JUDICIARY OF
ENGLAND AND WALES

THE RT. HON. LORD JUSTICE THORPE

RELOCATION – THE SEARCH FOR COMMON PRINCIPLES

LONDON METROPOLITAN UNIVERSITY

30 JUNE 2010

The Problem

The frequency and intensity of parental disputes over relocation are a relatively modern phenomenon. They are a by-product of communication and travel technology exemplified by the wide-bodied jet and the worldwide web. National frontiers are lowering as we create a global world. As we survey the future we can see that this a continuing process. The next generation of jets will double capacity.

In our region the steady and continuing expansion of the European Union enlarges the choice of countries to which every EU citizen has the right of entry and residence.

Add to all that the separation factor. In many of our jurisdictions relationships are easily formed and children follow. But the relationships are as easily unformed and the family fractured. In such a painful process one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissention results and the contested relocation case is born. Judges in several jurisdictions have said that these are some of the most difficult cases that a trial judge has to decide.

Furthermore the relocation case is but an aspect of the international movement of children. There is the lawless movement or abduction. Then there is the judicially sanctioned movement following a successful application to relocate. From the standpoint of the determined parent there is thus a choice of routes. Nothing more directly engages International Family Law than the cross-border movement of children. International Family Law has developed a common standard to prevent or deter the wrongful removal of children, thanks to the creation and rapid development of the 1980 Hague Convention. The

Convention enshrines the principles to be applied internationally to ensure the swift return of abducted children.

The question that this paper poses is whether common principles can be agreed internationally for the determination of applications brought by the parent who has chosen to seek judicial permission rather than to remove wrongfully. Again, viewed from the perspective of the unsettled parent, an informed choice between the lawful and the wrongful in part depends upon knowing what test the judge will apply to the application for permission and accepting that test as reasonable.

With that introduction I turn to consider in some detail the origin and development of the test applied in our jurisdiction and its principled foundation.

The English Approach

The Court of Appeal in London established its principles comparatively early in the course of the social developments referred to above. It was on the 24th day of July 1970 that the court delivered judgment in the case of *Poel v. Poel* (1970) 1WLR 1469. It was dealt with in the day: only 1 unreported case was cited in argument and none in the three extempore judgments. The three judges concurred that the mother's application to relocate to New Zealand had to be governed by the paramount factor of child welfare. However the court concluded that the welfare of the children was most likely to be achieved by recognising and supporting the function of the primary carer. This concept was expressed by Sachs LJ in the following passage: -

> "When a marriage breaks up, a situation normally arises when a child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

The subsequent development of this approach was strongly stated in judgments of Ormrod LJ in cases such as *A v. A* (1979) 1FLR 380, the unreported 1981 case of *Moody v. Field* and the later case of *Chamberlain v. De La Mare* [1983] 4FLR 434. The last case is important because Balcombe J at first instance had refused the mother's application, doubting whether

prior decisions of the Court of Appeal had sufficiently regarded the statutory requirement to give paramount consideration to the welfare of the child. The mother's appeal was allowed. Ormrod LJ emphasised that the court in *Poel* had not weighed the interests of the adults against the interests of the children but had rather weighed the effect on the children of imposing unreasonable restraints on the adults. Ormrod LJ explained the principle in characteristically unlegalistic English:-

> "The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach."

These forthright judgments provided a clear standard against which practitioners could measure prospects of success in individual cases and which trial judges could apply to the mounting stream of contested applications. Many of their decisions were challenged in the Court of Appeal on the facts or on the weighing of the discretionary balance but the underlying principle was unchangingly upheld. After thirty years of precedent it is easy to see that relocation applications have been consistently granted by the London Court of Appeal upon the application of the following two propositions:

(a) the welfare of the child is the paramount consideration; and

(b) refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children.

Or course in the majority of cases the diminution in contact to the other parent has been equally recognised as detrimental but then outweighed in the discretionary balancing exercise.

In so stating the proposition, note that I have given the primary carer the female sex. That is, of course, because in the overwhelming majority of cases considered by the Court of Appeal, the primary carer has been the mother. This factor requires further consideration but clearly the propositions apply equally to cases in which the primary carer is the father.

A landmark event in the law of England and Wales was the commencement of the Human Rights Act 1998 importing into our domestic law the European Convention of Human Rights. Most relevant to family proceedings is Article 8, establishing the right to family life. Inevitable then was the submission that the developed principles determining relocation applications were inconsistent with the ECHR and particularly the Article 8 right of the left behind parent to family life. That challenge came to the Court of Appeal in the case of *Payne*

v. Payne [2001] Fam 473. The submission failed. In my judgment I noted that decisions of the Strasbourg Court inevitably recognised the paramountcy of the welfare of the child in any situation in which the rights of individual family members conflicted. By way of instance in *L v. Finland* (application number 25651/94), the court stressed that "the consideration of what is in the best interests of the child is of crucial importance."

I also pointed out that Article 2 of Protocol 4 (a protocol not yet ratified by the United Kingdom) provides the European citizen with "the right to liberty of movement and freedom to choose his residence". Thus Protocol 4 is a useful reminder that it is not one but everyone in a family who enjoys rights. The function of the court is not only to uphold the rights of the individual but to balance the rights of the individuals when they conflict. A cornerstone objective of the European Union is also to ensure the European Citizen's right to movement within the Union.

The judgments in *Payne v. Payne* consider specifically two categories of case in which the court has recognised that the proposed relocation is consistent with the welfare of the child. The first category is the repatriating mother whose only attachment to England came with the marriage and went with its breakdown. The second category is the mother who has married again to a man whose roots or whose employment incline him to some other jurisdiction.

Later it was suggested that a third category was emerging, which was labelled the life-style choice category. Typically the applicant mother, with the right to reside in any EU jurisdiction, asserted that she and her child would greatly benefit from living out a Spanish/French/Italian/Greek idyll (the chosen locations are invariably Mediterranean and usually not far distant from the sea). It was then submitted that the principle in *Payne v. Payne* had no application to these cases, which were portrayed as whimsical or even capricious choices. That argument was rejected in the case of *B (Children)* (2004) EWCA Civ 956. In my judgment I emphasised the importance of applying the same principle in all relocation decisions and of avoiding invitations to categorise. Clearly in a life-style choice case the applicant faces a harder task in satisfying the judge that the refusal of her application would profoundly destabilise her emotionally and psychologically.

The Welfare Test in Relocation Cases and its Foundation

Let us now consider the elasticity of the welfare test in the context of relocation cases. Almost without exception the applicant is the mother and the primary carer of the child. The respondent father may oppose the application by criticising her proposals as unrealistic, or

urging the educational and cultural deficit of the proposed move or, most usually, emphasising the diminution in frequency and overall quantity of his contact were the move sanctioned. In the paradigm case the court weighs the impact on the mother of refusal against the diminution in the father's contact. This balance is struck in the context of the welfare of the child. Thus the harmful impact on the mother is taken to be harmful to the child: the diminution in contact is a deprivation of the child's right to relationship with his father. In recent years father's rights groups have singled out this principle for particular criticism, contending that it is matricentric and discriminatory. Given that the principle is not derived from expert evidence nor from many research studies in this jurisdiction the challenge cannot be lightly dismissed.

The emergence of the principle needs to be seen in the context of social tides that were moving some forty years ago. The judgments reflect the law as it then was. Parents contended for custody, care and control and access orders expressive more of parental power than responsibility. The parent who held the custody had a consequential right to decide major issues concerning the upbringing of the child including the country of habitual residence. In an age of sharing of responsibility and even residence perhaps the *Poel* edifice wobbles.

The points made in the preceding paragraph merit elaboration. Fortuitously the eleventh edition of Rayden on Divorce and Family Matters was published in October 1970 under the editorship of Joseph Jackson QC assisted by editors including Margaret Booth, then still a junior. In his preface Mr Jackson stated the law to be as at 24th October 1970 and acknowledged assistance on Chapter 27 from Mr Peter Singer and on chapter 26 from Mr Nicholas Wall. (How young we all were then.) Mr Jackson stated how wide ranging were the responsibilities of a custody order. Indeed, as defined in Section 21 of the Matrimonial Proceedings and Property Act 1970, "custody .....includes access to the child".

In Chapter XXIV Mr Jackson wrote "the divorce court has power to award custody of a child to one party with care and control to the other. But this practice has been criticised since it has been said that it is normally better for a child to have one authority in its daily life and that practical considerations as, for example, consent to an operation by the person having legal custody showed how undesirable a split order could be".

Later in relation to matrimonial proceedings in the Magistrates Court he wrote:

> "Whereas under the Guardianship of Infants Acts custody may be awarded to one parent and care and control to the other, there is no power under the

> 1960 Act to make such a split order. But an order awarding custody jointly to both spouses should not be made, save in exceptional circumstances, as in the event of disputes arising over questions relating to the child the matter has then to be referred back to the Court."

In relation to applications to remove a child permanently out of the jurisdiction Mr Jackson noted the very recent decision in *Poel* (then reported in 114Sol.Jo.). He thus extracted the ratio of the case:

> "held, that the dominant factor was that the wife had been granted custody and that the custody arrangements had worked well, so that leave should be given."

I share that analysis. It stares out from the first sentence of the passage that I have cited above to the effect that on divorce a child, instead of being in the joint custody of both parents must <u>of necessity</u> being in the custody of a single parent. I emphasise those words "of necessity".

On that analysis if the ratio for the decision now seems archaic so too maybe the principle.

Furthermore the U.N.C.R.C. had not been conceived when *Poel* was decided. In recent years its Articles are much more influential in any discretionary welfare judgment. Weight must surely be given to Art. 9(3):-

> "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest."

Equally pertinent are the provisions of Article 12(2):-

> "for this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings effecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

That sub-paragraph is of course an appendage to Article 12(1) assuring the right of the reasonably mature child to express views in all matters affecting welfare.

It is important that we do not loose sight of the responsibilities and duties that attend the exercise of rights. The mother who bears the responsibilities that flow from the grant of a residence order acquires a broad discretion as to how she discharges those responsibilities, always subject to the overriding power of the court whose supervisory role is there to be invoked by the other parent. Moreover the court recognises that the primary carer's

discretion extends to choosing the location of the children's home within the jurisdiction, even if that choice precludes weekly contact or terminates an already established pattern of weekly contact. It is only in the most exceptional cases that the court will intervene to prevent the primary carer's proposed relocation within the jurisdiction: see in *Re E (Imposition of conditions)* (1997) 2FLR 638.

Furthermore whilst the court's jurisdiction is limited to England and Wales Section 13 of the Children Act 1989 provides: -

"(1) Where a residence order is in force with respect to a child, no person may -
(b) remove him from the United Kingdom; without either the written consent of every person who has parental responsibility for the child or the leave of the court.
(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.
(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes."

Therefore a proposed move to Northern Ireland does not require an application under Section 13 whilst a proposed move to the Irish Republic does. How then do we develop a different principle for the determination of relocation applications that just exceed the borders of the United Kingdom? Differences that might be thought relevant are all of degree and not of kind. As such they contribute to the exercise of the discretion in individual cases. They do not require the development of a different principle.

Finally any re-evaluation of the established principle must be in the context of the court's powers, duly recognising their limitations. For the court's power to prohibit adult freedom in order to promote the interests of the child is a limited power. In the field of relocation the court may only prohibit the primary carer from a move that is incompatible with the welfare of the children. Even in that instance it is only the exit of the child that the court can prohibit. (However in reality a mother does not, save in the rarest instances, abandon her child and go alone. This reality is often exploited by the respondent to the relocation application who will seek to say: well if you are resigned to remaining, the prospect cannot be that distressing. Judges are not generally impressed by that tactic.)

Equally the court does not possess a power to require the other parent to relocate in order to ensure the best possible outcome for the child. There are cases, albeit rare, in which the court concludes that the reduction in contact, the basis of the respondent's opposition, would be overcome were he to join the move. An example of such a case in our court is *Re: S* [2005] 1FCR 471.

In such cases the court has not the power to order the result that would best serve the interests of the child. The court's powers in relation to the parents are only derived from the residence order, the contact order and the responsibilities that they impose. Powers deriving from the contact order are limited. The court cannot order a reluctant parent to spend time with a child or a committed parent to move in order to make weekly contact possible.

On that analysis the court's power to restrict the mother's right to choose the location of the family home is derived from the residence order and the responsibilities that it imposes. Any interference with that right would be unprincipled unless the welfare of the child plainly required it.

Other Jurisdictions

The principle applied in England and Wales I believe to be well founded and consistent with our statutory law. However it is clearly not universally or perhaps even generally shared by other jurisdictions. The challenge for the international community is to develop a principle of general application. In an ever shrinking world uniformity of approach would help parents to take responsible decisions and would reduce the scope for subterfuge and strategic manoeuvring. Indeed in a real sense uniformity of approach would support the efficacy of the 1980 Hague Convention and reduce the frequency of wrongful removals and retentions.

Whether or not there is sufficient International consensus in this most difficult area is a question that has come to the fore last year and this.

The following factors can be clearly identified:-

(i) There is no common approach, even within the jurisdictions of the common law. In the United States case law shows wide internal divergence. In the field of family law California is a highly influential jurisdiction. Even within that state the leading cases demonstrate swing from permissive to restrictive approaches and also how much individual decisions have been influenced by social science research literature. In Canada, Australia and New Zealand the emphasis has been on balancing factors that directly bear on child welfare, rejecting the heavy emphasis that this jurisdiction has placed on the impact of refusal upon the primary carer.

(ii) The recognition of a divergence of approach is nothing new. At the International Judicial Conference for judges of the six leading common law jurisdictions in Washington in 2000 the following resolution was passed:

"(9) Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."

(iii) The endeavour to elevate the debate above the domestic into the realm of international family justice was almost inevitable. All the jurisdictions of the common law world share the same problem and recognise the benefits of a uniform solution. The United Kingdom endeavoured to initiate a debate at the 5th Special Commission at The Hague in 2006. Unfortunately time and procedure did not favour the attempt. In this year and last we see a strong momentum. At the Cumberland Lodge Conference for judges of the commonwealth and common law jurisdictions more time was devoted to this debate than to any other. Groundwork was done in preparation for the Washington Conference in March 2010 (convened by the Hague Conference and the International Centre for Missing and Exploited Children) when judges and experts from around the world met to discuss over the course of three days the single topic of relocation. Now we have the opportunity at this Conference to progress the debate.

I have reported the outcome of the Washington Conference not only in International Family Law but in Family Law itself, since the issue is currently one of domestic family law. The report is in June (2010) Fam.Law 565. A fuller report appears in (2010) IFL 127 and 211.

At the heart of the resolutions agreed by the fifty delegates from fourteen jurisdictions attending are the factors relevant to decisions on international relocation (paragraphs 3-6 inclusive of the Declaration). I set those paragraphs out below in full:

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 listing 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, except 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.

Before hearing the criticisms I plead that due consideration be given to the limitations of committee drafting. The lowest common denominator factor guarantees that the text is not a matter of satisfaction to any individual on the drafting committee. It must be remembered that within the spectrum of the jurisdictions are those who have come to conclude, or whose legislators require them to conclude, that priority should be given to maintaining the contact relationship between child and parent. At the other end of the spectrum I identified Germany where the parent to whom the custody of a child has been entrusted requires neither the consent of the other parent nor the permission of the court before relocating. This seems surprising to me in the present century where so much emphasis is placed on shared parenting and the needs of the child for two engaged parents. Even in this jurisdiction in the 1960's the rights of the custodial parent to leave the jurisdiction were as circumscribed then as they are today.

Maintenance of the contact link by the relocation of both parents, a resolution that is attracting increasing judicial attention, is buried within the words of factor xii. That illustrates the delicacy of language that committee drafting demands.

(iv) There is every reason to favour a common standard adopted internationally. This could be achieved by a Convention or a Protocol made available for ratification among the member states to the Hague Abduction Convention. A relocation application is the means to a lawful removal. The Hague Convention is there to reverse an unlawful removal. States operating the Convention should support the creation of a parallel instrument standardising the factors to be taken into account in granting or refusing an application for lawful removal. I shall be disappointed if our efforts over the coming months achieve no progress towards an objective that is clearly achievable.

(v) A protocol to the 1980 Convention is being actively considered. In 2011 there will be the 6th Special Commission on the 1980 Convention. The opportunity that these developments present must not be let slip.
