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THE CURRENT LAW OF RELOCATION IN ENGLAND AND WALES

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In relocation cases in England and Wales case law is weighted in favour of a relocating applicant' wishes. The underlying theme appears to be a concern for the applicant's emotional and psychological stability should permission to relocate not be granted. Current legal analystis and practitioners would argue that this approach diminishes the child's best interests and does not equally consider the emotional and psychological effect on the left behind parent. Family dynamics have changed drastically in the past forty years since our current legal precedent was set, and falls short of addressing issues which arise in our society today which encompasses an increasing blending of cultures, genders, nationalities and diverse living and parenting arrangements. Our rules and principals of law become more uncertain in content and application culminating in a decrease in legal certainty over time in accordance with the second law of thermodynamics. But since our society does not exist in a perfect state of equilibrium, pockets of order can and do emerge. Thus, the tide is turning towards evolving a more ordered system for determining relocation cases which is more reflective of today's modern society. England and Wales is known as a pro relocation jurisdiction[1]. The landmark case was Poel v. Poel [1970]

[1] Foley, Lawyer to the Court of Appeal, Civil Appeals Office, Varying Approaches among Member States to the 1980 Hague Convention on Child Abduction October 2006. See Paragraph 14.2

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1WLR 1469, 3 All ER 659 in which Sachs LJ concluded that the welfare of the children was most likely to be achieved by supporting the primary caregiver. The guidelines included:

1. The welfare of the child is the paramount consideration
2. Refusing the primary carer's reasonable proposals for the relocation of family life is likely to impact dramatically on the welfare of her dependent children
3. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

In England and Wales, the welfare of the child is the paramount consideration in relocation cases and the court must consider as appropriate the welfare checklist at subsection 1(3) Children Act 1989[2]. The history of relocation cases since Poel was reviewed thirty years later in Payne v Payne [2001] All ER (D) 142 in conjunction with the Children Act 1989. It was decided by the then President of the Family Division, Dame Elizabeth Butler-Sloss, Thorpe and Robert Walker LJJ. Thorpe LJ suggested disciplines and guidelines as a means of ensuring that the applicant's proposals are compatible with the child's welfare:

[2] 1 (3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

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

The Payne guidelines are as follows:

1. The welfare of the child is always paramount.
2. There is (in law at least if not in practice) no presumption in favour of the applicant parent.

3. The reasonable proposals of a parent with a Residence Order wishing to live abroad carry great weight.
4. The proposals have to be scrutinized with care.
5. There must be a genuine motivation for the move.
6. There must not be the motivation to bring to an end contact and meaningful relationship between the child and the left behind parent.
7. The move must be realistic and practical.
8. The effect upon the primary residential parent of a refusal of leave is very important.
9. The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
10. The opportunity for continuing contact between the child and the parent left behind may be very significant.

Payne remains the leading case on relocation reflecting principals nearly four decades old. The question must be asked: " Does Payne truly address the needs of our society today?" How do the guidelines ensure the child's ongoing relationship with the non-resident parent? Does our precedent protect the child against potential ill effects of distancing from family, friends and peers? How is the Court persuaded that assimilation into a new culture and or language is paramount to the child's welfare? As a means of answering this attention was brought to the need for research at the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Windsor (2009), the International Judicial Conference on

Cross Border Family Relocation, Washington D.C. (2010) and by Dr. Marilyn Freeman who authored a report in 2009 for REUNITE in which she concluded:

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

In relocation cases, the judge is duty bound at first instance to follow the guidance given in *Payne v Payne.* Therefore the discipline set out therein can only be altered in one of two ways: by legislation or by being overruled by a decision of the Supreme Court. An unsuccessful

challenge was made to Payne v Payne in re G[3] so, in England and Wales, the position remains that the child's best interests are equated with those of the primary carer parent, usually the mother. More recently in Re D (Children) [2010] EWCA Civ 50 Lord Justice Wall, in a hearing for permission to appeal a leave to remove (relocation) order, added his support for a review of Payne v Payne in which he stated:

> "There has been considerable criticism of Payne v Payne in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent". He went on to say: "This is a perfectly respectable argument, and would, I have no doubt, in the right case[4] constitute a 'compelling reason' for an appeal to be heard.

The need for both change and uniformity amongst our sister states is being addressed.In Parliament MPs expressed their support for a review of the guidance in relocation cases in Early Day Motion 373 on 7th December 2009:

"That this House believes that a child's relationship with its parents requires

[3] [2008] 1 FLR 1587 which was heard by the Court of Appeal (LJJ Thorpe, Arden, Wall). The father argued that that the leading authority on leave to remove, Payne v Payne [2001] 1 FLR 1052, was outdated, and out of step with modern views of the dynamics of family life, reflecting the view of a past age in which joint residence orders would only be made in wholly exceptional circumstances. At the oral hearing the father retreated somewhat from this position, arguing instead that some judges were misapplying Payne, in that they were inappropriately prioritising the impact of refusal on the primary carer, and were disregarding modern views on the importance of co-parenting.

[4] LJ Wall, President of the Family Courts, decided that Re D was not the right case for a challenge to Payne before the Supreme Court and thus refused the father's permission to appeal. He also reiterated his views in his September 2010 speech to the charity Families Need Fathers.

> greater legislative protection with regard to the Family Court's current application of precedent in international and national relocation cases; further believes that the Family Courts of England and Wales' position on the importance of the father/child relationship does not reflect the current authoritative research on the importance of father involvement in educational and psychological development in relocation cases; further believes that the courts in practice place too great an emphasis on the unsubstantiated emotional risk to the child from the mother's possible distress and disappointment if not allowed to relocate; considers that this emphasis over-rides all other considerations including the needs and rights of the child; and calls on the Government to respond positively to the research report by the charity Reunite, entitled Relocation, funded by the Ministry of Justice and published in July 2009."

In September 2010 a seminar in the House of Commons, attended by MPs, solicitors, barristers, psychiatrists, representatives from the Ministry of Justice and family charities considered, inter alia, considered the Custody Minefield's reform proposals in their November 2010 report 'Family Law: Relocation and the Case for Reform'. On 25 March 2010, the 'Washington Declaration on International Family Relocation' came into being when Judges and other experts worldwide on private international attended the International Judicial Conference on Cross Border Family Relocation, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children with the support of United States Department of State. These Judicial and private international law experts agreed the following princi-

pals:

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.
2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.
3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.
4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

    i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, ex-

cept if the contact is contrary to the child's best interest;

ii) the views of the child having regard to the child's age and maturity;

iii) the parties' proposals for the practical arrangements for relocation, including

accommodation, schooling and employment;

iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;

v) any history of family violence or abuse, whether physical or psychological;

vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

vii) pre-existing custody and access determinations;

viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

x) whether the parties' proposals for contact after relocation are realistic, having

particular regard to the cost to the family and the burden to the child;

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.
6. The factors reflect research findings concerning children's needs and development in the context of relocation.
7. It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct cooperation between administrative and judicial authorities between the two States concerned, as well as the exchange of information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global

system for the protection of children's rights. States that have not already done so are urged to join these Conventions.

8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.
9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.
10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.
11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.

12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.
13. The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.

Following the Washington Declaration Mostyn LJ had an opportunity to review the relevant case law and the Washington Declaration in Re AR (a Child; Relocation) [2010] EWHC 1346. Poel v Poel [1970] 3 All ER 659 was considered; Payne v Payne [2001] All ER (D) 142 (Feb) was applied; G (leave to remove), Re [2008] 1 FLR 1587 were considered; H (A Child) (relocation application), Re [2010] All ER (D) 195 (May) were considered. In approaching the parties' respective application, the court also regarded the relevant factors set out in s 1(3) of the Children Act 1989 and impact of art 8 of the European Convention on Human Rights (the Convention). At paragraph 53 of his judgment Mostyn recalls In *Re C (Abduction: Residence and Contact)* [2006] 2 FLR 277:

> "I considered at paras 21 - 28 the impact of Art 8 of the European Convention on Human Rights on applications for residence and contact. In Paragraph 28 I stated: Given the terms of the Strasbourg jurisprudence to which I have referred, it is al-

most as if there is a presumption in favour of normal contact and it is for those who say it is inappropriate to prove by clear evidence why this is so. I would go further. If one were to draw up a hierarchy of human rights protected by the Convention I would have thought that very near to the top would be the right of a child, while he or she is growing up, to have a meaningful participation by both of his parents in his upbringing. Although this is (strangely) not explicitly spelt out in the text it must be implicit in the notion of the right to a family life. Recognition of the existence of this very obvious and critically important right is sometimes, so it seems to me, lost in the relocation cases."

Of the Washington Declaration, Mostyn goes on to say at Paragraphs 11 and 12:

11.The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. The hitherto decisive factor for us - the psychological impact on the thwarted primary carer - is relegated to a seemingly minor position at the back end of para 4(viii).

12. In the recent decision of *Re H* (Lawtel 19/5/10) Wilson LJ considered the Declaration and stated at para 26:

In that the principal charge against our guidance, as it stands, is that it ascribes too great a significance to the effect on the child of the negative impact upon the applicant of refusal of the application, one is interested to discern the way in which, in [4] of the declaration, that factor is addressed. One finds (does one not?) that it is not squarely addressed at all. The closest to any address of it is to be found in (viii), namely "the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties". Some may share my initial perplexity even at the terminology of (viii) in that it appears to train the consideration of the court not only upon impact "on the child" but also, and by way of contra-distinction, upon impact "on the parties" apparently irrespective of impact on the child. It is axiomatic that our notion of paramountcy excludes from consideration all factors which have no bearing on the child. But, that possible curiosity apart, there is no square address in (viii) of the impact upon the child likely to flow from negative impact upon the applicant of refusal of the application. Indeed the reference to the child's extended family, education and social life, seems almost to draw attention away from such a factor. I wonder whether consideration may need to be given as to whether, if the present law of England and Wales does indeed perhaps place ex-

cessive weight upon that factor, paragraph 4 of the declaration, as presently drawn, by contrast places insufficient weight upon it. I agree with this, up to a point. Certainly the factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less. The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward.

Let us move away from relocation cases being referred to as the "the San Andreas Fault of family law"[5]. Any truly revolutionary change of vision must be fundamentally simple. A "social capital" analysis could be the key to enable a Court to determine as paramount, the welfare of the child.

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[5] Richard Chisholm, *The Paramount Consideration: Children's Interests in Family Law* 16 AUSTL. J. FAM. L. 87 (2002) at 107.