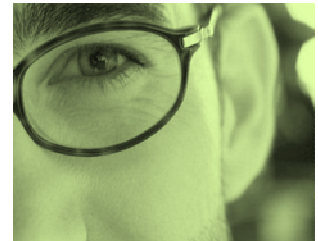


Child Welfare  
Needs and Rights

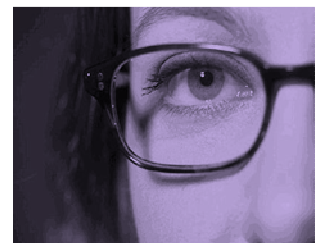


# Family Law: Relocation The Case for Reform



## A Report by The Custody Minefield

The UK's leading internet based information resource  
on relocation, leave to remove and shared residence  
[www.thecustodyminefield.com](http://www.thecustodyminefield.com)



in co-operation with the charity

## Families Need Fathers

The UK's leading shared parenting charity  
[www.fnf.org.uk](http://www.fnf.org.uk)



November 2010



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## Sir Bob Geldof's foreword to our December 2009 report on relocation and family law



I can hardly read the literature on Family Law without simultaneous feelings of an awful sadness and profound rage. Sadness at what has been done to our children and their families and deep rage for our Family Courts and the inadequate practitioners that work within it.

In the near future the Family Law under which we endure will be seen as barbaric, criminally damaging, abusive, neglectful, harmful to society, the family, the parents and the children in whose name it purports to act. It is beyond scrutiny or criticism and like a secret society its members – the judges, lawyers, social and child “care” agencies behave like any closed vested interest and protect each others’ backs.

The court is entirely informed by outdated social engineering models and contemporary attitudes rather than fact, precedent rather than common sense and modish unproven nostrums rather than present day realities. It is a disgraceful mess. A farrago of cod professionalism and faux concern largely predicated on nonsensical social guff, mumbo-jumbo and psycho-babble. Dangling at the other end of this are the lives of thousands of British children and their families.

Here is one more report that empirically nails the obvious fact that to remove a child from their father (in the hugely vast majority of cases), their grandparents and other family, their school and friends, is wholly destructive to a child and its family.

### **‘Barbaric’ family courts behind ‘state sponsored kidnap’ – Bob Geldof**

Bob Geldof has launched an outspoken attack on the family courts system of routinely allowing “state sponsored kidnap” of vulnerable children.

How much longer must we put up with the state sanctioned kidnap of our most vulnerable? Because in effect that’s what “Leave to Remove” amounts to. How much longer do we tolerate the vested interest intransigence of the appalling U.K. Family Justice system? How long before just one of them admit they have got it ALL wrong and apologise to their myriad victims?

This report is important, timely and vital. To accept its findings, which could have and should have, been conducted at any time in the past 30 years, is to accept the awful conclusion that rather than Solomon like resolving our tragically human disputes with understanding, compassion and logical pragmatism the courts have consistently acted against society’s interest through the application of prejudice, gender bias and awful impartial cruelty.

This report proves it. May God forgive them. I won’t.

**Bob Geldof**

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*Families need Fathers is happy to support the 'Relocation and Leave to Remove Campaign' by the Custody Minefield. Allowing children to be too easily removed from a loving parent and wider family needs to end, to reflect parenting in the twenty first century and to help make the law truly in the best interests of the child. Craig Pickering, CEO.*

Families Need Fathers is the UK's leading shared parenting charity, helping parents whose children's relationship with them is under threat. We offer information, advice and support services for parents on how to do the best for their children. We are the only organisation that provides these services on a national basis. [www.fnf.org.uk](http://www.fnf.org.uk)

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## Introduction

This, our second Parliamentary Briefing Report on relocation and family law, brings together debate and developments in 2010. We review judicial opinion, developments in the international community, and consider whether the misapplication of family law statute is a contributory factor to the continued use of what the appeal court itself now refers to as ‘controversial precedent’<sup>i</sup>. We have further developed our reform proposals to better protect and safeguard child welfare in relocation cases.

Relocation cases in family law determine arrangements for children when one separated parent seeks to move, either internally within the United Kingdom or abroad, and take the children with them.

Where one parent seeks to relocate abroad with the children and the other parent disagrees with the children emigrating, the relocating parent must seek ‘leave to remove’ from the courts. Relocation within the UK can also have a dramatic impact on children, their welfare and their relationships.

The last time that relocation and the court’s precedent was reviewed was in 2001 in the case *Payne v Payne*.<sup>ii</sup> In that case, the barrister for the father argued that the importance of contact between the non-resident parent (normally the father) and the child has greatly increased over the last thirty (now forty) years. Lord Justice Thorpe, the leading judge in *Payne v Payne* held that **‘No authority for the proposition is demonstrated. Without some proof of the proposition I would be doubtful of accepting it.’**<sup>iii</sup> In this report, we provide the proof that was lacking at that time.

In that case, the father went on to lose all contact with their child following the relocation, which the court allowed. As reported in *Family Law Week* ‘By way of coda Philip Cayford QC, counsel for the father in *Payne*, has made it known that, 10 years on, the pessimism was well founded. **The child lost contact with his father. Contact in New Zealand did not take place.**’<sup>iv</sup>

A wide body of research has been published in the years following the ruling in *Payne v Payne* which challenge the basis of the court’s guidance. Such research continues to be accorded insufficient weight by the courts, as the judiciary MUST follow the guidance set by Lord Justice Thorpe in *Payne v Payne* under the legal principle of ‘*stare decisis*’ (binding precedent).

The courts must adhere to a view, first expressed in the 1970s, and upheld by Thorpe, that to deny a mother’s application to relocate will cause her such psychological harm that it impacts on her ability to provide care. This is commonly referred to as the ‘**distress argument**’. The court, in practice, holds the view that the mother’s distress will be as great or a greater factor than the child’s distress in terms of

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losing a relationship with their other parent (or that relationship being severely diminished), the loss of contact with their extended family, removal from school and the loss of relationships with their established friends.

As reported by a barrister in Family Law Week in 2009 ‘...it has been difficult to persuade many judges of the importance of these points in the total welfare assessment exercise because of the significant emphasis traditional case law has placed on the impact on the mother of refusal of grant of leave.’<sup>vi</sup> The emphasis on the happiness of the mother overshadows the educational, developmental and psychological effects of relocation on a child which are compounded by the loss of their established friendships and other relationships, the loss of familiarity of their home environment and a change in school and sometimes culture.

Research confirms that when children are denied meaningful contact with a parent, they are more likely to suffer mental health problems; stand a greater chance of inhibited social skills in adulthood; and are disadvantaged academically. In this report, we list this research which the courts routinely ignore. It is estimated that in 90% of leave to remove cases, the court grants the mother leave to remove.<sup>vi</sup>

Many in the legal profession, including some of the most highly regarded, are similarly critical of the court’s stance. The head of family, Sandra Davis, of leading law firm Mishcon de Reya, agrees that the current case law needs rethinking. *‘The choice to have children necessarily involves sacrifices... One of those sacrifices must be to prioritise a child’s needs to maintain a fulfilling relationship with both of his parents over an often selfish desire to start afresh following parental separation.’*<sup>vii</sup>

There are wider welfare implications on a child from relocation than the diminishing of their relationship with the non-relocating parent. While little is known about the effects of relocation on children from the UK, the opinion of social workers in Canada is worth noting *‘From the child’s perspective, it can spell a very disruptive event with lifelong consequences. They may forever interpret the world as a hostile place with no internalized sense of control. Hence parents are well advised to strongly consider the disposition of their child and the necessity of the move. Typically these children are coming to terms with the parental separation and changes in parental availability, usually determined by the parenting plan. The child is grieving the loss of the family and subsequent changes to the family and how they present their changed family to those in their world. This adjustment alone can take many, many months to years, depending on the complexity of the situation and conflict between the parents. The changes added to that by a disruptive move could undermine any success for reasonable adjustment.’*<sup>viii</sup>



In June 2010, Lord Justice Thorpe, the Head of International Family Law in England and Wales, and the leading judge in the *Payne v Payne* case, went on Radio 4 stating that the court's current guidance was 'about right', but did accept that UK guidance needs to be reviewed.<sup>ix</sup> Thorpe's reasoning was the need for a uniformity of process following a declaration issued by experts from 50 countries in March



2010 which gave guidance for international relocation cases which was markedly different from his and the UK courts' own.<sup>x</sup>

There is a more compelling reason for reform which remains ignored. Child welfare is not safeguarded by the current guidance. If we must wait for an international convention, this is likely to take many years or decades if you consider that the UK will have taken 14 years to sign the 1996 Hague Convention on issues surrounding parental responsibility and the protection of children. Meanwhile, British children continue to be removed abroad with insufficient regard paid to their welfare or the risks of harm which relocation brings.

An earlier reform of the UK's law may only be achieved by a review of the guiding precedent by the Supreme Court or new statute. To date, attempts to achieve a review by the Supreme Court have been thwarted by the Court of Appeal. Under the somewhat perversely named 'Access to Justice Act 1999', if the Court of Appeal refuses a parent permission to appeal, and in this case, appeal the validity of its own guidance, the matter cannot then be taken to the Supreme Court.<sup>xi</sup>

Even if the Court of Appeal grants permission for the matter to be reviewed by the Supreme Court, a parent would need many thousands of pounds to cover application costs and legal fees, and this would follow the expense of trial in the lower courts to even get to that stage. There is also the risk that the Supreme Court will simply protect the lower courts' right to judicial discretion over an above the evidenced risks to child welfare. This risk was alluded to by Sir Nicholas Wall, President of the Family Courts, in his September 2010 speech to Families Need Fathers.<sup>xii</sup>

You might think that in leave to remove cases, where the long-term implications for the child are so profound, the Court of Appeal would insist that a trial judge's decision was sufficiently reasoned in their judgment. You would be wrong.

A month prior to his appearance on Radio 4, Lord Justice Thorpe heard an appeal (in the case *Re H*) regarding the relocation of a 9 year old child to Australia. In his application for permission to appeal, the

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father argued that the court had failed to pay sufficient regard to the mother's history of broken contact. The judgment at trial was so brief that it could not be determined whether the judge had properly considered motive. Despite this, appeal was refused.

Under Thorpe's own guidance from 2001 (in *Payne v Payne*), the mother must satisfy the court that her motives are not to frustrate contact between the father and child. Thorpe describes this as a primary hurdle the applicant must satisfy in terms of their motives being genuine. 9 years on, and in this current father's case, how could the Court of Appeal satisfy itself that a judge had properly considered this crucial point, if the written judgment from the trial was so brief? It couldn't, but still, permission to appeal was refused.<sup>xiii</sup>

Not only is the guidance in *Payne* flawed, the sad reality is that it is also misapplied, and commonly to support leave to remove being granted. Where the mother has a history of frustrating contact between the child and father, she need only say she wishes to be closer to her own family or has new employment, for her motives to be accepted and a history of frustrated contact orders goes ignored.

It should not be necessary to wait for an international convention to improve outcomes for British children. It should not be the case that only the very wealthy have the smallest of chances to stop the application of poor guidance causing their children harm. It should not be the case that a compelling body of research, which we present in this report, and which has been presented at appeal, is not even mentioned in judgment.

The current debate on relocation precedent is focusing too much on protocol and the judiciary's right to independence rather than the negative impact of relocation on children, and child welfare. The research already exists which confirms a risk of harm to children which the courts fail to recognise. As Bob Geldof says, for them to do so is to admit that they have got it wrong for 40 years, and that thousands of British children have suffered as a result.

Too much of our social and family policy is decided in closed courts rather than Parliament. We hope the impending family justice review redresses this current constitutional imbalance.

*Michael Robinson is the creator of The Custody Minefield, an information resource for separating parents and the extended family. The Custody Minefield is the most visited website on the internet on matters related to leave to remove, internal relocation and shared residence, having provided information to more than 80,000 parents in 2010 alone. michael.robinson@thecustodyminefield.com*



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# 1. Relocation – Judge Made Law

In 1989, Parliament introduced the Children Act, and within that statute, a list of factors which the courts must consider when judging any family case. This is commonly referred to as the Welfare Checklist.

In relocation cases, the judiciary have added their own opinions as to what matters significantly impact on child welfare, and ranked these equally (or arguably greater than) the statutory considerations set out within the welfare checklist.<sup>xiv</sup> As mentioned in our introduction, we and many in the legal profession believe that the judiciary's favoured distress argument is afforded as great or greater importance than those determined by Parliament through statute. In the case AR (A Child) in June 2010, Mr Justice Mostyn QC ably articulates this point:

*Indeed **there is a strong view that the heavy emphasis on the emotional reaction of the thwarted primary carer represents an illegitimate gloss on the purity of the paramountcy principle** [that child welfare must be the court's paramount consideration]. Moreover, some argue that it promotes selfishness and detracts from the importance of co-parenting.*<sup>xv</sup>

The views of Mostyn J, as editor of Jordan's International Family Law, should not be taken lightly. Mostyn J is a credible and widely respected member of the legal profession and judiciary, but his opinion cannot over-rule the Court of Appeal's historic precedent which he, like other judges, must follow.

The guidance in Payne v Payne harks back to the 1970s when the principle was firmly entrenched of there being a primary carer, with sole residence awarded to one parent upon separation. In 1989, Parliament introduced legislation to lead the courts away from this outcome. Parliament's reasoning is commented on by Mostyn J in the aforementioned judgment from June this year:

*There is very good reason why such orders (shared residence) should be normative for they avoid the psychological baggage of right, power and control that attends a sole residence order, which was the one of the reasons that we were ridden of the notions of custody and care and control by the Act of 1989.*

Parliament's intentions behind the Children Act, as expressed in 1989 are set out below:

*"It is intended that another difference between residence and custody orders is that the new order should be flexible enough to accommodate a much wider range of situations.*

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*In some cases, the order will provide that the child shall live with both parents, even though they do not share the same household. If such an arrangement is practicable, there is no reason to discourage it.*

*More commonly, however, the order will provide for the child to live with both parents, but to spend more time with one than the other...**It is a more realistic description of the responsibilities involved in arrangements of this sort to make a residence order covering both parents rather than a residence order for one and a contact order for the other.***<sup>ixvi</sup>

Parliament intended that the new act would see shared parenting and shared residence become the common outcome for children affected by parental separation. Parliament's thinking was ahead of its time, and has been upheld by a wide body of research in subsequent years, and we detail much of that research in this report.

20 years on from the making of the Children Act 1989, rather than shared residence being normative, the debate still continues as to whether shared residence should become the common post-separation arrangement for children. We believe that the cause stems from contradictory guidance issued by the President of the Family Division of the Courts in 1991 and the court's reluctance to accept outside interference. Following the introduction of the Children Act 1989, Dame Elizabeth Butler-Sloss, issued guidance which went counter to the intentions of Parliament. She informed the judiciary that:

***'shared residence orders should only be made in exceptional circumstances'***.

20 years on, the author of this report has heard judges at circuit level say 'shared residence orders are rarely made in my court'. Shared residence may be a commonplace outcome in some courts but remains a rarity in others. The inconsistency leaves outcomes a matter of chance dependent on the court applied to and the judge who hears the case. The same is less true in leave to remove and internal relocation cases where precedent first founded in the 1970s binds the courts.

How was it that the courts misinterpreted Parliament's intention? The answer can be seen in a twenty year old debate in the House of Lords, where Lord Kilbraken voiced his concern that the judiciary would misinterpret the legislation and be ignorant of Parliament's intentions. History has proven The Lord Chancellor's reassurances to have been misguided, and we detail those reassurances on the following page:

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**Lord Kilbracken:** *"... As I said in debate, I always thought that was a very good arrangement, where both parents had a residence order and the children went to each of them in succession." "... However it seems to me that when this definition arises we should emphasise that, by not having the word "person" in the singular in line 43, the residence order may apply in most cases to the father and the mother."*

**The Lord Chancellor:** *"... As I explained earlier, by virtue of Section 6(c) of the Interpretation Act 1978: "Words in singular include the plural and words in the plural include the singular".*

**Lord Kilbracken:** *"... I am very glad to know that will be on record, although of course what is said in your Lordships' committees on the record is in fact never brought up again in any court. But, all the same, I am satisfied by the noble and learned Lords assurance that the singular includes the plural. Therefore I wish to withdraw the amendment."<sup>xvii</sup>*

In the majority of family law cases, judicial discretion and a lack of detailed guidance and statute have led to inconsistent outcomes for families. In September, Sir Nicholas Wall, President of the Family Division of the Courts explained to me that *'the problem is the judiciary do not read Hansard reports. It is up to them to interpret statute'*. Better defined statute, as recommended in Section 9 of this report, would lead to less inconsistency, and arguably, reduce the number of contested cases as outcomes become more certain. Similarly, more detailed statutory guidance would help prevent the anomaly of out-of-date precedent in common law being rigidly adhered to.

Lord Justice Thorpe, when commenting about reform of relocation law in June this year, agreed that the current exercise of precedent in relocation cases looks back to the 1970s' societal norm of sole custody.

*Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our court has applied consistently since the decision in *Poel v Poel* [1970] 1 WLR 1469. The case for such a shift is not difficult to articulate. The principles stated in *Poel* were substantially founded on the concept of the custody or parent. Furthermore, there is an emerging body of significant research in various jurisdictions that must be brought into account."<sup>xviii</sup>*

In 40 years, society has changed, statute changed, and our understanding of child welfare has changed. The question must be asked, why has this judge made law remained unaltered for 4 decades, and how can we avoid this happening in the future?

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## 2. Calls for Reform

- 2005: **85% of solicitors agreed that leave to remove applications were too readily granted by the courts** (in a debate hosted by the Law Society). A leading psychiatrist, Professor Mark Berelowitz stated there was no evidence to support the assumptions which underpin the courts' binding guidance.<sup>xix</sup>
- 2005: The Courts of New Zealand rejected *Payne v Payne* as precedent in relocation cases in 2002 as **'it put a mother's needs above a child's'**.<sup>xx</sup> New Zealand introduced legislation in 2005 that protects a child's psychological and developmental need for stability and security by more clearly defining the matters that support child welfare.<sup>xxi</sup>
- 2009: The report by the independent think tank, the Centre for Social Justice, called for **'A change in the law regarding relocation... to take better account of the changed patterns of parenting, the considerable impact on the child of relocation away from home and other home environment features and wider family members, yet taking account of the increased movement of families.'**<sup>xxii</sup>
- 2009: Reunite is the leading charity on international parental child abduction. In the section entitled 'Systemic Problems', REUNITE states **'Generally, it was felt that children are not well served by the current relocation system and that insufficient attention has been paid, to date, to the effects of relocation on the child. At the same time, the over-emphasis on the happiness of the mother means that the system is apparently stacked against fathers, even custodial fathers, who feel that they suffer a serious legal injustice through the relocation system in this country.'**<sup>xxiii</sup> There is no scientific basis to support the opinion that denial of a mother's wish to relocate would be so psychologically damaging as to affect her ability to care for the children.
- 2009: David Maclean MP, previously Chief Whip of the Conservative Party, tabled a Parliamentary Early Day Motion, **EDM373**, which received cross-party support from 58 MPs. The EDM called for the better protection of child welfare and children's relationships in relocation cases [see section 11 on page 38].
- 2009: The Custody Minefield publishes its first Parliamentary Briefing Report. **Sir Bob Geldof endorsed our findings and recommendations**, as widely reported in the broadsheet and legal media, with articles in *The Telegraph*, *The Daily Mail*, *Family Law Week*, *Family Law News Watch*, *Community News Wire* and others.

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2009: In a letter, **Sir Mark Potter (President of the Family Courts) rejected the call for a review of Payne v Payne.**

2009: **Henry Bellingham, Conservative Shadow Minister for Justice,** in a letter to a father, **accepts the need for Payne v Payne to be reviewed** and says this is being looked at.

2010: The Custody Minefield assisted a parent with the preparation of arguments for a review of Payne v Payne in a case before the Royal Courts of Justice. Lord Justice Wall (now President) accepted the argument for a review of Payne were **'compelling in the right case'** but refused the father's permission to appeal. His reason was that further delay was not in the family's interests.<sup>xxiv</sup>

Delays are due to a crisis in the family courts, as admitted by Sir Mark Potter in July 2009 when he told the Sunday Times that delays were increasing.<sup>xxv</sup> The father could not appeal LJ Wall's decision, as The Access to Justice Act 1999 prevents a parent from approaching the Supreme Court if the Court of Appeal refuses their permission to appeal. This legislation grants the Court of Appeal an effective right of veto on a review of its guidance by a higher court.

LJ Wall's conclusion in that case was **'there is a perfectly respectable argument for the proposition that Payne v Payne places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done to children by a permanent breach of the relationship which children have with the left behind parent.'** Sadly, that respectable argument remains irrelevant so long as the courts are bound to follow the guidance within Payne.

2010: In March, a meeting was held in Washington, attended by experts from 50 countries. The ensuing 'Washington Declaration on International Family Relocation' provided guidance on matters that these experts considered of vital importance in international relocation cases [you will find their guidance on page 27]. It is entirely child focussed, and we applaud it. Nowhere does it mention the UK courts discredited 'distress argument', which the UK courts remain 'bound' to consider.

2010: In May, Lord Justice Wilson confirmed that the Washington Declaration has no bearing in UK law.<sup>xxvi</sup>

2010: In June, Mr Justice Mostyn QC, arguably the UK's most respected divorce lawyer and now appointed to the High Court, savaged the guidance in Payne v Payne in the case AR (A Child). His voice joined ours in a call for an urgent review of the Court of Appeals guidance by the Supreme Court.<sup>xxvii</sup>

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2010: In August, The Right Honourable Lord McNally wrote on behalf of the Ministry of Justice, confirming that **'There are currently no plans to change the law on relocation'** although relocation would be looked at as part of the overall family law review currently being undertaken by the Government.

2010: In September, Sir Nicholas Wall, President of the Family Courts expressed the belief that a review by the Supreme Court was unlikely to be successful, since the judicial right to discretionary privilege would be upheld by the higher court. His opinion was that change would need to be effected by Parliament.

2010: In November 2010, we presented this report and our recommendations at Westminster.

What follows is the evidence that was unavailable to the court when the court's current guidance was set in 2001. This research is routinely ignored by the courts which remain bound by the earlier precedent.

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## 3. Relocation: The Psychological effects on Children

Relocation inevitably results in the diminishing of a relationship between a child and the non-locating parent (typically the non-resident parent who is the father). From a developmental perspective, we know the likely effects on children from this. The research supporting this knowledge is set out below:



### UK Research: Effects on Mental Health and Psychological Development

#### 3.1 'Involved Fathers Key For Children'. Dr Eirini Flouri and Prof Ann Buchanan for The Economic and Social Research Council (ESRC) 2002

**Girls whose fathers are involved in their upbringing are less likely to have mental health problems in later life** whilst good father relations can prevent boys from getting into trouble with the police says research released during National Science Week 2002.

**'Good father-child relationships are associated with an absence of emotional and behavioural difficulties in adolescence and greater academic motivation too'** say Dr Eirini Flouri and Prof Ann Buchanan co authors of the research. **'Teenagers who have grown up feeling close to their fathers in adolescence also go on to have more satisfactory adult marital relationships'** she adds.

The ESRC funded research at the Department of Social Policy and Social Work, University of Oxford aimed to discover whether it could further support US research showing positive outcomes for children whose fathers were more 'involved' in their care. **'An involved father is one who reads to his child, takes outings with his child, is interested in the child's education and takes an equal role in managing his child'** explains Dr Flouri. 'That does not necessarily mean that he lives with the child's mother or is even the biological father of the child' she adds.

The research also shows that a good relationship with the father or father figure can also protect against adolescent psychological problems in families where the parents have separated. **'There was a particularly strong association between father involvement with daughters during adolescence and a lack of psychological distress in adult life'** says Dr Flouri. 'For boys who have involved fathers it was quite marked that they were less likely to be in trouble with the police as they grew older' she adds.

Involvement of the father or a father figure has a significantly protective role against psychological problems in adolescents in families where parents have separated. This finding is independent of whether mothers are also involved.

ESRC Report 2001, Father involvement and outcomes in adolescence and adulthood.

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**3.2 'The Role of Father Involvement and Mother Involvement in Adolescents' Psychological Well-being' Dr Eirini Flouri and Prof Ann Buchanan. British Journal of Social Work 2003; 33: 399-406**

This study of 2,722 British adolescents aged 14–18 years explored whether paternal involvement can protect against low levels of well-being even when maternal involvement and risk and protective factors are controlled for. Results showed that **although both father and mother involvement contributed significantly and independently to offspring happiness, father involvement had a stronger effect.**

Fortnightly amusement-park parenting (the old 80:20 formula) contributes little to developing meaningful parent-child relationships.

Laumann-Billings L & Emery RE. Distress among young adults from divorced families, Journal of Family Psychology 2002; 14:671-687.

**3.3 'A Good Childhood: Searching for Values in a Competitive Age'. Richard Layard and Judy Dunn. The Children's Society (2009)**

Based on the experiences of 30,000 children, the research found that 'a child's performance at secondary school, self-esteem and well being as an adult is linked especially to the father's input' and **'children are 40% more likely to suffer mental health problems when separated from their fathers'** and 'on average, children are less likely to fail at school or suffer depression the more they see their separated father.'

Fathers and mothers have different kinds of input to their children, both necessary.

Dr MK Pruett Ph.d, M.S.L, Fatherneed: why father care is as essential as mothercare for your child, Free Press New York 2000.

**3.4 'The role of father involvement in children's later mental health'. Dr Eirini Flouri and Prof Ann Buchanan. Journal of Adolescents 2003; 26; 63-78**

Data on 8441 cohort members of the National Child Development Study were used to explore links between father involvement at age 7 and emotional and behavioural problems at age 16, and between father involvement at age 16 and psychological distress at age 33, controlling for mother involvement and known confounds. **Father involvement at age 7 protected against psychological maladjustment in adolescents from non-intact families, and father involvement at age 16 protected against adult psychological distress in women.**

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**3.5 'Life satisfaction in teenage boys: The moderating role of father involvement and bullying'. Dr Eirini Flouri and Prof Ann Buchanan. *Aggressive Behaviour* 2002; 28: 126-133**

It has been suggested that bullying at school and low social support are related to relatively poor mental health in schoolchildren. Based on data from 1344 adolescent boys aged 13-19 years in Britain, this study explored whether father involvement, as an underestimated - in the related research - source of social support, can protect against low levels of satisfaction with life. Multiple regression analysis showed that **low father involvement and peer victimisation contributed significantly and independently to low levels of life satisfaction in adolescent boys**. There was also evidence relating to a buffering effect of father involvement in that this protected children from extreme victimisation.

**3.6 'Children in Changing Families'. Pryor, Jan, Rodgers, Bryan (eds), Malden, MA : Blackwell Publishers, p 124, 2001**

"the view is now widely held that frequency and regularity of father-child contact after separation is associated with children's psychological well-being, unless abuse or psychopathology is present."

Father absence through divorce is strongly associated with diminished self-concepts in children.  
(Parish, 1987).

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## 4. Relocation: The Developmental effects on Children

### UK Research: Effects on Schooling and Educational Development

#### 4.1 'The Impact of Parental Involvement on Children's Education'. The Department for Education and Skills 2003.

**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.** A father's interest in a child's schooling is strongly linked to educational outcomes for the child. Fathers who devote time to their sons are giving them a greater chance to grow up as confident adults. Boys who feel that their fathers devote time, especially to talk to them about their worries, school work and social lives, almost all emerge as motivated and optimistic men. **Father involvement in children's education at age 7 predicts higher educational attainment by age 20, in both boys and girls.** For boys, early father involvement protects against delinquency in later life. The involvement of fathers exerts an influence on children's positive attitudes to school.

Father involvement is associated with good parent-child relationships in adolescence and also with later satisfactory partnerships in adult life.

ESRC Report 2001, Father involvement and outcomes in adolescence and adulthood.

#### 4.2 'Early father's and mother's involvement and child's later educational outcomes'. British Journal of Educational Psychology 2004; 74: 141-53.

**Father involvement and mother involvement at age 7 independently predicted educational attainment by age 20.** The association between parents' involvement and educational attainment was not stronger for sons than for daughters. Father involvement was not more important for educational attainment when mother involvement was low rather than high. Not growing up in intact two-parent family did not weaken the association between father's or mother's involvement and educational outcomes. **CONCLUSION: Early father involvement can be another protective factor in counteracting risk conditions that might lead to later low attainment levels.**

Even very young children can benefit from overnight stays with their other parent.

Kelly J B & Lamb M E (2000) Using child development research to make appropriate custody and access decisions for young children, Family and Conciliation Courts Review, 39, 297-311.

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### 4.3 'Father's Day: The Importance of Dads'. Dr Daniel Nettle of Newcastle University and the Institute of Neuroscience in the Journal of Evolution and Human Behaviour.

Nettle used the National Child Development Study, which traces the lives of every Briton born between 3 and 9 March, 1958. Surveys taken in the 1960s and 70s asked mothers to rate the father's involvement in his child, from "inapplicable" to "equal to the mother". These and later surveys through 2005 tracked intelligence, income, and education of the participants.

**Dads who play an active part in their children's upbringing help them to be more intelligent and successful** was the finding of a second study published in the journal Evolution and Human Behaviour.

With paternal investment, however, time seemed to be the most important currency. At age 11, children of highly involved fathers boasted markedly higher IQs than children with less present dads. "This is not half a point, this is a few points of IQ, on average," he says.

Inter-parental conflict decreases over time in shared custody arrangements, and increases in sole custody arrangements.

Bauserman 2002.

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## 5. International Research

### 5.1 Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard. Erik Kruk M.S.W. Ph.D. The University of British Columbia. December 2008.

**Sole maternal custody often leads to parental alienation and father absence**, and father absence is associated with negative child outcomes. Eighty five per cent of youth in prison are fatherless; 71 per cent of high school dropouts are fatherless; 90 per cent of runaway children are fatherless; and **fatherless youth exhibit higher levels of depression and suicide, delinquency, promiscuity and teen pregnancy, behavioural problems and illicit and licit substance abuse** (Statistics Canada, 2005; Crowder and Teachman, 2004; Ellis et al., 2003; Ringback Weitoft et al., 2003; Jeynes, 2001; Leonard et al., 2005; McCue Horwitz et al., 2003; McMunn, 2001; Margolin and Craft, 1989; Blankenhorn, 1995; Popenoe, 1996; Vitz, 2000; Alexander, 2003).

These studies also found that fatherless youth are more likely to be victims of exploitation and abuse, as **father absence through divorce is strongly associated with diminished self-concepts in children** (Parish, 1987).

**Children of divorce want equal time with their parents and consider shared parenting to be in their best interests.** Seventy per cent of children of divorce believe that equal amounts of time with each parent is the best living arrangement for children, and children who have had equal time arrangements have the best relations with each of their parents after divorce (Fabricius, 2003).

A recent meta-analysis of the major North American studies comparing sole and joint physical custody arrangements has shown that **children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements.** Children in joint custody arrangements had fewer behavioural and emotional problems, higher self-esteem, and better family relations and school performance than children in sole custody arrangements. **The positive outcomes of joint custody were also evident among high-conflict couples.**

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## 6. Research on shared parenting

### 5.1.1 **Child Adjustment in Joint-Custody versus Sole-Custody Arrangement: A Meta Analytic Review.** **Robert Bauserman, Journal of Family Psychology 2002; 16: 91-102**

**Children in joint custody arrangements fare significantly better on all adjustment measures than children who live in sole custody arrangements.**

The fact that joint custody couples also reported less current conflict is important because of the concern that joint custody can be harmful by exposing children to ongoing parental conflict. In fact, it was the sole-custody parents who reported higher levels of current conflict.

### 5.1.2 **'Drifting Towards Shared Residence' Smart *et al* 2003.**

This small study only looked at the experiences of 30 teenagers and young adults but has shaped policy since it was published in 2003. We only mention this report because it is often incorrectly cited as calling into question the benefits of shared residence, but few who refer to the summary are aware of the diminutive and unrepresentative sample used in the underlying study.

As the authors admit, their title is confusing, in that the study was not into shared residence but the experiences of a few teenagers who were understandably unhappy with a rigid 50:50 division of time between parent's homes. The teenager's unhappiness seemed further compounded by poor parenting.

### 5.1.3 **Evaluation of the 2006 family law reforms**

**Australian Government: Australian Institute of Family Law Studies: December 2009**

Most parents with a child under 18 years old agreed that the continuing involvement of each parent following parental separation is beneficial for the children (81% of parents interviewed in 2009). In 2006, the proportion of parents believing that the continuing involvement of each parent following parental separation is beneficial for the children was slightly lower (77%).

Most parents in the 2009 survey believed that spending approximately half the time with each parent can be appropriate, even for children under 3 years old.

Parents with shared care-time arrangements were as likely or more likely than parents with other care-time arrangements to believe that their parenting arrangements were working well for the child, mother and father (reported by 70–80% of parents with a shared care-time arrangement. Shared decision-making is much more likely where there is shared care time than where the child spends most or all nights with one parent. For example, 79% of fathers with equal care time (48%-

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52% of nights) said that education decisions were shared by the parents, compared to 32% of fathers who had daytime-only contact with their child.

While a history of family violence and highly conflictual inter-parental relationships appear to be quite damaging for children, there was no evidence to suggest that this negative effect is any greater for children with shared care time than for children with other care-time arrangements.

There is some evidence to suggest that parenting arrangements are now more likely to take into account children's time with grandparents than was the case prior to the reforms. Just over half the post-reform separated parents who had sorted out their parenting arrangements and a similar proportion of grandparents felt that time with grandparents had been taken into account. Pre-reform separated parents, on the other hand, were less likely to have taken grandparents into account (40%) than after the reforms. The overall picture is of grandparents being very important in the lives of many children and their families, with some evidence that the legislation has contributed to foregrounding this.

Pre-separation experiences of violence and perceived issues relating to mental health, the misuse of alcohol and other drugs or specified addictive behaviours, along with current safety concerns associated with ongoing contact with the other parent, were more commonly reported by parents whose child never saw the father or had limited or no time with the mother than by other groups of parents.

**5.1.4 Shared Care Parenting Arrangements since the 2006 Family Law Reforms**  
**Report for the Australian Government, Attorney-General's Department, Social Policy Research Centre, University of New South Wales, May 2010**

While the findings were neither in favour nor against shared parenting, the sampling method for children's opinions must be viewed with caution. An online survey was used, drawing from children who accessed Kids Helpline, the National Children's and Youth Law Centre, and the Commission for Children and Young People in New South Wales and the authors accept that the sample is not necessarily representative.

As found in a further Australian study published this year, it is important to remember that shared care in Australia still remains a minority pattern of post-separation parenting. Most surveys, even those of substantial scientific rigour such as the Longitudinal Study of Australian Children, typically yield samples with small numbers of parents exercising shared care.

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## 7. Changing society and the parental role



In July 2009, the Centre for Social Justice called for a change to relocation law to take better account of developments in parenting in the last 30 years. The considerations in relocation cases have remained unchanged for 39 years and the case *Poel v Poel*.<sup>xxviii</sup>

Lord Justice Ormrod, a keen supporter of *Poel v Poel*, who cited that case law in a number of later judgments, had strong views on men being involved in childcare which appear to persist today within the Family Justice system. As recorded by his colleague, Lord Justice Dunn in his 1993 biography **'He was not sympathetic to husbands who maintained that they could bring up the children as well as their wives, saying that such men either neglected their children or gave up their jobs and became so engrossed in the children that they grew up in an unnatural environment.'**<sup>xxix</sup> This was an opinion which may have had some basis in 1970, but not today in the 21<sup>st</sup> century. Times change and the law must evolve to reflect real life parenting.

While these views may be understandable in people of a certain age and class, as reflective of their own upbringing, they are not representative of society today. In terms of supporting the earlier judicial opinion as well as the need for change, it is worth comparing the more progressive opinion of His Honour, Judge Boshier, the Principal Family Court Judge of New Zealand on the risks of disrupting bonds between children and parents: **'The more dependent upon that relationship the child is for its emotional wellbeing and development, the greater the likely injury to the child from the proposed move.'** The level of harm inflicted on children by the granting of an application to relocate would have been far less in 1970. There was considerably less paternal involvement in childcare 20 years ago.

In 2009, given the statistics on the following page and mindful of the opinion of the New Zealand courts, the risk of emotional and psychological injury to UK children is now high. Increasing paternal parenting time supports there being a stronger bond than would have been present previously.

In relocation cases where shared residence exists, and *de facto*, there are two primary carers with equal parental responsibility, the Court of Appeal continues to apply the same reasoning in favour of the mother that it held 2 generations ago.<sup>xxx</sup>

How has the role of fathers changed? Read on...

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**7.1 'Completing the Revolution: The Leading Indications', Equal Opportunities Commission 2007, London**

**British fathers now undertake approximately nearly half of all childcare.** Mothers recorded an average of 2 hours 32 minutes per day looking after their own children, compared with 2 hours 16 minutes by fathers.

**7.2 'Working Fathers, Earning and Caring', Equal Opportunities Commission 2003, London**

**The amount of time that fathers of children under the age of 5 spend with them on child-related activities has gone up from less than a quarter of an hour per day in the mid 1970s to two hours a day by the late 1990s.**

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## 8. The Washington Declaration on International Family Relocation

*On 23-25 March 2010, more than 50 judges and other experts from Argentina, Australia, Brazil, Canada, France, Egypt, Germany, India, Mexico, New Zealand, Pakistan, Spain, United Kingdom and the United States of America, including experts from the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, met in Washington, D.C. to discuss cross-border family relocation. They agreed the following:*

### **Availability of Legal Procedures Concerning International Relocation**

- 1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.*

### **Reasonable Notice of International Relocation**

- 2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.*

### **Factors Relevant to Decisions on International Relocation**

- 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 listed 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;*

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- 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.*

### **The Hague Conventions of 1980 on International Child Abduction and 1996 on International Child Protection**

- 7. *It is recognised that the Hague Conventions of 1980 and 1996 provide a global framework for international co-operation in respect of cross-border family relocations. The 1980 Convention provides the principal remedy (the order for the return of the child) for unlawful relocations. The 1996 Convention allows for the establishment and (advance) recognition and enforcement of relocation orders and the conditions attached to them. It facilitates direct co-operation between administrative and judicial authorities between the two States concerned, as well as the exchange of ...*

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*information relevant to the child's protection. With due regard to the domestic laws of the States, this framework should be seen as an integral part of the global system for the protection of children's rights. States that have not already done so are urged to join these Conventions.*

### **Promoting Agreement**

- 8. The voluntary settlement of relocation disputes between parents should be a major goal. Mediation and similar facilities to encourage agreement between the parents should be promoted and made available both outside and in the context of court proceedings. The views of the child should be considered, having regard to the child's age and maturity, within the various processes.*

### **Enforcement of Relocation Orders**

- 9. Orders for relocation and the conditions attached to them should be able to be enforced in the State of destination. Accordingly States of destination should consider making orders that reflect those made in the State of origin. Where such authority does not exist, States should consider the desirability of introducing appropriate enabling provisions in their domestic law to allow for the making of orders that reflect those made in the State of origin.*

### **Modification of Contact Provisions**

- 10. Authorities in the State of destination should not terminate or reduce the left behind parent's contact unless substantial changes affecting the best interests of the child have occurred.*

### **Direct Judicial Communications**

- 11. Direct judicial communications between judges in the affected jurisdictions are encouraged to help establish, recognise and enforce, replicate and modify, where necessary, relocation orders.*

### **Research**

- 12. It is recognised that additional research in the area of relocation is necessary to analyse trends and outcomes in relocation cases.*

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## Further Development and Promotion of Principles

13. *The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes.*

## The Court of Appeal's response to the Washington Declaration

It is briefly worth us commenting on Lord Justice Wilson's view of the Washington Declaration.<sup>xxxii</sup>

Wilson LJ's comments on the Washington Declaration are repeated below, as taken from the case *Re H (A Child)* [2010] EWCA Civ 915:

26. *The Washington Declaration is, in my view, extremely interesting and, subject to an aside which I articulate at [27] below, it may prove not only to be a valuable means of harmonising the approaches of different jurisdictions to the determination of applications for permission to relocate but ultimately also to become the foundation of some reform of our domestic law. **But it clearly has no such effect at the moment;** and Mr Ward will not mind my saying that his final submission, namely that today we should replace the guidance given in *Payne* with that contained in [3] and [4] of the declaration, lacked elementary legal discipline. **The document is indeed no more than a declaration,** to which our jurisdiction, through Thorpe LJ, has subscribed. Paragraph 13 of the declaration provides that "the Hague Conference on Private International Law... is encouraged to pursue the further development of the principles set out in this declaration and to consider the feasibility of embodying all or some of these principles in an international instrument". It is thus possible that, no doubt following amendment in various respects, the factors contained in [4] of the declaration will find their way into a protocol attached to the Hague Convention 1980, which, if ratified by the UK, would later find its way into the domestic law of England and Wales and would then impact upon the guidance set out in *Payne*. But that is all for the future.*

27. *With some hesitation I make the following aside. **In that the principal charge against our guidance, as it stands, is that it ascribes too great a significance to the effect on the child of the negative impact upon the applicant of refusal of the application,** one is interested to discern the way in which, in [4] of the declaration, that factor is addressed. **One finds (does one not?) that it is not squarely addressed at all.** The closest to any address of it is to be found in (viii), namely "the*

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*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." Some may share my initial perplexity even at the terminology of (viii) in that it appears to train the consideration of the court upon impact not only "on the child" but also, and by way of contradistinction, "on the parties" apparently irrespective of impact on the child. It is axiomatic that our notion of paramountcy excludes from consideration all factors which have no bearing on the child. But, that possible curiosity apart, there is no square address in (viii) of the impact upon the child likely to flow from negative impact upon the applicant of refusal of the application. Indeed the reference to the child's extended family, education and social life, seems almost to draw attention away from such a factor. **I wonder whether consideration might need to be given as to whether, if the present law of England and Wales does indeed place excessive weight upon that factor**, paragraph [4] of the declaration, as presently drawn, by contrast places insufficient weight upon it.*

The Washington Declaration makes no mention of the Court of Appeal's favoured distress argument (despite LJ Thorpe having been present at that meeting, representing the UK). Perhaps the reason being that it has no basis in fact, and despite being held as fact by the judiciary in the UK for 40 years, not one piece of evidence has been produced to support it. Our own counter arguments, as supported by the experts in Washington, have a compelling body of research findings to support them. The distress argument, conversely, has none.

In the case AR (A Child), the Honourable Mr Justice Mostyn QC also refers to the Washington Declaration. As the editor of Jordan's International Family Law, his opinion should carry considerable weight. He comments:

*The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. **The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of para 4(viii).**<sup>xxxii</sup>*

Hitherto and henceforth would more accurate. Until there is a Hague Convention which the UK ratifies, new statute or a review of precedent by the Supreme Court, the Washington Declaration is irrelevant, other than being something to which we aspire. It is not law, and cannot override our own common law.

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A new Convention including the guidance set out in the Washington Declaration is unlikely to be seen for many years, and possibly another generation. The UK will have taken 14 years to sign the 1996 Hague Convention on issues surrounding parental responsibility and the protection of children. On past experience, a British toddler might be a parent before the Washington Declaration transforms into a legally binding international agreement.

What the Washington Declaration does is demonstrate how far the UK Courts are adrift from contemporary international opinion and guidance.

Could the matter be resolved by the European Court of Human Rights? Sadly, the European Court of Human Rights has a seven year waiting list although we know of at least one case waiting to be heard.

Each day, week, month and year that the judiciary delay a review of the guidance in Payne, and Parliament waits to enact new legislation, more British children are shipped abroad without their welfare being properly considered or safeguarded. We are now experiencing a third generation of British children facing harm through flawed judicial reasoning and guidance which fails to take account of academic findings.

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## 9. Relocation: Legislative Change

There are advantages to following the legislative changes introduced in New Zealand in tandem with the proposed welfare checklist within the Washington Declaration

New Zealand's Care of Children Act 2004 has the benefit of having been tried and tested since it came into force in July 2005. Our proposed revisions also respect and reflect the family policy of all three main UK political parties and ensure that such policy is applied in practice in the family courts. Our proposals help redress the current imbalance caused by the adherence to case law which, rather than protecting child welfare, is likely to cause a child harm according to a wide body of research.

The case for revisiting and overturning *Payne v Payne* and updating the Welfare Checklist within the Children Act 1989 is perhaps best expressed by Lord Justice Thorpe himself. **'Very few family law decisions that are 'principled' decisions have a shelf-life of more than one generation. 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.'**<sup>xxxiii</sup>

These proposed changes are sympathetic to the Government's agenda of removing gender based discrimination from society and re-emphasises Article 8 of the Human Rights Act 1998 and the Conservatives' ideology that the state should not unreasonably interfere in family life. There also needs to be greater definition within the Welfare Checklist to emphasise the United Kingdom's obligations under the United Nations Convention on the Rights of the Child.

Our proposals include a wholesale revision of the Welfare Checklist at section 1(3) of the Children Act, as well as specifically addressing relocation and including those additional considerations raised within the Washington Declaration.

### Revisions to the Welfare Checklist

It is recommended that a revision to section 1(3) of the Children Act 1989 is made as follows:

- (3) In the circumstances mentioned in subsection (4), a court shall have regard to—
- (a) The welfare and best interests of the particular child which must be the court's paramount consideration;
  - (b) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.

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- (c) The principles set out below which are relevant to the welfare and best interests of the particular child in his or her particular circumstances:
- (i) the child’s parents and guardians should have the primary responsibility, and should be encouraged to agree their own arrangements, for the child’s care, development, and upbringing;
  - (ii) there should be continuity in arrangements for the child’s care, development, and upbringing, and the child’s relationships with his or her family, or family group, should be stable and ongoing;
  - (iii) the child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child’s parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child;
  - (iv) the child has the right to maintain personal relations and direct contact with both parents on a regular basis and in a manner consistent with the child’s development, except if the contact is contrary to the child’s best interest (upon the threshold criteria of significant harm);
  - (v) the child’s safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, or by other persons);
  - (vi) the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened;
  - (vii) a child must be given reasonable opportunities to express views on matters affecting the child having regard to the child’s age and maturity; and
  - (viii) any views the child expresses (either directly or through a representative) must be taken into account;
  - (ix) the range of powers available to the court under this Act in the proceedings in question.

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- (d) With regard to cases involving relocation of the child, either beyond the jurisdiction of the courts of England and Wales, or within the jurisdiction where relocation will affect existing parenting and care arrangements, the court shall have regard to:
- i) the parties' proposals for the practical arrangements, including accommodation, schooling and employment;
  - ii) where relevant to the determination of the outcome, the reasons for seeking or opposing the application to the court;
  - iii) 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;
  - iv) the nature of the inter-parental relationship and the commitment of the parties to support and facilitate the relationship between the child and their immediate and extended family;
  - v) whether the parties' proposals are realistic;
  - vi) the practicalities and financial burden of travel;
  - vii) issues of mobility for family members;
  - viii) the enforceability and viability of contact orders made within the jurisdiction of the UK courts under international conventions and agreements in the State to which the child will relocate, and where a mirror order is recommended by the court, that this should be in place prior to relocation if leave to remove is granted.

### **Further revisions concerning welfare Investigations and Reporting**

It has been our experience while advising in a number of leave to remove and relocation cases that, prior to a judgment being made and due to resourcing problems, CAFCASS have failed to:

- Meet with the child or seek their wishes and feelings. An example would be a case we saw, where the child was 9 years old and resource constraints prevented CAFCASS from investigating. Relocation happened 6 weeks after the mother's application to the court.

Visit the parent's homes or speak to members of the extended family. In a case where the child had a bedroom at the grandparents' home, was taken to school by them each day, and had been cared for by them prior to starting school (while the parents worked), the grandparents were not consulted, and the bond between the child and them not even considered as a factor;

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- Visit the child’s school and speak to their teachers;
  - Prepare a written report for the court to consider. Another case, where CAFCASS said resourcing constraints prevented them being able to provide a report to the court;
  - Make realistic proposals for continued contact. In one case we were involved in, where relocation was to Australia, the CAFCASS Officer recommended the father read bedtime stories to the child via webcam. The Officer failed to consider time differences, and that the father, as a teacher, would be in school working.

We believe that in any contested relocation case, there should routinely be a welfare investigation and report to assist the judiciary in making an informed decision. We therefore recommend a new subsection at section 13 of the Children Act 1989 to read:

- (4) When considering an application for leave to remove from the jurisdiction or an application concerning relocation within the jurisdiction:
  - (a) The court shall order a report under the provisions of section 7 of this Act into the family circumstances and address the points raised in the welfare checklist;
  - (b) Investigations for this report shall include meetings with the child (both in the presence of each parent, and independently), the child’s extended family, other adults who hold a position of significance in the child’s life, the school, the child in the separate company of each parent, and include visits to both parents’ homes;
  - (c) Following the investigation, the report shall be made in writing and served on the parties at least 14 days prior to a hearing listed to consider the report’s contents;
  - (d) The reporting officer shall restrict themselves to observation and recording, and not make a recommendation, as it is the role of the presiding judge to find fact.

### **Further Legislative Reform**

We believe that s.54 of the Access to Justice Act 1999 needs to be repealed, as this prohibits the citizen’s ability to approach the Supreme Court for a review of precedent established by the Court of Appeal. We recommend that the Education Act 1996 is revised to require that all holders of parental responsibility must agree a child’s registration at a new school within the jurisdiction of the courts of England and Wales to prevent children being arbitrarily relocated.

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## 10. Relocation: Summary and Conclusion

In the case of international leave to remove, once a court has agreed to a child emigrating abroad there is no monitoring to determine the effects on the child. It is estimated that 90% of cases are approved by the court<sup>xxxiv</sup>. There is less information available concerning judicial outcomes in internal relocation cases, but we know that the 'hurdles' that the applicant parent must satisfy are lower than if they were applying to move abroad. The likelihood is that the granting of internal relocation applications is far higher than those which involve relocation abroad.

We now fully understand the effects on children of separation from a parent:

- A child is 40% more likely to suffer mental health problems;
- Children are likely to achieve less academically;
- Children are at increased risk of emotional and behavioural difficulties in adolescence and reduced academic motivation ;
- There is a greater risk of teenage pregnancy, delinquency, bullying and substance abuse;
- Girls are more likely to experience psychological distress in adulthood.

Research tells us that children in shared care arrangements fare significantly better on all adjustment measures than those in sole residence arrangements. By shared care, we do not mean a rigid 50:50 division of parenting time, but both parents being fully involved in childcare.

The adverse effects of relocation go beyond the matters identified and discussed in this report. A child will lose the familiarity of both parents' homes. They will lose their friends. They face the disruption of a change in school. They often lose their relationship with paternal grandparents who may not be able to manage long journeys to maintain the relationship. Future contact with the non-resident parent is more easily thwarted. The court's often held view that a meaningful relationship can be maintained by webcam or telephone is nothing more than an unqualified assumption. There are often language and cultural barriers for the child to contend with.

The court's long held belief, that the denial of a mother's application to relocate would so adversely impact her psychologically as to affect her ability to provide care, has no basis in fact. That judicial opinion was challenged in the leave to remove debate by Resolution in 2005. Dr. Mark Berelowitz, an eminent and highly regarded child and adolescent psychiatrist, argued that there was no scientific basis for that opinion and that relocation was not a treatment for parental distress or depression. Stephen Cobb Q.C. made mention that the courts apply an unspoken presumption that the applicant will succeed and that the...

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courts unduly elevate the threat of disappointment to the applicant parent should their application fail. The motion, that leave to remove is too easily granted, was upheld by 77 votes to 19. Such is the opinion of the legal profession.<sup>xxxv</sup> Bizarrely, in 2005 the courts gave new guidance that no evidence needs to be provided by an applicant to support that they will suffer psychological harm from having their application refused.<sup>xxxvi</sup>

In a speech in September 2010, Lord Justice Wall commented that relocation cases are highly fact specific.<sup>xxxvii</sup> They are not. The 'distress argument' is lacking in any evidence based support, and is no more than an unsubstantiated opinion held by the judiciary, and at the Court of Appeal's own direction, requires no evidence to support it.<sup>xxxviii</sup>

Much has changed since the guidance in *Payne v Payne* bound the courts:

- 15 psychological/sociological/educational studies have been published by leading academics and institutions raising the spectre that the courts have harmed and continue to harm children via their decisions rather than safeguarding their welfare. Children's needs, as well as their wishes and feelings, must be recognised by the courts;
- A child's rights have been further defined by the United Nations Convention on the Rights of the Child;
- Evidence now shows that father involvement in childcare has increased 9 fold since the 1970s, and is now near equal to mothers. Society has changed while the law has not.
- Experts from 50 countries have recommended a guidance markedly different from the UK's;
- The legal profession, experts, members of the judiciary, charities, Members of Parliament, and the public have expressed a lack of faith in judicial discretion and guidance concerning child relocation in family law.

Family law in this country must be updated and as a matter of urgency. To do otherwise leaves children not only at risk of harm, but leaves a discredited judiciary defending a position which goes counter to expert child welfare research and international opinion. The adherence to the guidance in *Payne v Payne* undermines the public's belief and confidence in the law.

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The child in the case *Payne v Payne* lost their relationship with their father and paternal family. Contact is normally ordered by the court when children relocate. While a contact order made in the UK may be enforced in most European Countries (under a European agreement called the Brussels II Revised Regulations), it is rarely straightforward and depends on a parent's financial situation. Outside of Europe, re-establishing contact can be impossible.



Steve Moseley's ex-wife took their daughter to Australia three years ago. One month after relocation, the phone line he had been given was dead, and the mother and his daughter were no longer at the address he'd been given. 25,000 people have joined a Facebook campaign to help try to locate her. Even when the relocating parent does not seek to thwart contact, redundancy or illness can bring the child's relationship with their UK parent to an end. The members of the Find Savannah-Jade Campaign support the objectives in this report.

For 20 years, the courts decisions in relocation cases and the basis for them has gone counter to statute. It is a perverse situation when members of the public have to call on MPs to encourage the judiciary to follow statute to safeguard child welfare. While some in the judiciary have accepted that review and reform is needed, any actual change is likely to take years. This is unacceptable when we now know the risks of harm to children caused by judicial decisions.

We ask that:

- Section 54 of the Access to Justice Act 1999 be repealed to allow earlier review of precedent by the Supreme Court to prevent the Court of Appeal from being able to prevent a review of its own guidance in the future;
- Detailed guidance be set out in statute to make less likely judicial misinterpretation. Lord Kilbraken's prophetic words from the 1980s should remind Parliament that what is intended by Parliament is not discussed later in the courts. If it is intended, it must be stated;
- The welfare checklist be reviewed and amended as per our own recommendations and in consideration of the Washington Declaration. The UK should not need to wait for the international community to set our laws and safeguard our children's interests;

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- Where relocation is outside of the European Union, if the court is minded to grant leave to remove after relocation having been proven to be clearly in the child's best interests, a mirror 'contact' order should be made in the country of relocation prior to the child relocating albeit the court should also be informed as to any inherent difficulties in enforcement in that jurisdiction. The mirror order should include an indemnity in respect of the UK parent's costs in enforcing contact. Leave to Remove should not be granted until the mirror order is in place and evidence presented confirming this;
  - Consideration must be given to limiting judicial discretion, and there needs to be a clear demarcation as to the powers of the judiciary and family justice councils and that of Parliament. It is for Parliament to determine social and family policy. Since 2002, and following reviews of sociological and academic research, the Government has been promoting the importance of father involvement in schooling. The court's decision making should adhere to, and be informed by Government policy and academic social and child welfare related research findings;
  - The President of the Family Courts should issue new practice directions on shared residence, highlighting Parliament's 1989 intentions as expressed in The House of Commons reference sheet 89/5.13 on the Children Bill (26 June 1989) and reproduced on pages 8 and 9 of this report.
  - Any future guidance issued by the President of the Family Courts should be subject to Ministerial review and approval. The Minister for Justice should be granted powers to revoke or amend such guidance as is required to protect and safeguard child wellbeing and Parliament's prerogative to set and determine family and social policy. If constitutional reform is needed to achieve this, so be it.

These recommended changes should be implemented as a priority. A copy of the research findings detailed in this report should be forwarded to Family Justice Councils and dispersed to local judiciary and agencies to ensure that decisions are better informed.

We believe that Sir Nicolas Wall, as President of the Family Court, should declare *Payne v Payne* as having been made 'per incuriam' (without care). The guidance in *Payne* does not make reference to Parliament's intention that shared parenting should be commonplace, and in Mr Justice Mostyn's words, 'casts an illegitimate gloss on the purity of the paramountcy principle'.

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The Court of Appeal should not have provided guidance which interfered with the judiciary's duty to apply the welfare test as set out in s.1(3) of the Children Act 1989 or which 'contaminated the purity of the paramountcy principle. The child's best interests must be the court's unfettered consideration, as must be their right to family life as set out in the Human Rights Act and UN Convention on the Rights of the Child.

Current international law does not adequately protect children nor ensure their return if abducted, and should be the subject of a wider review. The Hague Convention on the Civil Aspects of International Child Abduction is not respected by some member states, and the belief that recovery of a child from a 'Hague Convention Country' is assured is sadly misplaced. Similarly, the UK/Pakistan Protocol has been described by one senior legal professional in Pakistan as not being worth the paper it is written on as it was not ratified under Islamic Law. If a British child is unlawfully abducted abroad, the courts and Government are often powerless to ensure their return. Our recommendation would be that given his knowledge and the wide respect for his opinion, Mr Justice Mostyn QC should head that review.

Michael Robinson

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## 11. 2009 - Parliamentary Support – EDM373

Following discussions with David Maclean MP in 2009, Early Day Motion 373 was tabled in the last Parliamentary session. 58 MPs expressed their support for a review of the guidance in relocation cases, and called for greater protection for children’s relationships and welfare when matters came before the court. EDM 373 read:



*“That this House believes that a child's relationship with its parents requires greater legislative protection with regard to the Family Court's current application of precedent in international and national relocation cases; further believes that the Family Courts of England and Wales' position on the importance of the father/child relationship does not reflect the current authoritative research on the importance of father involvement in educational and psychological development in relocation cases; further believes that the courts in practice place too great an emphasis on the unsubstantiated emotional risk to the child from the mother's possible distress and disappointment if not allowed to relocate; considers that this emphasis over-rides all other considerations including the needs and rights of the child; and calls on the Government to respond positively to the research report by the charity Reunite, entitled Relocation, funded by the Ministry of Justice and published in July 2009.”*

### Signatories by party

**Conservative Party:** Peter Atkinson, Richard Bacon, Peter Bottomley, Graham Brady, John Gummer, John Horam, Julie Kirkbride, Greg Knight, David Maclean, Anne Main, Michael Mates, Patrick Mercer, Richard Ottaway, Richard Shepherd, Graham Stuart, Robert Syms, Ian Taylor, Ann Widdecombe

**Democratic Unionist Party:** Nigel Dodds.

**Independent:** Andrew Pelling, Bob Spink, Richard Taylor.

**Labour Party:** Janet Anderson, Martin Caton, Janet Dean, Jim Dowd, Bill Etherington, Frank Field, Hywel Francis, John Grogan, Patrick Hall, Kate Hoey, Kim Howells, Brian Iddon, Brian Jenkins, Martyn Jones, Peter Kilfoyle, Paul Murphy, Terry Rooney, Alan Simpson, Howard Stoate.

**Liberal Democrats:** Colin Breed, Jeremy Browne, Tim Farron, Lynne Featherstone, Mike Hancock, Nick Harvey, John Hemming, Paul Holmes, David Howarth, Chris Huhne, Mark Oaten, Alan Reid, Bob Russell, Adrian Sanders, Stephen Williams, Phil Willis, Jenny Willott.

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## 12. Further Statements in Support



*The Find Savannah-Jade campaign strongly supports the Relocation and Leave to Remove Campaign. It is our view that the welfare of the child is not currently being taken sufficiently into account in such cases. It seems simply obvious to us that serious academic research into the effects of relocation on a child should carry considerably more weight than arbitrary judicial opinion.*

The Find Savannah-Jade Campaign seeks to re-establish contact between Steve Moseley and his daughter Savannah-Jade Dawson whose mother, Fiona Gray (nee Dawson) emigrated to Australia with her in 2007. Despite her assurance in a UK court that she would help Savannah-Jade maintain contact with her father, Fiona Gray has broken all contact and Steve has not heard from his daughter since September 2007. Like the father in the case *Payne v Payne*, the contact ordered by the UK Courts never happened, and the UK courts held no jurisdiction once Savannah-Jade had emigrated. The campaign enjoys the support of 25,000 members. [www.savannah-jade.org](http://www.savannah-jade.org)

*JUMP supports the campaign initiated by The Custody Minefield to re-evaluate and reconsider a new legal approach to addressing child and parent related issues impacting on relocation and leave to remove.*

Campaigning for Improved Relationships Between Divorced Parents & Their Children in the Jewish Community, as well as Nationally and Internationally. Tel: 0844 3578112 (Helpline)

E-mail: [info@jump-parenting.org.uk](mailto:info@jump-parenting.org.uk) Web: [www.jump-parenting.org.uk](http://www.jump-parenting.org.uk)



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*Constituted as a political party, the EPA promotes the right of children to parenting by both parents.*

**EQUAL PARENTING ALLIANCE**

*Putting equal parenting on the agenda*



The Equal Parenting Alliance stands squarely behind this report. Family Courts have turned the Children Act into a tool which makes the welfare of the resident parent paramount, rather than the welfare of the child. How refreshing to see this exposed so clearly and irrefutably.



I am speaking on behalf of the members of Grandparents as Parents (gap). Gap is a campaign and support group for grandparents who look after their grandchildren on a full time basis full, due to either the death of a parent or the parents' alcohol / drug dependency. We have a membership of nearly two thousand and many hundreds of supporters, We at gap support the relocation campaign whole heartedly, as many of our members and supporters have lost contact with their grandchildren due to one of the partners of a broken relationship relocating;

When children relocate, often they lose all contact with their paternal, and sometimes both sets of grandparents. The heartbreak that relocation does, to not just the parent that is left behind, but the grandparents that are also distanced from their grandchildren, is at the very least upsetting, and is not in the best interests of the child/ren.

Some of our grandparents have been really close to their grandchildren, babysitting, being involved in their day to day care ,seeing them on a regular basis etc, only to find that due to separation/divorce etc that their beloved grandchildren are removed far from their reach. I have had numerous letters and emails from grandparents whose very lives have been torn apart, just as the family's has been, due to one partner relocating, more so if it is the paternal grandparents, as some mothers (after a separation or divorce) want to distance themselves as far away as they can from their ex husbands/partners and their family.

If such separation occurs the only loser is the child or children who needs to be have contact with all members of his/her family and their love and support.

Signed Linda McEvelly (founder)

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## End Notes

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- i R A Child [2010] EWCA Civ 1137
  - ii Payne v Payne [2001] EWCA Civ 166
  - iii Para.29 Payne v Payne
  - iv Family Law Week 'International Relocation of Children – Part 1 (2010)
  - v Family Law Week 'International Relocation – The Reality Check' (2009)
  - vi Family Law Week 'Leave to Remove (A Lawyer's all too personal view)' (2008)
  - vii Jordan Publishing 'Relocation? Relocation? Relocation?' (2010)
  - viii Gary Direnfield, MSW, RSW (2008) www.womensdivorce.com
  - ix Radio 4: 30<sup>th</sup> June 2010: 7.30am.
  - x Washington Declaration on International Family Relocation (March 2010)
  - xi s.54 of the Access to Justice Act 1999
  - xii para 48. Lord Justice Wall 'Is the Family Justice System in Need of Review' Families Need Fathers Coventry (19 September 2010)
  - xiii Court of Appeal; Thorpe and Etherton LJ and Morgan J; 20 May 2010
  - xiv s.1(3) of the Children Act 1989
  - xv AR (A Child: Relocation) [2010] EWHC 1346 (Fam)
  - xvi The House of Commons reference sheet 89/5.13 on the Children Bill (26 June 1989)
  - xvii Hansard Debate (19 December 1988, page 1217 to 1219)
  - xviii [2010] IFL 127
  - xix Relocation was the subject of a debate at The Law Society by Resolution (formerly the Solicitors' Family Law Association) in September 2005
  - xx NZ Supreme Court D v S [2002] NZFLR 116
  - xxi NZ s.4 Care of Children Act 2004
  - xxii The Centre for Social Justice 'Every Family Matters' A Policy Report by the Family Law Review (July 2009)
  - xxiii Reunite 'Relocation' Report (July 2009)
  - xxiv Re D (Children) [2010] Civ 50 (January 2010)
  - xxv The Sunday Times 'Family Courts in Crisis' (3 July 2009)
  - xxvi H (A Child) [2010] EWCA Civ 915
  - xxvii ibid xiii
  - xxviii Poel v Poel [1970]1 WLR 1469
  - xxix Sword and Wig: The Memoirs of a Lord Justice (1993) by Roger Dunn
  - xxx News & Star 'Cumbrian Dad loses fight to stop wife moving 400 miles away with daughter' (16 July 2009)
  - xxxi ibid xxv
  - xxxii ibid xi
  - xxxiii 'Advocacy in Family Proceedings, a Practical Guide' - Family Law (March 2005)
  - xxxiv ibid v
  - xxxv ibid xviii
  - xxxvi Re G (Children) 2005 FLR 166
  - xxxvii para 46. Ibid xii
  - xxxviii Ibid xxxvii