# Relocation – The Dos and Don'ts

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## The Law

For many years, the case of Payne v Payne 2001 EWCA Civ 166 was the leading authority.

There were many arguments that followed in subsequent cases that the case had to some degree created a presumption in favour of the primary carers' reasonable plans.

K v K [2011] EWCA Civ 793 set the record straight.

The mother was of Canadian origin, the father Polish although he spent some childhood years in Canada. He moved to England in 1993 and the mother came to England 10 years later.

The parties married in England in 2004 and had 2 young daughters.

In 2010 divorce proceedings were issued. Both parents were employed in the banking world and both worked less than full time to enable them to be involved with the children.

There was a shared residence order in place but the mother relied on a nanny and although the mother had more nights pursuant to the shared order, the girls actually spent more daylight hours in the company of the father.

The mother presented a classic application for relocation – she wanted to go home to Canada. In England she felt isolated and stressed. In Canada she would be able to live within her parents' home, receiving emotional and material support.

In classic response, the father pointed to his greater commitment to the girls and the significance of the arrangement for shared care.

There was significant discussion about the Payne v Payne case and the Court commented *"Despite a considerable degree of criticism the decision in Payne has been consistently applied over the last decade in cases in which the applicant is a primary carer".*

The Court however concluded that the only principle of law enunciated in Payne v Payne is that the welfare of the child is paramount.

Lord Justice Moore–Bick considered all the rest to be guidance e.g. factors such as:

- The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight and the effect upon the applicant parent and the new family of the child of a refusal of leave.
- The opportunity for continuing contact between the child and the parent left behind may be very significant.

K v K clarified that the test in relation to relocation cases was simple namely the welfare of the child was the Court's paramount consideration when determining any question with respect to a child's upbringing. In many relocation cases the checklist of factors in section 1(3) will also apply. Everything that is considered by the Court in reaching its determination is put into the balance with a view to measuring the impact on the child.

Having clarified the test to be applied I thought it would be helpful to look at a few cases to see various Court decisions.

**DO v BO (Temporary Relocation to China) [2017] EWCH 858 (Fam)**

This case involved an application by a mother for permission to take her 2 sons to China for a holiday. The two subject children were aged 8 ½ and 6 years. The father had dual UK and Australian nationality. The mother was a Chinese national but had recently acquired a British passport. Both D and B held dual British and Australian citizenship.

Baker J reviewed the relevant authorities and in particular the decision in the Court of Appeal in Re R (A Child) [2013] EWCA Civ 1115 which sets out the 3 elements to consider when making the welfare determination of whether or not to grant leave:-

(a) the magnitude of the risk of breach of the order if permission is given
(b) the magnitude of the consequences of the breach if it occurs
(c) the level of security that may be achieved by building into the arrangements all of the available safeguards.

In this case the Court heard oral evidence from both parents and found that *"neither party was wholly reliable as a witness and in some respect each of them gave evidence which was inaccurate and untruthful."*

The Court had the benefit of hearing from a jointly instructed expert in Chinese law. This evidence made it clear that there were no effective safeguards which could be put in place to prevent the children being retained in China if the mother decided to stay. China is not a signatory to the Hague Convention. There were no bilateral arrangements between China and the UK. The Chinese Court would not make a mirror order or otherwise give effect to any English order. *"At most it would admit the order in evidence in the course of any proceedings brought by the father seeking to recover the children, but such proceedings would amount to a de novo assessment of child arrangements".*

In considering the overall welfare analysis Baker J concluded at [84]
*"I accept that it is ordinarily in the interests of children to have an opportunity to meet all members of their family and to explore their background … but in light of my assessment of the risks that the children may not be returned, the lack of sufficient safeguard to ensure that they would be returned and the dire consequences if they are not returned, I conclude that it is not in their interests to be taken to China at this stage."*

[I had an almost identical case albeit for permanent relocation a year or so ago before Alex Verdon QC sitting as a Deputy High Court Judge. The end result was the same and the mother was refused permission to relocate. My case was slightly different in that the mother had been on several trips to China with the parties' young son by agreement and had always returned. The father had met the mother in China and spoke some Chinese. He knew where her family lived. Nonetheless the mother was dreadful in the witness box. Her reasons for the earlier trips to China were that she needed specialist dental surgery (it was never clear why the dental care couldn't have been undertaken here). She had returned from the earlier trips albeit had outstayed the dates the Court had allowed. She offered some security to the father but only part way through the hearing. The reporting Cafcass officer who recommended that permission be given to the mother was very young and had never dealt with a relocation case before.

The moral of the above is that if you are doing a relocation case to a non-Hague Convention country it is vital at an early stage to instruct an expert to clarify if an English order is enforceable in any way in the country being suggested for relocation. Expect resistance from the Legal Aid authorities – see Re R (2014) EWHC 643 (Fam).

It is vital to consider what security can be offered to the parent left behind e.g. a bond so that they can pursue further legal proceedings if the departing parent fails to return the child etc.

Do not assume a Court will follow a Cafcass recommendation – many officers dealing with relocation case may be totally inexperienced in this field.

The law is summarised at paragraph 16 of the DO v BO case namely "the overriding consideration for the Court in deciding whether to allow a parent to take a child to a non-Hague Convention country is whether the making of the order would be in the best interest of the child. Where (as in most case) there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the Court has to be positively satisfied that the advantages to the child of visiting that country outweigh the risks to the child's welfare which the visit will entail. This will therefore routinely involve the Court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires.

## Mirror Orders

Such orders are a useful tool in the arsenal of those dealing with international child travel.

In cases where a parent is being given permission to take a child abroad, the Court will invariably ask "What conditions can I include in my order that will minimise the risk that the child will not be returned?"

One possibility is to ensure the travelling parent obtains a mirror order from a Court in the foreign jurisdiction.

A mirror order is one that is issued by another Court which contains the same terms as those that are contained in the order that is being mirrored. Inherent in the mirror orders concept is the fact that the foreign Court shall have the right and more importantly the obligation to enforce the terms contained in the order, specifically including the obligation to effectuate the prompt return of the child.

It is critical the foreign Court should not be permitted to modify the original order.

In an article I read in preparing for today's talk, the article highlighted real difficulties in using the mirror order concept in countries like India and Japan.

In SW v CW Mirror Orders Jurisdiction [2011] EWCA Civ 703 the father held a custody care and control order of the child A from the Court in Malaysia. The mother was to have contact “at reasonable times”.

The father applied to the PRFD for a mirror order on the basis of the Malaysian orders already made and so that he could apply for a British passport for A.

The Court made the mirror order. Following service of the order on the mother, she applied for residence and contact variations of the order.

The father responded by arguing that the Court had no jurisdiction. The Court at first instance accepted jurisdiction and ordered the father to set out his proposals as to contact and listed a review.

The father appealed arguing that his action in applying for a mirror order did not engage Article 12(3) as he had not expressly and unequivocally accepted the Court’s jurisdiction and that in any event it would not be in A’s interests for the English Court to accept competitive jurisdiction as against Malaysia.

The Court of Appeal agreed with the father’s position.

It found that a litigant seeking a mirror order was manifestly not accepting the jurisdiction of the Court to do any more than reiterate the provisions of the primary jurisdiction.

If the mother wanted to challenge the order or seek specific contact she should apply in Malaysia.

## Internal Relocation

Re C (Internal Relocation) [2015] EWCA Civ 1305 is a useful authority.

The mother in this case was able to move to Cumbria, the parents had hitherto both lived in the London area.

At first instance Mr Recorder Digney permitted the mother to move to Cumbria with the child, aged 10 years. The Recorder found that the mother’s specific issue application was genuine and not motivated by a desire to exclude the father and that it was well researched and

realistic. The Cafcass officer was concerned that the move 'may' be emotionally damaging for the child as she will not be able to enjoy the type of relationship with the father that she has had for all of her life and Cafcass recommended that a move to Cumbria would not be in the child's best interests.

The Recorder disagreed with the Cafcass recommendation. Two significant components of the Recorder's decision were:-

i) the child's express wish that she was keen to move
ii) the Recorder's view that the mother would find it very difficult to be happy and content and therefore a satisfactory mother if she is not allowed to relocate as she wishes.

The judgment can be found here (in London the mother and child were living in a basement flat with a small garden and damp problems).

The Court of Appeal concluded that a consideration of the proportionality of any proposed interference with a party's Article 8 rights is an essential part of the balancing exercise, but that is should not be undertaken separately.

The Court of Appeal unanimously dismissed the father's appeal and reminded the importance of McFarlane LJ's comments in Re F (2015) Civ 882 *"The exercise is not a linear one. It involves balancing all the relevant factors which may vary hugely from case to case…".*

The Court of Appeal dismissed the father's appeal in this case and confirmed that there is no distinction between relocation within the UK or internationally. The only principle to be applied in either situation is that the child's welfare is paramount.

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