

LEAVE TO REMOVE

From the welfare principle to Payne and back again...

24 September 2015

Introduction

1. Applications for permission to permanently remove a child from the jurisdiction of England and Wales are a natural consequence of the increasing prevalence of transnational parenting.
2. The law in relation to applications for such leave has been in a state of flux for the past 15 years. The Court of Appeal has provided some much needed further guidance on the applicable law in (the unhelpfully named) *Re F (A Child)* [2015] EWCA Civ 882.
3. In summary, Lord Justice Ryder held that an ‘holistic evaluative analysis’ was the correct approach in s 13 relocation cases. With that in mind, his lordship undertook a comprehensive review of the authorities from *Payne* to *Re F* [2012] via *K v K* before explaining what this ‘holistic’ approach entailed.
4. Whilst *Re F* [2015] provided some much needed clarification on the applicable law in relocation cases, the writer of this note wonders whether it ultimately represented a missed opportunity to consign the *Payne* guidance to the ash heap of history.

Leading authorities

- a. *Payne v Payne* [2001] EWCA Civ 166; [2001] 1 FLR 1052 per Thorpe LJ
- b. *K v K* [2011] EWCA Civ 793; [2012] 2 FLR 880 per Moore-Bick LJ
- c. *Re F* [2012] EWCA Civ 1364; [2013] 1 FLR 645 per Munby LJ
- d. *Re F* [2015] EWCA Civ 882 (unreported) per Ryder LJ

Payne v Payne

5. The three questions set out by Thorpe LJ in *Payne v Payne* at para [40] have for many years been the 'go-to' for practitioners undertaking leave to remove cases:

(a) Is the mother's application genuine in the sense that 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, founded on practical proposals both well researched and investigated?

(b) Is [the father's opposition] 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 offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

6. However, even in *Payne* itself, Thorpe LJ was careful to emphasise that the discipline that he proposed was but a starting point and **subject at all times to the paramountcy principle**:

[40] The outcome of the second and third appraisals must then brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate.

Was this warning heeded?

7. The answer, in short, is no. The authorities that followed consistently expressed a concern that the guidance in *Payne v Payne* was being too rigidly applied:

J v S (Leave to Remove) [2010] EWHC 2098; [2011] 1 FLR 1694 per King J:

[81] This court...must be careful not to allow itself to become confined in a strait-jacket with the series of questions presenting the only test.

Re H [2010] EWCA Civ 915; [2010] 2 FLR 1875 per Wilson LJ:

[21] ...one must be aware of endorsing a parody of the decision. Both Thorpe LJ...and Dame Elizabeth Butler-Sloss P ... stressed that, in the determination of applications for permission to relocate, the welfare of the child was the paramount consideration.

The turning point: *K v K*

8. The turning point came in *K v K* where Moore-Bick LJ went further and clearly expressed the view that the guidance in *Payne* was not only being applied too rigidly, but being **wrongly elevated to the status of legal principle.**

Return to the paramountcy principle

9. Moore-Bick LJ was clear that the **only principle** of law articulated in *Payne* was that the **welfare of the child is paramount:**

[86] I accept...that the decision in *Payne v Payne* is binding on this 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...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...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.

10. Thorpe LJ agreed:

[39] As Moore-Bick LJ pointed out in argument, the only principle to be extracted from *Payne v Payne* [2001] Fam Law 473 is the paramountcy principle. All the rest, whether in paras 40 and 41 of my judgment or in paras 85 and 86 of Dame Elizabeth Butler-Sloss P's judgment is guidance as to factors to be weighed in search of the welfare paramountcy.

Payne confined

11. Also in agreement with Moore-Bick LJ, and after undertaking an exhaustive review of the authorities of her own, **Black LJ summarised the correct approach to be applied leave to remove cases:**

[141] The first point that is quite clear is that...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...

[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...

[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.

Re F

12. The **above passages from *K v K* were endorsed by Munby LJ in *Re F* [2012]** (see para [29]). In his own words, his lordship emphasised that:

[37] There can be no presumptions in a case governed by s 1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the 'welfare checklist' in s 1(3).

[61] The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court.

Scope of the *Payne* guidance

13. Munby LJ also settled the disagreement between Black LJ and Moore-Bick LJ on the one hand, and Thorpe LJ on the other, over whether the guidance in *Payne* was confined to cases in which the applicant was the primary carer.
14. Thorpe LJ thought that it was (see para [41]). In non-primary carer cases (e.g. 'shared care' cases) his lordship held that the correct approach was simply to apply the welfare checklist (following the approach of Hedley J in *Re Y* [2004] 2 FLR 330 at paras [14] to [16]).
15. Black LJ (with whom Moore-Bick LJ concurred) disagreed:

[144] I do not see Hedley J's decision in *Re Y*... as representative of a different line of authority from *Payne v 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 v 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 "an *In 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.

16. Munby LJ **agreed with the majority**:

[45] ...the guidance which Thorpe LJ gave in *Payne v Payne* para [40] is not...confined to cases where the applicant is the primary carer. It is guidance that...may be utilised in other kinds of relocation case if the judge thinks it helpful and appropriate to do so.

17. His lordship was particularly careful to endorse Black LJ's warning that cases **should not become 'bogged down' in semantic satellite jurisprudence** about whether the case was a *Payne* case or a *Re Y* case (see para [58]).

The starting point

18. In *Re F* [2015], Ryder LJ made it clear that the passages from *K v K* and *Re F* extracted above represented:

[20] ...required reading by any judge faced with determining any international child relocation case. These passages state the law as it is to be applied. *Payne* is to be read in the context of these authorities and not in substitution for, or priority, over them.

[24] Those passages from the majority judgments in *K v K*, endorsed as they have been by Munby LJ in *Re F*, in my view represent the current law with respect to any application for the permanent international relocation of a child.

19. Indeed, it is interesting to note that Ryder LJ went much further in his criticism of the *Payne* guidance that its wrongful attainment of status as legal principle. His lordship **addressed both the gender based criticisms of the *Payne* guidance and their lack of focus on the wishes of the child:**

[18] ...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 ...the absence of any emphasis of the child's wishes and feelings or to take the question one step back, the child's participation in the decision making process, is stark.

The (not so new) holistic approach

20. Ryder LJ considered the 'holistic evaluative analysis' required in s 13 cases was nothing new (see para [5]). **So what does it entail?**

[30] Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary...Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken)...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.

[31] ...the parents' plans be scrutinised and evaluated by reference to the proportionality of the same. It is a proposition that has already been decided that international relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

[32] ...it will not be every private law application that requires a proportionality evaluation...International relocation applications under section 13 CA 1989 may require a proportionality evaluation because of the likelihood of the severance of the relationship between the child and one of her parents. That evaluation will inevitably focus on the welfare analysis of each of the realistic options and may amount to no more than an acknowledgment that one option is better than the other and that the preferred option represents a proportionate interference in the article 8 ECHR rights of those involved.

Pulling the strings together

21. The writer of this note suggests that the correct approach to relocation cases can hence be summarised as follows:

- a. The only authentic principle is that the welfare of the child is the court's paramount consideration;
- b. An evaluation of where the child's best interests lie is to be determined by having regard to the welfare checklist (even though consideration of the checklist is not obligatory in s 13 cases – see s 1(4));
- c. There are no presumptions in cases governed by s 1 of the CA 1989;
- d. Particularly, there is no presumption that the reasonable relocation plan of the primary carer will be endorsed;
- e. The guidance in *Payne* may be applied where helpful and appropriate;
- f. Such guidance is not confined to cases where the applicant is the primary carer;
- g. The parties must not therefore engage in semantic arguments about whether the division of care makes the case one involving a true primary carer or shared care;
- h. The guidance in *Payne*, if applied, must not be applied as rigid principle or to dictate a particular outcome. It must admit flexibility;
- i. Where there is more than proposal before the court, a welfare analysis of each proposal will be necessary;
- j. Each realistic option for the welfare of the child should be considered both internally on its own merits and externally in comparison with other proposals;
- k. The plans should usually be scrutinised and evaluated to ensure they are proportionate (hence ensuring the parties' Article 6 and 8 rights are respected); and
- l. The evaluation will likely focus on the welfare analysis of each of the realistic options, but may amount to no more than acknowledging that one option is better than the other(s) and that the preferred option represents a proportionate interference with the ECHR rights of the parties involved.

A final warning

22. Ryder LJ stressed the consequences of not adhering to the above guidance and instead slavishly relying on the factors set out in *Payne*:

[27] Selective or partial legal citation from *Payne* without any wider legal analysis is likely to be regarded as an error of law. In particular, a judgment that not only focuses solely on *Payne*, but also compounds that error by only referring to the four point 'discipline' ...is likely to be wholly wrong.

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ADDENDUM

Factors relevant in relocation cases

24 September 2015

Having undertaken a thorough review of the relocation authorities, the writer was able to compile a list of the factors that most commonly influenced the court in deciding whether to grant or refuse leave.

1. How strong is the child's relationship with the respondent?
 - a. Shared care?
 - b. Non-existent?
 - c. Improving?
2. What will the impact be of granting the application on the respondent's contact?
 - a. End a stable or developing relationship?
 - b. Limited? Ongoing contact maintainable?
3. What will the impact be on the applicant's situation if leave is refused?
 - a. Isolation?
 - b. Impact on mental health? Expert's report?
 - c. Impact on any new family unit the applicant has formed?
 - d. Limited – applicant resilient and pragmatic?
4. How realistic and well researched is the applicant's plan?
 - a. Education?
 - b. Housing?
 - c. Child care?
5. Is the applicant's plan financially viable?
 - a. Employment prospects? Evidence?
 - b. Rent or purchase a property?
 - c. Funding for property rental or purchase?
 - d. More secure in the UK?
6. How extensive is the applicant's support network in the location that they seek to remove the child to?
 - a. Grandparents?
 - b. Siblings?
 - c. Other extended family members?
 - d. Friends?
 - e. More extensive in the UK?

7. How realistic are the contact proposals?
 - a. Enforceability?
 - b. Mirror orders?
 - c. History of difficulty between the parties facilitating contact?
 - d. Time off work?
 - e. Cost of flights?
 - f. Adequacy of skype/phone calls/emails/letters?
 - g. Age of child?
 - h. Time difference?
 - i. Able to sustain ongoing relationship?

8. What is the underlying motivation for the parties' positions?
 - a. Best interests of the child?
 - b. Desire to frustrate the other party?
 - c. Desire to impede contact?

9. What is the view of the CAFCASS officer?
 - a. Unimpeachable or conclusions vulnerable?

10. What are the views of the child(ren) concerned?
 - a. Age?
 - b. Extent influenced by parent?

11. What will the effect be of the change of location on the child?
 - a. Social ties?
 - b. Education progress?
 - c. Promotion or demotion of dual heritage?

12. What was the original reason that the parties decided to live in the UK?
 - a. Work?
 - b. Permanent or temporary?

13. What are the parties' respective parenting abilities?
 - a. Comparable?
 - b. Both able to meet the child's needs equally?
 - c. Child equally safe with both parents?

14. How strong are the child's connections to the new country?
 - a. Bilingual?
 - b. Regular visits?
 - c. Friends? Other connections?