

**SUBMISSION FOR PERMISSION TO APPEAL - LEAVE TO REMOVE
CASE BEFORE THE ROYAL COURTS OF JUSTICE,**

My Lord, as a Litigant in Person, I would respectfully ask that I be permitted to read my submission, as I am sure you will appreciate that I am nervous today, not least because of the serious implications the outcome of this short hearing will have for my children.

My Lord, in short, I submit that the decision to grant permission to remove my children to [COUNTRY] is wrong.

I am aware that in all 'Leave to Remove' cases, the reasoning and guidance laid out in *Payne v Payne* remains a binding authority on the lower courts. [*Payne v Payne* [2001] EWCA Civ 166]

My Lord, it is my submission that *Payne v Payne*, and the particular weighting of evidence, to which the judiciary are bound, is in need of revision. I do not believe that it properly assesses and supports my children's welfare needs.

[The development of law]

It was Lord Justice Thorpe who said that, 'most principles in family law are actually founded upon social policies or social assumptions made by the judges. Those assumptions as to child development or child help have to be reviewed from time to time' [*an extract from 'Advocacy in Family Proceedings, a Practical Guide' - Family Law, March 2005*].

My Lord, I submit that there is now sufficient expert and scientific evidence available to support the view that this time has now arrived, and Lord Justice Wall accepted this argument as a valid argument for an appeal in the right case in January 2010. [*D (Children)* [2010] EWCA Civ 50]

[Weighting of evidence]

As to the guidance in *Payne v Payne*, your Lordship will be aware of the great weight trial judges must give to the presumed distress which a parent would experience as a consequence of a refusal of 'Leave to Remove', and the further presumption that such distress would impact detrimentally on his or her ability to adequately care for their children in the medium to long-term.

My Lord, I am also aware that senior members of the judiciary may be hesitant to initiate a review of *Payne v Payne* and the weighting of evidence in ‘leave to remove’ cases, due a supposed absence of longitudinal scientific studies. I most respectfully submit that in all British child welfare issues, and the issue of ‘Leave to Remove’ is no exception, the precautionary principle should be applied. Until such time as specific longitudinal statistics for ‘Leave to Remove’ are published, the family courts ought not to ignore the existing prima facie scientific evidence of harm to children following separation from their parents.

Furthermore, My Lord, I can find no ‘longitudinal’ study to support the supposition, originally made in *Poel v Poel* (1970); reiterated in *Payne v Payne* (2001); and relied upon by the judge in my own hearing [*if so*], that parental disappointment will likely cause psychological harm to the parent to the extent that it will impact on a child’s medium to long-term psychological, sociological, developmental and educational welfare.

Your Lordship may not be aware of Professor Berelowitz’s expert opinion on this matter, as expressed in the debate on ‘Leave to Remove’ by the Law Society in 2005, that there is no evidence or study whatsoever, longitudinal or otherwise, to support the aforementioned ‘distress argument’ presumption as held in *Payne v Payne*. Also, that relocation is not an effective treatment for parental anxiety or depression.

[Conflicting Court of Appeal Decisions]

My Lord, in my own case, there has been no expert evidence presented to support the assertion that my former wife would be so detrimentally affected by a refusal of her application [*if so*], that this would likely impact on her ability to adequately care for our children, and that the children would suffer significant harm in the medium to long-term. I am aware of this court’s opinion from the case *Re G* that there need not be evidence for such an assumption to be made. [*Re G (Children) 2005 FLR 166*]

I would also refer your Lordship to the case *Re W* in 2009, where this court upheld a trial judge’s decision to refuse leave to remove due to no evidence being provided to show that the mother would suffer more than disappointment were her application to be denied. [*Re W (Children) [2009] EWCA Civ 160*]

I appreciate that the Court of Appeal may choose which of its judgments to follow when they conflict, and that this court is entitled and bound to decide which of two

previous conflicting decisions of its own it will follow. I believe that the guidance on this point was given in the case *Young v Bristol Aeroplane*. [*Young v. Bristol Aeroplane Co Ltd* ([1944] KB 718 CA)]

[Argument for a review of Payne v Payne]

My Lord, I now come to the gravamen of my main argument.

No one would rightly dispute the assertion that judgments should be determined upon the evidence. I ask: what evidence is there, both in my own case and in ‘Leave to Remove’ cases in general?

My Lord, is there any evidence to support the erstwhile assumption that children will suffer more harm, in the medium to long-term, as a direct consequence of a refusal of ‘Leave to Remove’? As already mentioned, no expert evidence exists to support the assumption. None.

My Lord, is there any evidence to support the proposition that children will suffer more psychological, sociological, educational and developmental harm as a consequence of a granting of ‘Leave to Remove’? Yes, yes there is. There now exists an extensive body of expert, independent and concurring scientific evidence demonstrating psychological, sociological, educational and developmental harm and disadvantage in the absence of a close, frequent and ‘meaningful’ relationship between children and both of their parents.

My Lord, I use the term ‘meaningful’ in its scientific sense, as it has been described and defined by Professor Kruk. Professor Kruk provides evidence that a ‘meaningful’ relationship is not likely to be achieved if the relationship is conducted over large distances involving many hours of travel, and in unfamiliar and inappropriate surroundings such as motel rooms, and in the absence of frequent, shared activities, such as weekly after-school activities, home-work, meal preparation, bedtime routines and so on, and so on. [*Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard.* Edward Kruk M.S.W. Ph.D, the University of British Columbia, December 2008 – available from www.thecustodyminefield.com on the shared care research page]

For more scientific evidence, I refer your Lordship to the following Exhibits [*give details of the child welfare related research should be appended to your skeleton argument. You can find links to the research documents on The Custody Minefield*]

Website www.thecustodyminefield.com and via our e-Guide on leave to remove also available from the website].

Back in 2001, at paragraph 29 of *Payne v Payne*, Lord Justice Thorpe stated that no authorities existed to support the argument that the comparative importance of a child's contact with its absent parent had greatly increased in 30 years. He said that without some proof of the proposition you would be doubtful of accepting it. Consequently, therefore, little weight was given in the balancing exercise to this argument. As *Payne v Payne* remains a binding authority, this weighting also still remains.

There are plenty of authorities published in the UK which support the view that children are likely to experience significant medium to long-term harm due to an absence of frequent, close, 'meaningful' contact with both parents. This research has been published in the years that have followed the judgment in *Payne v Payne*. Furthermore, the fact that these reports may not refer specifically to 'Leave to Remove' cases is irrelevant. Removal abroad is surely at the most severe end of the spectrum of parental absence.

Furthermore, my Lord, according to the scientific research I exhibited, children fare significantly better educationally when their fathers are fully involved in their education.

My Exhibits recorded 'The Children's Society' findings that children are 40% more likely to suffer mental health problems when removed from a father. This was a longitudinal UK study based on the experiences of 30,000 children, and was carried out over a number of years. [*A Good Childhood, Searching for Values in a Competitive Age*. Richard Layard and Judy Dunn – see *The Custody Minefield recommended books page*]

My Lord, in the case of *Re G* (2005), the question was posited: 'has there been societal change in the last 39 years'. It could not be answered. If I am granted permission to appeal today, I will be able to answer that question. In 1970, at a time when the presumptions were set out in the case of *Poel v Poel*, fathers spent on average less than a quarter of an hour on childcare each day. By the 1990s, the level of father involvement had increased nine-fold, and to be nearly equal to that of mothers, according to research published by the Equal Opportunities Commission.

[EOC, Completing the Revolution: The Leading Indicators (London 2007)]. Societal norms, and the dynamics of child care, have unquestionably changed since 1970. The 1970's reality that men are bread winners and women childcare providers has changed. 44% of women now earn more than their partners *[National Equality Panel, 2010]*. In 2010, our new Prime Minister and Deputy Prime Minister agreed to put back the time that Cabinet Meetings would start to enable them to take their children to school.

Despite this significant societal shift in the organisation of British family life, the 40-year-old principles upon which *Payne v Payne* are based remain unchanged. The importance of father involvement in childcare was recognised in Government Policy in the policy document *Every Child Matters*. The importance of fathers in supporting their children's education was recognised by the Department for Education and Skills in 2003. The DfES's own findings were that 'Fathers play an extremely important role in their children's lives and a plethora of research indicates that father involvement is significantly related to positive child outcomes. *[The Impact of Parental Involvement on Children's Education' published by the Department for Education and Skills, 2002 – available for download from www.thecustodyminefield.com on our shared care research page]*

I remind your Lordship of Lord Justice Thorpe's wise words, that family law is based on social policies which must be reviewed from time to time. When there is fresh evidence, surely that need becomes a necessity.

I further respectfully submit that in leave to remove cases, the welfare checklist and in particular the importance of maintaining the status quo is granted insufficient weight, and that scientific research fully supports that a child's educational, psychological and emotional development is best served by father involvement which leave to remove precludes. I question the judge not having considered the harm to the child of growing up in a foreign country, away from the familiarity of all they have known, their father, their extended family, their friends and school.

[Wishes and Feelings]

[If the children have said they do not wish to relocate] What further harm is done to a child if they believe their wishes were irrelevant? My understanding is that 'Brussels II Revised' regulations place a far greater importance and weighting on the wishes of

the child, emphasising that in European Law at least, a child's wishes and feelings should carry far more weight than is given by *Payne v Payne*. I also believe that it is a child's Right, under the UN Convention on the Rights of the Child, that its wishes and feelings be properly heard.

This court has no certainty that my children will adapt to the move. The trial judge had nothing upon which to base such an assumption. There have been no expert assessments [*if so, and CAFCASS are not experts in this regard or qualified to express opinion on psychological adjustment*], [*child's name*] has never before experienced a relocation of any kind, and there is no longitudinal study in existence to support the assumption that even 'socially competent children' adapt well to dramatic changes in their lives? Existing scientific studies confirm that children in general experience emotional harm when subjected to dramatic changes in their formative years.

On successful contact

My Lord, in terms of contact being supported in the future, surely this child is entitled to more than hope, and once the children have left the jurisdiction this court will be powerless to assist me if contact breaks down. The precautionary principle is not being applied. The judge's findings are not robust [*if so*].

I ask your Lordship whether many miles of distance will assist the mother in accepting the child welfare risks of reducing my involvement in my child's life. Professor Kruk's report [*exhibit XXXX, available from www.thecustodyminefield.com on the shared parenting research page*] provides scientific data showing that post-divorce inter-parental hostility is reduced where there are frequent and balanced shared care arrangements in place, and that it is actually increased or initiated where these arrangements are not in place. [*Detail any examples of contact having been frustrated in the past*].

My Lord, self-evidently, the children's best interests lie in their parents' interaction improving over time, and the evidence shows that this is most likely to be facilitated in a shared care arrangement in the UK, and that this may further be supported by family therapy. I remind the court of Bausermann's finding that children fare better on all adjustment measures when subject to shared care arrangements, even when hostility exists between the parents. [*Child Adjustment in Joint-Custody Versus Sole-*

Custody Arrangements: A Meta-Analytic Review': Robert Bauserman. Journal of Family Psychology 2002, Vol. 16, No. 1, 91-102. – which is available from www.thecustodyminefield.com on the shared parenting research page]

In Summary

My Lord, I would wish to emphasise that I am seeking to appeal the substantive issue of 'Leave to Remove'.

My Lord, in summary, I submit that my child's needs, wishes and future well-being have *not* been given sufficient weight, recognition, and authoritative analysis. This was made worse by an absence of expert psychological assessments [*if so*] which I feel should be automatic in leave to remove cases, considering the published scientific research into the adverse welfare implications from the diminishing of a child/father relationship.

I am aware that, as *Payne v Payne* is a binding precedent, the Court of Appeal is unable to move outside of the guidelines put forward by Lord Justice Thorpe and that a review of *Payne v Payne* can only take place in the Supreme Court, and a further appeal to the Supreme Court, if required, will be prohibited if permission to appeal is refused today. [*ref s.54 of the Access to Justice Act 1999*]

My Lord, if granted permission to appeal, I will be able to demonstrate, on the basis of scientific research and evidence, which was held to be necessary in the case of *Re G* in 2007 that there is a self-evident social shift that requires the appeal court's consideration and a review of guidance in leave to remove cases. [*Re G [2007] EWCA Civ 1497, CA*]

In the case *Re D* in January 2010, Lord Justice Wall accepted that these same arguments were 'compelling arguments for an appeal to be heard' in the right case. I submit that this is the right case, and further that there is a compelling need for a review of the guidance given in *Payne v Payne* as it applies to all leave to remove cases, and that this current application of binding precedent prohibits the proper development of law to ensure child welfare needs are properly assessed and safeguarded.

I therefore respectfully ask that you grant my permission to appeal.

We cannot guarantee an outcome in the family courts, however the arguments presented in this draft submission are the ones that Lord Justice Wall accepted as being compelling for an appeal to be heard in the right case.

What that right case would be, Lord Justice Wall did not expand upon, although the main reason cited by Wall in the case *Re D* for permission to appeal not being allowed in that case was due to a further delay caused by a possible retrial not being in that family's best interests.

The arguments provided in this draft submission are written in such a way as to be presented in the Royal Courts of Justice, and may need to be amended if being presented in a lower court.

The arguments presented in this submission are for a generic challenge to the courts' adherence to the guidance given in *Payne v Payne* due to its being a binding precedent. We recommend you take advice regarding the judgment in your own case, and whether there are further appellable points which are unique to your own case.

We would warn you that you are unlikely to be successful in an appeal if you simply disagree with the judgment. We would further warn you that a trial judge has a 'wide ambit of discretion' when determining whether or not leave to remove should be granted. Matters which may be successfully appealed include if a trial judge:

- made a mistake in law;
- took into account some factor which he/she ought not to have taken into account;
- did not take into account some factor which he/she ought to have taken into account;
- gave no weight or insufficient weight to matters that they should have taken into account;
- failed to give adequate consideration to the emotional needs of the child or other parts of the Welfare Checklist;
- misdirected him/herself (e.g. incorrectly interpreted or quoted case law, court rules, judicial guidance etc);
- was misled;
- there was no evidence on which a finding could be based.

...and where these matters materially affected the final judgment. In other words, if a judge made the right order for the wrong reasons, an appeal is unlikely to be successful.

You will notice that the main thrust of this generic submission is in circumstances where the trial judge relied on the guidance of *Payne v Payne* (which they are 'bound' to do), and that that guidance affords too little weight to contemporary scientific child welfare research which highlights potential emotional, psychological and developmental harm which a child is likely to suffer when denied substantial involvement from both parents in their day-to-day care. Further, that *Payne v Payne* affords great weight to the distress argument, despite there being no scientific evidence to support the assumption that refusal of a leave to remove (LTR) application will so adversely impact the primary carer that it will cause harm to the children. Further, that LJ Thorpe, in *Payne v Payne*, did not accept that the comparative importance of fathers had changed in 30 years as no authorities were presented by counsel to support such a finding. In this submission, we highlight a number of research authorities which have been published in the years following the judgment in *Payne v Payne*.

It is important that you amend this submission to highlight how the guidance in *Payne v Payne* has been applied by the judge in the judgment in your own case. If the judge has talked in depth about the distress caused to the mother of a refusal, reference that paragraph of the judgment within your own version of this submission. Similarly, you should be highlighting in evidence during proceedings the importance to your children of your involvement in their schooling and childcare, and highlighting that the trial judge afforded insufficient weight to your arguments in this regard. Bear in mind the hurdles that LJ Thorpe stated must be satisfied, that the relocating parents plans are thought through, that their motives for the move are not to diminish the children's relationship with you etc. We also recommend you read our e-Guide on LTR, which you can find at our website.