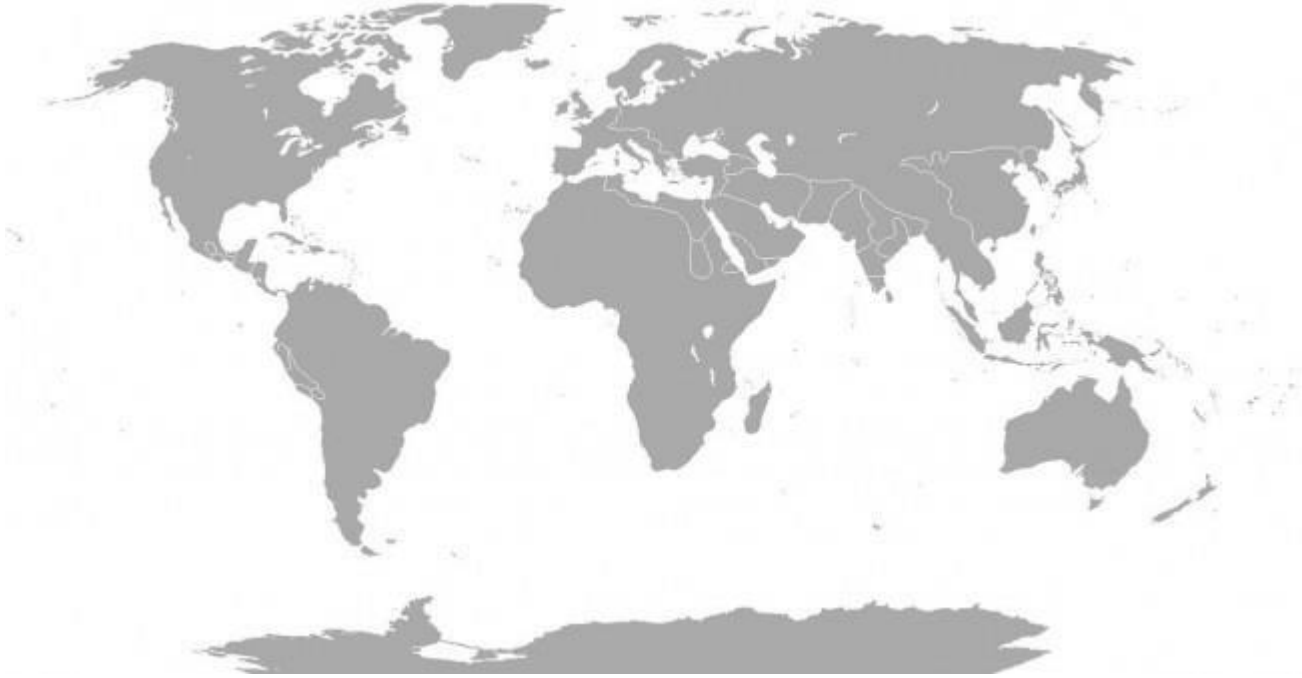
Leave to Remove Guidance for the non-relocating parent



On the weekend I was asked what goes through my head (*not the first time in the last week*) when working on arguments in leave to remove cases. The question "*are they very difficult to stop*" raises the response "*no, but you can't hope to just walk into court without detailed preparation and get a good result*". You need to have facts pertinent to the individual case to work with and build the arguments around those facts. You need to prepare thoroughly. There are pitfalls too to be avoided and these are discussed further on.

Courts are different places today from how they were before 2011, when leave to remove applications were routinely rubber stamped by judges. For those who say there hasn't been progress, while accepting change is not universal, the playing field is much much more level than it was (where preparation has gone into the case).

Court guidance before 2011 was primarily (and rigidly) drawn from the 2001 case Payne v Payne. 2011 saw that guidance scaled back to "helpful guidance" rather than binding precedent. Guidance drawn from case law is a good place to start when considering which arguments may help defend against a leave to remove application. It's a starting point but not an end.

In the High Court in 2013, Mostyn gave a summary of guidance in the case TC and JC (Children: Relocation) [2013] EWHC 292 (Fam). His summary is set out below (while is appears gender specific, it relates to the case before him – were the relocating parent the father, those gender labels should be swapped).

It's important to note the guidance is not just for cases where there is a primary carer but would also apply where parents share care. The days of getting too wrapped up in whether this is a

Payne case or Re Y case have gone (those who know what I mean by this will get it, those who don't can ignore it as it's not relevant today but was in the past).

Mostyn's summary…

1. Is the mother´s application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
2. Is the mother´s application realistically founded on practical proposals both well researched and investigated?
3. What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
4. Is the father´s opposition motivated by genuine concern for the future of the child´s welfare or is it driven by some ulterior motive?
5. What would be the extent of the detriment to him and his future relationship with the child were the application granted?
6. To what extent would that detriment be offset by extension of the child´s relationships with the maternal family and homeland?

This is all good leave to remove specific stuff. **It is crucially important to consider both the motives of the parents and the parents' plans.**

Another point to briefly note is the 'distress argument'. It used to be the case that where the primary carer said they would be 'devastated' if their application was refused, this trumped all other considerations as the court held a view that a devastated primary carer's ability to care for their child would suffer, and therefore, so too would the children. This is still a consideration in cases, but doesn't carry the weight it once did. Even in cases where the court accepts that refusal of an application will devastate the primary care (rather than simply causing disappointment), other factors can lead to an application being refused – see C v D [2011] EWHC 335 (Fam).

Mostyn also rightly points out:

The only authentic principle to be applied when determining an application to relocate a child permanently overseas is that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be.

All of the above are very valid points, but you then have to look at the specifics of the case, and in particular the following (while considering whether they are relevant to the specific case):

1. **UK Extended Family Relationships:** In weighing the benefit of the extension of the child´s relationship with the foreign based family (Mostyn's 6th point), logic dictates consideration must similarly be afforded to the impact of the diminishing of the relationship with the UK based extended family. That importance grows where a strong, established bond exists.

2. **Impact on Education and Schooling:** What would be the impact on the child´s education through moving country and schools? Is the child at a critical stage in their education? Are

the education systems in the two countries comparable, and how will adjusting to a different system impact on the child? Research exists which confirms the benefit of both parents being involved in a child's education, and that benefit exists regardless of the extent of the primary carer's level of involvement (see Shared Care Research – *we'll be expanding/updating content on this soon in a new section on the web site*).

3. **Focus on the Welfare Checklist:** The above two points are drawn from the Welfare Checklist (educational needs and change in the status quo). As Mostyn says, the welfare of the child is the court's paramount consideration and there is a statutory list of factors set out in the Children Act (by Parliament) which the court MUST consider when determining what is in a child's best interests (in any family law case). Other guidance is helpful, but it in no way trumps or replaces these. That statutory list of considerations includes the child´s ascertainable wishes and feelings, their specific medical needs, any harm they have previously experienced or are likely to experience (the full list is set out in section 1(3) of the Children Act 1989). If the child is positive about the relocation, how much of this is due to their experience of the country as a holiday destination?

4. **Breaking down the Status Quo:** Changes to the status quo can adversely impact on a child's welfare. Examples? *What would be the impact on the child from loss or diminishing of UK based relationships, peer friendships, social/sporting activities and potentially moving to a country where the culture is significantly different or where there are language barriers.*

5. **International travel practicalities – long term:** As well as the practicality and affordability of international travel today, risks of unemployment and changes in economic circumstances should be considered as factors which may impact on the child´s ability to maintain their relationships in the future. Costs of travel need careful examination, factoring in return trips and practicalities of whether the child can be dropped off… brought to the UK… and is this really viable in the long term? If there are no direct flights, can the child travel unaccompanied? What age do the airlines accept unaccompanied children? Is the child mature and emotionally secure enough to cope? If the child cannot travel on their own, can the parties afford one parent bringing the children and where will they stay if also taking them back? If one parent is to 'drop off' and one to return, can the parties afford 4 air fares for the adults, and 2 for each of the children, and how regularly? How many times a year can they truly afford this, and other associated costs?

6. **Contact/communication history:** Crucially, there must be consideration of the relocating parent's history of support (or not) for contact and inclusion/exclusion of the other parent in the decision making process in matters related to the child. Many leave to remove applications have fallen at this hurdle. While motive is a factor to consider and there may well be a genuine reason for relocating, so too is the relocating parent's attitude to contact and communication when the court weighs whether future contact proposals will be successful.

   If the relocating parent has not stopped contact, have they placed unnecessary obstacles in its path in the past? If a counter application for residence has been made by the non-

relocating parent, which of the two is more likely to support contact (see M v H [2008] EWHC 324 (Fam)).

If the relocating parent is controlling, is there reason to believe they will impose unreasonable restrictions on contact in the future, which the non-relocating parent has no option but to accept (see paragraph 86 of N v N (Removal from the jurisdiction) [2015] EWFC B89).

How realistic is it for the UK parent to be able to enforce contact arrangements abroad if relocation is granted but contact not supported? Assurances mustn't be taken at face value where history contradicts them.

7. **Skype and other non physical contact:** Are proposed methods of non-physical contact suitable and realistic when considering the child´s age and technical matters – refer to what´s commonly referred to as the ´Skype judgment´ Re R (A Child: Relocation) [2015] EWHC 456 (Fam). The social worker beautifully sums this up in the phrase "You can't hug Skype!".

   Don't forget to consider time zones differences and their impact on the practicalities of regular telephone or Skype contact… an offer that the non-relocating parent read bedtime stories can be impossible when the time difference means the UK parent is at work when the child goes to sleep.

8. **The importance of the bond between the child and non-relocating parent:** Last but by no means least, that bond is crucially important to the child's welfare. The courts are more considerate of this point than they were and there are arguments to consider advancing at each end of the spectrum (strong bond/weak bond).

   Strong bond: Is the bond so great that infrequent contact will cause the child harm? It should be remembered that Children Society research found children to be 40% more likely to suffer depression when contact with their father was diminished.

   Weak bond: If the children are very young, or if contact has previously been thwarted, will relocation deprive the child of ever having a normal, close and natural bond with the parent left behind? Should consideration of leave to remove be delayed until the bond is firmly established?

9. **Risks related to the specific country:** If the country has poor medical care compared to the UK, substandard education or if there are genuine safety risks, these should be raised. Arguments that countries in the developed world are going to offer fewer opportunities than the UK (and vice versa) are highly unlikely to be taken seriously. Arguments that less developed countries are worse countries to live often gain no traction unless they are war zones or have identified safety risks. Referral to the Foreign Office can be helpful, and if there are warnings against travel to these countries, then that's clearly worth raising. It can be worth raising difficulties in enforcing contact abroad where history supports that the relocating parent isn't committed to supporting the child's relationship with the nonrelocating parent.

One very important consideration…

The parent seeking to defend against a leave to remove application must consider giving the court choices. Within that, the non-relocating parent should consider making a counterapplication (and at an early stage in proceedings) that the child live with them if the court accepts relocation is not in the child's best interests but the child's resident parent still intends to relocate.

If the court has no alternative care proposals to consider, their hands may well be tied. CAFCASS may have expressed opinion on the relocating parent's plans, but a change in residence to the non-relocating parent will also need investigation. We've heard of cases where matters went to a final hearing only for the judge to say "*...but Mr X, you've presented me with no alternative to consider.*"

Courts are highly unlikely to stop an adult from relocating… the decision is on whether the child should. The inexperienced miss this crucial consideration.

When putting forward arguments and evidence, alternative care plans (for the child to remain in the UK in the non-relocating parent's care) need to be detailed. They can give a useful contrast to the other parent's (less well-considered plans). Remember to think of childcare and who will help with this if either you or the child is ill, will your employer grant flexible working to help with school runs, are there after school clubs? How will the non-relocating parent support the child's existing relationships, schooling and social activities. The more these change from their proposals, the weaker their counter argument to leave to remove gets and vice versa. Obtain a letter of support from the employer if possible. Describe accommodation, local amenities, school information (check the school's Ofsted rating). Asking the court's permission for supportive UK family members to file statements in support can be useful where they will support the childcare plans.

As ever… build and present child focused proposals and evidence based on the unique circumstances of the case to hand, with one eye on published guidance and one on common sense!

Common Mistakes – stacking things in the relocating parent's favour

It may seem bizarre, but in my experience, most helpful evidence comes from the other parent's written and oral evidence. People can't help shooting themselves in the foot (sometimes in both feet as I remember one judge commenting). These are some of the more common mistakes made by the non-relocating parent when building their arguments and why cases often '*go bad*' when they might have had a positive result. The problem isn't always a biased system, conspiracies, and evil judges but these are 'too easily' named as the problem. Parents and advisers are also, like it or not, part of the system when they enter it, and sometimes more to blame for the result. I know some will seethe at this comment, but if you ignore that reality you fail the people you wish to help.

We use some more technical terms in the next section related to court proceedings. On our site, we explain these in more detail, and process map the stages of court proceedings explaining

things step-by-step and stage-by-stage. Links to the guides are included at the end… but onto discussing the common mistakes which can wreck cases.

"No alternatives proposed" We've covered this above.

"*The best form of defense is attack!*" Don't give the court the impression that co-parenting would be unworkable if the other parent is not allowed to relocate. Arguments need to be focused on the child's needs. If the ex-partner represents a genuine risk to the other child, raise it, but in terms of what happens and how it is observed to impact on the child and the risks this poses for the future. You can point out concerns without being aggressive or insulting. In our experience, the legal advisers and parents who are most aggressive and combative are the ones who believe the system is stacked against them and make this a selffulfilling prophecy.

An example... *If a CAFCASS Officer includes something in their report which is wrong, don't call them a liar. Don't go onto social media calling them corrupt and evil and plaster it all over your Facebook page (which the other side may scan and include in their evidence as examples of contempt of court). Instead, take a deep breath, and when you return to court, put in a position statement pointing out they've made an error. Before this, send them an email thanking them for the report and asking for a correction to be made.* If they weren't biased, they may become so if you start calling them corrupt, incompetent or otherwise insult them. Show a little sense…

Some parents' statements and evidence is so combative and critical of the other parent that they fail to include why maintaining their relationship with the child is in the child's best interests. They give no information of their involvement in the child's life, their commitment, and paint no picture of what the child stands to lose if relocation is allowed (aside from living in a warzone between their parents). They fail to present proposals and sometimes even fail to include what they want, so intent are they on making the other parent look bad.

"Over egging the pudding" If the other parent has broken contact in the past, it is very important to raise it, but do so without overly emotive language. Also consider whether you're going to look petty by raising one or two missed occasions where valid reasons exist. Was there a *real* problem over contact? Were *real* or *serious* obstacles to contact present in the past. Other examples? *If the parent smoked weed 15 years ago, does it have any relevance today?*

"War and Peace" I see a considerable number of statements where the parent drones on about their life history, how they met their ex, their school life etc without advancing any real arguments. This is common for both parties. Important points are hard to spot when they're buried in trivia. Statements are not biographies or long, tortuous novels (actually, many are!). As for the reason why the parties broke up, as Mostyn said in another case, 'if parents had behaved well they'd probably still be together'. Past infidelity and similar matters are not really relevant to an ability to be a safe, capable parent.

"Piss Poor Preparation" Parents and advisers who go into court on a wing and a prayer with no detailed preparation often get bad results. Barristers may take cases '*on the fly'* (but it's not desirable) and the good ones I've seen do exceptionally detailed preparation. This holds true for solicitors and McKenzie Friends. The good ones put in the time and get far better results

for their clients. The ones who don't prepare properly or go in aggressively are the ones who complain about the system most. The common factor in routinely poor outcomes is them.

It can be hard for a stressed litigant-in-person to deal with the emotions of their child potentially being moved half way around the world, but they have to get their head together if they're going to have a chance. No adviser can build effective arguments unless the client hands them the material to work with (and ideally in a semi coherent package). A good adviser will probe for this information and raise areas of potential evidence with the client, and that comes from experience and common-sense. The litigant too has a responsibility in this. I personally get tired of receiving 40 emails of information, with each page of evidence and historic reports scanned as a photo image rather than pdf files which can be converted to MSWord. On one occasion I was pointed to an online drop box, where there were more than 300 files amounting to 4 gigabytes of data. Any legal adviser is there to help and assist, but can't do the job for the parent (and arguably shouldn't be). On some occasions, the litigant has had weeks to prepare their statement, but you get the "*oh god help*" call two days before (or after) the statement is due to be filed. Most of us work better when not having to work through the night!

In terms of preparation for a final hearing, have you prepared a skeleton argument, opening and closing submissions, cross-examination questions and structured the evidence in chief. Parents new to family law will struggle with some of this although our guides help. A legal adviser should understand these things intimately, and it still shocks us when we hear of charging advisers who've never prepared a skeleton argument and don't know what a witness template is. Legal advisers with no experience (and decent experience) of these things should avoid complex cases (and their clients avoid them like the plague). There is little sadder than a leave to remove case lost which would have been won with more detailed and experienced preparation.

"The MY Child and ME Syndrome" It's not "MY CHILD", it's "our child". Show consideration for the other parent and think about how your language may be interpreted (and ideally make that shift in thought not just for proceedings but for life). Refer to them in your statement by their first name, not as "the applicant" or Mrs X. On the point of language, write the statement as the parent, not as a pseudo Rumpole of the Bailey (I know I'm showing my age!).

Including the kitchen sink! I remember one person approaching me with the comment "*this is the perfect statement for shared residence*" and it ran to 200 pages. Did they really think it would be read or digested? The strong points were lost. Don't overload arguments or evidence with irrelevance or repetition. Structure it so it's easy to read. If an argument is weak, why include it? Put the strong points first. If there are a number of arguments which have important detail behind them, summarise these at the front of the statement. Evidence is often skim read, if looked at at all before a hearing. Judges are busy and at times overloaded as are social workers and CAFCASS Officers. Concise and relevant content is desirable as opposed to rambling content which is not. Again… don't assume that your statement has been read when walking into court.

Case Law: Don't assume that the judge knows the case law surrounding leave to remove. If you want to submit case law, ensure it's included in the court bundle, at the Dispute Resolution

Appointment ask if you can put in (or contribute to) a reading list. For complex cases such as leave to remove cases, you should be considering filing a skeleton argument.

…and please, please consider…

If there is any genuine risk that the parent who wishes to relocate may take the children abroad without consent, apply immediately to court for a prohibited steps order. See our guides on:

Prohibited Steps Orders
Emergency Applications
International Child Abduction

All of the above are not exhaustive considerations of matters which should be considered, but they're a good start. There will be arguments the relocating parent will advance which need to be addressed, and as Mostyn says, their plans and proposals must be given detailed scrutiny. For the litigant-in-person, don't assume others will raise these matter for you… it's your job as the parent opposing the leave to remove. It's your child and ultimately, your responsibility to make sure this happens. It is scary, it is hard, it is stressful, but the potential outcome of not doing so is worse.

Further Reading (all content listed below is free!)

Our Leave to Remove Guide
Our Leave to Remove Case Law Library
Our Temporary Leave to Remove Case Law Library
Resolving Disputes and the Legal Process – (this includes information on skeleton arguments, court bundles, preparing evidence, preparing for hearings, preparing statements etc).
The Importance of ABC – Attitude, Behaviour and Conduct

If you want to test your leave to remove knowledge, try our Leave to Remove Quiz