

## Relocation of Children

The statutory test is fairly clear. Section 2(3) of the Children (Scotland) Act 1995 provides that removal or retention outwith the UK is unlawful in the absence of the consent of everyone who has PRR or the consent of the court.

The test which the court will apply, where a party seeks a specific issue order permitting removal of a child outwith the UK, is a familiar multipartite one of Section 11(7) of the 1995 Act.

When the court is considering whether or not to make an order and what order to make, the court shall regard the welfare of the child concerned as its paramount consideration and shall not make any order unless it considers that it would be better for the child that the order be made, than that none should be made at all and, taking account of the child's age and maturity so far as practicable, give the child an opportunity to indicate whether he wishes to express his views and if he does so wish, give him an opportunity to express them and have such views as he may express. There are new considerations tacked on to Section 11(7) A to E but, in practice, these really do not add much to what the court was doing before they were enacted.

The paramount criterion is the best interest of the child and, on one level, the lecture could stop right there. However, the particular circumstances of a relocation case do throw up interesting factors which have a bearing on that paramount criterion.

There have been authorities from the Sheriff Court and from the Court of Session, but the most useful guidance comes from the Sheriff Court case of *M v M* 2008 Fam LR 90 in which Sheriff Morrison set out eleven factors which the court should consider. The list is not exhaustive.

Not all the factors will crop up in every case and there are areas of possible overlap, but the Morrison 11 is probably our best starting place in most relocation cases. The 11 factors are:-

- 1 The reasonableness of the proposed move abroad.
- 2 The motive of the parent wishing to take the child abroad.
- 3 The importance of the contact with the other or absent parent in the child's life.
- 4 The importance of the child's relationship with siblings, grandparents or other extended family to be left behind.
- 5 The extent to which contact can be maintained with the left behind parent.
- 6 The extent to which the child may gain from a relationship with family members as a result of the proposed move.
- 7 The child's views where he is of an age to express them.
- 8 The effect of the move directly on the child.
- 9 The effect of refusal of the specific issue order on the applicant.
- 10 The effect of refusal on the welfare of the child.
- 11 Whether it is better for the child to make an order rather than no order at all.

The earlier English policy of giving great weight to the wishes of the primary parent has an echo in these Scottish factors, but the important point is that, insofar as that criterion is relevant, it is relevant only to the extent that it impacts on the paramountcy of the child's welfare.

There were three decisions in a row which looked at the issue of relocation - *S v S* 2012 Fam LR 32, *M v M* 2012 SLT 428 (no relation to Morrison's case) in the same year and *Donaldson v Donaldson* in 2014 CSIH 88.

In *S v S*, the mother had given up her job in Scotland to take a promoted post in Texas. She wanted to take the six-year-old child of the former marriage with her and the father objected. He does seem to have been a thoroughly involved parent, having contact for five nights out of every fourteen. Nevertheless, the Sheriff allowed the mother's specific issue and the father appealed. He was unsuccessful, partly because of the high threshold which he had to cross to disturb the judgement of the Judge at first instance and partly, the court said, because there was a burden on a party who wished to disturb the status quo. That could perhaps appear a little difficult to understand, because it was the mother who was trying to change the status quo in a particularly radical way by relocating to Texas. The point the court was making, though, was that the comfortable arrangement to which the father had devoted his life in a particularly wholehearted way was not going to continue anyway.

The Inner House did say that the relocation question had to be addressed "without any pre-conceived leaning or presumption in favour of the rights and interests of either parent".

A deliberately unkind critic could possibly find inconsistency in these two comments.

But the Inner House went out of its way to take the opportunity to squash the English *Payne* approach once and for all -- or so we thought.

In *M v M* in 2012, the mother wanted to take the two young children to live with her in England. The Sheriff granted her Motion but seems to have given too much weight to the mother's wishes and the likely effect upon her of a refusal. Their Lordships lost no time in saying that was the wrong approach and the Sheriff had given too little consideration of the disruption to the children's education and to the practical problems of contact with the father and the father's wider family. This case was an intra-UK move from Scotland to England, but Lord Emslie said that the same considerations applied as in an international relocation case. Well, why wouldn't they? The difference between an international and a non-international relocation is a tactical one for the solicitor, rather than a legal one for the jurist. I will come back to that.

I want to mention *Donaldson v Donaldson*, not because it disagrees with earlier cases but because it represents one stark warning to parties and their advisers. The mother wanted to relocate from Scotland to San Francisco with the parties' five-year-old child. The Sheriff granted the mother permission and also granted the father generous contact. The problem was that the father had not actually craved contact - he just opposed the relocation. It had been the curatrix who had recommended contact for the father.

The father appealed saying that it was impractical for him to exercise the contact which the court had specified, but he had not led any evidence about this. The Inner House said that the Sheriff's Interlocutor had been a final one and that the father had no title or interest to challenge the Sheriff's Interlocutor, having made no submissions about contact at first instance. That's one stark warning.

The court once again took the opportunity to say

"it is no part of our law that a Judge requires to regard any particular factor as having greater weight than any other. It would, for instance, be wrong to proceed on the basis that there is a rule that the most crucial assessment required is as to the effect that a refusal of the relocation application will have on the applicant".

That question does not seem to have been argued very much in the case, but it may be significant that the Inner House thought fit to take the opportunity to sit very heavily once again on the old English approach.

There is a second stark warning for advisers in the Sheriff Court case of *DH v GH 2015 WL 348005*. This was a case in which the mother wanted to take her two daughters to live in Florida. The parties had been married in New York and both children had been born there. The children had lived in New York until they were three and then the parents relocated themselves and the children to Edinburgh for about a year. There was no doubt that the children were habitually resident in Scotland.

It is also clear that the marriage had been in difficulties, even before the parties moved from New York to Edinburgh, and this move did not save the marriage. They continued to live in the same property but live completely separate lives, at least up until the date of the Proof, swapping child care responsibilities each midnight. The Pursuer/mother was American by birth. The father/Defender was not. The mother wanted to 'go back home to the States' with the children. The case appeared at the same time a difficult one and a fairly simple one. However, the mother embarked on a relationship with a work colleague and, at the date of the Proof, that relationship was continuing. She had not disclosed that relationship to her husband. When the father was away, due to his employment, the other man stayed overnight at the parties' home and met the children over breakfast, all without the father's knowledge. Not surprisingly, the father called a halt to the marriage when he found out about all of this.

There were several factors which appeared to strengthen the mother/Pursuer's case. She had a good job in the UK and hoped to be employed in an equivalent job in the same global organisation after the move to Florida. Her mother and sister and niece lived together in Florida in a three-bedroomed property. The Pursuer's family was able to maintain her and had, by the date of the appeal, already funded the proceedings to the tune of about £100,000. They were prepared to continue to support the Pursuer and the children in the event of their move to Florida. Neither party was from Edinburgh nor had any family there. The Pursuer was American and the Defender's family were in the South of England. The children had, as the court said, a close and loving relationship with the Pursuer's parents.

On the other hand, the Pursuer had not disclosed the existence of her new relationship to the Defender until very late on.

More importantly, the Pursuer had not arranged any contact proposals for the Defender in the event of a relocation, *and*

She had not arranged any school place for the children in Florida, *and*

The mother had never lived in Florida and so, although she was "going home to the USA", it was not in any sense a return to her roots, *and*

She was seeking to move to an entirely new location to an apartment which she had reserved but had not seen, *and*

In her own evidence, she did not seem to know whether or not she was required to sign the proposed Lease in Florida.

At best she hoped for the possibility for continued employment but even that, including the rates of pay, were entirely speculative.

The Sheriff said "I have no confidence in the solidity of any of the Pursuer's relocation plans. They were quite literally changeable overnight." (It must have been an interesting proof.)

" The unreasonableness of the order sought can also be seen to relate to the unprecedented nature of the application, namely that never before has any Scottish court been asked to make such an order in circumstances where both parents are resident in the family home and where there is no established pattern or residence in contact, let alone the clean break of a divorce. I conclude that relocation is not a reasonable proposition on the evidence before the court".

The Sheriff took the Pursuer's desire to move to be primarily financially motivated and her Financial Schedule was found by the Sheriff to be unreliable.

While, of course, every case must turn on its own facts, it is clear that a party in the Pursuer's position in *DH v GH* has got to provide the court with a very full and vouched plan of what is to happen after the proposed relocation takes place.

The last case I want to look at is *L v L 2017 CSOH 60* in which Lady Wise gave her Judgment only in April of this year. The mother wanted to move from Edinburgh to Bromsgrove which is where she was from and where her family lived. As with all cases this one was fact specific but Lady Wise did make some comments of more general application.

**First she said**

**"It is neither instructive nor appropriate to try to formulate any list of applicable factors to be applied in considering a case of this sort."**

**She stressed the fact specific element which was not in itself surprising, but was she actually saying that we can forget the Morrison's XI? I don't think so. Sheriff Morrison's list is a useful aide memoire of factors to consider - not a hierarchy of criteria. It is not a check list and Sheriff Morrison never suggested that it was. Lady Wise reminds us in L against L not to treat it as if it were a check list but the list is still there and it is still useful.**

**In the circumstances of the particular case it is clear that the Court was not at all impressed by the mother's evidence but the point to make is that the pursuer relied on the good things available to the child if the move were to go ahead. The schooling arrangements would be fine. The accommodation would be more than adequate and there would be several potential male role models there for the young child. Despite this the Court said that the case was not even finally balanced. The accommodation in Edinburgh was fine as was the future education. The problem was the future contact with the father and - this is the point - there was no compelling need for the move. This could be misunderstood as imposing a burden of proof and I don't think it is that. But it is necessary for a party wishes to disrupt the status quo to "produce evidence illustrating that the proposal is in the interest of the child..."**

**The country which probably has more internal relocations than any other is the USA because each individual State has its own Family Law and the nation as a whole as a high incidence of matrimonial breakdown. There is a vast array of authorities but we can probably derive some general principles from them. In the USA relocation does seem to be more acceptable when it**

is for the career or educational reasons of the 'movant' as they call the leaver. The genuineness of the motive of the movant is a major factor and the Courts will look at the history of co-operation with contact prior to the move being planned. As long as there is good faith and legitimate reasons for relocation it's irrelevant that there might be additional subjective reasons such as - " - wanting to be far away from the non-custodial parent".

The legitimate reason must be in place at the time of the move and cannot come into existence at a later stage in the proceedings. In one interesting case it was pointed out that there is a two stage process. First of all the Court looks for a good and sincere reason for the move which must not be motivated by desire to deprive the other parent of reasonable visitation. Only then should the Court look at the question of whether or not removal is in the best interests of the child. This is rather different from the Scottish approach and it does seem to harp back more to the old English one. That case in any event came from the Massachusetts Appeal Court *Schechter v. Schechter*. In a case from New Jersey in 1988 - *Holder v. Polanski*, the New Jersey Supreme Court abandoned any requirement of showing a real advantage to the relocation. The fact the non-custodial parent would not be able to maintain alternate weekend visitation did not necessarily mean the visitation rights were "adversely affected". In another example, a very significant factor was that in the de jure or de facto shared care cases the Court has to be careful to check whether or not it is genuinely a case for removal or in fact for a change of custody. There are different jurisdiction with different rules and different priorities in the different States of the Union and of course there is a vast number of reported cases from the litigious USA. I have to say though that I have seen nothing in the survey of the American authorities which was kindly sent to me by Professor Sutherland, which makes me look enviously across the Atlantic.

I said before that I would look at tactical issue which is more for solicitors than for jurists. In *L v L*, Lady Wise said that relocation of the child outside the UK was unlawful in terms of Section 2 (3). However, she also went on to say that the Family Law Act 1986 makes it clear that "our legislation does not condone the removal of a child from the territorial jurisdiction of its

habitual residence without the consent of any other person who holds parental responsibilities and rights". For example, she said Section 4 of the 1986 Act provides that if a child under the age of 16, habitually resident in one part of the UK, is removed from that part to effect the change of residence without the agreement of the person or persons having parental responsibilities and rights, the child is treated for the purposes of the legislation as continuing to be habitually resident in the part of the UK from which he was removed for a period of one year.

Lady Wise seemed to be suggesting that the court's consent is a necessary pre-requisite for the relocation of a child from one part of the UK to a different jurisdiction within the UK, in the absence of the consent of the other parent with PRR. With the very greatest of respect to Lady Wise, I do not think that she is correct. If you are advising a party who intends to be, as the Americans would call her, a movant, who wishes to go from Edinburgh to Manchester with the child, then Section 2 (3) of 1995 Act does not prevent that move. Section 41 of the 1986 Act does not prevent that move. If the move is made, then it will be up to the remaining parent - perhaps we should call him the restant parent - to seek a remedy in the court. If the move has been clandestine then the movant parent will have the disapproval of the court, but that does not necessarily mean that she requires to litigate before doing anything. If she moves and establishes a status quo before the restant parent objects in court, then that new status quo will be a relevant factor in determining - not the habitual residence but the best interests. Yes, it is the court of original jurisdiction which will make the decision, but the criterion to be applied will be the best interest of the child.

When advising such a person, I think it would be better to ensure that there is a letter addressed to the restant parent or to his solicitor intimating an intention to move to a given address on a given date, including details of employment for the movant, education for the child and proposals for future contact, effectively leaving it to the other parent to seek interdict. If that parent chooses not to do anything about the matter in the court, then that surely strengthens the hand of the parent who intends to move.

Of course, if the restant parent has made it clear, especially through a solicitor, that the move is objected to then it would be wise for the prospective movant to seek the consent of the court under the 1995 Act, by way of a specific issue order.

Finally ...

Relocation is not a separate area of Family Law. At least in Scotland the applicable criteria are the same as in any other child case.

What you can do about it will vary between intra-national and international cases -- specific issue or interdict or Hague Convention -- but the paramount criterion, once the matters of jurisdiction have been sorted out is the best interests of the child. Ideally, of course, that should be fully considered before anybody seriously proposes relocating a child in the first place. But unfortunately the opportunity to consider that matter has usually long passed before you and I, the lawyers, get involved.

**John M Fotheringham WS**

**Morton Fraser**

**0131 247 1018**

[John.fotheringham@morton-fraser.com](mailto:John.fotheringham@morton-fraser.com)

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