IAML European Chapter Young Lawyers Award 2016

Introduction

"The starting point now must be K v K. Its central message is conveyed, succinctly and accurately, in the headnote in the Law Report: "…that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be…" Ryder LJ[1].

The Erosion of Gender Bias – A Walk down Memory 'Payne'

For over a decade it would now seem the ratio of the decision in *Payne*[2] was wrongly applied. An over emphasis on the harm that might result if freedom to move were restricted led to a plethora of decisions, in the context of generalised assumptions about the role of each parent, that distorted the prism through which the welfare principle was applied. One cannot, however, help but sense the irony that the far reaching impact of the decision in Payne - tainted with gender based assumptions - could have been avoided had the words of the highest-ranking female judge in the United Kingdom (as she was then) been heeded. In *Payne* Dame Elizabeth Butler-Sloss expressed caution about the rigid application of guidance arising from historic jurisprudence that would, in some respects, circumvent the crucial welfare analysis.

There can be no doubt the decision in *Payne* led to an era of dismay for Fathers' faced with the prospect of their child being relocated across international borders. It became relatively easy for the applicant Mother to build a compelling case for relocation by simply isolating, and placing emphasis upon, the infamous 'four-point discipline' in *Payne*. The applicant Mother returning to her origins who was able to outline a package of realistic proposals whilst establishing she felt isolated, had genuine reasons for returning and would be left unable to shield the children from her emotional devastation if she were not permitted to return, was likely to be given permission to relocate. Even the inevitable detriment to the Father and his future relationship with the child was frequently offset by the extension of the child's relationships with the maternal family and her homeland.

Even the most optimistic and enthusiastic family lawyers found it difficult to defend the process. Payne created significant inequalities. Ryder LJ did not side step the issue: *"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…"*[3]

It is difficult to think of two cases (*Payne & Re F*) that better symbolise the evolution of the approach adopted by courts across the full spectrum of private law children proceedings.

Of course the movement from gender based assumptions has quite recently been recognised by the controversial introduction of the subsection into Section 1 of the Children Act 1989. Section 11 of the Children and Families Act 2014 came into effect on the 22nd October 2014. It amended section 1 of the Children Act 1989 to include a provision relating to "parental involvement" in the assessment of a child's welfare.

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[1] *Re F (a child) (International Relocation Cases) [2015] EWCA Ciov 882. This passage is required reading for any court adjudicating on a removal case.*
[2] *Payne v Payne [2001] EWCA Civ 166*
[3] *Re F* above n 1, para 18

The following insertion was made to subsection (2)

"(2A)A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare."[4]

Ten years on and the decision in *K v K*[5] represented the beginning of a titanic move in the way the court determined relocation applications whilst providing Father's with a clear 'strategy' to resisting a move. It is worth noting that the amendments were not in force at the time of the decision.[6] The decision in *Re K* coincided with a wider move to balance the gender inequalities in family proceedings. The 2011 Family Justice Review had considered the issue of whether the family courts should approach cases with a view to ensuring "co-parenting", "shared parenting" or an ongoing role of both parents in a child's life after separation. In the final report published in November 2011 it was stated:

"The child's welfare should be the court's paramount consideration, as required by the Children Act 1989. No change should be made that might compromise this principle. Accordingly, ***no legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents.*** *For that reason and taking account of further evidence we also do not recommend a change canvassed in our interim report that legislation might state the importance to the child of a meaningful relationship with both parents after their separation where this is safe. While true, and indeed a principle that guides court decisions, we have concluded that this would do more harm than good."*[7]

Accordingly the legislation defined the term "involvement" as meaning involvement of some kind, either direct or indirect, but not any particular division of a child's time.

In *K v K* the court gave permission for the Mother to relocate with the children to Canada in circumstances where the children spent up to 6 nights out of 14 in Father's care. *"The mother presented a classic application for relocation following the failure of the marriage. She wanted to go home. Here she was isolated and stressed. There she would be able to live within her parents' home receiving emotional and material support."*[8] Father appealed.

Thorpe LJ giving the lead judgment (as he did in Payne) allowed the Father's appeal issuing a salutary note of caution:

"… the only principle to be extracted from Payne v. Payne is the paramountcy principle. All the rest..is guidance as to factors to be weighed in search of the welfare paramountcy…the authority which I consider the judge should have applied [was] Re Y"[9]

The 2004 approach taken by Hedley J in *Re Y*[10] had been overlooked for a number of years, albeit in an era where shared care arrangements were less frequent[11]. Simply put *K v K* became proposition from which the Court may extract that the existence of a shared care arrangements displaced the

[4] http://www.legislation.gov.uk/ukpga/2014/6/enacted
[5] *K (Children) [2011] EWCA Civ 793*
[6] *Articles 3 and 4 of the Children and Families Act 2014 (Commencement No 5 and Transitional Provision) Order 2014, SI 2014/2749 provide that the new provision of s.1 CA1989 applied to proceedings not disposed of before 22 October 2014*
[7] *Para 109, Family Justice Review Final Report, November 2011*
[8] *Re K, n5 aboce Para 20*
[9] *Ibid Para 39*
[10] *Re Y [2004] 2 FLR 330*
[11] *At paragraph 59 of his judgment Thorpe LJ referred to the national survey, "Understanding Society", that put the proportion of equal shared care at 3.1% of the total.*

guidance in *Payne* and rather the court should exercise its discretion by reference to the statutory checklist.

There offered the saving hand to which every Father sought to cling. Establish a shared care arrangement and the classic *'Payne case'* advanced by the Mother would be significantly diluted. Interim contested hearings took on a new significance and skirmishes over labels became common place. Interestingly the court sought to redress the balance in *Re F* with Munby LJ quoting from the judgment of Black LJ in *K v K:*

"…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."[12]

Parents who seek to gain advantages through the use of labels are not likely to be viewed in a positive light. The Mother who peppers her application with the term 'primary carer' is in danger of being perceived as a parent who is not able to foster a positive image of the left behind Father, a key component to securing relocation. Equally the Father who seeks to deploy the 'shared care; weapon is in danger of being perceived as overbearing, controlling and strategic, in circumstances where he will need to crucially demonstrate that he remains, notwithstanding the separation, a point of support to the isolated Mother.

The decision in *Re F* has helpfully unified the judicial approach that should be taken when faced with determining an external relocation application. *Re F (supra)* has subsequently been applied in the reported authority of *Re D*[13]

In one sense the decision in *Re F* does not really represent any change to legal principle. Rather the decisions that followed *Payne*, colored by the context of gender based assumptions, represented an endemic failure to properly apply the most basic and fundamental legal principle - that of the child's welfare being paramount. This proposition was reinforced by Moore-Bick LJ when he said in K v K:

"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… 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…. 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."[14]

The Case Study: Summary of Parties' Positions

Although Mrs Brand is a native English speaker and proposes to relocate to an English speaking country it does not appear the move to State B represents a return to her origins. Her career prospects are much better in State B and in turn this will improve her mental well being, create financial independence from Mr Yun and make her emotionally more available to the children. Mrs

[12] *Re F above n1, [42]*
[13] *(A Child) [2015] EWHC 3434 (Fam)*
[14] *K above n5 [86]*

Brand will need to demonstrate that she can ensure the children maintain a positive and regular relationship with Mr Yun.

In contrast Mr Yun will argue that such a move will impact upon his relationship with the children. He will point to the recent difficulties he has faced with the child arrangements to be indicative of a wider issue as to whether Mrs Brand:

(a) Is able to foster a positive image to the children of life with the paternal family;
(b) Promote a positive relationship;
(c) Will subvert the relationship between Mr Yun and the children.

Mr Yun will have concerns about the regularity in which he is able to spend time with the children given the distance between the two States and how such a move would impact on Paul's treatment. There is also a concern about the children losing their sense of identity through the use of the English language and a possible diminution in Buddhist teaching

Advice

1. (A)

(i) My advice to Mrs Brand would be to make an application to permanently relocate with the children to State B. Strategically Mrs Brand would be encouraged to demonstrate behaviours that would give the court confidence she would foster a positive relationship between Mr Yun and the children through the use of effective communication. Importantly Mrs Brand would be advised to consult with Mr Yun about the move and to show that she had given careful consideration to, not only his status as an equal parent, but how the move will impact on the children. Mrs Brand should be advised that the court is likely to view her application as a 'lifestyle choice' and that will potentially alter the welfare balance. She has the advantage of being the primary carer in so far as the children are in Father's care for only two weekends per month during term time, but this does not create a presumption that her reasonable relocation plans will be facilitated unless there is some compelling reason to the contrary[15]. Caution should be issued in seeking to categorise the case as a "Payne type case", or a "K v K type case" or a "Re Y type case"[16]

(ii) As identified in the discussion above, the court's approach will be to adopt what is now known as the 'global, holistic evaluation' of the children's welfare. Is it in Rebecca and Paul's best interests to maintain continuity by remaining in State A or relocate with Mrs Yun? Following the endorsement of the majority judgments in *K v K* by Munby LJ in *Re F*, the only principle of law to extract is that Rebecca and Paul's welfare is paramount. It is ***"the lodestar by which the court at the end of the day is guided"***[17].The court will have regard in particular to the 'welfare checklist' being the statutory criteria set out at s.1 (3) of the Children Act 1989:

(a) The ascertainable wishes and feelings of Rebecca and Paul (considered in **the light of his age and understanding);**

At the age of 12 - 13 Rebecca will be more aware of the proposed relocation. Assuming a reasonable level of maturity it is likely the court will pay careful attention

[15] *Per Black LJ [143] n 5 above Re K*
[16] *"It is simply a recipe for unnecessary and inappropriate forensic dispute or worse. It is to be avoided" per Black LJ Ref*
[17] *Per Hedley J, n 10 above Re Y*

to any views expressed by Rebecca. At the age of 5 – 6 Paul will lack the cognitive ability to understand fully the magnitude of the proposed relocation and thus the court is not likely to place any significant weight on his views.

(b) Their physical, emotional and educational needs;

Clearly Paul's chronic allergies and the capacity to treat those in State B will have a significant bearing on the decision of the court. This will be balanced against the children having better educational opportunities in State B. There is no suggestion their emotional needs will not be met in either State.

(c) The likely effect on them to any change in their circumstances;

If they remain in State A the children's lives will remain unchanged. A move to State B will invoke significant change in all aspects of their lives. It is not know the extent to which these changes would impact upon them, albeit given the disparity in age it is likely to affect Rebecca and Paul in different ways. The court will need to assess the strength and depth of the relationship shared by the children with Mr Yun and the impact on them of not seeing their Father with the degree of regularity, and in the same circumstances, in which they are used to doing.

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

Buddhism is a feature of the children's upbringing. The court will need to carefully consider whether the teaching of the faith will be positively fostered in State B.

(e) Any harm which they have suffered or are at risk of suffering;

There is no suggestion at this stage that the parents are in significant conflict, however, as the dispute gathers pace the court will need to assess to what extent Rebecca and Paul will be caught up in the conflict. If Mr Yun's concerns about the present arrangements are correct it highlights an issue as to whether his relationship with the children will be subverted in State B and the emotional harm this will cause.

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

The court will need to grapple with the question as to whether it is in the children's interests that both parents play a significant role in their lives. There is no suggestion that either parent is incapable of meeting the children's needs, however, Mrs Brand is providing the lion's share of the care.

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

Given that the children are only spending 2 out of every 14 nights in Mr Yun's care during term time, it is possible the court could compensate his loss of time with increased time during the holiday periods in State B. The court would need to weigh up the impact on the children should permission be refused. The guidance in Payne remains useful and, whilst it should not be elevated to legal principle, it should not be

disregarded as it remains *"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."*[18] The impact on Mrs Brand of a refusal should therefore guide the court in its overall welfare analysis when deciding what powers to exercise.

(iii) There can be no doubt that, absent of Mrs Brand demonstrating she would promote ongoing contact in State B, permission would be refused. It would not be enough for Mrs Brand to convince the court that she would make the children available. She would need to demonstrate that, particularly with regard to Paul, she would actively encourage the use Skype and phone contact as a way of keeping in touch with Mr Yun. A careful assessment of Mr Yun's financial capacity to maintain regular direct contact will be required. The flight is medium to long haul and is likely to be expensive and prohibitive in nature. Rebecca is of an age where she can travel. The court would expect Mrs Brand to outline realistic proposals for ongoing contact and to obtain a *'Mirror Order'* in State B as a mechanism for Mr Yun to enforce the order of the court.

In the jurisdiction of England and Wales maintenance for children is dealt with through a separate statutory body, namely the Child Maintenance Service (CMS). Mrs Brand will not be able to apply to the CMS if she is living outside the UK with Rebecca and Paul, however, she could apply separately to the court. Given that Mrs Brand's relocation is predicated on increasing her income by 40% through career opportunities the court will want to assess the cost of Paul's treatment and whether this would impact on her ability to meet the children's financial needs. The relocation will not abdicate Mr Yun of his financial responsibilities towards the children.

(iv) The following type of comparative evidence would be useful in supporting Mrs Brand's case:

- Living arrangements – where will the children live?
- School arrangements – what schools will they attend, how do they compare to the schools in State A?
- Health care – In particular how will Mrs Brand ensure Paul's treatment for chronic allergies is not prejudiced? Will the children have access to free healthcare? How will the impact of not being domiciled in the country impact on the healthcare available?
- Evidence from family and friends on how she has confided in them about the impact a refusal would have upon her.
- Evidence from family members in State B as to how they will, not only support Mrs Brand, but help her to support the relationship between Mr Yun and the children.
- Evidence of a Buddhist temple, enquiries made and steps that will be taken in State B to ensure the children continue being taught in this faith.
- Details of flights and accommodation available to Mr Yun to facilitate direct contact.
- Her career prospects in State B compared to State A.
- Medical evidence

[18] *Per Black LJ [90] Re K, n5 above*

(B)

i. My advice to Mr Yun on the law would remain unchanged. I would have, however, have advised Mr Yun to establish a greater proportion of time caring for the children, in the absence of agreement, by issuing an application to vary the custody agreement. The court may question whether the application was made *bona fide*, but he would have been advised that with a proper application of the welfare principle the court will not ignore the strength of his relationship with the children and the extent to which he meets their needs. As set out above, whilst the courts have been very clear that we should avoid categorising cases, there remains a logical inevitability that he will be able to better demonstrate a close and regular relationship if he provides a greater degree of care. It will be more difficult for the court to compensate his lost time through increased holiday time. I would have advised Mr Yun that he should continue to provide emotional, practical and financial support to Mrs Brand. Moreover, the fact she is not returning to a country of origin will add some weight to his opposition.

ii. The following type of evidence would be useful to Mr Brand:

- A report from Paul's family doctor as to his diagnosis, treatment and prognosis under his care. In particular it will be crucial for Mr Yun to establish the importance of continuity of care; that a move for Paul at this juncture could significantly hamper his treatment and the extent to which, if he did not receive the same level of care, it would impact upon Paul's health.

- Evidence from members of the wider paternal family as to the relationship they share with Paul and Rebecca, there observations of Mr Yun's care of the children and the impact it would have on them. The evidence would need to demonstrate an understanding of Mrs Brand's desire to relocate and how they would be prepared to support her if she remained in State A.

- Comparative evidence in terms of schooling and arrangements.

- Evidence as to the recent difficulties with contact and concerns as to whether Mrs Brand would promote a positive image of the paternal family. His wider concerns about the extent to which his relationship would be subverted and Mrs Brand's motivations for seeking to relocate.

- Tangible evidence as to the strength of his relationship with the children.

2. In view of the legal analysis set out above the existence of a court order and a marriage would not impact on the court's assessment of the children's welfare.

3. I have set out in some detail above the approach of the courts where a shared care arrangement exists. In *Re F* Thorpe LJ said this:

"What is significant is not the label "shared residence" because we see cases in which for a particular reason the label is attached to what is no more than a conventional contact order. What is significant is the practical arrangements for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal

proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in Payne v. Payne *should not be utilised."*[19]

It seems to me that whilst the label is not important, it is almost inevitable, for the reasons I have already outlined, that an agreement by Mrs Brand and Mr Yun to share the care of Rebecca and Paul on a week on/week off pattern would have a significant impact on the force of Mr Yun's opposition to the move, not least because in all but the most exceptional cases the strength of the children's relationship with the Father is likely to be greater and this could tip the balance of the welfare analysis in his favour.

4. Had State B been Mrs Brand's homeland I suspect the factual matrix of the case would have been entirely different in terms of her motivations for relocating. Her focus would have been on the network of support available to her in State B and how the diminution in the Father's relationship with the children would have been offset by the extension of the children's relationship with their maternal family. Being able to offer first hand experiences of life at 'home' would, without doubt, make the case for a move more compelling.

5. I am not of the view that Mrs Brand's failure to share the Buddhist faith has any significant impact on the case for two reasons. Firstly: there is no suggestion from Mr Yun that he has any concerns about Mrs Brand's desire to promote the children's faith. Secondly: Despite spending significant proportions of time in Mrs Brand's care, Paul and Rebecca have continued to study Buddhism since separation. Mrs Brand has ensured the children attended the Buddhist temple even in circumstances where Mr Yun complains that Mrs Brand has been difficult with the contact arrangements. To her credit this demonstrates that Mrs Brand will promote the faith. I believe the court will be entirely satisfied that will remain the case should she relocate to State B.

6. My advice to Mr Yun would be to seek legal advice from a practitioner in State B as to the enforceability of any court order made in State A, whether by the use of a 'Mirror Order' or otherwise. The availability of Mirror Orders varies considerably between different countries. Quoting from *SW v CW* [20]":

"As yet there is no accepted international, let alone universal, mechanism to achieve protective measures. Even amongst common law jurisdictions there is no common coin… In many ways the power to make mirror orders is the most effective way of achieving protective measures. What the court in the jurisdiction of the child's habitual residence has ordered is replicated in the jurisdiction transiently involved in order to ensure that the parents are equally bound in each State….this appeal also illustrates the practical difficulty of a requirement in State A for a mirror order in State B which, for jurisdictional or other reasons, then declares itself unable to comply. It is an elementary extension to state that a litigant who seeks a mirror order is manifestly not accepting the jurisdiction of the ancillary State to do any more than to reiterate the provisions of the primary jurisdiction."[21]

If the agreed arrangements were not in an order I would:

(a) Express grave concerns to Mr Yun about his ability to enforce an order;
(b) That any future litigation would take place, in the first instance, in State B;
(c) Advise Mr Yun to speak to a specialist practitioner in State B before agreeing the arrangements without a court order;

[19] *Re F, n1 above [57] It is worth noting there was a point of divergence between Thorpe LJ and Black LJ as to whether Payne was posited on the premise of the applicant being the primary carer.*
[20] *SW v CW - mirror orders jurisdiction - [2011] EWCA Civ 703*
[21] *Ibid*

(d) Advise Mr Yun to ensure the arrangements were in an order

7. I would advise Mr Yun not to consent to a temporary posting, even if State B were a signatory to the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). A period of one year would provide Mrs Brand with the opportunity to settle with Rebecca and Paul. The Hague Convention is applicable in the same form across all signatory states. It is not a matter of domestic jurisprudence. Hence it must have the same meaning and effect under the law of all contracting states.[22] There would remain issues. First: Although applicants under the Hague Convention in the English courts automatically qualify for public funding, the same is not true of all signatory states. I do not know the position in State B but Mr Yun may face the potential hurdles of obtaining legal advice in that state, issuing proceedings and funding them if the children were not returned. Second: In practice international law is not consistently applied across all signatories. Over a period of 12 months Mr Yun would expose himself to the 'settled defence' argument. Article 12 of the convention states that the contracting state *"where a child has been wrongfully removed or retained…[for] a period of less than one year…shall order the return of the child …unless it is demonstrated that the child is now settled in its new environment."*[23]

Conclusion

Mr Yun and Mrs Brand have competing cases on the proposed relocation. Mr Yun would be well advised to focus on the strength and depth of his relationship with the children, his concerns about Mrs Brand promoting contact in State B and the impact such a move will have on Paul's health whilst seeking to expose vulnerabilities in her career prospects. As the classic primary carer Mrs Brand can use the guidance in Payne to support the direction in her case but there is no presumption in her favour. Ultimately she needs to focus on advancing a compelling case that satisfies the court that, not only is a move to State B a valid option for the welfare of the children, but also that she can foster a positive relationship with the paternal family.

Though one must be careful not to misinterpret Re F as the death of Payne, Mr Yun can oppose the application with reassurance that, "Analysis of welfare in relocation cases has tended to rely on generalised assumptions rather than an individualised analysis of the particular child in question….the concept of custody in *Poel* [has] changed radically in the 40 years…What has changed in that time is not the value placed on contact, but the reality and ideal of post-separation parenting".[24]

Thus the court's 'global, holistic evaluation' will ensure that Rebecca and Paul's welfare is paramount and will overbear all other considerations.

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[22] *Re H (Minors) (abduction: acquiescence) [1998] AC 72 [1997] 2 All ER 225*
[23] *Article 12*
[24] *Gilmore S, Herring J & Probert R, 'Landmark cases in Family Law' (2011)*