

WHITE PAPER CONFERENCE 2022

PRIVATE CHILDREN LAW

**HOW DO YOU PERSUADE A COURT TO KEEP A CHILD IN THE UK IF
A PARENT RELOCATES TO ANOTHER COUNTRY – SCHOOL, FAMILY,
WISHES, FEELINGS?**

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harcourt

FAMILY LAW

NJ v OV [2014] EWHC 4130 (Fam) per Mostyn J § 4:

It is my opinion that outside the sphere of State intervention for the purposes of child protection, the hardest decision that a judge ever has to make in the field of family law, or, for that matter, in any field, is a relocation decision...

Re G (Leave to Remove) [2008] 1 FLR 1587 § 19 per Thorpe LJ:

These cases are particularly traumatic for the parties, since each of them conceives so much as being at stake. They are very, very difficult cases for the trial judges. Often the balance is very fine between grant and refusal. The judge is only too aware of how heavily invested each of the parents is in the outcome for which they contend. The judges are very well aware of how profoundly the decision will affect the future lives of the children and how difficult it will be for the disappointed parent to adjust to the outcome.

1. There is only one legal principle applicable to relocation disputes, namely that welfare of the child concerned is the paramount consideration. Within this broad principle, the courts have laid down guidance about how relocation cases should be approached. It is important that those involved in relocation cases understand both what the guidance means and how it applies to individual cases, and also what it does not mean and how to avoid falling into error in using it.
2. In terms of the appropriate application for a parent to make, both international and internal relocation cases have provoked a degree of debate about the appropriate order for a parent to seek.
 - a. International moves: a parent seeking to move internationally requires court permission to do so (if the other parent does not agree to the move). There appear to be two ways in which this can be done:
 - i. in every case, the court could make a specific issue order under s 8 of the Children Act (preferable approach);
 - ii. where a child arrangements order is in force, the court may be able to allow a relocation by making a free-standing leave to remove order under s 13.
 - b. Internal moves: There is no automatic restriction on moves within the UK, but the court might be concerned with several different orders to regulate a proposed relocation, all under s 8 of the Children Act. These orders principally comprise:
 - i. a specific issue order allowing the child's relocation;
 - ii. a prohibited steps order preventing the child's relocation;
 - iii. a specific issue order about an issue such as schooling, which has the effect of determining the issue of the child's relocation;
 - iv. a child arrangements order which either resolves the question of the relocation (for example, by saying that the child lives with the parent who is not proposing to relocate) or which contains conditions made pursuant to s 11(7) of the Children Act where those conditions determine the relocation

(for example, conditions imposing a geographic restriction on the child's place of residence).

3. Where there is in force a child arrangements order providing for a child to live with a person there is an automatic prohibition on removing that child from the United Kingdom for a period of more than one calendar month unless everyone with parental responsibility gives written consent or unless the court gives permission. However, regardless of whether there is a relevant child arrangements order or not, it is strongly inadvisable to consider an international relocation without written agreement from all those with parental responsibility or, failing that, court permission. The reason is that interference with a parent's 'rights of custody' (which need not include daily care or control of the child) is child abduction. The consequences of parental child abduction can include orders that the child be summarily returned, or even criminal charges. At the very least, the stress and hassle of dealing with a potential child abduction case, which usually starts with the police arriving at the front door, is something that most parents prefer to avoid, even if in the end it turns out that the removal was not unlawful.
4. In terms of the current law, in line with the judgments of Munby LJ in *Re F (Relocation)* [2012] EWCA Civ 1364 and of Ryder LJ in *Re F (International Relocation Cases)* [2015] EWCA Civ 882 it must now be said that the starting point for considering an international relocation case is the 2011 decision in *K v K* [2011] EWCA Civ 793. In the latter *Re F* case, Ryder LJ set out a number of paragraphs from *K v K* and from *Re F (Relocation)* which are, in his words, 'required reading by any judge faced with determining any international relocation case'. It makes sense to start by looking at what those paragraphs are, so as to know what the 'required reading' is in this field:

(a) *K v K* per Moore-Bick LJ, para 86:

'[86] I accept, of course, that the decision in *Payne v Payne* is binding on this court, as it is on all courts apart from the Supreme Court, but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles. I am conscious that any views I express on this subject will be seen as coming from one who has little familiarity with family law and practice. Nonetheless, having considered *Payne v Payne* itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a

failure to distinguish clearly between legal principle and guidance. In my view Wilson L.J. was, with respect, quite right to warn against endorsing a parody of the decision. As I read it, the only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted. Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child. As Hedley J said in *Re Y*, the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in *Payne v Payne* intended to suggest otherwise.'

(b) *K v K* per Black LJ, paras 96 and 140-145:

[96] ... Thorpe LJ considers that *Payne* should not be applied in circumstances such as the present and that the judge should instead have applied the dicta of Hedley J in *Re Y*. For my part, as will become apparent, I would not put *Payne* so completely to one side. Whilst this makes no difference to the outcome of this case, it may not be without significance more generally.

[140] Looking back over what is now nearly 40 years of jurisprudence in this area of family law, I have come to a number of conclusions. I am indebted to my Lord, Moore-Bick LJ for his judgment which ... I have read in draft, and in particular for its analysis in paragraph 85 of the approach to be taken to *Payne* in the light of the conventional treatment of principle and guidance.

[141] The first point that is quite clear is that, as I have said already, the principle - the only authentic principle - that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.

[142] Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else - the valuable guidance - can be ignored. It must be heeded for all the reasons that Moore-Bick LJ gives but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable.

[143] Furthermore, the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in *Payne* and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of paragraph 26 ('Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children') for re-elevation to a status akin to that of a determinative presumption. It is doubly inappropriate when one bears in mind that the judgments in *Payne* must be read as a whole, with proper weight given to what the then President said. She said that she wished to reformulate

the principles since they may have been expressed from time to time in too rigid terms with the word 'presumption' over-emphasising one element of the approach (paragraph 82) whereas the criteria in s 1 Children Act govern the application (paragraph 83) and there is no presumption in favour of the applicant (paragraph 84). Dame Elizabeth referred, of course, to the effect on the parent with residence (paragraphs 83 and 84) but she also stressed that the relationship with the other parent is highly relevant and that there are many other factors which may arise in an individual case (paragraph 84). I detect in her discussion of the factors and in her summary at paragraph 85 no weighting in favour of any particular factor. She said that the reasonable proposals of the parent with a residence order wishing to live abroad carry 'great weight' whereas the effect on the child of denying contact with the other parent is 'very important' but I do not infer from that phraseology any loading in favour of the reasonable proposals as opposed to the effect of the loss of contact.

[144] Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's decision in *Re Y* as representative of a different line of authority from Payne, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which Payne is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.

[145] Accordingly, I would not expect to find cases bogged down with arguments as to whether the time spent with each of the parents or other aspects of the care arrangements are such as to make the case 'a *Payne* case' or 'a *Re Y* case', nor would I expect preliminary skirmishes over the label to be applied to the child's arrangements with a view to a parent having a shared residence order in his or her armoury for deployment in the event of a relocation application. The ways in which parents provide for the care of their children are, and should be, infinitely varied. In the best of cases they are flexible and responsive to the needs of the children over time. When a relocation application falls to be determined, all of the facts need to be considered.'

(c) *Re F (Relocation)* per Munby LJ, para 60:

'[60] ... Adopting conventional terminology, [the present case] was neither a 'primary carer' nor a 'shared care' case. In other words, and like a number of other international relocation cases, it did not fall comfortably within the existing taxonomy. This is hardly surprising. As Moore-Bick LJ said in *K v K*, 'the circumstances in which these difficult decisions have to be made vary infinitely.' This is not, I emphasise, a call for an elaboration of the taxonomy. Quite the contrary. The last thing that this very difficult area of family law requires is a satellite jurisprudence generating an ever-more detailed classification of supposedly different types of relocation case. Any move in that direction is, in my judgment, to be firmly resisted. But so too advocates and judges must resist the temptation to try and force the facts of the particular case with which they are concerned within some forensic straightjacket. Asking whether a case is a '*Payne* type case', or a '*K v K* type case' or a '*Re Y* type case', when in truth it may be none of them, is simply

a recipe for unnecessary and inappropriate forensic dispute or worse. It is to be avoided.'

5. Moreover, since the court in a relocation case is almost inevitably faced with competing proposals from the two parents, it is also not enough for the judge to make an assessment only of the application to relocate:

'Each realistic option for the welfare of the child should be validly considered on its own internal merits (ie an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposals from the absent or "left behind" parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.'

6. In *Re F (International Relocation Cases)*, Ryder LJ proposed that a 'balance sheet' approach may be helpful, with the pros and cons of each proposal set out clearly to aid the judge's analysis. This approach can assist in making sure that all relevant considerations are taken into account, though it should be noted, as McFarlane LJ has emphasised, that such a balance sheet is a tool to help with making an assessment, and is not a substitute for a reasoned judgment. This is particularly true since a balance sheet will usually give little if any indication of the *weight* which individual factors should have, with the consequent risk that it may erroneously appear that 'all elements of the table hav[e] equal value as in a map without contours'.

7. Vos LJ in *Re C (Internal Relocation)*:

'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.

One of the most difficult aspects of this case has been to establish in the light of previous authority what use, if any, should be made in the process we have just described of the 4 "disciplines" identified by Thorpe LJ at paragraph 40 of his

judgment in *Payne v Payne* (the “*Payne* factors”). In my judgment, one of the valid concerns about the *Payne* factors is that they do not adequately reflect the gender-neutral approach to these problems that the court will now adopt in every case. Whilst the *Payne* factors may still be of some utility in some cases, they are no part of the applicable test or the applicable principles. In some circumstances, the judge may find them useful. In others, the judge may not. If the judge finds them a useful guide to some of the factors that he should consider, he will be doing so only as part of the multi-factorial balancing exercise that is required.’

8. *Re C (Re F (International Relocation Cases))* [2015] EWCA Civ 882 – *Ryder LJ*:
 - a. Reliance on the well-known and formerly leading case of *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052, without a broader legal analysis of welfare, may amount to an error of law which would found a successful appeal (para 27);
 - b. There are limitations in the *Payne* reasoning, including its lack of adequate focus on the views (or other participation) of the child concerned, and its outdated and gender biased presumptions about how parents care for their children (para 18);
 - c. The impact of the article 8 ECHR rights of the parties and children on the welfare analysis and the possible requirement for a specific proportionality evaluation (paras 31 & 32), of which there was discussion in *Re C* (see below per Vos LJ, and further in *Re K* below);
 - d. The requirement to focus on a ‘holistic analysis’ of welfare (para 28) which, understood in the same way as it is in the public law context (para 29), requires the court to engage in an evaluation of all the options, avoiding a linear approach (a characteristic of *Payne*) and considering the benefits and detriments of each realistic option against each other. A balance sheet approach can be helpful in this evaluation, so long as the *weight* to be attached to the various factors is not forgotten (see McFarlane LJ’s important supporting judgment at paras 50-52).
9. Proportionality:
 - a. *Re K (A Child) (International Relocation: Findings of Fact)* [2016] EWCA Civ 931 – Black LJ: “*Re C* did not endorse a completely separate consideration of the proportionality of the orders proposed. Rather it contemplated that the analysis of the best interests of the child would necessarily involve a careful examination of

the parents' wishes and their interests, their article 8 rights, given the potential for the impact of the decision on the parents to affect the child as well.” [51] and

b. *Re C (Relocation: Appeal)* [2019] EWHC 131 (Fam) – see below.

10. *Re C (Relocation: Appeal)* [2019] Williams J:

[15] The most recent and authoritative appellate decision on the approach to permanent overseas relocation cases is *Re F (A Child) (International Relocation)* [2015] EWCA Civ 882, [2017] 1 FLR 979. The material paragraphs of the judgment are [3], [4], [30]–[35] (Ryder LJ) and [45]–[52] (McFarlane LJ). *Re F*, together with the earlier authorities of *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 2 WLR 1826, [2001] 1 FLR 1052, *K v K (Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793, [2012] 2 WLR 941, [2012] 2 FLR 880 and *Re C (A Child) (International Centre for Family Law, Policy and Practice Intervening)* [2015] EWCA Civ 1305, [2016] Fam 253, [2016] 3 WLR 1, sub nom *Re C (Internal Relocation)* [2017] 1 FLR 103, make clear that that whether the applications are configured under s 8 or s 13 of the Children Act 1989 the following framework applies:

1. (a) The only authentic principle is the paramount welfare of the child.
2. (b) The implementation of s 1(2A) of the Children Act 1989 makes clear the heightened scrutiny required of proposals which interfere with the relationship between child and parent.
3. (c) The welfare checklist is relevant whether the case is brought under s 8 or s 13 of the Children Act 1989.
4. (d) The effect of previous guidance in cases such as *Payne v Payne* a may be misleading unless viewed in its proper context which is no more than that it may assist the judge to identify potentially relevant issues.
5. (e) In assessing paramount welfare in international relocation cases, the court must carry out a holistic and nonlinear comparative evaluation of the plans proposed by each parent. In complex b international relocation cases this may need to be of some sophistication and complexity.
6. (f) In addition to rights under Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 – indeed probably as a component of the Art 8 rights and s 1(2A) – one must factor in the rights of the child to maintain personal relations and direct contact with both parents on a regular basis (unless that is contrary to her interests) in accordance with Art 9 of the United Nations Convention on the Rights of the Child 1989.
7. (g) Furthermore, the court must also take into account the Art 8 rights of the parents. In the usual case the child’s Art 8 right will take priority over the parents, but that should not cause the court to overlook the Art 8 rights of others affected and the court should balance the competing Art 8 rights.
8. (h) The effect of an international relocation is such that the Art 8 rights of a child are likely to be infringed and the court must consider the issue of

proportionality of the interference. There remains some degree of uncertainty as to how the proportionality evaluation is to be applied in relocation cases. In *Re F* it was said one should be undertaken, in *Re Y (Children) (Removal from Jurisdiction: Failure to Consider Family Segmentation)* [2014] EWCA Civ 1287, [2015] 1 FLR 1350 it was said in private law cases it does not need to be. The Court of Appeal in *Re C* expressed doubts about how it was to be undertaken. I consider that in most cases in practice the proportionality issue will be subsumed within the overall holistic evaluation, in particular when considering effect of change and risk of harm. In reality, in the judicial consideration of the welfare checklist, it simply is likely to mean the judge will be that much more alert to the importance and thus weight to be afforded to the child's right to maintain contact with the left-behind parent and their rights to a stable and secure family life with their primary carer, if there is one.

[16] Insofar as it may exist in identifying the court may (but is not obliged to) deploy what may be described as the '*F, K, C, Payne*' composite. This is no more than an integrated approach to the welfare checklist and the *Payne* guidance/discipline incorporating within the welfare checklist relevant *Payne* criteria and any other particular features of the individual case which appear relevant. Of course, in some cases it may be that one or more particular aspects will emerge as carrying significantly more weight than others – a contour map with high peaks and low valleys; in others the factors may be much more evenly weighed and present a gently undulating landscape. In the former the balance may fall more obviously in one direction if it is dominated by peaks with no valleys, in others the peaks may be balanced by the valleys creating a finer balance. In the latter the overall undulations may make the balance a very fine one. Ultimately every case is fact-specific. This case is a paradigm example of that.

11. While every case is different and each will have nuances of its own, the following considerations are likely to be important in considering the vast majority of relocation cases:
 - a. the motivation of the applicant parent, in particular whether her motivation is to disrupt the child's relationship with the respondent parent;
 - b. the motivation of the respondent parent, in particular whether his motivation is to exert control over the applicant rather than having a focus on the child's welfare;
 - c. the level of planning which the applicant has put into the proposals for relocation, bearing in mind that more planning can be expected when the application involves a leap into the unknown than when the parent is proposing to return to a place that she knows well;
 - d. conversely, the court will need to ask about the respondent's alternative plan, if he puts one forward, perhaps bearing in mind that he may have had rather less time

than the applicant to think through his proposals, depending how quickly the case has developed;

- e. the proposals that each parent puts forward for promoting the continued involvement of the other parent in the child's life if their plan is accepted by the court, bearing in mind practicalities like cost and time for travel, together with factors relevant because of the child's age (such as with younger children whether they can fly unaccompanied, or with older children whether they are likely to want to spend all their holidays with their parent rather than with friends);
- f. the child's own wishes and feelings, which will naturally take on more importance as the child gets older, though bearing in mind that many children do not want (and should not be asked) to choose between their parents and take on that the burden of responsibility.
- g. The effect of the changed, and usually reduced, relationship between the child and the respondent parent will always need careful consideration in deciding whether a proposed relocation is to be allowed. This analysis requires consideration and assessment of a number of elements. One is the role that the respondent is presently playing in meeting the child's welfare needs; another is the extent of the impact that the move would have on his involvement in the child's upbringing; and a third is the extent to which that impact can be reduced or managed through ongoing contact, direct and indirect.
- h. In some cases, particularly those where the applicant is clearly the child's primary carer seeking to return to family (whether abroad or in another part of the United Kingdom), the court may need to think carefully about the effect on the parent, and consequently on the child, of refusing permission to relocate. In other cases, this factor will be of less relevance. Again, the extent to which any impact can be reduced or managed (for example, though regular visits instead) may be highly significant to the court's overall assessment.
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