

INTERNATIONAL RELOCATION OF CHILDREN

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1. THE STATUTE

The Children Act 1989 Section 13 provides

- (1) where there is in force a residence order in respect of a child no person may –
 - (b) remove him from the jurisdiction without the written consent of every person who has parental responsibility for the child or the leave of the court.
- (2) subsection (1)(b) does not prohibit the removal from the child from the jurisdiction for a period of less than one month by the person in whose favour the residence order is made

2. *Payne v Payne* 2001 1 FLR 1052 is well known. The application was for leave to remove a child aged 2 to New Zealand. Thorpe LJ said, at paragraph 40 (page 439):

'To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion

Pose the question: (a) is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and well investigated? If the application fails either of these tests refusal will inevitably follow. (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with maternal family and homeland? (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare of the paramount consideration, directed by the statutory checklist in so far as appropriate'.

At paragraph 41 (page 440), Thorpe LJ continued:

'In 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 factor

Thorpe LJ and Dame Elizabeth Butler-Sloss P stated that there is no presumption in favour of relocation. The Guidance, at para 26(b) in the Judgment of Thorpe LJ, was

“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.”

3. TEMPORARY REMOVAL

The Payne approach does not apply to temporary removals from the jurisdiction. The more temporary the period the less regard should be paid to Payne.

4. Re A 2005 Fam law 215 the court had to balance the mother’s desire to move abroad for two years for her professional development against the child’s need for contact with the father

5. Re S and O 2009 Fam law 114 the court granted the father leave to take the children to Barbados on his undertaking to put in place an agreement that if he did not bring the children back by the due date he would lose his interest in the home in England. There was no time to put in place a mirror order

6. Re N [2006] Fam Law 737 CA holiday abroad without parent

The mother of a 9 year-old child sought permission to send the child unaccompanied on a two week holiday during the summer of 2006 to visit his mother’s family in Slovakia. The father opposed the application on the basis that the child was too young to travel alone, especially since he did not speak Slovak and the maternal family did not speak English. The trial Judge refused the application and the mother appealed.

Allowing the Appeal and granting permission for a Summer 2007 visit –

- (i) The Judge had failed to take into account relevant positive factors and had over-estimated negative factors.

- (ii) He had failed to give weight to the evidence that the child had had happy experiences dealing with the mother's family in the past
- (iii) The Court was not satisfied that the mother could not take time off work to accompany the child this summer and considered that if she did so, this would better prepare the child for an unaccompanied visit the following year.

7. This case is an example of how a primary carer may make holiday arrangements for a child without the consent of others who have parental responsibility. The Court considered that there is an interesting legal point as to whether the permission under CA 1989 Section 13(2) permits a carer to make arrangements and rely upon others to care for the child while he or she is abroad

8. POST PAYNE PERMANENT RELOCATION CASES

Since Payne there have been a number of cases. In by no means all have the Applicants been successful. Each case is fact specific. The cases are difficult. Examples are:-

9. Re B 2003 2 FLR 1043 the Court of Appeal stressed that where the mother cared for the children within a new family the impact on the new family including the stepfather of the child was to be considered

10. Re Y 2004 2FLR 330 the court refused leave where care of the child had been shared since separation and the child had been brought up to be bilingual in Welsh and English. Removal to the USA would cause him significant emotional and educational loss would cause him significant loss

11, Re J_(Leave to remove) April 2007 Fam Law 375 CA EWHC 1897

Two older children aged 15 and 11 refused any contact with their mother and lived with their father. The younger child aged 6 lived with the mother and had frequent contact with their father and the older children. In the course of cross residence order applications by the parents the father made an application for leave to remove the two elder children to Bulgaria. The father presented himself as financially desperate. The Judge granted permission to re-locate to Bulgaria with the two children. The mother appealed arguing that the father had failed to establish that practical arrangements as to home, school and employment had been made. Held (i) The Judge ultimately had to decide between mother's proposals for a residence order to be implemented in this jurisdiction and a father's residence order application to be implemented in another state. In this case *Payne and Payne* principles were barely applicable. (ii) There was the extraordinary consideration in this case that a sound future for the family could be achieved only by the father recovering an earning capacity in some other economy. (iii) The Judge had been right to give great weight to the practicalities.

12. Underlying this case was the polarisation of the two older children against their mother and economic necessity. At ages of 15 and 11 cases become increasingly child driven. The Court specifically expressed that *Payne v Payne* principles were barely applicable in the case

13. *Re MK (A child)* 2007 1FLR 432 CA

The Brazilian mother had a child by a man she met in England. Contact was agreed and F's application for residence and parental responsibility was heard with M's application to relocate to Brazil with her child. The Judge refused her application on the basis that she was not satisfied with her practical proposals for relocation and in particular with the evidence

that she could practice law in Brazil. The CAFCASS officer stated that she would not be shattered if she could not return. Held on appeal by the mother:-

- (i) The Judge's rejection of M's credibility was unfair and unwarranted. No allowance was made for the fact that she was testifying in her second language with no interpreter. Further she had told the CAFCASS officer that she would have to take further exams.
- (ii) If the mother earned her living that would facilitate contact.
- (iii) Leave was granted only in principle by the Court of Appeal. Thorpe LJ directed that each party file statements with regard to contact.
- (iv) Strong orders were needed in both England and Brazil to ensure that F could continue his relationship.

The Court of Appeal accepted that the process below was seriously flawed.

but in granting outline leave left the question of contact to be pursued. Outline leave is not unusual

14. Re B leave to remove 2007 1 FLR 333 Sumner J_The parents were both homosexual and held UK passports. M's partner was the father's sister. F had acted as sperm donor merely to impregnate the mother. Since the birth in 2002 contact had taken place only by court order and acrimonious incidents had occurred. M took the child in breach of court order on one occasion and made unfounded accusations of sexual abuse. She had undertaken not to make any such allegations in future. M offered contact in USA and claimed that she had changed her attitude to F. F sought a sole residence order on the ground that that only in the UK could his contact be promoted.

Held

- (i) The draconian option of change of residence had not been made out convincingly. The mother was a good carer. The mother had “moved on” more than the father.
- (ii) A shared residence order was unlikely to work in the circumstances of this case because of the very high level of hostility
- (iii) The experts’ view that the level of contact precluded a developing relationship in the UK was in this case decisive.
- (iv) Relocation would reduce the pressure on the mother and contact in the USA was the best chance of developing the relationship with the father.
- (v) The mother had much better employment prospects in the USA and would be devastated if she could not relocate and this would impact on the child

15. This case is shows that contact is not always central to the Payne exercise. The experts decided that the prospect of contact was better if relocation was permitted than if it was refused

16 As Thorpe LJ has stressed, each case is fact sensitive. As Head of International Family Justice he is of the view that relocation applications should be considered at High Court level. Given the number of applications annually that is not feasible. There is usually no right and wrong answer in these cases. Instead there is a dilemma.

16. Re G 2008 1 FLR 1587 there was a joint residence order and generous contact to the children aged 6 and 9. The CAFCASS officer had stated that the children were strongly bonded to their father and suggested that the mother might have underestimated the effect

of relocation. The mother was granted leave to remove to Germany and the father appealed. The Court of Appeal (Thorpe and Wall LJ) deflected the attack on Payne by deciding that there was no social shift which required Payne to be reconsidered and that the guidelines in Payne were helpful

NEW RESEARCH

17. New research suggests the outcome predicted by the Court in litigation is often not what occurs in fact. Professor Patrick Parkinson at the Australian Family Lawyers' Conference in Fiji in early June 2009 summarised the first part of research carried out by the Faculty of Law, University of Sydney in collaboration with a team at the University of Otago in New Zealand. Dr Marilyn Freeman on 7 the July summarised research carried out by the Reunite Research Unit and funded by the Ministry of Justice. Neither sample was large, though Professor Parkinson says that there is no reason to believe that his findings are unrepresentative. Dr Freeman points out that, when eliciting information from parents who have been involved in relocation, those for whom the effect of relocation has been negative are more likely to respond to requests for interviews than others. Professor Parkinson, one of the principle architects of the 2005 radical overhaul of Australian family law, acknowledges that the Sydney research represents the first stage in a long-term longitudinal study, and that the findings reported in his paper must be seen as preliminary. Both authors, have cooperated with each other, and drawn on other research. Their conclusions are similar. Many practitioners find that these also confirm their own experience. In a recent case where some of the points highlighted below were made to the judge by reference to the Research the Judge responded: "A matter of commonsense I should have thought". However until now it has been difficult to persuade many judges of the importance of these points in the total welfare assessment exercise because of the significant emphasis traditional case law has placed on the impact of the mother of refusal of grant of leave.

RESEARCH SUMMARY 18-30

18. THE REST OF THE WORLD: LACK OF CONSENSUS

There is a wide range in the approach of different jurisdictions to applications to relocate children. Dr Freeman refers to earlier research in which different jurisdictions are categorised as pro-relocation, anti-relocation, and neutral. Professor Parkinson notes that a change in Australian statute law in 2006 has lowered the success rate in relocation applications; but that the prospects of success in Perth or Melbourne are significantly higher than in Sydney. It should be noted that in Australia parents wanting to relocate within the country are likely to be facing the same test as those seeking to relocate externally.

England is categorized as pro location, New Zealand against.

19. IS CONTACT SO IMPORTANT?

The first point argued on behalf of the appellant father in *Payne* was that the *Poel* approach was inconsistent with the importance which the courts now attach to maintaining contact between the child and the absent parent. This argument was rejected. At that time there was little or no academic research on the subject. Even in the years since *Payne* the importance of maintaining positive relationships with two parents is more widely acknowledged.

20. LOSING TOUCH

The researchers confirm what many have suspected: after relocation a large proportion of fathers lose touch with their children.

21 COST

A family which has been through a contested hearing will have been financially weakened by (a) the cost of the dispute; (b) the cost of the relocation; and (c) the cost of maintaining two rather than one

households, before the cost of maintaining contact can even be considered. In practice, the costs of travel to the new home state often make contact impossible. Even if the cost seemed feasible at the time of the court order, life moves on and a father may be torn between prioritising his new family unit and setting aside enough money for contact arrangements.

22. THE CONTACT

For children of many age groups, seeing a parent again after, say, 6 months can feel strange. The relationship is so dislocated that it is barely meaningful. Even though quality time rather than quantity time are still recognised as needed, the impact of the interruption of contact routines is great. Contact in the new home state of the child can be thwarted readily. A father who has travelled for 24 hours to see his child only to find barriers to meaningful contact exist, will find it very hard to persevere.

Good fun at an exotic location does not reflect the reality of life with that parent: “Disneyland contact “is not what a relationship is really about.

23. TRAVEL TIME

The impact of travel on the child can be a great strain as Professor Parkinson points out. For many children even a 4 hour journey, each way, to Ireland or France is an exhausting experience. The child can become neutral or even hostile to international contact because of the strain. The child contemplates a long dreary journey, a barely recalled environment, unfamiliar relationships.

24. INDIRECT CONTACT

Indirect webcam contact is difficult for many young children even if the relocated parent co-operates. Even if the child does sit still in front of the camera, the interaction is a poor substitute for physical presence.

25 OBTAINING LEAVE: THE TRIAL PROCESS

The intending relocater pays lipservice to a desire to support future contact. It is often hard to show that the commitment is thin. In practice it often evaporates quickly. The relocated parent, sometimes deliberately, undermines the relationship with the left behind parent.

26. CAFCASS

CAFCASS officers assist the court in an environment which is known to be under pressure from underfunding. However the methodology of some CAFCASS officers has been open to criticism in the past by OFSTED. The task of assessment is difficult. In *Payne v Payne* the CAFCASS officer had formed a view of the relevant law after obtaining a set of notes made by a colleague at a seminar she had not attended. Some CAFCASS officers have directed the thrust of their inquiries in a direction which is not fully child centric, with insufficient focus on the practical problems and the adjustments required of the child in a new state. The risk that a child lacks the resilience to adapt to the new life and lack of frequent regular contact with the other parent is considerable. In a recent case where the author was instructed for the father the mother gave evidence:

“I am sure our child aged 3 is resilient and will get used to not seeing her father more than once a every three months. I know my child better than anyone. She was fine last summer when I was away for two months”.

In that case the CAFCASS officer formed the clear view that the mother was not committed to contact at all and that the proposed dislocation of shared care arrangement created an unacceptable risk to the child’s emotional development: leave to relocate to France was refused.

27. UNDERTAKINGS AND MIRROR ORDERS

Both reports suggest that when permitting relocation, courts often attach conditions which are

ineffective. Not all countries will grant mirror orders or, if they do, they are not applied as one might hope. Many left-behind parents find that it is too easy for the parent who has relocated to ignore or circumvent undertakings which have been given. In non-EU cases the English court will often have no power to enforce the undertakings and the court of the country of relocation may take a different view.

28. BRUSSELS 2 REVISED CASES

In cases to which Brussels II Revised applies, Article 9 provides that after the lawful removal of a child to another Member State, the Member state of origin retains a concurrent jurisdiction for three months to modify the contact order. Article 41 provides for the certification of a judgment for contact which will provide for the recognition and enforcement of that judgment in another Member State. Article 8 confers jurisdiction on the Member State where the child is habitually resident, and it remains controversial as to the extent to which Article 9 nor Article 41 will prevent the Member State where a child has become habitually resident from effectively modifying the original contact order to a high degree.

29. HAPPY CHILDREN HAVE HAPPY MOTHERS?

The relative importance of thwarting the parent seeking relocation and the impact of a radical change in the child's existing contact arrangements is difficult to assess. In her statement the applicant mother asserts that she would be "devastated" if leave were refused. The mother sits in court, ashen faced, as the Judge will notice. Lack of any medical evidence that she would if refused leave, suffer such distress that it would impact on her parenting abilities is no bar to a decision in her favour with this point central to the judgment.. Dr Mark Berelowitz in the Resolution debate of September 2005 pointed out that there is no evidence that relocation is a cure for depression. Neither was there evidence of the impact on a child of "sub threshold depression" ie distress and disappointment. In

reality relocation creates new stresses and strains for all, whilst placing a child in a new situation with the loss of much of what is familiar.

The mothers who are refused permission to relocate do usually come to terms with their disappointment. A few told the researchers that they were glad they had not moved or that the relocating parent returned to the original state. Quite simply the grass had not been greener.

30. Meanwhile the accepted wisdom that “Happy mothers have happy children” may need to be revisited. Should there be a more child centric approach? Perhaps we should assume as did one mother did who regretted relocation: “Happy children have happy mothers”.

INTERNAL RELOCATION

31. Internal relocation is important if an established regime of care is dislocated. In that situation a parent may resist an application by one parent to alter the contact or shared care arrangements. In Australia because the distances are great internal relocation is a common issue.

Re G (Contact) [2007] FLR CA The parents lived in Australia and they decided eventually that they would return to England after the marriage broke down. They obtained an order from the Australian Court permitting the wife to bring their 10 year old son to England and have him reside with her providing for contact to the father and specifying that the child must attend a particular school.

However, the mother decided to move to live with other members of her family in a different part of the country so that the child could not travel to the school. The child refused to see his father. The father successfully sought orders in the English Court for the same arrangement as had been ordered by the Australian Court.

Held Granting permission by the mother to appeal and allowing the appeal and remitting the matter to the High Court –

- 1 In most cases a residence order should not be fettered with a condition that the parent who has that order be confined to a particular locality.
- 2 To pick a school and work everything around the school was to put the cart before the house. The fact was that the mother had re-located to another part of the country and it was completely unrealistic to expect the child to travel to school from there.
- 3 The contact order made by the first instance Judge to reflect the pattern ordered by the Australian Court was not workable and the matter should be remitted to the High Court, with both parents accepting that there must be a compromise.

32 The Court in this case accepted that the mother's re-location was sensible in view of her lack of income and alternative accommodation. The question of which school a child should attend could not be allowed to determine the remaining issues between the parents. Choice of school often has to be secondary to other practical matters

THE SHARED RESIDENCE ORDER

33. There is no magic in a shared residence order: Wall LJ in *Re L* [2009] 1 FLR 1157 reviewed the authorities. He decided that it was wrong in principle to apply different criteria merely because there is a shared residence order. Although a parent resisting internal relocation faces an uphill task the court will make an order in effect refusing internal relocation in some cases. Evidence for example that the relocating parent intends to undermine the other parent / child relationship by the move is relevant. The mother's appeal from a refusal to permit a move from London to Somerset was dismissed

34. STEPS TO TAKE WHEN YOU ARE SEEKING OR RESISTING IN PRACTICE

Instructions:-

- (a) Reasons for relocation
- (b) What is the motivation of the parent seeking to relocate
- (c) Is the plan thought out properly
- (d) Immigration issues
- (e) What is the effect on the stepfather and new family of refusal to relocate
- (f) Relationships in new state
- (g) Money and housing and insurance etc
- (h) Schooling
- (i) Are there special cultural factors such as religion or a language
- (j) Evidence of back up in the event of problems
- (k) Is there a commitment to contact
- (l) What is the cost of contact
- (m) How will the cost be funded
- (n) Is planned contact feasible in practice
- (o) What journeys can the child cope with

- (p) What is the impact of refusal on the parent wishing to relocate
- (q) What is the effect on the child of disruption with his significant relationships and life here
- (r) What does he leave behind in England
- (s) Are mirror orders likely to be effective
- (t) What are the wishes and feelings of the child
- (u) Can safeguards be put in place such as a bond

35. A point may often be made that the child has no conception of what it would be like to be separated from his other parent and his habitual environment for more than a short time. He will usually reflect the wishes of the parent with whom he lives. It is all very well to assume that a child is resilient and will adapt readily to a change but this is speculative. When questioning a CAFCASS officer elicit the underlying facts underpinning her opinions. Where is the evidence? How can he or she know or predict? CAFCASS officers sometimes stray beyond the area where they are trained and take into account distorted information fed to them by one party

36. Breach of contact orders

In a case in which the author appeared in 2005 a mother of a 5 year old boy sought leave to relocate to Australia. The Judge granted permission. The mother failed to honour the contact obligations imposed before departure. She showed herself hostile to contact. The father aged 57 applied for a residence order in Australia and succeeded on the ground that the mother was guilty of parental

alienation. Care was transferred to the father. The mother was to have contact for most of the holidays. She has had a nervous breakdown and is not seeing the child. This illustrates the draconian approach to the issue in some states. The client must understand that breach of contact arrangement can be very serious

37. The Crystal Ball

The advice of practitioners acting for a father has often been so pessimistic that fathers have decided not to squander their resources on resisting. As a result of the latest research the outlook for resisting parents may, in some cases, be different

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