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Case No: FD07P02332

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
10/06/2010

B e f o r e :

THE HONOURABLE MR JUSTICE MOSTYN

Between:

F — Applicant

- and -

M — Respondent

Cliona Papazian (instructed by Frank Brazell & Partners) for the Applicant
Peggy Ekeledo (instructed by Burke Niazi) for the Respondent
Hearing dates: 27-28 May 2010

HTML VERSION OF JUDGMENT

Mr Justice Mostyn :

1. The court is concerned with the future of A who was born on 11 February 2005 and who is therefore five years of age. I shall refer to him as A in this judgment. His parents are F, aged 31, and M, aged 29. I shall refer to them as F and M.

2. F is English. M is French. A has only French nationality. Although M and F were never married, F has parental responsibility, by virtue of being named on the birth certificate.

3. The applications before the court are, first, F's application for residence of A; and, second, M's application for leave to remove A permanently to live with her in France, specifically to Troyes, which is in north-eastern France in the Champagne region.

Relocation

4. Applications for leave to relocate are always difficult for the court and distressing for the parties. They involve a binary decision - either the child stays or he goes. There is no scope for any middle way. If the decision is that the child goes, then the left behind parent inevitably suffers a disruption to his relationship with the child, at the very least in terms of quantum and periodicity of contact. If the decision is that the child stays then the primary carer, if not invariably, then frequently will suffer distress and disappointment in having what will normally be well reasoned and bona fide plans for the future frustrated. So the decision, whichever way, is bound to cause considerable trauma.

5. The law that I must apply on an application for leave to remove is set out in the decision of *Payne v Payne* [2001] 1 FLR 1052. In that case Thorpe LJ stated at para 26:

> In summary a review of the decisions of this court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:
> (a) the welfare of the child is the paramount consideration; and
> (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.

And at para 32:

> Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability.

6. Thorpe LJ then famously set out the following discipline:

> **[40]** However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent's rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:
> (a) Pose the question: 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. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
> (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the

> child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
> (c) 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?
> (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.
> **[41]** In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

7. The approach represented nothing new. It was a reiteration of the principles that the English courts have consistently applied since the decision in *Poel v Poel* [1970] 1 WLR 1469, and those principles were substantially founded on the concept of the custodial parent, as Thorpe LJ himself has recently pointed out in [2010] IFL 127. The passages I have quoted above place heavy, arguably decisive, emphasis on the impact on the primary carer of a refusal of leave. That is exactly the same ideology as was expressed in *Poel* (save that we now call custodial parents primary carers). In that case Sachs LJ stated:

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

In my opinion this passage, and the passages I have quoted above from *Payne* are indistinguishable in their ideology. They are equally tendentious in the true sense of that word i.e. supplying a tendency, and that tendency is the almost invariable success of the application, save in those cases where it is demonstrably irrational, absurd or malevolent.

8. This ideology has not been uncritically accepted. 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. Moreover, some argue that it promotes selfishness and detracts from the importance of co-parenting. Some argue that on the birth of children parents are indentured to sacrifice throughout their minority, but that the one word that is missing from *Payne* is, in fact, sacrifice. In *Re G (Leave to Remove)* [2008] 1 FLR 1587, I myself argued these points as counsel,

with no little personal conviction. But the arguments were firmly repelled and the orthodoxy of *Payne v Payne* reaffirmed. Thorpe LJ stated:

> 13. Accordingly, the only skeleton in support of the appellant's notice is the skeleton settled by Mr Mostyn QC and Mrs Carew Pole as long ago as 12 October. The thrust of that skeleton is to suggest that the leading authority in this court, the case of *Payne v Payne* [2001] 1 FLR 1052, was now outdated and heavily criticised, both in this jurisdiction and beyond, by judges, practitioners and academics. The decision in *Payne v Payne* was, I think, available in February 2001, and in the skeleton argument it was suggested that it was antiquated, in that it reflected the view of a past age when joint residence orders would only be made in wholly exceptional circumstances. The essential complaint was that in modern times, when joint residence orders have become commonplace, judges were applying the principles in *Payne v Payne*, or *some* judges were applying the principles in *Payne v Payne*, which were predicated upon a status of sole residence order and sole primary carer. The skeleton, further emphasises two judgments at first instance, where judges of the Family Division have declined to follow the guidelines in *Payne* on the basis that the case before them was a case in which there was no clear primary carer.
> 14. That, in my judgment, would be an extremely difficult argument to advance in this court. Clearly this court is bound by the decision in *Payne v Payne* so long as there is not a self-evident social shift that requires its reconsideration. I am far from persuaded that there has been any social shift and would only emphasise that the decision in the influential case of *D v D* [2001] 1 FLR 495 was given some months earlier, on 20th November 2000. In *D v D*, both the President and Hale LJ emphasised that joint residence orders were certainly not to be labelled as exceptional. That would be an unwarranted gloss on the statute. They were part of the menu of choice for trial judges, and where the circumstances suggested that form of order then it was an order that would be supported by this court. That shift from a position that obtained in the 1990s must have been well in the mind of this court, given that both in *Payne* and in *D v D* the presiding judge was the former President, Baroness Butler-Sloss. Furthermore, as Mr Cobb has pointed out in his skeleton argument, an analysis of the facts in *Payne v Payne* demonstrates that the father there, prior to the judgment in the county court, had been having the children at his home for much the same proportion of the year as the father in this case.
> 15. So the grounds within the appellant's notice, skilfully settled by counsel, opened with the first, that namely:
> "The current principles applicable in relocation cases need to be reviewed, as they place an impermissible gloss on the statute; wrongly prioritise one factor above all others (the impact of refusal on the primary carer); are out of step with modern views of the dynamics of family life and of the importance of co-parenting; are inconsistent with the approach taken in many overseas courts, both common-law and civil, and are the subject of serious public criticism, both popularly and by the legal community."
> A submission to that effect, I recognise, might be open in an appeal to the House of Lords, but plainly not at this level; and accordingly I refused

permission on that ground whilst granting the limited opportunity on the remaining grounds, 2 to 12.

16. That resulted in a letter from the appellant's solicitors, in which they somewhat retreated from an earlier stated intention to argue for permission on Ground 1 at this oral hearing, something that they were obviously entitled to do, given that the refusal had been only a paper refusal. However the letter of 16th retreated to the extent of this statement:

"…on reflection [we] think that Ground 1 has perhaps been too strongly stated. In essence we would wish to argue that the current principles as enunciated in *Payne v Payne* have been much misunderstood and frequently misapplied by lower courts (inasmuch as they appear to deduce from these principles (a), the prioritisation of one factor above all others - the impact of refusal on the primary carer - and (b), the disregard of modern views on the importance of co-parenting), and therefore should be restated in such a way that future misapplications and misunderstandings do not occur."

17. Mr Mostyn, at the very end of his submissions, came to address this point. That he had left it to the end is perhaps a reflection of the difficulties that confronted him in advancing it. A decision of this court stands and requires no correction, so long as the principles enunciated remain good. He was not suggesting that Payne v Payne had been wrongly decided and should therefore be revisited. He was only suggesting that it was being widely misunderstood. That does not seem to me to be an issue that can be in an individual case. In the individual case, all that is in issue is whether the judge has correctly or incorrectly understood and applied the principles. Mr Mostyn sought to contend that there was amongst the practitioners some sort of general perception that district judges at conciliation appointments are applying unfair pressure on respondents to relocation applications. My Lord, Wall LJ, quite properly stopped that line of submission and it is important, I think, to emphasise that applications for permission in this area are commonplace and in view of the importance that the decision has both for the children and for their emotionally distraught parents, we not infrequently grant some sort of oral hearing, generally on notice and generally with appeal to follow.

18. The volume of such applications and hearings is not inconsiderable and only a proportion of those reach the specialist law reports. I see almost all those cases and I certainly have no impression that the principles in Payne are being misunderstood and misapplied. Very often the trial takes place before a circuit judge who may not be a specialist in international family law and may have nothing but a private law ticket to equip him for the task, but cases in which we have had to intervene on the grounds of misdirection are infrequent. Sometimes this court has intervened and allowed an appeal. Sometimes this court has had no hesitation in upholding the decision below as a decision that particularly fell for the judge, who had had the advantage of seeing and hearing the oral evidence and who in the end had had to apply a very difficult balance of a number of competing factors.

19. These cases are particularly traumatic for the parties, since each of them conceives so much as being at stake. They are very, very difficult cases for the trial judges. Often the balance is very fine between grant and refusal. The judge is only too aware of how heavily invested each of the parents is in the outcome for which they contend. The judges are very well aware of how profoundly the decision will affect the future lives of the children and how

difficult it will be for the disappointed parent to adjust to the outcome. Despite the difficulties that these cases present, certainly from the perspective of this court, the principles enunciated in Payne v Payne are well understood and have been of evident assistance to trial judges in the difficult task that they perform. That is all that I need to say about the submission with which Mr Mostyn concluded.

9. More recently, in *Re D (Children)* [2010] EWCA Civ 50 Wall LJ (as he then was) acknowledged the strength of the criticisms mentioned above. He stated at para 33 that:

> There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.

10. An interesting, and potentially momentous, development has been the gathering in March 2010 of judges from all over the world in Washington DC and the promulgation by them of the eponymous declaration on International Family Relocation. This states:

> 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
> iii) the parties' proposals for the practical arrangements to relocation, including accommodation schooling and employment;
> iv) where relevant to the determination of the outcome, the reasons for seeking or opposing 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 party's proposals for contact after relocation real estate, having regular regard to the cost of 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 such stances deemed to be relevant by the judge.

11. 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).

12. In the recent decision of *Re H* (Lawtel 19/5/10) Wilson LJ considered the Declaration and stated at para 26:

> 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 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 not only upon impact "on the child" but also, and by way of contra-distinction, upon impact "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 may need to be given as to whether, if the present law of England and Wales does indeed perhaps place excessive weight upon that factor, paragraph 4 of the declaration, as presently drawn, by contrast places insufficient weight upon it.

I agree with this, up to a point. Certainly the factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less. The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the

reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward.

13. Writing of the Declaration in [2010] IFL 127 Thorpe LJ stated:

> 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.

14. In *Payne* Thorpe LJ at para 26(a) and the President at para 85(a) made clear that ultimately the decision in a relocation case turns on the application of the paramountcy principle. In *Re H* Wilson LJ reiterated this stating at para 21

> Nevertheless one must beware of endorsing a parody of the decision. Both Thorpe LJ, at para 26(a), and Dame Elizabeth Butler-Sloss P, at para 85(a), stressed that, in the determination of applications for permission to relocate, the welfare of the child was the paramount consideration. It is only against the subsidiary guidance to be collected from *Payne* that criticisms can perhaps more easily be levelled.

In applying the paramountcy principle the court must of course have particular regard to the specified factors mentioned in s1(3) Children Act 1989 when deciding whether to make vary or discharge an order under s8 namely:

> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
> (g) the range of powers available to the court under this Act in the proceedings in question.

It is noteworthy that while Parliament thought it appropriate to draw particular attention in (b) to the emotional needs of the child when making or refusing a s8 order, it did not think it necessary to make an express statement as to the emotional impact on the parent were an order under s8 to be made or refused. I doubt that this was an oversight. Perhaps this factor is to be read between the lines of (f). In seemingly relegating this factor to a status of minor importance it may be remarked that the drafters of the Declaration are in fact mirroring the Parliamentary hierarchy of emphasis.

15. In *Re D (Children)* Wall LJ observed, at para 11, that the decision in *Payne* was binding upon the Court of Appeal and all lower courts and that its effect could be displaced only by a decision of the Supreme Court or by legislation. Observations to the same effect were made in *Re G* and in *Re H*. In the latter case Wilson LJ stated at para 25 that while the Declaration might form the basis for a future reform of our domestic law, it had no current effect. In my view (for what it is worth) a review of the ideology of *Poel/Payne* by the Supreme Court is urgently needed, where the "emerging body of significant research in various jurisdictions" would be brought into account.

16. In many relocation cases there is a concurrent residence application by the respondent to the relocation application. This phenomenon is commonplace. In *Payne* at para 42 Thorpe LJ stated:

> In very many cases the mother's application to relocate provokes a cross application by the father for a variation of the residence order in his favour. Such cross applications may be largely tactical to enable the strategist to cross examine along the lines of: what will you do if your application is refused? If the mother responds by saying that she will remain with the child then the cross examiner feels that he has demonstrated that the impact of refusal upon the mother would not be that significant. If on the other hand she says that she herself will go nevertheless then the cross examiner feels that he has demonstrated that the mother is shallow, or uncaring or self-centred. But experienced family judges are well used to tactics and will readily distinguish between the cross application that has some pre-existing foundation and one that is purely tactical. There are probably dangers in compartmentalising the two applications. As far as possible they should be tried and decided together. The judge in the end must evaluate comparatively each option for the child, one against another. Often that will mean evaluating a home with mother in this jurisdiction against a home with mother wherever she seeks to go, against a home in this jurisdiction with father. Then in explaining his first choice the judge will inevitably be delivering judgment on both applications.

There is just such a concurrent residence application in this case.

17. Fortunately, in this case I have reached the conclusion that the result would be the same whether I were to follow a neutral non-presumptive path taking into account the factors mentioned by the Declaration or to follow, as I must, the presumptive tendentious route mandated by current binding authority.

Narrative

18. A curious feature of this case is that this is the second application by M for permission to relocate A to Troyes. In a lucid and incisive judgment dated 11 August 2008 District Judge Segal granted M leave. The background up to that point can be collected from the judgment. Essentially, M, who grew up in the Troyes area, came to England as a student in 2002, where she met F. They had a punctuated relationship which ended more or less finally in 2004 shortly after A was born. Manifestly, F has always had a very full and meaningful relationship with A, and his contact has been substantial both in terms of quantum and periodicity.

19. In para 9 of the judgment the District Judge describes M's case for relocation at that time:

> LRG says that she finds living in an inner city estate with a younger child very stressful and lonely. She does not have any family support, and no one to help with A or the shopping, except 2 Disabled neighbours. She feels "very unhappy and alone in the UK", totally isolated. Her mother lives in Hayes, but suffers from manic depression, and does not give her any support. She has suffered from stress and depression, and suffers from low blood pressure. She always intended, before she became pregnant, to return to France. She says that she finds it very difficult to raise A in these conditions. The CAFCASS officer says that M finds living in London as a single parent a very isolating and difficult situation at times.

20. In his conclusion at paragraph 25 of his judgement the District Judge stated:

> Materially, she will be better off in France, but this is not the only consideration. This is not a matter of a straightforward comparison of the relative merits of life in England and life in France. The most important consideration to my mind is that she will feel lonely, isolated and unhappy in England, struggling on an inadequate income in substandard accommodation. I am sure that she will do her best but, as time passes, I think it likely that she will become bitter and resentful, and feel that F is keeping her in England, and that this is bound to rub off on to A and affect not only her relationship with him, but his with CR. In many relocation cases the mother says that she will be "devastated" if she cannot relocate. The word "devastated" (to be caused severe and overwhelming shock and grief) is usually put into her statement by the draftsman, and the mother adopts it in the witness box. It is to LRG's credit that she did not allow this to happen.

21. There is some reason to think that the District Judge did not have the whole story in the summer of 2008. This conclusion can be reached not only by reference to material which seemingly was withheld from him but also by reference to events that occurred very shortly after M arrived in France in September 2008.

22. It appears that right up to the time that M left from France she and F maintained a sporadic sexual relationship. Approximately six weeks before they appeared in Court in August M became pregnant as a result of one such liaison with F. She was very happy to be pregnant and had made up her mind to stay in England after the birth so F could get to know the new baby. Unfortunately M started bleeding on the day that the parties appeared before the District Judge; and she subsequently miscarried. All this is clear from an email sent by M to F from France on 11 January 2009, entitled *"why we need to talk when I am in London"* . It says:

> When we went to court in August I wasn't sure that I would go to France even if I won. Haven't had started (sic) miscarrying on the first day at court (God is a sicko) I would have stayed whatever the judgement after all you had a right to get to know your child. ... When I discovered I was pregnant I was strangely ecstatic, I did all the things I didn't do for A as we found out too late ... I didn't tell you for the same reasons that in the end I decided to leave even though

having the right to leave didn't mean I had to ... I did it because there's two F ... there's one F who for his family and most of his friends has that evil ex namely me. That F rarely says anything good about his ex... There's also one F who played happy family with his ex and their son when he felt like being a family man two or three times a week (more would have been too much for both of us). He used that time to get laid or to be looked after if he was under the weather ... that F was due to have a second child in March 2009. To that F I would have told I was pregnant the moment I found out even though I knew how he would react, I didn't care I knew he was a great dad so what the hell, I didn't want him to be anything more in my life than a dad. ... A is unhappy, your best efforts to keep in touch with him have faults and those are toxic to him. My baby's relationship or lack of relationship with his dad is starting to be toxic to him. ... He is turning into a mamma's boy ... we need to talk about the situation and how to fix it when we're in London.

23. I rather doubt that the District Judge would have reached his conclusions concerning M's isolation here and determination to leave had he known that at the time of the hearing M believed that she would give birth to F's second child and would stay here so that he could get to know the baby.

24. In September 2008 M left for Troyes with A. There are indications that M did not intend this to be a permanent relocation. She did not give up her council tenancy of a flat in *(address)*. A remained registered at his GP. As seen from the email mentioned above M was planning to be in London shortly and was expressing doubts as to the wisdom of the move to France and its effect on A.

25. Once M arrived in France she obtained work as a supply teacher. However she told me that in late 2008 or early 2009, a mere matter of months after her arrival, she received a call from someone at Canal + saying that a brand new one year post-graduate course in investigative journalism had just been set up at the City University in London. M applied for this in January 2009 and was informed by a letter dated 24 March 20909 that she had been selected for interview on 8 April 2009.

26. On 3 April 2009 M and A arrived here on return tickets which specified a return date sometime in May. When M arrived here she was 6 months pregnant by M. M, the notary mentioned in the District Judge's judgment. (That pregnancy was later terminated here after a scan revealed a defect in the foetus).

27. M told me that to get onto the course a candidate needed in a first degree a First or a 2:1 plus experience and that as she had a 2:2 she was 99% sure she was not going to get in. I find this evidence hard to accept. If that were so, how had she managed to be granted an interview? And if M was in fact 99% sure she was not going to get in, what was she doing coming here for 6 weeks? She says she did so in order that F might have better contact with A, but I am convinced that the true reason was that she believed that she would have a realistic chance of succeeding at the interview. And that was not a misplaced view, for she did in fact so succeed and was offered a place in May 2009. M did not in fact take up the place until August 2009, after a further bout of litigation had erupted between the parties, which I will describe below.

28. The course began in September 2009 and has recently concluded. Armed with her new qualification M has applied for employment not only in French news media organisations but also with the BBC.

29. Following her arrival here in April 2009 M has resumed living with A at her *(address)*.

30. On 29 July 2009 F applied for orders (1) to set aside the grant of leave by District Judge Segal (2) prohibiting M from removing A from the jurisdiction (3) impounding the passports of A and M and (4) for residence of A. On 30 July 2009 King J made temporary orders preventing M and A leaving the jurisdiction. On the return day, 5 August 2009, M made an agreement whereby she unambiguously accepted the jurisdiction of this court. HHJ Finnerty ordered the return to M of her passport and the passport of A. A new contact arrangement between A and F was agreed and ordered. This provided that F would care for A for half of the holidays; on three afternoons each week; and on alternate weekends. Thus F has contact with A on 5 days out of 14. I calculate that on an annual basis A spends about 40% of his time with F under this order.

31. Although M has been free to travel since August 2009 she has not in fact travelled back to France even once since then.

32. Since September 2009 A has attended school at *(name)* Education Centre. There is a dispute between the parents as to where he should go to school from September 2010 if leave is refused. F suggests *(name)* Primary School. M suggests *(name)* Primary School. Both are excellent state primary schools well suited to meeting A's needs. A is an exceptionally gifted boy and has been officially recognised as such.

M's plans

33. If leave is granted M proposes to leave for France with A at the end of August 2010.

34. When M went to France in September 2009 she was able to obtain a place for A at a private Roman Catholic school in Troyes *(name)*, which M herself had attended. It is uncontested that that this is an excellent school. Unfortunately, on his removal to London in April 2009 A lost his place and would not be able to regain it, at least for a while, were he to return. Until a place becomes available he will have to attend a local French state school.

35. Until M establishes her own home it is M's proposal that she and A should live with her grandmother in Troyes. Her aunt lives in a village nearby. She has children aged 10 and 8 (A's first cousins once removed). M has siblings who live in Paris, and they also have children. M points to a family network in France the participation in which she argues would be beneficial to A.

36. M's own mother continues to live in Hayes. Her father, with whom she has had a troubled relationship on account of an ugly incident when she was a child, lives in Benin in West Africa.

37. M hopes to obtain employment in the world of journalism in Paris. Her mentor, a man named LE, has recently set up an independent media company and would have been minded to offer M employment but has held back being wary of being embroiled in this litigation. M accepted my assurance that LE had nothing to fear on this account and was of the view that accordingly he was more likely than not to offer her the job. This would mean a daily commute (when not working remotely) from Troyes to Paris – a 1½ hour train journey each way. Plainly, were M to work in Paris a great deal of A's day to day care would have to be undertaken either by A's great-grandmother, or by his great-aunt, or by a paid child-minder.

38. M's proposal for contact between A and F is set out in her solicitors' letter dated 25 May 2010 and is as follows (1) 8½ weeks in A's holidays and half-terms and (2) Six occasions of weekend contact in term-time. This contact amounts to 71 days a year, or 20% of A's time. Moreover, the term-time visits by F to Troyes will have to take place in an inexpensive local hotel, assuming he could afford the expense. On any view in terms of quantum, periodicity and most importantly quality the contact between F and A will be substantially diminished.

39. M seeks a residence order in her favour. She resists a shared residence order.

F's plans

40. Initially F sought a residence order in his favour. Now he seeks a shared residence order, but with the care being unequally weighted in his favour, so that M should care for A in term-time on alternate weekends on each Wednesday night. Holidays would be split.

41. In terms of family network F points to the presence of his father in Dartmouth Park (with whom A has a close relationship), to his mother in Scotland, and to his sister and her children in the USA.

42. Above all, F's case is predicated on the maintenance of a very full relationship with A, which relationship would be disrupted profoundly were A to return to France.

43. Although F has a qualification as a plasterer (as mentioned in the judgment of the District Judge) he has not as yet put his shoulder to obtaining remunerative work and lives on state handouts.

Assessment of the evidence

44. The Cafcass officer, Mrs Walton wrote a full report and gave oral evidence to me. I had a written report from a psychiatrist Dr Sullivan on M's mental state. He did not give oral evidence. M and F made full statements and gave oral evidence.

45. In his written report Dr Sullivan unsurprisingly found that M suffered from no mental illness. But his observations of M are highly acute. He wrote:

> At the time of my interview with M, I elicited no symptoms consistent with a mood disorder, for example depression, or a severe and enduring psychotic disorder. She has become depressed at times in the past and there are reports

that she has self-harmed, although there is no reference to these episodes in her medical notes. Since she engaged in psychotherapy M does not appear to have had any contact with psychiatric services or treatment with psychotropic medication according to her medical records. I note by her report that her mother has a history of bipolar affective disorder, which potentially raises M's predisposition to developing a psychotic illness herself. However, there is no record of this in her notes and from the information I have seen from my interview, it is my opinion that she is not suffering from any mental illness. With regards to personality disorder, I was struck by M's rather flamboyant presentation at interview, giggling and laughing at times and often becoming over-talkative. Her presentation was quite dramatic, for example crying at two points in the interview, then becoming angry and swearing, and at other times again laughing and giggling, particularly when recounting her childhood and adolescence. I note she has presented at an Accident and Emergency department once wishing to speak to doctors, and by her account this was not the only time: this perhaps suggests a rather needy element to her presentation at times. However, the most overwhelming theme from my interview with M was her apparent extreme self-belief and estimation of her abilities: I was particularly struck by her account of her talents and how she had managed to turn her hand to several different potential careers with seeming success. Whilst I do not consider that any of the clusters of traits that M displays are sufficient to warrant a diagnosis of personality disorder, it is my opinion that she has traits of some diagnoses relating to dimensions of personality, for example histrionic or narcissistic personality disorder. Amongst other traits, histrionic personality disorder is characterized by labile affectivity, theatricality, and exaggerated expression of emotions and egocentricity, all of which I would consider to be present in M. M also displayed elements of narcissism, as evidenced by her unshakeable self-belief and the manner in which she held herself and her abilities in very high regard. However, I do not believe that these are sufficient for her to reach threshold for a diagnosis of either disorder.

46. These observations were echoed by Mrs Walton and conformed with my assessment of M after watching her closely in the witness box. M is a highly intelligent and confident person. It may be suggested that she is over-confident and somewhat self-obsessed but she is certainly not delusional as to her abilities and ambitions. In character she is flamboyant, theatrical even. I judge her to be critical of F as a person and as a father. As I will explain, F is in personality her polar opposite.

47. M's personality traits are such that as regards dealings with F about A she has a tendency to be autocratic and to act unilaterally. I have no doubt that her motives are benign and not in any way malevolent, but there is great scope for misunderstanding when such traits are manifested. Thus F wrongly interpreted M's commencement of A's religious instruction (he was baptised in the Catholic faith by agreement) as an instance of unreasonable unilateral action. On the other hand, for M to have written, as she did on 12 June 2009, with the bald announcement that "A will be going to boarding school in France because you are unemployed and not financially committed to him", was to say the least unfortunate.

48. Just as was the case before the District Judge M did not make a mountain out of the disappointment she would undergo were leave to be refused. This is to her credit, but then credit should hardly need to be given to authenticity and a disinclination to dissimulate. I gained the strong impression that were leave to be refused M would make the most of her situation here; would seek to obtain employment and a better home; and would cooperate with F in co-parenting A.

49. As I have said, F is in personality the polar opposite of M. He is reflective, almost introspective. He gave his evidence calmly and persuasively. His devotion to his son was obvious. Other than an unwarranted degree of suspicion as to M's motives he gave credit to M where that was due. Mrs Walton said of him: "he doesn't dish the dirt on M" and "he offers to A an evenness and stoicism".

50. Mrs Walton found the case to be finely balanced both as to residence (in the sense of with which parent A should spend the greater part of his time) and as to relocation. She gave her evidence clearly and articulately but in effect left the decision on both these fronts to me.

Conclusions

51. I deal first with F's residence application. I reject it. M has always been A's primary carer, and notwithstanding her personality traits (which I do not regard as faults, but rather an example of just how varied personality can be) it is plainly in A's best interests that she should continue to be so. It would cause enormous upset and confusion to A were this status quo to be altered.

52. I am clearly of the view that a joint or shared residence order should be made. Indeed, such an order is nowadays the rule rather than the exception even where the quantum of care undertaken by each parent is decidedly unequal. There is very good reason why such orders 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. A joint/shared residence order is not inapt even if leave to relocate is granted: see *Re G.*

53. I now turn to M's renewed relocation application. In *Re C (Abduction: Residence and Contact)* [2006] 2 FLR 277 I considered at paras 21 - 28 the impact of Art 8 of the European Convention on Human Rights on applications for residence and contact. In Paragraph 28 I stated:

> On the facts of this case it is clear to me that supervised contact would only have been appropriate if there was the clearest and most compelling evidence that in some way S's best interests would be jeopardised by unsupervised, normal contact. Given the terms of the Strasbourg jurisprudence to which I have referred, it is almost as if there is a presumption in favour of normal contact and it is for those who say it is inappropriate to prove by clear evidence why this is so.

I would go further. If one were to draw up a hierarchy of human rights protected by the Convention I would have thought that very near to the top would be the right of a

child, while he or she is growing up, to have a meaningful participation by both of his parents in his upbringing. Although this is (strangely) not explicitly spelt out in the text it must be implicit in the notion of the right to a family life. Recognition of the existence of this very obvious and critically important right is sometimes, so it seems to me, lost in the relocation cases.

54. With this right at the forefront of my mind I turn to Thorpe LJ's discipline:

> (a) Is M's application genuine in the sense that it is not motivated by some selfish desire to exclude F from A's life? Is M's application realistic, founded on practical proposals both well researched and investigated?
> I do not think that M's application is selfish or malevolent in the way described. I do think however that to a degree M's application is motivated to some degree by a wish to consolidate what she regards as her greater decision making power over A. I am concerned by the lack of precision of M's plans in France both in terms of her work and the arrangements made for A's day to day care and education. Moreover, I consider the failure by M to sever her connections with this country and her swift return here in April 2009 signify an attachment to this country and its way of life that she has underplayed in her case before me.
> (b) Is F's opposition motivated by genuine concern for the future of A's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with A were the application granted? To what extent would that be offset by extension of A's relationships with the maternal family and homeland?
> I have no doubt that F's opposition is motivated by a genuine concern for A's future welfare. I believe that the relationship between F and A, which must be of equal importance to the relationship between M and A would be badly affected by a removal to France. The quality of the relationship, its intimacy and depth would in my view suffer greatly. To ask whether this would be offset by the relationship that A would have with M's family in France seems to me to compare chalk with cheese. Plainly the importance of the relationship that A has with F cannot be compared in any meaningful way with the relationship that A has with his maternal family in France.
> (c) What would be the impact on M of a refusal of her realistic proposal?
> As I have stated above I believe that M would accept an adverse decision responsibly and would work with F in co-parenting A in a meaningful way. She plainly has a significant attachment to this country and its way of life.

55. I now turn to the paramountcy principle as directed by the statutory checklist.

> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).
> A has stated that he expects to return to France. But at aged 5 I place little weight on this. It is likely to be a reflection of the views of his primary carer.
> (b) his physical, emotional and educational needs;
> A's physical and educational needs would be equally well met in London or Troyes. He has a strong emotional need to have a meaningful participation in his upbringing by F; this would be adversely affected were he to be relocated to France.

(c) the likely effect on him of any change in his circumstances;
To relocate A to France with the consequential effect on his relationship with F would, in my judgment be damaging to him.
(d) his age, sex, background and any characteristics of his which the court considers relevant;
I need record nothing further to that which I have written above.
(e) any harm which he has suffered or is at risk of suffering;
I need record nothing further to that which I have written above.
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
I need record nothing further to that which I have written above.
(g) the range of powers available to the court under this Act in the proceedings in question.
I need record nothing further to that which I have written above.

56. Reliance is placed by M on the fact that of all foreign jurisdictions, France, by virtue of its propinquity, is the place where relocation should be most readily ordered. While that argument has force, it cuts both ways. It will be very easy for M and A to maintain close contact with M's family. The main downside to a refusal of leave is M's inability to obtain a job in France; but I have no doubt that she will deploy her undoubted talents to obtain equally satisfying employment here.

57. Having reached these conclusions I step back and ask what would, *au fond*, be in A's best interests. I have concluded that they would be best served by his continuing to live here and being cared for by M and F in terms of quantum and periodicity along the lines presently obtaining.

58. M's application for permission to relocate is therefore refused.

59. As to the education issue, I do not have sufficient material to make an informed decision. If the parents cannot agree they should each file a further statement setting out precisely why the school for which each contends would best serve A's interests.