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Relocation, Relocation, Relocation: A Comparative Study of 'Leave to Remove' Applications in England and Scotland

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INTRODUCTION

A high degree of similarity can be observed between England and Scotland regarding the statutory rules applied to relocation cases, where one of the parents wants to relocate and it impacts any child. The drivers of international relocation are generally similar in terms of cultural, social and economic conditions. Both jurisdictions consider the welfare of the individual child to be paramount. Furthermore, regard must be had to the child's views and both systems have a "no order" principle. It is the approach taken by the appellate courts that divides the two jurisdictions. Traditionally, the English approach has been very pro-relocation, whereas the Scottish approach has been far more neutral. A middle ground between the two approaches would appear to be a viable solution. English law would benefit from moving away from the decision in the current leading case *Payne v Payne*[1] so as to increase flexibility. Scots law, on the other hand, might achieve improved consistency and an increase in amicable dispute resolution by following England's lead in introducing mediation and a welfare checklist.

PART 1: ENGLISH RELOCATION LAW

Much of the criticism surrounding the relocation debate focuses on *Payne* which derives almost wholly from *Poel v Poel.*[2] In *Poel* a mother sought permission to take her three year old child to New Zealand to live with her and her new husband. The Court considered it should not readily interfere with any

[1] [2001] EWCA Civ 166, [2001] 1 FLR 1052.
[2] [1970] 1 WLR 1469.

reasonable way of life selected by the parent with custody rights. Any such interference would place considerable strain on the applicant and consequently have a negative effect on the child's happiness.

Similarly, *Payne v Payne* – another English case – involved an application by the mother to relocate to New Zealand. The application was granted both at first instance and on appeal. Importantly, the mother in this case was a citizen of New Zealand, the father was British, and sometime after the child was born both parents had decided to move abroad. However, whether it had been decided they were all to live in New Zealand was in dispute. The mother and child lived in New Zealand for fourteen months before the parents separated and an order was made providing for the child's return to the United Kingdom. President of the Family Division, Dame Elizabeth Butler-Sloss, summarised the guidelines to be followed in relocation cases, and these subsequently became the most important part of the case. Where a parent with a residence order puts forward reasonable and genuine proposals to relocate, it will usually be allowed.

The approach in *Payne* has been tempered somewhat by *K v K*,[3] in which a father's appeal was allowed with their Lordships determining that the paramountcy of the welfare of the child was the only principle following *Payne* and that the rest is merely circumstance-specific guidance. Furthermore, the statutory checklist in section 1(3) of the Children Act 1989 is to be applied in the exercise of discretion in order to help a judge determine what will optimise the welfare of the child. As set out below, there are a number of reasons why, despite the recent judgment in *K v K*, English relocation law should be reformed.

SOCIAL BACKGROUND FACTORS

Care arrangements today vary hugely when compared with those in the past. Particularly important is the development of shared care, rather than solely

[3] *(Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134.

resting on the primary carer, which raises questions regarding the proper approach which should be taken in relocation cases. Edward Devereux and Rob George argue that since *Payne* is based on circumstances in which the applicant is generally the primary carer, it "cannot any longer be appropriate as the main guidance for all international relocation cases".[4]

HUMAN RIGHTS

Despite the judges in *Payne* stating that there is no presumption in favour of the applicant primary carer, there is a gloss on the welfare system which "expects a judge to approach his task in a manner which is weighted towards one party".[5] There is evidence from recent case law that suggests too much emphasis is placed on the wishes of the applicant parent.[6] From the perspective of human rights, this would appear to be somewhat unfair as it raises questions regarding the degree to which the opposing parent is receiving a fair chance to state their case.

However, it is suggested by Fortin that the welfare principle should be applied as a qualification to the individual rights set out in Article 8(1) of the European Convention on Human Rights.[7] She fears that in some cases the needs of the parents are lost in an attempt to promote the interests of the child above all other factors. Despite understanding Fortin's attempt to achieve fairness for all when disputes arise, I am not persuaded that the interests of the child should be considered equal to those of the parents, as will be illustrated in the following sections.

THE "DISTRESS PRINCIPLE"

The *Payne* approach of "happy mother, happy child" neglects to take into account a variety of factors. The idea that the child does not suffer as a result of

[4] E Devereux and R George, "When Will the Supreme Court Put Us Out of Our Payne?" November [2014] 14 Fam Law 1586, para. 11.
[5] Professor Mary Hayes, "Relocation Cases: Is the Court of Appeal Applying the correct principles?" [2006] 18 CFLQ 351, 362.
[6] *Re D (A Child)* [2010] EWCA Civ 593.
[7] J Fortin, "The HRA's Impact on Litigation Involving Children and Their Families" [1999] CFLQ 237.

the loss of their second parent and wider surroundings, such as their extended family, friends and culture, oversimplifies the needs of a child. It lacks necessary flexibility and confines decision-making when contemplating an issue that can include a broad range of circumstances. Although it is predominantly mothers rather than fathers with residency of the child in these relocation cases, the focus on the "mother" serves to enforce traditional gender roles, with arguably negative consequences for both mothers and fathers. Not to mention the fact that the child's interests are equated with those of the mother, while this may not necessarily be accurate.

The assumption that the restriction of the primary carer will negatively impact the child patronises the primary carer and demeans their ability as a parent. Marilyn Freeman suggests "happy child, happy mother" would be more suitable.[8] Despite a lack of evidence, *Payne* also presumes that the result of the distress caused to the mother, by her inability to move, would be worse for the child than the loss of the second parent. This only serves to further solidify traditional gender roles and could in reality be very detrimental to the child. Clarification of the reasoning and research behind the "happy mother, happy child" approach is needed if its continued use is to be allowed. The best solution seems to be the removal of the distress principle as the individual circumstances of every case will dictate levels of distress or happiness and no broad-brush principle can be generally applicable.

RELOCATION FOLLOWING *K v K*

K v K was a case in which a Polish father successfully appealed against a decision that allowed his former Canadian wife to relocate to Canada with their two daughters. In the period leading up to the relocation, the father cared for the children for five nights and the mother for nine nights out of every fourteen-day period. The mother wanted to relocate to Canada so that the children would have the support of her family, to which the father objected. However, at first instance the court relied upon *Payne* and the guidance for

[8] "Relocation: The Reunite Research" (International Child Abduction Centre, July 2009).

applications by primary carers. On appeal, the court found that the only binding principle from *Payne* was that the child's welfare is paramount, the rest merely being guidance that may or may not be relevant based on the circumstances. Some argue that the case has been hugely significant in reforming the courts' interpretation,[9] whereas others consider it to be merely a first step with little practical effect. Whether *K v K* has been merely theoretical, and if it has in fact added confusion to the law, has to be considered.

The contrasting approaches of Thorpe and Black LJJ in *K v K* initially caused some confusion. Thorpe LJ found that the guidance in *Payne* is only applicable when the applicant is the primary carer, while Black LJ reached the same ultimate conclusion but found that cases should not try to distinguish between a "*Payne* case" and a "*Re Y* case" (a case that gave guidance for applications concerning shared care arrangements) based on the amount of time a child spends with each parent, but that all factors should be considered. Andrea Watts considers that *K v K* has in general terms been a step away from English law's pro-relocation stance when considering shared care arrangement cases.[10] However, in a study of 100,000 people, it was found that only 3.1% had equal shared care arrangements.[11] Therefore, even if Watts' claim were undisputed, *K v K* would have little practical significance.

Devereux and George opine that "this apparent solution risks causing significant problems".[12] As the majority of judges hearing relocation cases are no longer international family law specialists, they consider that clarity is more important than ever.

However, if the approach of Black LJ is to be followed then *Payne* is still to be acknowledged in shared care cases.[13] This calls into question the benefits of *K v K* in modernising the law at all. Black LJ warned against the classification of

[9] Andrea Watts, "The End of Payne?" [2011] Family Law Week.
[10] Ibid.
[11] Institute for Social and Economic research "Understanding Society".
[12] Devereux and George (n. 4) para 20.
[13] The approach was endorsed recently in *Re F (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645.

cases as either "*Payne* cases" or "*Re Y*[14] cases", and did not consider Hedley J's decision in *Re Y* as representative of a different line of authority from *Payne*. Although I am not persuaded by her view that *Payne* should continue to be applied, the possibility of parents attempting to engineer shared care arrangements to achieve an advantage in the future is evident, and would clearly be a drawback of putting the welfare and interests of the child first. However, the approach in *Re L*[15] (as endorsed in *Re S*)[16] is significant, namely that shared residence is not to be considered a "trump card" in favour of the respondent parent.

It must be considered whether this focus on shared care arrangements is actually useful or ultimately confusing. Eekelaar states that the judgement in *Payne* seems to promote the interests of others "under the guise of the child's welfare".[17] *K v K* gives more weight to the second parent but whether this can be considered a step forward, or whether it merely disregards the needs of the child under a different pretence, is open to debate. However, in shared care cases it is likely that the child will be impacted to a greater extent by the loss of the respondent parent in their everyday life.

It is time for the Supreme Court to wholly reconsider the interpretation of relocation law in England. English law would benefit from aspects of Scots law's presumption-free approach which allows a more neutral analysis of relocation cases and, therefore, encourages flexibility and a case-by-case approach. Cases must no longer be led astray by *Payne* and must focus again on the most important issue at stake: the welfare of the child.

[14] [2004] 2 FLR 330.
[15] [2012] EWHC 3069 (Fam).
[16] *(A Child)* [2012] EWCA Civ 1031.
[17] JM Eekelaar, "Beyond the Welfare Principle" (2002) CFLQ 237, 242.

PART 2: SCOTTISH RELOCATION LAW

Scottish relocation law is viewed entirely through the "prism of the welfare of the child".[18] Scottish courts have not followed *Payne* and so do not make use of a presumptive rule in theory or in practice. However, Janeen Carruthers argues that Scots law could be considered anti-relocation when considering the burden of proof, as the applicant is required to show that it would be better for the child for a relocation order to be made than no order.[19] However, there are circumstances where the move may offer the child concerned considerable advantages. In the case of *Johnson v Francis*[20] it was considered to be in the children's interest to immigrate to Australia due to their stepfather's employment circumstances.

It was emphasised in the case of *M v M*[21] that the interests of either parent is to receive no greater weight than they truly deserve in the circumstances and the eldest child's views in favour of relocation were considered of importance. In Scots law no factor is to receive any greater weight than any other factor. This was highlighted in *Donaldson v Donaldson.*[22] The court did acknowledge that there may be some features which are of particular importance when determining what is in the best interests of the child, but this will always depend on the facts of the case. The ability of the second parent to gain contact with the relocating child has been discussed in some cases, however, it was made clear in *Donaldson* that being satisfied about post relocation contact did not necessarily mean there had to be detailed provision made.

[18] Janeen Carruthers, "International Family Relocation: Recent UK Experience" (2012) 3 Jur Rev 187, 197.
[19] Ibid.
[20] 1982 SLT 285.
[21] [2011] CSIH 65, 2012 SLT 428.
[22] [2014] CSIH 88, 2014 Fam LR126.

POSSIBLE REFORM OF THE SCOTTISH APPROACH

Duggan suggests that Scottish Court decisions have "no better predictive accuracy than one based on a coin toss".[23] Although the "welfare test" has allowed case law to change as society evolves it has meant a lack of consistency and predictability. As welfare decisions are often subjective, as opposed to evidential, a judge's personal beliefs are often influential. This raises questions regarding fairness. The clarity of Scots relocation law might therefore be enhanced by adopting elements of the English system through the introduction of mediation and a statutory checklist.

MEDIATION

Parents will always know more about their child's life than a judge. Mediation allows an alternative that is potentially both more effective and less likely to cause an unfavourable environment for the child. The adversarial nature of the court system often causes hostility and conflict, whereas mediation has the potential to improve the nature of communication. The decision made is likely to be in the agreed interests of all concerned and, therefore, more likely to be adhered to. Finally, mediation leaves parents and families with a flexible situation that can be adapted as required unlike court decisions, which are difficult to change.

STATUTORY CHECKLIST

The introduction of a statutory checklist similar to that of England would potentially improve consistency and alleviate the possibility of judicial prejudice arising out of the subjectivity of the welfare of the child approach. Although argued that this would create a stringent approach, lacking required discretion, it is possible that such a checklist could be interpreted as guidelines rather than strict rules. These guidelines would improve consistency without bringing about any negative results arising from the fettering of discretion.

[23] Dennis Duggan, "Rock-Paper-Scissors: Playing the Odds With the Law of the Child" (2007) Family Court Review.

Unfortunately, this was rejected by the Scottish Law Commission on consideration prior to the 1995 Act.[24]

PART 3: WASHINGTON DECLARATION OF INTERNATIONAL FAMILY RELOCATION

The neutral approach taken by the Washington Declaration should be adopted by all jurisdictions worldwide to resolve relocation disputes. The neutral method achieves a good balance between the rigidity of the English stance and the unpredictable approach taken in Scotland. Its enactment would increase clarity between different jurisdictions while ultimately improving the law in Scotland and England individually. However, we do not have time to wait for international consensus. Cases continue to be interpreted in a fundamentally unsuitable manner and this must be addressed as soon as possible.

CONCLUSION

Perfect results are unrealistic in relocation cases but the method of reaching decisions making it all the more important that the method of reaching decisions has sound foundations. It cannot be guaranteed that a decision is in the best interests of the child, and at least one parent (often two) is going to be left disappointed. However, by finding a middle ground both jurisdictions can reform their approach to relocation cases and arrive at a result that advocates fairness, encourages flexibility, contains no presumptions, and most importantly, does the best it can for the welfare of the child.

[24] Report on Family Law (Scot Law Com No 135, 1992).