

Child Arrangements for Very Young Children

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1. I have been asked to speak about contact arrangements for very young children. In this short seminar I will consider what that contact might look like and I've also been asked to consider the topic of internal relocation for very young children. I will use the old fashioned term 'contact' rather than 'spends time with', for speed.
2. The answer to the primary question of what contact might look like, is, as ever, "it depends!"
3. Firstly every family is unique and secondly as with each individual family and each individual child that we focus on within proceedings, the welfare checklist always settles in an essentially unique direction.
4. What is interesting about this topic is that I have pulled together authorities from differing areas of family law, and was reminded, as I did so, that sometimes we can become siloed in outlook.
5. I will deal with a number of topics in turn:
 - (a) Key preliminary considerations
 - (b) The voice of the child and the age of the child guidance and authorities
 - (c) Contact for very young children – guidance and case law review
 - (d) Internal relocation and very young children

Key considerations

6. I often begin my seminars with this advice, but when considering arrangements for very young children it is important to consider the practical realities of the day to day and to be really clear about what your case is. Especially when dealing with the very young. It is essential to be very clear about how your client would like contact to look.
7. Very young children share a number of characteristics which must be taken into account by anyone seized with making a welfare decision about them.
8. When dealing with children under two it is essential to consider what sort of parenting the family has agreed upon, for example attachment parenting and factor that into the plan for contact. Is the child being breastfed? What is the position with sleep training? What is the child's routine? How flexible is the child to any change in that routine and can both parents manage it? Is there co-sleeping? It takes time to establish breast feeding and fresh

routines and this is a period of time in a child's life full of big changes for them, for example potty training.

9. Many young children can be very sensitive to the absence of their primary carer full stop and especially during periods of transition from cot to bed, for example, or when establishing nappy free days.
10. This all appears self evident but must be considered prior to any application made, especially if the application is for overnight staying contact, more of which below.
11. Do remember this – whilst you are in the early years all of these issues are self-evident. But the tribunal and the professionals may not have the reality of a three hour feeding cycle front of mind! They may have forgotten what those early years are like and have an entirely functional approach to contact ready to deploy.
12. The huge caveat within this topic is that each case will be fact specific and the welfare checklist applies.
13. Remember that children are vulnerable by reason of their age. The younger they are the more vulnerable they are considered to be.
14. Any potential risk needs to be immediately identified and taken seriously. This is not a seminar about PD12J but I refer practitioners back to that and also to the need for any disputed risk factors to be carefully explored when dealing with young children and any application that might result in them spending prolonged periods away from their primary carer.
15. Ultimately when in litigation one is dependent on the tribunal. The tools and guidance exist to ensure that that court is aware of the issue of increased vulnerability that arises within this topic and most of the useful guidance is clearly set out within the FPR 2010 PDs.
16. At the other end of the spectrum do consider ADR. All arrangements will immediately work better if reached by agreement, rather than through litigation. As younger children are more vulnerable they are equally highly sensitive to the fall out from litigation. The best people to determine how time should look are the child's parents.

The voice of the child and the age of the child guidance and authorities

17. A really interesting question, then is how the voice of the child factors into this topic.
18. The fundamental point is that a child's wishes and feelings are ascertainable in a number of ways.

19. The child must be at the centre of the decision making process. This means that your client must have a case that places the child at the centre of planning.
20. The older a child is, of course, the better they are able to express their wishes and feelings. Of course, we all know, that pre-verbal children are also able to express their needs. Factor this into your case.
21. The following guidance is of perhaps limited use but I include it here for your consideration and ready reference when thinking of the voice of the child in any event.

Guidance

PD 12B – Child Arrangements Programme

(https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12b)

The child in the dispute

4.1 - In making any arrangements with respect to a child, the child's welfare must be the highest priority.

4.2 - Children and young people should be at the centre of all decision-making. This accords with the Family Justice Young People's Board Charter (https://www.cafcass.gov.uk/media/179714/fjypb_national_charter_1013.pdf).

4.3 - The child or young person should feel that their needs, wishes and feelings have been considered in the arrangements which are made for them.

4.4 - **Children should be involved, to the extent which is appropriate given their age and level of understanding**, in making the arrangements which affect them. This is just as relevant where:

(1) the parties are making arrangements between themselves (which may be recorded in a Parenting Plan),

as when:

(2) arrangements are made in the context of dispute resolution outside away from the court,

and/or

(3) the court is required to make a decision about the arrangements for the child.

4.5 - If an application for a court order has been issued, the judge may want to know the child's view. This may be communicated to the judge in one of a number of ways –

(1) By a Cafcass officer (in Wales, a Welsh Family Proceedings Officer (WFPO)) providing a report to the court which sets out the child's wishes and feelings;

(2) By the child being encouraged (by the Cafcass officer or WFPO, or a parent or relative) to write a letter to the court;

(3) In the limited circumstances described in paragraph 18 below, by the child being a party to the proceedings;

and/or:

(4) By the judge meeting with the child, in accordance with approved Guidance (currently the FJC Guidelines for Judges Meeting Children subject to Family Proceedings (April 2010)).

Family Justice Council Guidance 2010 – Guidelines for Judges Meeting Children who are subject to Family Proceedings

[https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/voc/Guidelines +Judges seeing +Children.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/voc/Guidelines+Judges+seeing+Children.pdf)

Produced by Family Justice Council and approved by President of Family Division, April 2010.

- **Key points re younger children:**

- Purpose of guidance – *“to encourage Judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge’s task.”*
- Guidance not intended to replace Cafcass’ role/responsibility in ascertaining a child’s wishes and feelings.
- Purpose of judge meeting child is to benefit the child. Not to gather evidence or for the benefit of the judge or other family members.
- *“In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child’s chronological age is relevant but not determinative. **Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.**”*

Norgrove Committee – Family Justice Review 2011

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

- Expressed an aim to strengthen the voice of children in proceedings.
- 6.*Family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all. Our proposals aimed to address this and focus on:*
 - *ensuring the voices of children and young people are heard, and that they understand the decisions that affect them...*
- 9. *Children and young people should be given age appropriate information to explain what is happening when they are involved in cases. They should as early as possible be supported to make their views known and older children should be offered a menu of options, to lay out the ways in which they could – if they wish – do this.*

- 10. *The work needs skilled professional support. The Family Justice Service (see paragraphs 13 to 25) should take the lead in developing and **disseminating national standards** and guidelines on working with children and young people in the family justice system.*

- 124. *Children and young people should be given the opportunity to have their voices heard in cases that are about them, where they wish it. The key needs within the Family Justice Service and private law generally are to:*
 - *give clarity to the child about the process, their options for involvement and the likelihood of their view being taken into account;*
 - *raise parental awareness, through education and support, of the effect disputes can have on their children;*
 - *support parents to communicate with their children; and*
 - *ensure consistency of approach and materials throughout the process – via the hub, mediators, legal practitioners, PIPs and in court.*

Government Proposals

Children will be seen and heard in Family Courts - <https://www.gov.uk/government/news/children-will-be-seen-and-heard-in-family-courts>

- Proposals made in 2014 by coalition government that children will have a greater voice in Family Courts.
- Commitment for children **from the age of 10** to be involved in hearings and to have access to judges to make their views and feelings known.
- Also for children to have appropriate access to mediators in cases affecting them.
- To be implemented in public and private law cases “as soon as is practically possible”.
- Not yet implemented.

22. A few observations that flow on from this.

23. Children, from around the age of 7 will have a literal voice in proceedings, depending on local practice and the nature of the case.

24. In terms of young children what I would suggest your team focuses on is impact. If you are seeking longer periods of contact for the non-primary carer then make sure that your plan takes this into account.
25. How will you help the child understand what is happening to them and understand that they are central to the process. What practical tools do you have in mind to assist with e.g. frequent transitions, taking into account their specific needs? The court is unlikely to meet with them and hear them directly. How will you communicate the fact that they're at the centre of the decision making process?
26. And remember the voice of the child, their wishes and feelings, are not determinative.

Case law on the voice of the younger child:

27. The following authorities are of interest:

Re R (Child Abduction: Acquiescence) [1995] 1 FLR 716

<http://www.hcch.net/incadat/fullcase/0060.htm>

- Hague proceedings.
- F appealed a refusal for children to be returned to him in Illinois after M retained children in Wales after a visit.
- Children aged 6 and 7 expressed a wish to remain with M.
- M argued F had acquiesced to the children staying.
- *“The children in the present case are aged 7½ and 6 years. Counsel for the Mother has submitted correctly that there is **no hard and fast rule which lays down a minimum age** below which the views of child need not be taken into account. She accepts, I think, that it would be most unusual for a court for any of the contracting States, except perhaps Germany, to have regard to the views of children as young as 7½ and 6 years; but she says correctly that there is no rule of law to this effect.”*
- *“Whether any particular child has attained sufficient age and maturity, she submits, is a **question of fact** and depends upon the circumstances of the particular case”.*

Re W [2010] EWCA Civ 520, [2010] 2 FLR 1165 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/520.html>

- M removed three children (aged 8, 6 and 3) to England from Ireland without F's consent.
- F applied under 1980 Hague Convention for children to be returned.
- Children aged **8 and 6** spoke to Cafcass and expressed a wish to remain with M in England.

- Judge held that they were old and mature enough to have their views taken into account.
- F sought to appeal arguing, among other points, that views of 6 year old should not have been taken into account as she was too young.
- Leave to appeal refused.
- Children as young as six can be mature enough to have their views taken into account.
- The youngest age of a child whose views have been taken into account in a reported case.

Re F (Abduction: Child's Wishes) [2007] EWCA Civ 468, [2007] 2 FLR 697 –

[Http://www.bailii.org/ew/cases/EWCA/Civ/2007/468.html](http://www.bailii.org/ew/cases/EWCA/Civ/2007/468.html)

- Child aged 7.
- International abduction proceedings.
- M appealed against location order made in F's favour.
- Child overstayed in UK with maternal grandmother after a holiday.
- F applied for child to be returned to Spain nine months later and was granted.
- Child was not consulted for wishes and feelings.
- M appealed on the basis that the judge had failed to discharge obligation under Art 11 (2) of Brussels IIa in not hearing the child.
- F argued that given child's age, it was within the judge's discretion to decline to hear from the child.
- Held - failure to hear the child had been a fundamental deficiency.

Re M [2007] UKHL 55, [2008] 1 AC 1288 –

<http://www.bailii.org/uk/cases/UKHL/2007/55.html>

- Hague proceedings.
- Order made for children aged 10 and 13 to be returned to F's care in Zimbabwe after M abducted them to UK.
- Children objected to being returned.
- Children's views held not to be determinative.
- 46. *"In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has **attained an age and degree of maturity at which it is appropriate to take account of her views.** These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider*

*it appropriate to take account of a child's views. **Taking account does not mean that those views are always determinative or even presumptively so.** Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. **The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.**"*

F v F [2013] EWHC 2683 (Fam) –

<http://www.bailii.org/ew/cases/EWHC/Fam/2013/2683.html>

- Even older children's views not necessarily determinative.
- Children were aged 11 and 15.
- Expressed a view that they did not want vaccinations.
- Judge met with children and determined that their views were influenced by multiple factors, including mother's views and children did not have an understanding of the issues involved.
- Decided that vaccinations should be given despite children's wishes.

28. On a separate note, I would at some point like to discuss the issue of overriding the wishes and feelings of older, even Gillick competent ones, and will suggest as much to our friends at White Paper.

29. But in terms of this topic it is important to note that the ascertainable wishes and feelings of any child are just one facet of the welfare checklist, and despite the relevant child being young or non-verbal there will be an attempt to focus on matters from their perspective.

Re F (A Child) (International Relocation Cases) [2015] EWCA Civ 882 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2015/882.html>

- Criticism within judgment of *Payne* guidance re relocation cases.
- Emphasis needs to be on children's wishes and feelings.
- 18. *Furthermore, in the decade or more since Payne it would seem odd indeed for this court to use guidance which out of the context which was intended is redolent with gender based assumptions as to the role and relationships of parents with a child. Likewise, the absence of any*

emphasis on the child's wishes and feelings or to take the question one step back, the child's participation in the decision making process, is stark. The questions identified in Payne may or may not be relevant on the facts of an individual case and the court will be better placed if it concentrates not on assumptions or preconceptions but on the statutory welfare question which is before it, to which I will return in due course.

- Now approach in *K v K* and *Re F (Relocation)* followed i.e. *emphasis on wishes and feelings*. [See below for discreet section on this point]

Re D (A Child) & Another [2016] EWCA Civ 12 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2016/12.html>

- Proceedings in relation to recognition and enforcement of an order made by Romanian courts.
- Romanian court made an order in F's favour for custody of child, aged 7, despite fact child have lived in England with M from a young age.
- Child's views were not heard during proceedings.
- M appealed against recognition of the order in England.
- Held that failure to listen to child's voice violated fundamental principles in English law under Art 23(b) Brussels IIa.
- **45. For young children who have not developed any sufficient communication skills it may not be possible or necessary to ascertain their wishes and feelings. Furthermore, there may on the facts of a particular case be very good welfare reasons to make a decision not to do so. That is quite separate from the question whether and how they are going to participate. Again, for some children in the private law context participation may be through their parents but it must not be assumed that that will be good enough. The question must be asked.**

30. Again and again at the beginning of each of my cases we start by looking at the question of participation in respect of all the parties and the children. This is a fundamental starting point in any case involving a child.

Re L (A Child) [2019] EWHC 867 (Fam) –

<http://www.bailii.org/ew/cases/EWHC/Fam/2019/867.html>

- Court ordered transfer of residence of an 8 year old from M to F.
- Child had lived with M and maternal grandmother since age of 2.

- Held that duty of guardian to report on child's wishes and feelings should be tempered by the overarching requirement to give paramount consideration to the child's welfare.
- Child's expression of wishes was unlikely to represent true wishes and feelings because of negative impression of F given in maternal home.
- *60. CA 1989 s 1(4)(a) requires the court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".*
- *61. Whilst it is a fundamental principle, applicable to every case, that the child who is the subject of the proceedings shall be heard, the manner and the degree to which the child is heard will vary from case to case. Further, it is important to bear in mind that each element in the welfare checklist is subject to the overarching requirement in CA 1989, s 1(1) that the welfare of the child must be the court's paramount consideration.*
- *62. In the present case, L is represented by a professional CAFCASS guardian, a solicitor and experienced counsel. To that extent the voice of those acting on L's behalf is certainly "heard" within the proceedings.*
- *63. The duties of the Children's Guardian, appointed under Family Procedure Rules 2010, r 16.4, are set out in PD 16A paragraphs 7.6 and 7.7:*
- *"7.6 It is the duty of a Children's Guardian fairly and competently to conduct proceedings on behalf of the child. The Children's Guardian must have no interest in the proceedings adverse to that of the child and all steps and decisions the Children's Guardian takes in the proceedings must be taken for the benefit of the child.*
- *7.7 The Children's Guardian who is an officer of the service or a Welsh Family Proceedings Officer has, in addition, the duties set out in Part 3 of this Practice Direction and must exercise those duties as set out in that Part."*
- *64. The reference to duties under Part 3 of PD 16A refers to the duties of a Children's Guardian appointed under r 16.13, namely one appointed in specified "public law" proceedings or adoption proceedings. By PD 12A, para. 6.6(b) the Children's Guardian must advise the court on "the wishes of the child in respect of any matter relevant to the proceedings...".*
- *65. There is, therefore, an express duty placed upon a guardian in a case such as this to report on the child's wishes. However, in my view, that duty must be tempered by the overarching requirement to afford paramount consideration to the child's welfare. In the present case, the Guardian began direct work with L which would normally lead to explicit discussion of the central issue before the court. However, during the course of that work she saw first-hand that which her predecessors had also apprehended, namely that this young boy was exquisitely torn between a wholly negative presentation of his father in the maternal home which was in total contradiction to the reality of his relationship with his father when they were seen*

together. The Guardian considered that any expression of wishes in the current circumstances would be bound to favour the mother. More importantly, she considered that to ask the question and to put this eight year old boy on the spot of expressing a choice would itself be emotionally harmful. She therefore made the positive decision not to ask him the question. Her decision was, certainly by implication, supported by the solicitors and counsel instructed on L's behalf, who now defend that decision before this court, and her decision was accepted by the very experienced family judge. In those circumstances, it is difficult, indeed it is not possible, for the mother to argue on appeal that the exercise conducted by the Guardian was fatally flawed and that, as a result, the process before the judge should be set aside and a fresh exercise undertaken to canvass L's wishes and feelings.

- 66. Further, I accept the submission of Mr Veitch and Ms Musgrave which focusses on the word "ascertainable". In the professional opinion of the Guardian, it was not possible to ascertain L's wishes and feelings on the central issue without causing him emotional harm. It was also the view of the Guardian that L's position was such that any expression of wishes would be unlikely to represent his true wishes and feelings, and, to that extent it would not be possible to ascertain the child's genuine view.

31. "Ascertainable" is certainly a critical word and one that is particularly important when in dispute about child arrangements for very young children. It transcends language.

Judge writing to children -

D v D [2022] EWFC 164 –

<http://www.bailii.org/ew/cases/EWFC/HCJ/2022/164.html>

- Boys aged 11 and 8
- Cross-applications – M wishing to relocate to Somerset, F wishing for children to live with him in London.
- Judge wrote a letter to children explaining decision to maintain status quo and reject the relocation application.

Re A (Letter to a Young Person) (Rev 1) [2017] EWFC 48 –

<http://www.bailii.org/ew/cases/EWFC/HCJ/2017/48.html>

- Peter Jackson J (as he then was)
- Child aged 14

- Application for leave to remove to Scandinavia.
- Originally application made by child, then taken over by F.
- Child spoke with Cafcass and met with judge privately.
- Application dismissed.
- Judgment delivered by way of a letter to the child.

32. This is a very child centred approach and one that will provide a record for the child about the starting point of contact arrangements and the rationale for that, perhaps especially important when children are very young at the time that the template is set.

Contact and very young children

Cafcass – Engaging with and seeing children policy:

<https://www.cafcass.gov.uk/sites/default/files/migrated/Engaging-with-and-seeing-children-policy-Feb23.pdf>

1.5 Pre-verbal infants

*The purpose of seeing pre-verbal infants is to observe their behaviour and presentation, their interactions with their care givers and to check that their specific needs are being met. If a baby is sleeping during a first visit, this should be noted in the recording and a further visit planned to observe and interact the infant when they are awake. **In exceptional circumstances, when the FCA decides that an infant is not going to be seen within the required timescale there must be a case discussion with a manager and the decision recorded on the child's file with the rationale agreed with the manager.***

Case Law

33. It is fair to say that even in the last ten years there has been a considerable shift in the gendered approach the courts took to the identification of the primary carer and contact with non-resident fathers.

Re W (A Minor) (Residence Order) [1992] 2 FLR 332 – [my note: I have highlighted the date!]
Balcombe LJ:

“Although there is undoubtedly no presumption of law that a child of any given age is better off with one parent or the other, and although the only legal principle involved is that the welfare of the child is the paramount consideration, no court can be ignorant of what would be the natural position if other things were equal. It hardly requires saying that a baby of under 4 weeks old would normally be with his or her natural mother.”

Lord Donaldson of Lymington MR:

“At the risk of being told by academics hereafter that my views are contrary to well-established authority, I think that there is a rebuttable presumption of fact that the best interests of a baby are served by being with its mother, and I stress the word 'baby'. When we are moving on to whatever age it may be appropriate to describe the baby as having become a child, different considerations may well apply. But, as far as babies are concerned, the starting-point is, I think, that it should be with its mother. That is not to say that it is not a rebuttable presumption. There are many mothers whose circumstances are such that the presumption would be rebutted; but that is not this case.”

Re A (Children: 1959 UN Declaration) [1998] 1 FLR 354 –

M’s counsel in seeking a residence order sought to rely on Principle 6 of the UN Declaration of the Rights of the Child 1959 i.e. that a child of tender years shall not, save in exceptional circumstances, be separated from its mother.

Judge at first instance agreed and ordered residence to the mother.

On appeal determined that the relevance and value of the UN 1959 declaration was ‘most doubtful’

Key paragraphs –

In terms of relevant social policy it could be said to be almost antiquated since it is now nearly 40 years old and in terms of social development and in terms of understanding of child development and welfare that is an exceedingly long time. Nor is that principle reflected in the 1989 Convention on the Rights of the Child, a Convention ratified by this nation, as indeed by most other nations of the developed world. As Miss Nijabat points out, the corresponding article of the Convention, Art 9, is in strictly neutral terms. It states that the parties shall ensure that a child shall not be separated from his or her parent against their will except when competent authorities, subject to judicial review,

determine, or where the parents are living separately and a decision must be made as to the child's place of residence. In modern terminology that is gender neutral.

The judge should have had greater regard to the decisions of this court in *Re S (A Minor) (Custody)* [1991] 2 FLR 388 and *Re A (A Minor) (Custody)* [1991] 2 FLR 394. In the first case, in a judgment by Butler-Sloss LJ, it had been held that there was no presumption that one parent should be preferred to another for the purpose of looking after a child at a particular age. **It was likely that a young child, particularly a little girl, would be expected to be with her mother, but that was subject to the overriding factor that the child's welfare was the paramount consideration.** Returning to that judgment in *Re A*, Butler-Sloss LJ at 399H turned to the submissions in the case, saying:

'... the first was that it was natural for a mother to have the care of a 6-year-old girl. This was, in my judgment, a misunderstanding of the decision of this court in Re S where I said that: "it is natural for young children to be with mothers but, where it is in dispute, it is a consideration but not a presumption."

In cases where the child has remained throughout with the mother and is young, particularly when a baby or toddler, the unbroken relationship of the mother and child is one which it would be very difficult to displace, unless the mother was unsuitable to care for the child. But where the mother and child have been separated, and the mother seeks the return of the child, other considerations apply, and there is no starting-point that the mother should be preferred to the father and only displaced by a preponderance of evidence to the contrary.'

In a passage immediately following she said:

'The welfare of the child is paramount, and each parent has to be looked at by the judge in order to make as best he can the assessment of each, and to choose one of them to be the custodial parent. Insofar as the judge appears to have started with the proposition that little girls naturally go to their mothers, the judge was in error and applied the wrong test.'

That last sentence might be readily adapted to the judgment which we review, insofar as the judge considered that J should naturally go to his mother, being a child of tender years. He was, in my judgment, in error and applied the wrong test.

Re T (A Child) [2005] EWCA Civ 1397 -

Wall LJ

No presumption exists in favour of either parent but “*as a matter of practice, very small babies are usually cared for by their mothers*”.

H v W (Surrogacy Agreement) [2015] EWFC 36 –

This case demonstrates the shift.

One year old child (M) born as a result of artificial insemination.

Applicants (H and B) a couple applying for residence and contact orders in respect of M. H is biological father.

First respondent (S) M’s biological mother.

H and B arguing that S had agreed to act as a surrogate but that she would continue to have a role in M’s life.

S asserting that she had an agreement with H that excluded B, that H would act as a sperm donor and she would be M’s main carer and parent.

Arguments raised by S in respect of her role in breast-feeding and co-sleeping with M.

Held that in M’s best interests to be removed from S’s care to live with H and B.

Key paragraphs -

98. S has made a great deal of her status as a breast-feeding mother and the disruption to M's routine of staying with her father overnight; not least because M “co-slept” with S and was breast fed during the night. Although some weeks after the hearing concluded S changed her position and agreed to M staying over-night with her father and B it is evident that she did so as she accepted that she had to following the decision to refuse her permission to appeal.

Prior to that S had, as I have set out above, used the fact that she continued to breast-feed M as a reason for reducing or limiting contact and claimed that it was in M's best interest. It is the current orthodoxy, which the court does not gainsay, that breast feeding, if possible, for the first year or more as it provides many health advantages for a child. In her first statement in April 2014 S said that she wanted to breast-feed for the first 9 months; as time has progressed so the length of time she wishes to breast-feed has increased. In her oral evidence she was unable to say how long it would go on but indicated that it would be as long as M wanted it to which could be as much as several years into the future.

99. Part of S's case is that she sleeps with M which also provides the child with health and emotional advantages in respect of their co-attachment. **The practice is not recommended for babies and small infants as there is a danger of over-lay and as a result may be considered to be more controversial, but that was not a matter that I was asked to decide. This practice when it takes place cannot be used as a reason to inhibit or curtail a child's right to form a positive and substantial relationship with her other parent or parents; which was a direct effect of S's practice in this case and she used it as part of her argument to support the curtailment of overnight stays. Based on the needs of a child, as M grows she must be allowed to become independent and grow as a human being separate from her parents and carers. At her age it is most unlikely that she will not suffer any harm sleeping on her own; indeed she has already experienced it without ill effect when she stayed with her father and his partner overnight.**

...

Conclusions

116. The evidence has to be considered in the light of the child's best interests. I have used the welfare checklist as the basis for my decision because I am concerned with how to best provide for M's physical, emotional and educational needs under the provision of s 1 (3) (a) CA. Although M is not yet at school it is more likely than not that the parent who can best meet all her other needs and is most likely to be able to provide her with a secure home and stable upbringing with room to grow emotionally for the remainder of her infancy is more likely to meet her educational needs fulfil her potential in the future. The latter requires that M is afforded the scope to grow up in an environment where conflict is at a minimum. **M is not yet able to say as she is just learning to talk so I do not know her expressed wishes and feelings but I assume it that for the immediate future she would want to continue to remain with S and continue to spend time with and H and B, including overnight stays.**

117. Any decision that M lives with H and B and spends much less time with S is bound to affect her, likely to upset and distress her in the short term at least and necessarily amounts to a change in her circumstances. However familiar M is with her home with H and B she would miss her mother with whom she has spent most of her time. Against that I will weigh the harm that she is at risk of suffering if she remains with her mother. As she gets older she will become more aware of, and will be directly affected by, her mother's negative views about her father and B. These views will affect her own sense of identity; negatively inform her view of herself and where she fits into the world.

118. I can only judge S's ability to parent M based on recent history and based on that history M is more likely than not to suffer harm; to continue to be taken to the GP and to hospital at times when it is not necessary in furtherance of S's determination to control M's contact with H and B or in respect of contact or any other dispute she may pursue over M with H in the future. It is likely that S will present H and B in a negative way to M and give her limited opportunity to understand the history behind her conception and of how she came to be here; nothing in S's conduct of her case can offer any assurance to the court that S is capable of doing that for M in a balanced way that is free from S's own agenda.

119. At present S is able to care for M well physically but there are already grounds for concerns about her mother's over emotional and highly involved role in this infant's life. Ultimately the role of a parent is to help the child to become independent. This is a child who at 15 months old is still carried by her mother in a sling on her body. M spends most of her time with her mother who does not set out any timetable for returning to work, as S would have to, to provide for M and for herself. There is a potential for enmeshment and stifling attachment rather than a healthy outward looking approach to the child's life. The question is who benefits most from this chosen regime which points towards an inability to put the child's needs before her mother's need or desire for closeness.

120. The attachment which will develop in an infant who sleeps with her mother, spends all day being carried by her mother and is breastfed on demand through out the day and night raises questions about the long term effect on M. From the point of view of this judgment it further begs the question as to who benefits most from the regime S has chosen to impose without reference to M's father, H. I have little doubt that the breast-feeding was used a device to frustrate contact during the proceedings, a conclusion supported by S claiming at first that she could not express her milk which so reduced the time available for contact; subsequently when it was clear that M could be fed and was able to eat other foods S no longer had difficulty expressing milk. I am forced to conclude that S has shown herself to be unable to put M first and that she is unable to meet M's emotional needs now and in the long term.

121. The contact that S has with H and B has been very successful; the guardian who has observed it more than once described M as alert, happy and relaxed in her surroundings. Unlike S, H and B have not made a plethora of allegations against S; apart from those directly concerned with contact or her conduct towards them during contact. They have said that they want there to be as harmonious a relationship as possible between the adults and their support of M spending time with her mother is evinced by the level of contact they suggested. Their conduct has been consistent with this approach and while it is exemplified by an offer of contact which is greatly in excess of that proposed by the guardian they have never sought to exclude S from M's life and to the end of the proceedings expressed

the hope that the relationship between the parties could become more harmonious for the sake of M. The Applicants could easily have adopted the recommendation of the guardian that contact should be once a month but they have not done so.

122. While to move a young child from her mother is a difficult decision and is one which I make with regret as I am aware that it will cause S distress I conclude that H is the parent who is best able to meet M's needs both now and in the future. It is he who has shown that he has the ability to allow M to grow into a happy, balanced and healthy adult and it is he who can help her to reach her greatest potential. I accept the evidence of the guardian that H and B have had a child-centred approach throughout. It was obvious from their oral evidence and their statements. H, in particular, has always sought to put M first.

...

126. M should live with her father H and his partner B as it is in her best interests to do so; I reach that conclusion having had regard throughout to the welfare checklist and to M's interests now and in the long term.

Re K (a child) [2001] EWCA Civ 1427 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2001/1427.html>

Thorpe J

Appeal against an order granting parents contact with baby for 1.5 hours each weekday.

Reference made to separating parents from breastfed baby at para 23 – *“However, there remains, in my mind, some anxiety at upholding an order which separated a 4 week old baby from her mother, a breast feeding mother whose resistance was supported by the guardian ad litem.”*

- The position is that breast feeding is not preventative of overnight staying contact.

Internal relocation

34. And so, tying all of the above together, leads us naturally to a recent authority dealing with the internal relocation of a 4 year old child, from Nottingham to Rugby. *Father v Mother* [2023] EWHC 1454 (Fam)
<http://www.bailii.org/ew/cases/EWHC/Fam/2023/1454.html>

35. This is an interesting authority, in the context of this seminar and generally. I've taken you through the somewhat gendered and slightly older authorities that explore the participation of a child in proceedings and time away from their primary carer. Here we have a paradigm case where some of the key issues I touch on above arise, so I will take a moment to explore it. Lieven J begins by summarising the key case law:

"The Law

23. *All the advocates agree that the leading case in terms of internal relocation applications is Re C (Internal Relocation) [2015] EWCA Civ 1305. The key passages are at [51] to [54]:*

"[51] There is no doubt that it is the welfare principle in s 1(1) of the Act which dictates the result in internal relocation cases, just as it is now acknowledged that it does in external relocation cases. It is difficult to see any room in the statutory scheme for the outcome to be dictated by other, different, principles. And when one goes back over the internal relocation cases, it is clear that one of the main influences behind the exceptionality test was always the welfare of the child. The protection of the freedom of the adults to choose where they would live within the United Kingdom was, of course, another significant influence, but the exceptional cases where that would be restricted were those where the welfare of the child required it.

[52] In Re E, it was contemplated that the welfare of the child might require the adult's freedom to be restricted because of concerns about the competence of the parent. In Re S [2001], Thorpe LJ explained the reluctance to place restrictions on the freedom of the child's primary carer to choose where to live in welfare terms, remarking that such restrictions were likely to have an adverse effect on the children indirectly through the impact on the primary carer, but he also subscribed to the notion that restriction might be necessary where the ability of the primary carer to give satisfactory care to the child was in doubt. Clarke LJ expressed himself very clearly in welfare terms in that case, when he said that no case will be an exceptional case unless the absence of such a condition would be incompatible with the welfare of the child, which could be loosely recast, I suppose, as unless the welfare of the child requires the parent to be constrained to live in a particular place. It was in much the same terms that Dame Elizabeth Butler-Sloss P expressed herself in Re S (No 2) when she said that her earlier judgment had been read too narrowly and that there would be exceptional circumstances in which conditions will have, in order to protect the best interests of the child, to be imposed even where there was no complaint against the parent whose movement would be restricted. As she said, [s]ection 11(7) provides a safety net to allow for the exercise of discretion under the provisions of s 1 where the paramountcy of the

welfare of the child exceptionally requires restrictions on the primary carer. In *Re H* [2001], Thorpe LJ said that in making its decision, the court must always apply the welfare test as paramount, whether the relocation is internal or external, albeit that he later wished, in *Re B*, to emphasise that a restriction was truly exceptional. In *E v E* (*Shared Residence: Financial Relief: Yardstick of Equality*), Wall LJ said that the function of the court was to decide whether or not the relocation is in the best interests of the children. In *Re L*, where he carried out his review of the authorities, although endorsing passages from them which referred to conditions being exceptional, he said that in each case what the court had to do was to examine the underlying factual matrix and decide in all the circumstances whether it was in the child's interest to relocate, bearing in mind the tension that may well exist between the parent's freedom to relocate and the welfare of the child which may militate against it.

[53] Given the central thread of welfare that runs through all these authorities, and with the reasoning in *K v K* very much in mind, I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases. It is no doubt the case, as a matter of fact, that courts will be resistant to preventing a parent from exercising his or her choice as to where to live in the United Kingdom unless the child's welfare requires it, but that is not because of a rule that such a move can only be prevented in exceptional cases. It is because the welfare analysis leads to that conclusion. One can see from the authorities, and indeed from this case, that the courts are much pre-occupied in relocation cases, whether internal or external, with the practicalities of the child spending time with the other parent or, putting it another way, with seeing if there is a way in which the move can be made to work, thus looking after the interests not only of the child but also of both of his or her parents. Only where it cannot, and the child's welfare requires that the move is prevented, does that happen.

[54] Once welfare has been identified as the governing principle in internal relocation cases, there is no reason to differentiate between those cases and external relocation cases. In my view, the approach set out in *K v K*, *Re F* (*Relocation*) [2012] and *Re F* [2015] should apply equally to internal relocation cases. Clearly, however, the outcome of that approach will depend entirely on the facts of the individual case. At one end of the spectrum, it is not to be expected, for instance, that the court will be likely to impose restrictions on a parent who wishes to move to the next village, or even the next town or some distance across the county, and a parent seeking such a restriction may well get short shrift. At the other end of the spectrum, cases in which a parent wishes to relocate across the world, for example returning to their original home and to their family in Australia or New Zealand, are some of the hardest cases which the courts have to try and require great sensitivity and the utmost care.”

...

Vos LJ (as he then was) held:

“82. I add a few words in an attempt to summarise the position that has now been reached. As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.”

24. In summary, the law is that the court must undertake a global, holistic evaluation of the best interests of the child. In doing that analysis the wishes and feelings of the parents, and how they will impact on the child are of great importance. This analysis will necessarily encompass a consideration of the Article 8 interests of the parents and the child, and the proportionality of any interference in the parents’ Article 8 rights.

25. Some reference was made to the factors set out by Thorpe LJ in Payne v Payne [2001] EWCA Civ 166. Those include the motivation behind both the application to relocate and the opposition to it, and the impact on the parent of a refusal to allow relocation. It seems to me that those factors are necessarily encompassed in the global holistic analysis.

26. Ms Meredith drew my attention to Re W (Residence) 1999 2 FLR 390 and W v W [1988] 2 FLR 505 as to the need to give reasons if the Court is going to depart from a Cafcass recommendation. I do not read these cases, or any subsequent cases, as suggesting that there is a presumption in favour of the Cafcass recommendations. Mr Lill is an expert in his field and, as such, I should, and I do, give reasons for departing from his recommendations.

27. There are a number of cases on shared residence orders, and it is clear that the child’s time does not have to be divided equally for it to be appropriate for there to be a shared residence order.”

36. Here the recommendation was against relocation. The four year old child enjoyed a good relationship with each parent and his ascertainable wishes were supportive of the status quo.

37. Here, however, the judge was persuaded that the mother’s need to relocate to continue in her cherished career was a magnetic factor. I note that the mother’s decision to breast feed (§ 53) was the subject of some criticism on the part of the father which the court simply didn’t take into account, ultimately. But what is stark is how this authority balances the welfare checklist and builds in the parents welfare, in a modern way.

38. Please note §59,

“I thought both parents were trying to be truthful, and both thought they had K’s best interests at heart. Both of them tended to see K’s interests very much from their own perspectives. Both of them now acknowledged that they had made mistakes and some of their decisions or communications had been a mistake.”

39. If possible a case ought to put from the child’s perspective.

40. The judge took the view that the father had become too fixated on equality of time:

“I think the F, possibly led by Mr Lill, has become too fixated on “equality” of time, and on the belief that if there is not complete equality that will undermine the F’s relationship. There is no principle that the starting point for the Court is equality of time between parents, each case must turn on its own facts. Many children spend different amounts of time with different parents, including when the parents are living together, the bond with the parent does not depend on such chronological equality.”

41. I suggest that this is particularly important to bear in mind when advising parents of very young children in contact disputes. See also §79.

42. She goes on to make a shared lives with order on the following basis (§75),

“Finally, I agree with Ms Meredith that a shared lives with order is appropriate, albeit K’s time will not be spent equally with both parents. It is important that the F, and indeed the M, understand that K is equally both their child, and that the fact that he spends more time during the week with one rather than the other is not some form of emotional demotion.”

43. This again is an important restatement of the principles at play, with the concept of equality transcending geographical proximity and the number of nights a child spends in one location versus another.

Internal Relocation Authorities – other points for your use and reference:

I have included some of the key authorities here for easy reference:

Re E (Residence: Imposition of Conditions) [1997] 2 FLR 638 –

- Imposing a condition attached to a CAO as to the location at which a child must reside is a power that the court should exercise sparingly and only in ‘exceptional cases’.

Re S (A Child) (Residence Order: Condition) [2001] EWCA Civ 847, [2001] All ER (D) 159 (May) –

<http://www.bailii.org/ew/cases/EWCA/Civ/2001/847.html>

- As above, CA confirming that imposing a condition pursuant to s.11(7) ChA 1989 not appropriate save in exceptional circumstances.

Nazarenko v Russia (Application No 39438/13) [2015] ECHR 686, [2015] 2 FLR 728 –

<http://www.bailii.org/eu/cases/ECHR/2015/686.html>

- In certain relocation cases, the decision the court makes will necessarily involve interference with Art 8 rights of one parent because it will either restrict the relocating parent’s ability to live where they choose, or because it may damage the left behind parent’s relationship with the child.

Re C (A Child) (Internal Relocation) [2015] EWCA Civ 1305, [2017] 1 FLR 103 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2015/1305.html>

- **Key authority on internal relocation.**
- There should be no distinction in treatment between case of internal and external relocation.
- The approach set out in:
 - *K v K (children) (removal from jurisdiction)* [2011] EWCA Civ 793, [2011] All ER (D) 67 (Jul);
 - *Re F (a child) (permission to relocate)* [2012] EWCA Civ 1364, [2013] 1 FLR 645; and
 - *Re F (A child) (International relocation: welfare analysis)* [2015] EWCA Civ 882, [2015] All ER (D) 90 (Aug)

should apply equally to internal relocation cases.

- In either type of relocation case, external or internal, a judge is likely to find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.

Re K (A child) (international relocation: appeal against judge's findings of fact) [2016] EWCA Civ 931, [2017] 1 FLR 1459 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2016/931.html>

- Confirming that *Re C* did not endorse a completely separate consideration of the proportionality of the proposed orders. What was contemplated was that the welfare analysis would involve an examination of the parents' wishes, interests and their Art 8 rights given the potential impact of the decision on the parents affecting the child as well.

Re R (a child) (domestic abduction) [2016] EWCA Civ 1016, [2017] 2 FLR 921 –

<http://www.bailii.org/ew/cases/EWCA/Civ/2016/1016.html>

- CA drawing a distinction between relocation and abduction cases.
- Black LJ rejecting argument that *Re C* changed the law so as to dictate a new approach to cases where children are unilaterally removed or abducted from their home to another place within the jurisdiction. Could not provide a basis for ordering child's summary return to the area the family had lived in. No general principle that children relocated unilaterally within the jurisdiction should be summarily returned.

S & V (Children – Leave to remove) [2018] EWFC 26, [2019] 1 FLR 46 –

<http://www.bailii.org/ew/cases/EWFC/HCJ/2018/26.html>

- Mostyn J
- External relocation case, however helpful summary of principles in relocation cases at para 5.
- The court's function in a relocation case is one of evaluation rather than a pure exercise of discretion (*Kacem v Bashir* [2010] NZSC 112, [2011] 1 NZLR 884).
- Burden of proof on party alleging the facts in issue. Once the facts are established there is no formal legal burden of proof on the applicant (*Payne v Payne* [2001] EWCA Civ 166, [2001] 2 WLR 1826).

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1.12.23