4 years old	8 children	9-10 years old	2 children
4-5 years old	6 children	10-11 years old	3 children
5-6 years old	4 children	Over 11 years old	6 children
6-7 years old	3 children		

Although the greatest number of children were subject to a relocation decision when they were between 3-4 years of age, this may simply be related to the age of the children at the time of the relationship break-down and does not provide any reliable data about the ages at which children are most likely to be subject to a relocation in their lives. The statistics relating to the marital status of the parents are largely reflective of the overall trends in marriage and cohabitation in this jurisdiction⁶⁶.

⁶⁶ There were 17.0 million families in the UK in 2004 and around 7 in 10 were headed by a married couple, see <http://www.statistics.gov.uk/cci/nugget.asp?id=1161> Our sample contained 79.41% of married couples – roughly in line with government statistics.

iii) Themes

i) **Contact**

(a) **Maintaining contact**

The problem

A recurring theme in our interview sample was that children are regularly “lost” to left-behind parents through the relocation decisions made by the United Kingdom courts. Parents are often placated with assurances that CAFCASS will be involved to ensure that contact arrangements work but, in reality, CAFCASS is unable to assist once the child leaves the jurisdiction.

Many parents complained that there were constant problems in exercising the contact that had been ordered by the court granting permission to relocate. One father described how his life had been defined by these problems after his children had relocated to The United States. Another father, who was granted contact to his child in another EU country, has a not untypical story. He explained the problem of finding a suitable place for that contact to take place. He decided that the best course was for him to move to the same jurisdiction as his relocated child in order that he could properly exercise contact. The mother later abducted the child back to the original jurisdiction when the judge in the new State of habitual residence made an order regarding contact of which the mother did not approve. The mother was returned under The Hague Convention, and contact was resumed. Multiple applications were subsequently made by the mother to prohibit the father’s contact which have resulted in enforcement measures being finally undertaken by the court of the State of the new habitual residence.

Another father describes the constant confrontations and problems about exercising contact with his children in The United States. He has sought enforcement on numerous occasions both in this jurisdiction and in The United States, and has lost considerable sums on international travel because the children were not allowed to take the flights, or because he was not able to see the children as arranged after arriving in The United States for contact.

Several parents reported that indirect contact, which is often part of a contact order and is designed to supplement the infrequent physical visits between a parent and child, rarely happens and cannot be relied upon as a method of maintaining contact. Telephone conversations are difficult to organise at times which suit the residential parent and which fit into the child’s programme. When they do take place, they are strained and truncated as the child is aware that others are listening to the call, feels the pressure of divided loyalties, or just cannot be bothered to speak at that time. The internet is not a suitable method of communication for most young children who would require parental assistance which may not be forthcoming, and the same is true of webcams which regularly are included within contact orders. Similarly, pre-paid mobile phones which have been programmed with the telephone numbers of the left-behind father and family are only useful where the residential parent will allow their use which, often, is not the case. Older children are very comfortable with using the internet as a means of communication, but will only do so if they know that it is

supported by the residential parent and will not cause a problem with that parent. The effect is that the contact between the parent and child living in another jurisdiction is usually irregular, and that neither party feels part of the other's life.

An even more difficult problem arises where the relocating parent has not provided a postal address so that the left-behind parent has no way of knowing where the child is living in the new State of habitual residence. In one case concerning a relocation to Australia, and where the father was representing himself in the relocation proceedings in this jurisdiction, the proposed contact arrangements seemed very good. However, the e-mail address that was provided to the father was changed without notice following the relocation and the United Kingdom mobile telephone number, which the relocating parent undertook to maintain, has been cut off. With no postal address, and with his letters being returned from the post office address that he was given, he has no way of communicating with his child. He says that he has now stopped writing because he finds the situation too painful.

Dealing with the problem

In some cases within our sample⁶⁷, parents have returned to the United Kingdom court for assistance because of non-compliance with the contact order by the relocating parent, but have discovered that the court is unable to require the attendance of the relocating parent who now resides in another jurisdiction. Mirror orders are not routinely granted, especially if, as is very often the case because of the costs involved in the type of multiple litigation which such cases produce, the parent opposing relocation is self representing. This has required the left-behind parent to engage the assistance of the court in the new jurisdiction, with all the personal, time and financial considerations that this involves, often to find at the end of the process that contact is not reinstated by the new court which takes a different view of the best interests of the child concerned. The situation has been addressed within Europe⁶⁸ by the new Brussels II Revised Regulation⁶⁹ (BIIR) which provides in article 9 that in cases within the European Union, jurisdiction is retained by the original State of habitual residence which makes the contact order for 3 months following the lawful removal of the child in order that the contact order may be modified, if required, after which time jurisdiction passes to the new country. However, any protection that this may provide is only as good as the intentions of those that it is designed to bind as it may be circumvented with ease by those who wish to do so, either through lack of bona fides or through genuine change of circumstances. In the former case, this may be achieved by honouring the order of the court granting relocation for the duration of the "safety period" (the initial 3 months), and then refusing to do so afterwards on the basis of alleged changed circumstances. The left-behind parent is then in the position of having to enforce the original order in the court of the new jurisdiction, dealing with the issues of representation and costs, and any argument from the relocating parent about the change of circumstances which necessitated the non compliance with the original order. Such arguments might well find favour with the court of the relocating parent's

⁶⁷ Which pre-date the coming into force of BIIR – see below.

⁶⁸ but for jurisdictions outside of Europe, the difficulty remains.

⁶⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Entered into force 1 August 2004, applied as from 1 March 2005, repeals Brussels II (Council Regulation (EC) No 1347/2000. Applies to all EU Member States except Denmark.

home jurisdiction so that, although this process may result in the re-establishment of contact, it is far from guaranteed.

(b) Financing Contact

A father who takes multiple flights each year to visit his children, is grateful for the contact but says that the costs are such that he is struggling to afford it. Almost all the flights are to be financed by him. He does not consider himself a father at all and says that he is more like an uncle to the children who jets in and out of their lives.

Another father, in a case involving New Zealand, reports that, although the mother must return once each year to facilitate contact, the question of funding for this trip was not addressed in the court order. This may well reflect the situation that neither party is, in fact, able to afford the international contact which has been ordered so the order can only be aspirational. Fathers who are burdened with paying all the costs of international contact report being near to bankruptcy. Some believe that this is part of the mother's plan because, without funds, the father will not be able to maintain international contact with his children and will be cut off from their lives. Although this may not, in fact, be the mother's intention, it may well be the result of the continued litigation to enforce contact.

The stress that this causes for the father can lead to problems for the child. One father explained the horrible cycle of his life whereby the constant worry of financing his long term international contact with his child means that he is under too much stress to work. However, he needs to work in order to fund his much valued contact with his child who now lives abroad. If he is unable to work, that contact will cease and the impact on the child is likely to be considerable, having already lost day to day involvement with his father, with whom he had a very close relationship. Fathers have reported sleeping in their cars in order to spend weekends with their children who live in places which are not served by local inexpensive airports, and therefore having to drive extremely long and exhausting distances in order to see their children.

The costs of international contact must be realistically considered by a court ordering contact, and must not be brushed aside as one of the burdens that a left-behind father must bear. It may not be possible for him to do so, and the child may suffer as a result.

ii) The Distress Argument, levels of contact and shared residence

Many parents have spoken of the over-emphasis by the courts of this jurisdiction on what is often called "the distress argument", i.e. that the mother's distress at not being allowed to relocate will impact negatively on the well-being of the child, to the extent that permission is given to the mother to move. These parental concerns focus on the undermining of the child's need for contact with both parents, and the potential subjugation of the child's interests to those of the mother. It has been suggested that independent guardians should be appointed to inform the Court as to the psychological and other child-centric arguments which are raised⁷⁰.

⁷⁰ In Jersey, article 75 Children (Jersey) Law 2002 provides for the court, where it considers it desirable in the interests of a child to do so, to order that the child be separately represented in such proceedings under this Law as the court may specify or that the child be assisted and befriended by such person .. as the court may specify. There is, thus, a high probability that a children's guardian will be appointed where an application is made under this provision. Our thanks to Barbara Corbett of Hanson Renouf for her assistance with this issue.

Dr. Mark Berelowitz has argued⁷¹ that no scientific research exists to support the belief that either distress or depression are assisted by allowing relocation. The level of distress and its impact on the mother are often assessed through oral evidence in court which may, either genuinely or through contrived motives, be exaggerated by the circumstances of court appearance. One case in our sample provides a good example. A mother, who was seeking a life-style relocation to a place she had visited for only a few days, was permitted to relocate in spite of recommendations by the court welfare officer that relocation be refused. Even though the judge accepted that the mother would not be devastated by the refusal, her evidence persuaded him that she would struggle with the disappointment that such a refusal would create. Subsequent to the relocation, contact for the left-behind father in this case proved extremely difficult to maintain because of the mother's antipathy towards him and the idea of contact between him and the child.

It is interesting to note that it is not only left-behind fathers who have raised the over-emphasis of the distress argument. One relocating mother believes that the emphasis is wrongly stated. She says that her own experience has taught her that it is a happy child that makes a happy mother, and not the more commonly expressed happy mother that makes a happy child. She regrets being allowed to relocate and to remove her child so far from his father. She says that there is a definite bias in favour of women in the courts of this jurisdiction and that men would not receive the same treatment if they wished to relocate abroad in order to marry someone from another jurisdiction and to take the children of the marriage with them. She believes that this is because of the unspoken assumption that mothers are the better primary carers for their children, and that fathers are able to move on with their lives without their children. This can be seen in those cases where both parents share residence of their children but, where the mother wishes to relocate, and she is allowed to do so⁷².

In this jurisdiction, it has recently been held that shared residence in an internal relocation case does not act as a trump card to prevent relocation⁷³. Lord Justice Wall explained: “[T]here is no doubt that a shared residence order can properly be made where there is a substantial geographical distance between the parties”⁷⁴. It seems that shared residence cannot be relied upon to prevent relocations, internal or international, nor can the amount of contact which the left-behind parent and family has been enjoying with the child.

iii) Monitoring relocation, and research into the outcomes and effects of relocation

Parents complained that there was no monitoring system in place after the relocation in their cases and felt that it was both necessary and helpful that some form of compulsory follow-up after removal should exist in order to know what happens after a child has relocated⁷⁵. It is only in this way that information about the practical aspects of court orders may be ascertained. However, parents also want the body which monitors the contact arrangements between the child and the left-behind parent to be granted the capability to assist if contact

⁷¹ See fn 17 supra and accompanying text.

⁷² See *Ford v Ford* below where the South African court did not allow relocation in such circumstances.

⁷³ *Re T (A Child)* [2009] EWCA Civ 20 where at para 36 Wall LJ stated: “[i]n my judgment, therefore it is wrong in principle to apply different criteria to the question of internal relocation simply because there is a shared residence order. ... I respectfully agree with counsel that it is not, in effect, a trump card preventing relocation”.

⁷⁴ *Ibid*, para 35.

⁷⁵ There is no “follow-up” of relocation orders, which is one of the reasons that *reunite* decided to engage in this research – to try to discover how the practical circumstances worked out for the parties, especially the children, subject to relocation orders.

arrangements are not working as envisaged by the court granting permission to relocate. There are obvious problems with this idea which are addressed in the conclusions. However, it is right to report the way in which parents in our sample believe this issue should be addressed.

It was widely expressed by interviewees, and this view is reflected by those currently researching internationally in this area, that research into the effects of relocation on the children concerned is an essential requirement for good practice in this area. Such research would provide the scientific evidence for the development of this area of law which is currently lacking. The potential consequences are as serious as those that children face on parental divorce, as a result of witnessing domestic violence, or as children experience with poor contact – all of which have received attention in recent years leading to discussions and/or changes in policy and practice⁷⁶. Consideration must now be given to this, equally important and influential, area in a child's life.

iv) CAFCASS⁷⁷ and child participation

Although it is possible for CAFCASS to be appointed as guardians ad litem in relocation cases⁷⁸, the usual situation is for CAFCASS to be appointed in relocation cases under S7

⁷⁶ See, e.g., Rodgers and Pryor, *Divorce and Separation: The outcomes for Children*, 1998, which demonstrated the policy implications of their findings - <http://www.jrf.org.uk/publications/divorce-and-separation-outcomes-children>, Neale and Flowerdew, *Moving on: The Changing Lives of Young People after Parental Divorce*, (2006) London: Routledge *Objects of Concern?* – children and divorce, Smart, Wade and Neale, *Child and Family Law Quarterly* (1999) 11:4, 365-376; Home Office Development and Practice Report, *Tackling Domestic Violence: providing support for children who have witnessed domestic violence*, 2004, which provides good practice recommendations - <http://www.homeoffice.gov.uk/rds/pdfs04/dpr33.pdf>. The legislature has now made witnessing domestic violence part of the definition of harm within S31(9) Children Act 1989 as amended by the Adoption and Children Act 2002. *Making Contact Work, A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact*, February 2002, <http://www.dca.gov.uk/family/abfla/mewrep.htm>, *Parental Separation: Children's Needs and Parents' Responsibilities, Next Steps*, 2004, setting out series of proposals designed to improve outcomes for children who experience the separation of their parents. <http://www.dfes.gov.uk/childrensneeds>. Children and Adoption Act 2006, implemented 8th December 2008, amended the Children Act 1989. The Act provides new ways to help the courts find solutions in private law Children Act 1989 cases where there is conflict between the parties, for example about who a child should see, and how often. The Act gives the courts more flexible powers to deal with cases where parties cannot reach agreement or cases where a person fails to comply with a contact order - http://www.hmcourts-service.gov.uk/infoabout/children/child_adopt_act.htm.

⁷⁷ Children and Family Court Advisory and Support Service.

⁷⁸ rule 9.5 Family Proceedings Rules 1991. (Statutory Instrument 1991 No 1247 (L.20)) Separate representation of children 9.5 (1) Without prejudice to rule 2.57, if in any family proceedings it appears to the court that any child ought to be separately represented, the court may appoint (a) the Official Solicitor, or (b) some other proper person, (provided, in either case, that he consents) to be the guardian ad litem of the child, with authority to take part in the proceedings on the child's behalf. (2) An order under paragraph (1) may be made by the court of its own motion or on the application of a party to the proceedings or of the proposed guardian ad litem. This is governed by a Practice Direction issued by the President of the Family Division: 5.4.04 see <http://www.hmcourts-service.gov.uk/cms/949.htm> which sets out a list of examples of cases in which it might be appropriate to join the child as a party to the proceedings. However, guardians are seldom appointed in these cases and, even more so, where the child is very young. These are, perhaps, the cases where a guardian would be most useful, to consider the impact on such a young child of relocation in terms of the loss of contact, and identity, which relocation might involve. It is also possible to appoint NYAS (National Youth Advocacy Service) under rule 9.5. NYAS is funded by the Legal Services Commission and has a team of inhouse lawyers who can represent children. Some parents have reported their experiences as NYAS being the more child-centric of these two organisations - see Charan Martin, *The Future of Separate Representation, Seen and Heard*, Volume 16, issue 4, p32 who describes

Children Act 1989 to undertake a report for the court which will include recommendations on whether the relocation should take place (however, in some cases, for example where the children are very young, the proposals are clear and the parties are well represented, CAFCASS may not be appointed). It is therefore extremely important that a child's situation is well understood, and that his or her views are properly represented by the Children and Family Reporter in the CAFCASS report. Although some CAFCASS officers are extremely experienced in this field, and provide an excellent service, many have no such experience. This variation, and the consequent non specialist status of many CAFCASS officers in relocation issues, has caused great anxiety amongst those who participated in our research. Our understanding is that, although until the late 1990's it may well have been possible to have had a court welfare officer whose experience was in probation work, this is no longer the case as the recruitment practices of CAFCASS and their own in-service training, prevent this from occurring. Family Court Advisers are required to have 5 years minimum post qualification experience with children and families and are now, therefore, child focused in their approach⁷⁹. Nonetheless, this experience may not be specifically related to relocation issues which are specialised and individual cases. Parents suggest that the role of CAFCASS in these cases should be limited to reporting on the wishes and feelings/observation of the child(ren). The anecdotal evidence from our practitioner respondents is that very often CAFCASS officers do not appear to understand the law or procedure in relocation cases. Their reports do not focus sufficiently on welfare and the impact of relocation on the child, paying too much or exclusive attention to the wishes of the primary carer applicant, wrongly believing that this is what they are required to do, sometimes treating the case as if it does not involve a relocation at all. The performance of CAFCASS in relocation cases does not, it seem, compare well to that in international child abduction cases which are dealt with centrally at the Principal Registry of the Family Division and where CAFCASS involvement is generally regarded as very successful.

Parents also complained about delays in obtaining reports and the quality of service provided by CAFCASS. There is some support for these concerns, both in practitioner feedback that we have received which details delays of more than 6 months in areas outside of London, and in the reports that Ofsted has issued on CAFCASS performance⁸⁰. In Ofsted's Inspection of CAFCASS south east region in May 2008, it states at p 11 "[m]ost private law reports were considered inadequate. Key faults in inadequate reports included: lack of clarity over criteria used in assessment; failure to assess domestic violence issues; the use of vague subjective description; making implications about children and families; and reporting to court about issues that were not relevant to the welfare of children". The Ofsted report into the Durham and Tees Valley service area in March 2009 states at p5: "[o]verall effectiveness in the Durham and Tees Valley service area is inadequate". Domestic violence was not addressed appropriately in some cases (p11) and "[t]here is too much variation in the quality of direct work with children and young people (p13); Ofsted's inspection of the experience of CAFCASS service users in the family courts in South Yorkshire in August 2008 states at p11: "...[O]ften the quality of handwritten notes made them impossible to read. The lack of

the "holistic, socio-legal approach .. to get the best outcomes for children. It provides multi-disciplinary training on advocacy, children's rights and issues of current interest for professionals and agencies working with children and their families within both public and private law family proceedings". A protocol exists between CAFCASS and NYAS determining when NYAS can be appointed .

⁷⁹ We are grateful to our practitioner commentators for their assistance with this issue.

⁸⁰ www.ofsted.gov.uk/reports. Only some comments from some reports have been quoted. However, these serve to demonstrate independently the concerns of the parents in our sample. See also Family Law Newswatch, 1st June 2009: "[a]s a result of the increase in workload, Cafcass waiting lists for court guardians are rapidly mounting across the country".

appropriate case records meant that usually it was not possible to understand how family courts advisers (FCAs) came to their judgements. .. [in] private law there was considerable delay in providing a service. As a result of this delay, the stress on children and adults taking part in court proceedings was unnecessarily prolonged. .. service users were not assessed by FCAs according to a consistent model. There was an over-reliance on the individual styles and preferences of FCAs. Reports to court from CAFCASS practitioners in private law were inadequate in unacceptable numbers. Key faults in inadequate reports included: not including the child's wishes and feelings sufficiently; not including all the parts of the welfare checklist (as required); lack of clarity over criteria used in assessment; failure to assess domestic violence issues; and reporting to court about issues that were not relevant to the welfare of children". The Ofsted inspection of CAFCASS East Midlands in January 2008 commented at p8 on the serious and significant deficits in the service delivered to children, young people and families involved in family proceedings, particularly in private law. Overall, public reports were of a better standard than private law reports. Key faults in inadequate reports include: lack of clarity over criteria used in assessment⁸¹; failure to make statements relevant to the conclusion; insufficient evidence to support statements; lack of focus on the wishes and feelings of children; and failure to evaluate the options available to the court, particularly the implementation of the 'no order' principle (p9).

Many interviewees also expressed concerns about the lack of objectivity of CAFCASS officers who, they argue, are influenced by the prevailing approach of the courts in this jurisdiction towards relocation, i.e. it will almost always be granted. This permeates the task of recommending for or against relocation.

v) Legal representation

Many interviewees expressed disappointment about the legal advice and representation that they received. The general tenor of advice, to both mothers and fathers, has been that mothers will inevitably be granted leave to remove from the jurisdiction, and that fathers should not bother to defend such applications as it is better to try to make good contact arrangements. Many parents accept that there is no point in trying to do what they perceive to be in the best interests of their child because it will just cost time, money and emotion, and all to no avail. This negative perception of the relocating parent's case by legal advisers, and others, means that many cases are settled on the basis of the general position, rather than the position of the individual child in the particular case.

Parents have complained that they were not advised about certification of orders under BIIR and that the contact orders made as part of the relocation order have not been certified. Some interviewees informed us that their legal representatives did not know about this procedure when questioned by the interviewee once contact had failed and the contact parent wished to enforce the order. Similarly, parents told us that mirror orders which were supposed to be made, and orders of the English court which were supposed to be registered in the new State of habitual residence, were not, in fact, done. This has left many parents with difficulties in maintaining contact.

⁸¹ One parent explained how his child, who did not want to relocate, had been asked by the CAFCASS officer to describe feelings in terms of red and green lights. The child told the father that he simply wanted to say that he didn't want to go and did not understand the process that had been undertaken.

vi) Presumption in favour of residential parent

Joint residence orders are increasingly used today. However, until recently this was a relatively unusual order, with the far more common order being that of residence to one parent, usually the mother, and contact to the other parent, usually the father. The potential exists in relocation cases to favour the residential parent⁸² as the primary carer of the child although, in many cases, this is not a judicially decided appointment after consideration of the welfare principles in the Children Act 1989. This was noted in a legal practitioner's comments: "[a]lthough, in Payne v Payne Thorpe LJ said that there should be no presumption that a parent with a residence order is permitted to relocate. In reality though, if that parent's case is well argued and the criteria is well thought through, then that parent is most probably going to be permitted to relocate in any event". If parents appreciated the potential significance in future relocation decisions, it may be that the initial allocation of parenting roles would be given more weight by both parents.

This perceived presumption is conveyed consistently to both mothers and fathers who report the broad and common conception that the mother is overwhelmingly likely to succeed in her relocation application, and that the best that a father can do is to fight for good contact. One father described the "learned helplessness" that such a culture creates which is reminiscent of the slow-burn that has been seen in the area of battered wives' syndrome. Fathers do not routinely contest a relocation application because they are told that there is no point in doing so, and that they should conserve their energy, emotion and finances to support international contact. One father describes this as "State sponsored abduction". Another father explained how "utterly powerless" he felt, and understands that other fathers feel, when the mother decided to move abroad. He said that this is the reason that some fathers seek the protection of the court in order to redress the balance. However, he states that the court invariably treats the father as the parent with power, and the mother as his victim. He said that this is nothing like the truth and "is like entering a parallel universe".

vii) Links between international child abduction and relocation, and reasons for relocation

It is argued that, if the relocation process is too restrictive, parents wishing to relocate may be encouraged to take the law into their own hands and simply leave the country without the required consents. Conversely, if the process is too liberal, potential left-behind parents may feel that they have nothing to lose by abducting the child before the court has a chance to make the relocation decision. The data that our sample has produced would suggest that the above arguments concerning restrictive and liberal jurisdictions are overly simplistic. In two cases in our sample, mothers wishing to relocate abducted the children from England and Wales, a recognised "pro-relocation" jurisdiction, when the relocation decision either went against them, or looked likely to do so. Another mother, who had lawfully relocated from England and Wales, abducted the child when she did not agree with the contact order made in the new State of habitual residence. A further mother, having been refused permission to relocate against a background of violence, has thought about abducting her child but has decided against doing so.

⁸² Although see Payne v Payne which states that no presumption is created by section 13(1)(b) in favour of the applicant parent – see para 85 (b). At para 85 © The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

Abductions occur for a variety of reasons and, although a restrictive relocation regime might discourage parents from applying to relocate in the belief that, as in a liberal regime, it would inevitably be granted, it does not follow that it would necessarily increase the incidence of abduction. Much will depend on the reasons that parents wish to relocate. Although multiple reasons were cited by some interviewees, the overwhelming majority of relocating parents in our sample (24) were going home. The remainder were either re-partnering (5) or wanted to relocate for work or lifestyle purposes (7).

The legal and social environments will, to some extent, influence the thinking of those who wish to relocate, and the alternatives that they may consider. It is submitted that much of this area is connected with expectation. If it is expected that, unless the circumstances are exceptional, you will not be allowed to relocate before the child reaches a certain age, then it is equally arguable that people's attitude towards relocation will be moderated by that expectation. It may well be that the knowledge of having to remain in a country if there is a child of a failed relationship may concentrate the minds of those contemplating having a child in a country which is not their home. Work and lifestyle choices may be modified if the opportunities to relocate do not easily exist at that time for those people. Re-partnering may prove a more difficult problem but, in the light of a different expectation, the solutions may be more flexible than currently envisaged. What would remain would be those relocation applications which were, if not exceptional, certainly not routine.

Although great sympathy exists for women who wish to go home and be supported by friends and family, together with a legal and social system which is familiar to them, the consequences of relocation cannot be excluded from the decision being taken. One relocating mother stated that parents must be prepared to stay in the same country while their child is growing up and that this issue needs publicising.

viii) Relocation awareness

We asked all our interviewees whether they had ever discussed before the birth of their children what would happen to any children of their union if it broke down. In only one of 36 interviews was this question answered affirmatively. However, many of the interviewees thought that they should have had this discussion, and that this issue is one that needs to be addressed in some way before the birth of a child. One mother asked whether this could be publicised on the **reunite** website as she believes that this would be a very useful way to alert people to this matter. **reunite** is currently considering initiatives in relation to this, and other, issues that have been raised by participants during the course of this project.

24 cases in our sample involved parents from different countries. Notwithstanding the international nature of these relationships, in two thirds of these cases (16) the interviewees stated this issue was not discussed between the parties. In only one case, the interviewee stated that it was always understood that she would return home if the relationship failed. In another case, the interviewee stated that the failure of the relationship was discussed but only on the basis of the children remaining in the mother's care in the State of habitual residence. In 4 cases, either the interviewees did not recall this issue, or had thought that they would be able to prevent the mother from leaving the jurisdiction. Of the remaining 2 cases, in one there had been no discussion before the birth of the child but the mother had always said subsequently that she would not be applying for leave to remove, and in the other there was no discussion because the interviewee did not predict the mother's lifestyle relocation as he

had already relocated to the jurisdiction of the mother's birth, and did not anticipate her wish to relocate elsewhere.

ix) Mediation in relocation cases

There is no current requirement in England and Wales to mediate in a relocation case⁸³. Some parents reported having received information from the court about mediation but, after contacting the writer, were told that there was little the mediation service could do for them as the parental positions were polarised with no room for negotiation. Some interviewees appeared to support this view and said that mediation was of no interest to them because they simply did not want the children to leave the country, and the other parent did.

The delay in obtaining legally aided mediation was a hurdle in one case. Several interviewees stated that mediation had not been offered to them but that they would have been interested in pursuing this if it had been offered. One relocating mother informed us that mediation was not offered but that she would definitely have accepted the opportunity had it been available and that she is 99% sure that, if mediation had taken place, that she would not have relocated. However, it is clear that some parents were discouraged from mediation after having a poor initial experience with a mediator who "had no international understanding and no mediation skills". In one case the mother's lawyer advised against it although the mother now feels that it would have been useful.

The basic general premise of mediation is the requirement for the willing participation of both parties⁸⁴. Some parents were willing to mediate but were unable to secure the support of the other parent. Several parents stated that there was no point in mediating with someone who you do not trust, who tells lies, and whose word is meaningless. One interviewee reported that the parties had mediated but that the mother withdrew from the agreement and decided to pursue the relocation application through the court. One father informed us that, being from an Asian family, there would be no point in mediating because he and his former wife were not the decision-makers. Everything would need to be referred back to those in the family who were able to take the decisions as the spouses could not conclude an agreement.

Although Professor Parkinson's team has not found that mediation was particularly helpful to the parents in their study (Canberra p74) because of the high conflict involved and the few compromise positions available, and in our own study parents have expressed mixed sentiments about mediation and its utility in their cases, **reunite** has conducted a research project into mediation⁸⁵ and recognises the assistance that mediation is able to offer some parents in international children cases, and which might also be useful to parents in international relocation cases⁸⁶. The **reunite** mediation model, which is now running as a

⁸³ Our thanks to Carolyn Usher for her guidance on this issue.

⁸⁴ However, mediation is compulsory in some jurisdictions, e.g Norway, Malta and some States in The United States – see Parkinson, Family Mediation in Europe – divided or united? Cited in Vigers, Preliminary Document No 5 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Note On The Development Of Mediation, Conciliation and Similar Means To Facilitate Agreed Solutions In Transfrontier Family Disputes Concerning Children Especially In The Context Of The Hague Convention Of 1980 (hereafter Vigers).

⁸⁵ Mediation In International Parental Child Abduction, October 2006 www.reunite.org.

⁸⁶ "[w]hen considering the 28 cases which progressed to a concluded mediation, the overwhelming response is that there is a clear role for mediation in resolving these highly contentious and emotional disputes, and that parents are willing to embrace the use of mediation.. whilst it would be true to say that mediation would not be

successful mediation service⁸⁷, is the subject of extensive training to other global providers interested in following its principles.

The Hague Conference on Private International Law has considered mediation in terms of both international child abduction and wider cross-border matters⁸⁸. A feasibility study on cross-border mediation in family matters⁸⁹ was undertaken and The Council on General Affairs and Policy of The Conference⁹⁰ invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters, asking the Permanent Bureau to begin work on a Guide to Good Practice on the subject which will focus on the use of mediation in the context of the 1980 Child Abduction Convention. As a first step, a Guide to Good Practice is to be prepared and submitted for consideration at the next meeting of the Special Commission to review the practical operation of the 1980 Convention, which is likely to be held in 2011⁹¹.

International child abduction cases involve many of the same issues as relocation cases, one parent wanting to live in another jurisdiction with the child(ren) of the family, the other parent not wishing this to happen, and all the ancillary issues that this situation creates. Mediation is not an answer for everyone, and will not provide solutions in all cases, as it requires openness and a willingness to move away from polarised positions by examining the parties' issues and interests, and the options involved. Not everyone is able or willing to do that. However, we believe it is possible that, with skilled and experienced specialist practitioners, mediation might well provide an environment in which these issues can be successfully addressed in relocation cases, in a realistic and productive manner, as it is now being recognised may also be achieved in cases of international child abduction.

appropriate, or suitable, in every case, and that mediation cannot resolve all cases where it is attempted, it is a facility that should be offered in all cases of international parental child abduction". Ibid at p51.

⁸⁷ dealing with referrals from the Central Authority, the High Court, lawyers and individual persons in international children cases. See www.reunite.org.

⁸⁸ See note by Vigers, supra. The note focuses on the use of mediation in international child abduction cases. However, it discusses the inclusion of mediation within the duties of central authorities in BIIR and 1996 Hague Conventions (the 1980 Convention does not specifically refer to mediation but requires central authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues) which Vigers states highlights the importance placed upon the use of mediation in international family disputes (p6).

⁸⁹ The General Affairs Council in a meeting in April 2006 invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject. The feasibility study provided an overview of the development of mediation in family matters within national systems, and the current status of mediation in international family matters. The Council of 2007 gave the mandate for the Permanent Bureau to invite Members to provide comments on the feasibility study and responses to a questionnaire before the end of 2007. The Council of April 2008 studied the written comments on the feasibility study and the responses to the questionnaire. Preliminary document no 10 of March 2008 for the attention of the Council of April 2008 on General Affairs and Policy of the Conference – www.hcch.org ; Annual Report 2008, Preliminary Document No. 12 of March 2009 for the attention of the Council of March/April 2009 on General Affairs and Policy of the Conference <http://www.hcch.net/upload/wop/genaff2009pd12e.pdf>, Projects Concerning The Children's Conventions, Maintenance, Adults and Cohabitation – Planning for 2009-2010, Preliminary Document No 6 of March 2009 for the attention of the Council of March/April 2009 on General Affairs and Policy of the Conference p7. In spite of the earlier discussion on the possible development of an instrument on cross-border mediation, this has not been taken forward as there does not seem to be support for such an instrument. <http://www.hcch.net/upload/wop/genaff2009pd06e.pdf> which details the group of experts on international mediation currently being consulted regarding the formulation of the Good Practice Guide on Mediation, including Denise Carter, Director, **reunite**.

⁹⁰ Report of the Council on General Affairs and Policy of The Conference of 1-3 April 2008.

⁹¹ Ibid p15 – see <http://www.hcch.net/upload/wop/genaff2009pd01e.pdf>.

x) Systemic problems

Generally, it was felt that children are not well served by the current relocation system and that insufficient attention has been paid, to date, to the effects of relocation on the child. At the same time, the over-emphasis on the happiness of the mother means that the system is apparently stacked against fathers, even custodial fathers, who feel that they suffer a serious legal injustice through the relocation system in this country. Fathers complained that mothers who abduct, and are returned under the Hague Convention to the State of habitual residence, and who then make applications to lawfully relocate, are not penalised for having abducted the child. The court ignores this serious wrong-doing on behalf of the mother, concentrating instead on all the failures of the father.

A far more child-centric approach is being urged by the majority of the interviewees, to be based on a thorough enquiry of the motives of both parties, scientific evidence on the effects of relocation and the impact of maternal (primary carer's) distress on the child, together with the routine appointment of a guardian⁹² to safeguard a child's interests and determine the evidence which is required in the circumstances of the particular case. One mother who relocated with her child expressed concerns at the lack of genuine child centricity in the relocation process. She informed us that the father raised a series of defences to her application. She was aware that the father wanted to put pressure on her to make a financial settlement. She agreed to his terms and he withdrew his opposition to the relocation. The judge in the case congratulated both parties for having come to an agreement. The mother feels that the judge should have been questioning the withdrawal of opposition, rather than congratulating them on settlement. If she had not been prepared to sacrifice financial security by accepting disadvantageous financial terms in return for the father's agreement to relocation, she suggests that the court would have taken the father's spurious arguments seriously which might have led to relocation being denied. She does not believe that this represents a child-centric approach.

The secrecy with which the Family Courts operate has also caused concern⁹³. To some extent this has been addressed recently through new rules which came into effect on 27th April 2009 and which, for the first time, allow members of the press to attend certain hearings⁹⁴. However, the anecdotal feedback we have received on the way that this is working in practice is that the restrictions on press reporting are so tight that there is likely to be no impact on the relocation jurisdiction.

xi) Effects of relocation decisions

It is unsurprising that no left-behind parent interviewee spoke of any positive effects of relocation, although one mother who was refused permission to relocate spoke of the advantages for the child of not living in a different country from the father. One relocating

⁹² See fn 70 supra for the position in Jersey regarding the appointment of guardians.

⁹³ See Griffin Stone fn 61 supra: [t]hrough the reason for this secrecy is a good one, the result is what happens in any institution that is shielded from scrutiny: abuse, arrogance and overreach".

⁹⁴ <http://www.justice.gov.uk/news/newsrelease060409b.htm>. See also McWatters, Family Law Week: The Shining Light of the Media, 28th April 2009: "...[T]he reforms in their final form have gone much less far than campaigners had hoped. The media will be allowed into court. But they will not be allowed to name or identify anyone in the case, unless they apply for and receive specific permission from the judge. They will not be allowed to report the detail of the case. In these circumstances, it will not be easy to get a press story out of a visit to a family court".

mother spoke movingly of her guilt at having moved her child away from the care and influence of the father, and another has returned to the former State of habitual residence after a short time in the country to which she had moved with the children due, at least initially, to circumstances which made it difficult for her to remain there. However, the more usual feedback from relocating mothers is that the move has worked well for them and their children.

Many left-behind parents spoke of the devastation that the relocation has brought to their lives. One father described the way he feels “totally uninvolved” in his child’s life and said: [o]ne minute you are a dad, then you are no longer part of your child’s life”. He says that, as an adult, he has to cope. However, he does not know how this removal of a pillar in a child’s life can, and does, affect a child. Other left-behind fathers described their descent into alcoholism, poverty and loss of identity, with many accounts of sleeplessness and loss of employment. Depression is a common experience for such parents. One told us that, through the relocation, he was “beside himself with grief and anger”. He considered suicide, as well as killing both his new and his old families. One father described relocation in his case (where he has lost contact with his child) as akin to bereavement but without the comfort of a resting place. He feels unable to trust anyone and is too frightened to have children with his new partner in case he suffers the same loss again. Another father told us that he wakes up every morning, wishing that he had not done so. A further general observation was that fathers are made to feel like expendable, unnecessary accessories in a child’s life.

As our sample included a majority of father participants, much data has been produced concerning the impact of a relocation decision on a left-behind parent. However, we have also heard of the desperation of mothers who, having suffered the break-down of a relationship with the father of their child(ren), are unable to leave a country which is not their home, and where they live only because of the relationship which has now failed. Several such mothers have told us that they are miserable and unhappy, that they lack emotional and financial support, and that they wish, above all else, to go home where they can provide a better life for their child(ren). In some cases, the fathers are having sporadic contact with the child(ren), in others the contact is more regular or equal with the mother. One mother reports that, leave to remove having been refused by an EU State, she has been threatened that her children will be removed from her care if she re-applies, notwithstanding that the level and quality of contact is, in her view, detrimental to the well-being of the child(ren). She explains that she feels trapped in a society which encourages shared parenting in high conflict cases, even where this was not the pre-separation arrangement. Other mothers, who were refused permission to relocate, have described their shock, sadness and ongoing depression at having to remain in a country which is not their home, and where they do not want to be, and the inability to get on with their lives that is created by this situation. Some do cope, notwithstanding these emotions, while others are struggling to manage, undergoing counselling if they are fortunate enough to be able to access it on a funded basis, which is not often the case. Several mothers talked of their suicidal thoughts. One mother, who unsuccessfully applied to relocate against a background of domestic violence which had necessitated court protection, said that the court “simply does not get the domestic violence context”⁹⁵.

⁹⁵ This reflects the Ofsted findings concerning CAF/CASS and domestic violence allegations.

6. CONCLUSIONS

One of the greatest problems in relocation cases is the potential loss of contact between the child and the left-behind parent and wider family. One practitioner has described this as akin to adoption so that contact may be radically changed, or indeed wiped out, by the relocation – a virtual transfer from one family to another. The provisions designed to assist with this problem, and to reassure courts in relocation decisions, are helpful in terms of setting boundaries and benchmarks, but suffer from the same “Achilles Heel” that has been encountered with undertakings given in abduction cases, that is enforcement. There is no such thing as guaranteed contact.

The 1996 Hague Convention⁹⁶ will finally come into operation in June 2010. It contains provisions which relate to transfrontier contact, which supplement the 1980 Hague Convention, and provide for advance recognition of contact orders made in the context of relocation cases. Although a contact order will generally be recognised by operation of law in all other Contracting States, advance recognition can be requested under Article 24 and should be used to dispel doubts about the existence of a ground for non-recognition⁹⁷. It is also suggested that⁹⁸, where advance recognition is not possible, a mirror order should be obtained.

However, the practical situation is that it may not be possible to obtain mirror orders in the other jurisdiction and, even where they are so obtained, they may be varied where there is a change of circumstances. Under the 1996 Convention, primary jurisdiction resides in the court of the country of relocation as soon as the child becomes habitually resident there⁹⁹. This raises concerns about the relocating parent applying to vary the contact order made in the previous State of habitual residence as part of the relocation order, notwithstanding the advance recognition¹⁰⁰. Article 8 of the 1996 Convention allows the court of the new State of habitual residence to make a request that the original court which allowed relocation should assume jurisdiction. It is questionable how often the Contracting States will be prepared to use this procedure when a national of their own State reports a change of circumstances for the child concerned which necessitates a departure from the contact order granted by the previous State of habitual residence.

We have considered the impact of the BIIR regulation on relocation applications in this jurisdiction¹⁰¹ as it seems that, in theory at least, it would now be harder to argue against relocation on the grounds of loss of contact in cases within the European Union. Where applicants have been refused relocation to European jurisdictions, they have expressed surprise that the refusal has been linked to concerns about the maintenance and honouring of contact arrangements with the left-behind parent and family. Article 41 BIIR relates to certification of a judgement for contact which will provide for the recognition and

⁹⁶ The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

⁹⁷ Transfrontier, supra, para 3.4.2.

⁹⁸ Transfrontier, para 3.4.3. However, see Section 3 Family Law Act 1986 for requirements in this jurisdiction regarding the making of mirror orders.

⁹⁹ Transfrontier, para 8.5.

¹⁰⁰ Article 9 BIIR provides for jurisdiction to be retained by the former State of habitual residence for 3 months following lawful removal where the non resident parent is still in the jurisdiction where the contact order was made and provided that the non resident parent has not accepted the new jurisdiction by participating in proceedings.

¹⁰¹ See Themes 3(1) above.

enforcement of that judgement in another Member State¹⁰². Article 41 also states that, where certification has occurred, the judgement shall be recognised and enforceable without any possibility of opposing its recognition¹⁰³. This has led to arguments by the would-be relocating parent that the court need have no concerns about contact taking place because the order is recognisable and can be enforced under the fast track procedure if an Article 41 certificate is provided¹⁰⁴. The State of former habitual residence retains jurisdiction under Article 9 for the first 3 months following the lawful removal of a child in order to modify a contact order. However, there is no power to do more than modify the order. Modification does not include enforcement. the State in which the child was habitually resident before the lawful removal does not have the power to make an order. Neither is the new State of habitual residence precluded from making another access order under article 8¹⁰⁵ during the 3-month period, although they may transfer the case under article 15¹⁰⁶. Therefore, if the contact order made in State A as part of the relocation order is being breached in State B, an application would have to be made to enforce it in State B, on the fast track if there was an article 41 certificate in existence. That would not, however, prevent State B from entertaining an application for a contact order¹⁰⁷. Therefore, although BIIR contains a regime for dealing with contact following lawful removal of a child from one European Union jurisdiction to another, scope exists for the new State of habitual residence to make a new order on a application from the relocated parent, and the left-behind parent would have to apply for enforcement in the new State of habitual residence which involves issues of legal representation and funding which must be considered and addressed. This might, therefore, explain the reticence of some judges where concerns about the maintenance of contact exist, notwithstanding the apparent reassurance of the provisions of BIIR.

These are all good initiatives but, like our findings regarding undertakings in our previous research¹⁰⁸, they are usually unnecessary in the cases of those who intend to abide by them, and do not prevent circumvention by those who do not so intend. Much depends on the bona

¹⁰² Although this seems to require certification at the time of making the order, and the only way that is envisaged by the Regulation for post-order certification is that set out in Article 41(3) where the situation subsequently acquires a cross-border character, if the order was not certified at the time it would appear that it is possible to return and ask for certification in cases of omission in order to achieve a purposive interpretation of the Regulations (my thanks to Michael Nicholls QC, formerly of 1, Hare Court, now in practice in Australia, for his guidance on this issue).

¹⁰³ Therefore the exceptions within article 23 do not apply once a certificate has been granted because the certificate certifies that the grounds for recognition are all complied with.

¹⁰⁴ There are now two routes to enforcement, the ordinary route and the fast track for enforcing access orders and orders for the return of a child under Art 11(8). Under the ordinary procedure, it is necessary to obtain a declaration of enforceability .. before enforcement. Under the fast-track procedure the order can be enforced directly, provided that the appropriate certificate has been issued by the court of origin. See Lowe, Everall and Nicholls, *The New Brussels II Regulation, A Supplement to International Movement of Children*, Family Law 2005, para 7.9, p.38

¹⁰⁵ “The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised”.

¹⁰⁶ “by way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 4”.

¹⁰⁷ There is nothing which suggests that enforcement has priority over original jurisdiction. Our appreciation is extended to Michael Nicholls QC for his assistance with this issue.

¹⁰⁸ Outcomes, p30.

fides of the undertaker or the person who is subject to the mechanism, i.e. the mirror order, the order of advance recognition, or the order made which is subject to BIIR. None of these provisions are a panacea in terms of the problems arising from contact in relocation cases.

Therefore, problems with the maintenance of contact are likely to continue and only so much can be achieved by further legislation. It might be helpful if it were possible to implement a system of monitoring relocation cases but this would simply be a data collection agency unless that body would also have the capacity to intervene in cases where contact has failed, and this is really unlikely¹⁰⁹.

Funding contact is an issue which is not assisted by these initiatives. Neither is the virtual loss of wider relationships for the child because, notwithstanding any orders requiring the child to return to this jurisdiction for contact which may include the wider family, such relationships, in any real sense, will be unlikely to survive the relocation. In many of the cases in our sample, the left-behind parents were enjoying regular contact with the child and, in some cases, had a shared residence order in their favour. That contact was not only with the left-behind parent, but also with the wider family of that parent, including grandparents, cousins, and half-siblings. The loss of these relationships to a child is likely to be very significant; the effects of such loss are not well understood as there has been no longitudinal research in this area. The substitution of new and, possibly, exciting surroundings and lifestyles cannot adequately compensate for the loss of established and important relationships in the child's life. The continuity and familiarity of personal relationships are crucial features of most people's sense of being and security. Their loss is usually suffered through bereavement and causes well documented effects as children struggle with grief, and to come to terms with losing their

¹⁰⁹ Under BIIR the original State of habitual residence retains jurisdiction for the first 3 months. It is theoretically possible that there could also be acceptance within the EU States of enforcement mechanisms for the original State during this period. Outside of the EU, it would be possible to consider bilateral agreements. However, these are extremely difficult options to achieve in practice and it is important to be realistic about what is possible. This can be seen in the willingness of parents to offer, and of courts to accept, impossible to maintain contact regimes in relocation cases. It is far better for all involved in these cases to accept the realities and to use them as a basis for both policy and decision making. The historical path towards BIIR demonstrates that, even States which share borders, and are strong supporters of the European Union, have not created supranational bodies to deal with their contact problems and it appears that, following the introduction of the Regulation, contact problems persist. This is also the case where there is regional collaboration between the Nordic States in terms of recognition and enforcement of contact orders made in one Nordic country which are always enforced on the same conditions without exequatur in other Nordic States, similarly to BIIR. The enforcement lies with the new, not the old, jurisdiction. The likelihood of the creation of a supranational body with enforcement powers is, therefore, remote. (Our anecdotal understanding is that relocation orders as such do not exist within the Nordic States. Where there is joint custody and the parents cannot agree, sole custody will be ordered so that the custodial parent may then choose where to live (also see Decker, A View from the Top: The Challenges of European Integration for Nordic Cooperation and Identity, January 5, 2004, <http://www.euroculturemaster.org> which argues that Nordic cooperation has been challenged to redefine its position in wider European context. See also the Uniform Child Custody Jurisdiction and Enforcement Act (1997), 9(1A) U.L.A 657 (1999). www.nccusl.org designed to promote uniform jurisdiction and enforcement provisions in interstate child-custody and contact cases. The Act required State courts to enforce valid child-custody and contact orders made by other States). The experience of bilateral agreements is that they do not work well. See Caroline Gosselain, Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States. A Research Paper. Preliminary Document No 7 of August 2002 for the attention of the Special Commission of September/October 2002 at p27: "[t]he bilateral conventions in this field operate with difficulty". Our report on the operation of the UK-Pakistan Protocol (www.reunite.org) supports this statement, as well as the anecdotal evidence from a Swedish colleague to the effect that no success was achieved in the negotiations between Swedish and Tunisian delegations where contact was sought in 9 cases under the Swedish-Tunisian bilateral agreement to children abducted to or retained within Tunisia.

loved ones¹¹⁰. These losses change people and their personalities. We cannot do anything about mortality, and we need to deal with this aspect of life, at whatever age it strikes. It is questionable whether children should routinely have to deal with such losses in circumstances where they may be avoided.

These are matters connected with the welfare of the child which must be addressed at the time that the relocation issue is first raised, and in a way which allows those involved to make decisions which are truly in the best interests of the child concerned, and which may mean that relocation is not undertaken.

We appreciate the frustration and distress of mothers, most often the primary carers of their children, who wish to return home or, in some way, to move on with their lives. The refusal of relocation applications has a potentially disproportionate impact on women because of the traditional primary carer role that most women play in their children's lives.

This was addressed in Ford v Ford¹¹¹ where the Supreme Court of Appeal of South Africa considered an application by a primary carer mother for leave to remove a child permanently from South Africa. The child was strongly bonded to both parents and, indeed, spent almost equal amounts of time with both parents. Both parents were British citizens who had settled in South Africa as newlyweds. The mother wanted to return “home”, and felt unhappy and depressed in South Africa. The court confirmed the judgement of the lower courts and refused the application to relocate. In the judgement, the Supreme Court stated at para 10 that: “[i]t is an unfortunate reality of marital breakdown that the former spouses must go their separate ways and reconstitute their lives in a manner that each chooses alone. Maintaining cordial relations, remaining in the same geographical area and raising their children together whilst rebuilding their lives will, in many cases, not be possible”. The court continued at para 12 that: “[i]t is also important that courts be acutely sensitive to the possibility that the differential treatment of custodian parents and their non-custodian counterparts – who have no reciprocal legal obligation to maintain contact with the child and may relocate at will – may, and often does, indirectly constitute unfair gender discrimination”.

It may be that the corollary of the privilege of primary caring is the requirement for willing self-sacrifice. This was considered by Lord Justice Thorpe, who stated¹¹²: “[o]f course I accept that the refusal of this application is likely to be a huge disappointment to the mother and any inroad in her sense of well-being and fulfilment is likely to have an adverse effect on D. But parenting is enormously demanding and often requires considerable self-sacrifice. I have no doubt at all that the mother has both intellectually and emotionally anticipated the prospect of refusal. I have no doubt at all that she will make the necessary adjustment and sacrifice, and that her alternative plans, although for her a poor second best, will ensure for D consistent and continuing primary care”.

Although the principle of sacrifice discussed by Lord Justice Thorpe in 1995 seems to have lost favour, it may be that its merit is being overlooked in our current quest to have everything we want when we want it.

Commentators generally agree that something needs to be done in respect of relocation and the issues which are raised. The United States judge, The Hon. Dennis Duggan, thinks that the

¹¹⁰ See, e.g., Dora Black, Bereavement in Childhood, *BMJ* 1998 March 21; 316(7135) 931-933.

¹¹¹ 52/2005) [2005] ZASCA 123 (1 December 2005).

¹¹² MH v GP [1995] 2 FLR 106 LJT at 111.

welfare test is too vague to be useful and states: “[s]o let us just admit that, as judges, we are doing our best to balance equities, do substantial justice, and make sure that the children are no worse off by our decisions. But let us not kid ourselves that we are somehow able to divine a child’s best interests for, perhaps, a decade or more into the future or that lawyers and forensic psychologists can produce evidence which proves such a fact”¹¹³. Duggan favours a system which encourages, empowers and commands parents to reach joint decisions, making suggestions which include the use of mediation and legislative bright-line rules¹¹⁴ which add predictability to the issue of relocation.

Eekelaar¹¹⁵ advocates transparency so that the interests of each of the parties is clearly stated and weighted, openly taking into account the interests of the parents and not trying to subsume them within a consideration of the child’s best interests which is misleading and muddling for the parents and those involved in these cases.

The highlighted vagueness of the welfare test, and the lack of transparency regarding parental interests in the welfare evaluation, can be addressed by amendments to the welfare checklist applicable in relocation cases. These could, perhaps, be based on the Australian system detailed above which specifically considers the benefit to a child of a meaningful relationship with both parents and the practical difficulty and expense of spending time with and communicating with a parent, and whether that will substantially affect the child’s right to maintain personal relations and direct contact with both parents¹¹⁶. The New Zealand system similarly contains provisions which provide for these considerations to be taken into account in the decision whether to allow relocation.

This, together with Parkinson’s suggestion of a process change¹¹⁷, seems to offer a real chance of improvement. This process change, which involves a more active role for practitioners in helping the parent parties in a potential relocation case to make informed choices about the way the matter proceeds and, where possible, to avoid the dispute being litigated, is one which resonates with the findings of this research. Parents have reported that they wish this approach had been adopted in their own cases and that they had been made aware of alternatives and consequences. One parent suggested that parties in a relocation case should be required to attend an education programme which should include the results of any research into the effects of relocation. Parents have reported their reticence about mediation because of the few opportunities which they perceive as being available for negotiation in circumstances where either the child does, or does not, relocate. However, with specialist mediators¹¹⁸, experienced in international children cases, mediation might well provide an opportunity for all the alternatives to be considered and explored.

Tapp and Taylor¹¹⁹ state that the design of any system to assist parents with post-separation parenting arrangements must take into account the research on the negative emotional and

¹¹³ Rock supra at 208.

¹¹⁴ A judicial rule that helps resolve ambiguous issues by setting a base standard that clarifies the ambiguity and establishes a simple response - <http://legal-dictionary.thefreedictionary.com/Bright-line+rule>

¹¹⁵ Eekelaar (2002) “Beyond the Welfare principle” 14(3) *Child and Family Quarterly* pp 237-249.

¹¹⁶ See 3(iii) supra 60 cc (2)(3) Family Law Amendment (Shared Parenting) Act 2006.

¹¹⁷ Parkinson, “The realities of relocation: Messages from judicial decisions” (2008) 22 *Australian Journal of Family Law*, pp 35-55 at 55.

¹¹⁸ e.g. The **reunite** mediation service – see fn 86 supra.

¹¹⁹ see fn 49 supra.

financial consequences of litigation for children and parents¹²⁰, as well as the evidence that the greater risks for the welfare of a child post-separation come from parental conflict, economic adversity, and repeated geographical moves.

It is clear from this project that there are often seriously negative effects of relocation on the left-behind parent and family. Although we may feel great sympathy for their position, the primary concern in family jurisdictions which are based on the best interests principle, must be with the children involved in these cases. We need to know whether our policies regarding relocation are, in fact, working in the best interests of the children who we seek to serve with our laws. Perhaps, therefore, the greatest imperative is for research to be urgently undertaken specifically into the outcomes of relocation and the effects of relocation on children. Without this scientific evidence, we are working almost entirely in the dark in an area of potentially dramatic impact on a child's life. We do not know whether, in general, relocation works well for children who adapt quickly and suffer no significant emotional loss, or whether, alternatively, relocation impacts negatively and substantially on a child's life and development and, if so, in which ways. This information is vital in order that policy in this area can be informed through a sound research basis.

Additionally, we consider that an amendment to the welfare checklist in The Children Act 1989 as suggested above would provide a better foundation for relocation decisions to be taken than currently exists¹²¹. We would also support a form of process change which enables informed decisions to be taken by parents involved in relocation issues and which may include a combination of mediation¹²², education programmes and practitioner information sessions. Finally, we believe that a guardian should be routinely appointed in relocation cases, rather than in the rare cases in which one is currently appointed. This is especially important in cases involving very young children, where the relocation has the potential to threaten the heart of the relationship-building in which a young child engages with its parents and wider family. Older children are currently more likely to be separately represented but, at least in these cases, the child has an established relationship with his or her parents and relatives. It is at least arguable that such children are at less risk than very young children who have not had the benefit of time to establish those foundations. Relocation cases are the closest relations in private law proceedings to care proceedings in public law, or adoption proceedings. In neither of the latter two types of proceedings would it be thought conceivable to proceed without a guardian, and separate representation of the child. Relocation cases are not cases simply about contact – they are cases about relocation, and its impact on the child concerned. This is the root of the issue. This is where the child's best interest must be addressed and considered.

¹²⁰ At their fn 97 they cite Parkinson and Cashmore who suggest from preliminary findings of a research project about relocation disputes that the high level of conflict between the parents in their sample may relate to the effect of litigation driving people into corners compounded by the crippling cost of litigation and the cost of funding contact at a distance.

¹²¹ NB Patrick Parkinson has suggested that guidance is also required on how judges should apply the terms of the welfare checklist regarding the requirement to maintain contact with both parents. He states that: In determining whether a parent's proposed change of location is in the best interests of the child in cases where: (i) their parents have or will have equal shared parental responsibility (ii) the child has been consistently spending time on a frequent basis with both parents, and (iii) the child will benefit from maintaining a meaningful relationship with both parents, an outcome that allows the child to continue to form and maintain strong attachments to both parents, and to spend time on a frequent basis with both parents, even if it is not as frequent as before, shall be preferred to one that does not". Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation - http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1181442.

¹²² See above.

These initiatives may result in a readjustment to the “pro-relocation” attitude which is routinely adopted by our courts so that we might achieve what is required - a truly child-centric approach to this extremely difficult familial issue.

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Families Need Fathers

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