Neutral Citation Number: [2011] EWCA Civ 793

Case No: B4/2011/0457

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Her Honour Judge Bevington
FD10P01682

Royal Courts of Justice
Strand, London, WC2A 2LL
07/07/2011

B e f o r e :

THE RIGHT HONOURABLE LORD JUSTICE THORPE
THE RIGHT HONOURABLE LORD JUSTICE MOORE-BICK
and
THE RIGHT HONOURABLE LADY JUSTICE BLACK

Between:

MK — Appellant

- and -

CK — Respondent

Miss Deborah Eaton QC and Miss Madeleine Reardon (instructed by Messrs Withers LLP) for the Appellant
Timothy Scott QC and Indira Ramsahoye (instructed by SA Law LLP) for the Respondent
Hearing date: Wednesday 18th May 2011

HTML VERSION OF JUDGMENT

Lord Justice Thorpe:

Introduction

1. In January of this year Her Honour Judge Bevington, sitting as a Deputy in retirement, heard a complex and finely balanced relocation application. She devoted four days to hearing oral evidence and submissions. She heard from the parties, the CAFCASS officer, the maternal grandmother, the paternal aunt and the

mother's general practitioner. At the end of those four days she reserved for a week, delivering an oral judgment on 3rd February 2011. She granted the mother's application to relocate to Canada.

2. At the conclusion of judgment there were lengthy further submissions which now cover 23 pages of transcript. A ruling or an indication was sought on a variety of ancillary matters. These exchanges were clearly inspired by a general desire to achieve parental acceptance that would ease the removal to Canada and to put in place arrangements that would minimise the impact of the removal on the father's relationship with the children. These exchanges were certainly not adversarial in tone and, as Mr Timothy Scott QC remarked, show Judge Bevington speaking with the voice of mediator rather than judge.

3. Miss Janet Bazley QC, who appeared below for the father, spoke with the same commendable and constructive moderation. However, at one stage, with the most perfect courtesy, she observed that, in addressing the *Payne* guidelines the judge had only considered the mother's case and had endorsed it without any reference to the father's case. Miss Bazley concluded:

> "I do not know if you would like to say anything about that now, just to cover those matters?"

4. The judge responded:

> "Yes, of course. I think I have said I have taken everything into account that has been placed in front of me. Of course that includes the impact upon the father himself as a person because, as I have said, I know he is devoted to these two little girls. Of course, it is natural, when a relocation case is allowed, that there is likely to be some alteration or diminution of the physical contact between the children and the parent who is remaining in this country. Of course, I take that into consideration. It seems to me that hopefully, as I said, the father will, with the flexibility which he may be able to arrange, be able to visit the children very much more frequently than they would be able to visit England were they in Canada. That is because, of course, the school terms which are rather differently configured from those in England. It would make visits for the shorter holidays very difficult for the children. But, I see no reason at all why the father should not be able to visit the children frequently and regularly, including of course the short holidays that the children have – possibly half-terms and possibly at other times as well. Of course, I take that into consideration. I am sorry if it did not appear to be said in my judgment. But, of course I have."

5. Then when all was settled Ms Bazley moved from cooperation in implementation to an application, again expressed with perfect courtesy:

> "Your Honour, I ought to cover formally the question of permission to appeal because your Honour is not regularly here – in case. We are obviously going to have to consider the father's position and give him careful advice about that. But, would your Honour just formally cover that?"

6. The judge responded saying that she had considered the case very carefully, had done her best, and would refuse permission.

7. The appellant's notice was filed on 24th February with grounds of appeal settled by Ms Bazley. There was then a change of solicitors and counsel and the skeleton argument, written by Ms Deborah Eaton QC and Ms Reardon, was dated 22nd March. On 7th April I directed an oral hearing on notice with appeal to follow on 18th May.

8. The respondent's skeleton argument written by Mr Timothy Scott QC leading Ms Indira Ramsahoye was dated 10th May.

9. Shortly before the hearing both parties applied to admit evidence of events since the trial. Sadly both have been treated for stress and depression and the father asserts that the mother is not supporting the maintenance of his relationship with the children. To that the mother has filed a statement in reply.

10. We granted both applications before hearing argument on the appeal.

11. That is the history of the proceedings at trial and on appeal. I now turn to the family background.

Family background

12. The mother is of Canadian origin. The father is Polish although he spent childhood years in Canada. He moved to England in 1993 and the mother arrived here 10 years later.

13. The parents married in London on 27th July 2004. They have two daughters, I born 16th November 2006 and A born on 8th January 2009. Later in that year the marriage became unhappy and in July 2010 divorce proceedings were filed and the mother moved out of the matrimonial home, renting a flat in Pimlico.

14. Both are employed in the banking world and both work less than full time to enable them to be more involved with the children. A shared residence order was made by the District Judge on 23rd August 2010. Under its terms the girls spend five nights with their father and nine nights with their mother in every fourteen day period.

15. However, as Miss Eaton explained, the father is released from work on Friday and Monday. Thus he has six consecutive days with his daughters. During this period he cares for the girls unaided.

16. The mother does not work on Wednesday. On that day, and at the weekends, she is with the children. Otherwise she relies upon the nanny who moved with her when she left the home. Thus although the mother has more nights the girls spend more daylight hours in the company of their father. So Ms Eaton demonstrates that this is a case in which there is not only a shared residence order but also an arrangement for the sharing of care under which the father's part is not inferior to the mother's.

17. The mother comes of a supportive family. As well as her parents she has a brother with two daughters of much the same age as hers.

18. The father too has supportive parents and his younger sister, who lives nearby, also has a major part in the life of the girls.

19. Sadly the relationship between the mother and her parents in law and sister in law is not good.

The Trial

20. The mother presented a classic application for relocation following the failure of the marriage. She wanted to go home. Here she was isolated and stressed. There she would be able to live within her parents' home receiving emotional and material support.

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

22. The judge had the benefit of a report from a CAFCASS officer, Ms Susan Mullally. Her written report skilfully and sensitively sets out the factors and the crucial balance. In her oral evidence she emphasised that the judge had to weigh the balance between the detriment to the children if they remained and the detriment that would result from a diminished relationship with their father. She presented it to the judge as a fine and difficult balance.

23. She concluded that that balance came down against the move and recommended the refusal of the application.

24. However, in considering the impact of refusal on the mother, she observed:

> "It would be essential for the mother to feel supported as a parent and an adult in her own right in England and, I feel, for some acceptance by the father that should she still wish to return to Canada in 3-4 years time, all being equal, this is likely to be in the best interests of the children."

The judgment below and the submissions on appeal.

25. Ms Eaton has had an easy task in criticising the judgment below. Her full and able skeleton might be reduced to three principal points:

i) The judge rejected the recommendations of the CAFCASS officer without proper analysis and explanation.

ii) She directed herself by reference to the guidance offered by Dame Elizabeth Butler-Sloss P. at paragraph 85 (guidance apt for applications by primary carers) rather than by reference to the decision of Hedley J in *Re Y* [2004] 2 FLR 330 (the only authority then available directly considering a relocation application by a care sharer).

iii) In explaining her conclusion she referred only to the case that the mother presented. Even when that deficit was raised by Ms Bazley, she had not remedied the defect.

26. Mr Scott has done his best to support the judge. He has sensibly accepted the imperfections. He accepted that his submissions were but an attempt to rescue the judgment or at least to point out its better parts. He relied upon a list of findings or quasi findings which he had extracted from the judgment. He then submitted that, however deficient the judgment, these findings in favour of the mother are so strong and numerous we could not, ourselves, set aside the permission in the exercise of an independent discretion.

27. Both counsel in their submissions have taken us through the line of authorities in this field. Ms Eaton began at the beginning with the judgments of this court in *Poel v Poel* [1971] WLR 1460, then followed *A v A* [1981] 1 FLR 380, *Payne v Payne* [2001] 1 FLR 1052, *Re Y* [2004] 2 FLR 330 and a recent unreported case of *C v D* [2011] EWHC 335 (Fam).

28. The purpose of this journey was to demonstrate how reliant the line of authority is on the primary carer status of the applicant. Since the judgment of Hedley J in *Re Y* there is clear authority that the *Payne v Payne* line is not to be applied in cases where the applicant shares the care of the children more or less equally with the respondent.

29. Mr Scott, in his submissions, also draws attention to *Payne* and particularly paragraph 11 which establishes that the children were in the physical care of the respondent for just over 40% of their routine. He then referred us to the decision of this court in *Re L* [2009] 1 FLR 1157 from which he seeks to extract the proposition that the same principles apply whether the applicant is a primary carer or a parent with shared residence order. For completeness he also drew our attention to the very recent decision of this court in *Re W* [2011] EWCA Civ 345.

30. Despite Mr Scott's valiant efforts, I am in no doubt that Ms Eaton succeeds in all of her three criticisms and that any one of them would be sufficient to upset the judgment below.

31. The judge had dealt with the CAFCASS officer's opinion by characterising it as a recommendation to adjourn the issue. But that only flowed from the suggestion that the mother deserved the palliative of an expectation of success in three to four years' time and it is not a fair characterisation of the report. Its clear recommendation was that the mother's application should be refused. What she said as to the future was little more than a speculative observation.

32. In consequence, given the clarity of the recommendation, there can be no denying the judge's obligation to explain why she rejected it. It could not legitimately be finessed in the way that the judge attempted.

33. The judge had very little to say about the law. There is only this in paragraph 16:

"I have reminded myself of the line of authorities on the issue of relocation and, indeed, of orders for joint residence. The seminal authority on relocation is the case of *Payne v. Payne*, decided in 2001, in which the old authorities of *Poel v. Poel* [1970] and *A. v. A.* [1980], amongst others, were considered. There has been a long line of court decisions on this point. I am most grateful to counsel for refreshing my memory of some of the more recent authorities: *Re. W* [2008], *Re. L* (shared residence) [2009], and *J v. S* [2010]."

34. In the next paragraph the judge continued:

"In *Payne*, however, Dame Elizabeth Butler-Sloss…set out and distilled for us the principles which the court should follow in applications such as the present."

There then followed paragraphs (a) to (g) extracted from paragraph 85 of the judgment.

35. I am in no doubt that that is a misdirection as to the law. Given the extent to which the father was providing daily care, the judge should have considered and applied the dicta of Hedley J in *Re Y* rather than those of the President in *Payne*. Unfortunately it appears that the case of *Re Y* was not cited and the judge can surely be excused from overlooking it.

36. Finally, nothing can rescue the judge's failure to explain her conclusion as she did in the concluding paragraphs 31-35:

"31. Taking the guidance to which I have already alluded, set out in *Payne*, I am satisfied that the proposals of the mother are reasonable. Toronto, like London, has a lot to offer those who live there or visit. The mother's family have been, I am sure, a great support to her. She wants to continue to have that support to an even greater degree now that she and the father have separated. Her present relationship with him is obviously of a different order to the days when they were happily married. Unfortunately, as I have said, her relationship with the father's parents and sister seems to have cooled over recent months. Now that the couple's difficulties have been aired in court it may be that the father's family will be even less well disposed towards the mother. She is unlikely to gain a great deal of support from them following this case, leading, I anticipate, to her greater feeling of isolation.
32. I am satisfied from all that I have heard that the mother has a genuine motivation for a move to Canada. It is not, in my judgment, her intention to bring contact between the children and their father to an end. Although, as it has been suggested by the father, the mother would be able – and he would create a £10,000 fund – to travel frequently to Toronto, it seems to me that that fund could be earmarked for him to travel as often as his work permits to visit his daughters. He would not, of course, be confined to visiting them during school holidays and short visits would, I believe, be possible and less expensive for him as a single traveller. Flights between London and Toronto are frequent and regular. If I and A are at school in Toronto I do not envisage that contact need be denied. The father could visit them as frequently as he is

able, and if his contact were during school term or at half-term, he would be able to visit their school and even attend some school functions.
33. Importantly, I have to consider the effect on the mother and, consequently, upon the children of a refusal of her application. In my judgment she would feel increasingly isolated and depressed, which would be damaging for the children. I have read the wife's petition and it is clear to me that were she to fail in her application the father's family might not be fully supportive of the mother. She has had some difficulties with her in laws already, as I have said, and this seems to be accepted by the father and his sister. I cannot envisage an improvement in the near future. If the mother were required to remain in London where I am satisfied she has not been happy in recent times, her distress is highly likely to increase with consequential impact upon the girls' welfare.
34. I have looked at the mother's proposals with great care. They are reasonable in my judgment and the children's welfare will be secured by having their mother within a supportive family environment.
35. It follows from what I have said that I will grant the mother's application to relocate to Toronto with the children."

37. Her conclusion is not the result of a balancing of pros and cons. She lists only the pros upon which she pronounces her conclusion. That is, in my judgment, a fatal deficit.

The Law

38. Given the full and careful citation of authority it is necessary to make some further observation on the state of the case law.

39. As My Lord, Moore-Bick LJ, pointed out in argument, the only principle to be extracted from *Payne v. Payne* is the paramountcy principle. All the rest, whether in paragraphs 40 and 41 of my judgment or in paragraphs 85 and 86 of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy.

40. In family law principles are scarce and generally the more important function of this court is to state guidance. Guidance that directs the exercise of the welfare discretion is equivalent to a statutory checklist. It is valuable if it renders outcomes more predictable and if it supports judges in reaching and explaining discretionary conclusions in a way that is not open to appellate challenge.

41. I am in no doubt at all that the guidance in *Payne* is posited on the premise that the applicant is the primary carer. It so states in terms.

42. It also reflects the fact that its foundation is the judgment of this court in *Poel*.

43. In 1970, when *Poel* was decided, the court's statutory power was to make custody orders, care and control orders and access orders. Granting custody to one parent and care and control to the other was judicially criticised. Equally it was said that custody should not be awarded jointly to both parents, save in exceptional circumstances. So the ratio of the court was that, whilst the welfare of the child was

paramount, the custodial parent should be supported in her choice of habitual residence. As Sachs LJ put it in his judgment, post separation a child "instead of being in the joint custody of both parents, must of necessity, become one who is in the custody of a single parent."

44. Of course that all now seems archaic given our shift from parental power to parental responsibility introduced by the Children Act 1989 and given the more recent emphasis on the value to children of shared parenting where the parental relationship and the circumstances are favourable.

45. In *Payne* the continuation of the whole line of authority into the 21st Century was challenged by reference to the Human Rights Act 1998 rather than by reference to the Children Act 1989. That is clear from the record of the submissions for counsel for the appellant. He did not submit that the ratio in *Poel* could not survive such sweeping socio-legal changes. He did not submit that the ratio in *Poel* could certainly not be applied to an applicant who had not a custody order and, despite her residency order, in reality was sharing care on a 59%/41% ratio. In the brief judgment of Lord Justice Robert Walker there is reference to his concerns that *Poel* did not survive into the post Children Act era, concerns allayed by the circulation of the draft judgments.

46. Thus the survival of the authority of *Poel* into this century, in my judgment depends crucially upon the primacy of the applicant's care. As Ms Eaton put it, if she is supplying so much she must be supported in her task precisely because the children are so dependant on her stability and wellbeing. Once the care is shared there is not the same dependency and the role of each parent may be equally important. The judgments in *Poel* consider only the position of the primary carer and an earlier position where there is a pending contest as to who should be the primary carer. *Payne* does not anywhere consider what should be the court's approach to an application where there is no primary carer.

47. Another factor not considered in *Payne* is the mobility of the respondent: could he, should he also move? That is a factor which has risen in prominence over the last decade.

48. Despite a considerable degree of criticism, the decision in *Payne* has been consistently applied over the last decade in cases in which the applicant is a primary carer. The continuity of that proposition is demonstrated by the judgment of the President in the case of *Re W* dated 30th March 2011, as yet unreported but with neutral citation [2011] EWCA Civ 345. Whilst his judgment is largely concerned with the facts, I draw attention to paragraph 23 and the post script in paragraphs 128 and 129.

49. I must also explain why I do not accept Mr Scott's submission that the judge rightly concluded from the decision in *Re L* that the same principles applied in relocation whether the applicant had a residence order or a shared residence order.

50. Mr Scott fairly emphasises the first sentence of paragraph 36 of the judgment of Wall LJ in which he says:

"In my judgment, therefore, it is wrong in principle to apply different criteria to the question of internal relocation simply because there is a shared residence order."

51. But that sentence must be put in its context, namely all of paragraph 36 and paragraphs 51 and 52.

52. Although, as Mr Scott points out, the boundaries between internal and external relocation often appear paradoxical (his example was Dover-Calais external: Dover-John O'Groats internal), there is no doubt that different statutory provisions and different lines of authority apply in internal and external relocation cases.

53. In terms of statute the prohibition on removal without written consent or the leave of the court is only where a residence order is in force with respect to a child and the removal is from the United Kingdom: see section 13(1) of the Children Act 1989. The authorities that we consider on this appeal are those governing removals caught by section 13(1).

54. Where the relocation is internal, and so not prohibited by section 13(1), the general rule is that a parent with a residence order is entitled to plan an internal move unless exceptionally demonstrated, on an application for a prohibited steps order, that the move would be injurious to the welfare of the child. Those authorities are listed in paragraph 12 of the judgment in *Re L.* They are quite distinct from external relocation authorities.

55. Furthermore the first sentence of paragraph 36 was expressed in the context of the submission that a shared residence order constituted a bar to an internal move. That submission was rejected by Lord Justice Wall who stated that the critical balance was between "the freedom to relocate which any parent must enjoy against the welfare of the child which militates against relocation."

56. Finally I must deal with the authority which I consider the judge should have applied namely *Re Y.* Having cited *Payne* and the President's guidance at paragraph 85, Hedley J continued:

"[14] Now, the court clearly contemplates two different states of affairs. The one, the more common and in some ways the more obvious, is where the child is clearly living with one parent, and it is that parent that wishes to leave the jurisdiction, for whatever reason. The other, and much less common state of affairs, is where that does not exist and either there is a real issue about where the child should live, or there is in place an arrangement which demonstrates that the child's home is equally with both parents. In those circumstances, which are the ones that apply in this case, many of the factors to which the court drew attention in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 whilst relevant may carry less weight than otherwise they commonly do.

[15] The father does not have an application for a residence order in this case, but it was raised only in response to the mother's application for permission to remove, and the father's actual proposal is for a continuation of the present position.

> [16] This case accordingly falls outside the main run of cases that one encounters where this problem is raised, and certainly within my own experience is unique. What it seems to me I must do is to remind myself of the opening provisions of the Children Act 1989. Section 1(1) says that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration, and in considering these issues I have to take a number of matters into account as required by s 1(3). It seems to me that of those matters, the ones that are important in this case are the educational and emotional needs of *Y*, the likely effect on him of any change in his circumstances, and his age and background so far as his life is presently concerned. It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided."

57. I fully concur with the reasoning and conclusion of Hedley J. What is significant is not the label "shared residence" because we see cases in which for a particular reason the label is attached to what is no more than a conventional contact order. What is significant is the practical arrangements for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in *Payne v. Payne* should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989.

58. An excellent example of this approach is to be seen in the recent judgment of Mrs Justice Theis in the case of *C & D*, as yet unreported, neutral citation [2011] EWHC 335 (Fam). Under the sub-heading "Welfare check list" she turns in paragraph 64 to a detailed consideration of its subparagraphs over the course of three pages of judgment. That exercise leads her to her conclusion stated in paragraphs 65 and 67.

59. The adjustment in judicial approach signalled by Hedley J is unlikely to affect many orders. A recent national survey, "Understanding Society", puts the proportion of equal shared care at 3.1% of the total.

Conclusion

60. For all these reasons I am in no doubt that permission must be granted and the appeal allowed. The consequences are devastating for the parties and a matter of considerable concern to me. Mr Scott sought to submit that the case could be remitted to HHJ Bevington on the authority of *Re B* [2003] 2 FLR 1035. With due respect, that is a hopeless submission. There are three defects in judgment and only one is a defect of omission.

61. I accept Mr Scott's submission that neither parent can afford further litigation and that neither parent is presently fit to litigate at a retrial which would encompass not only all the material before the judge in January but the further material that has emerged since.

62. However there is no other principled consequence once the order below is set aside. It would be quite impossible for this court to exercise an independent discretion in a case which crucially depends upon oral evidence and the assessment of the witnesses.

63. I can only urge the parties to consider mediation, exploring an immediate future in this jurisdiction flowing into a planned future move to Canada. From the children's point of view the ideal future move would be of both parents. Fortunately all four members of the family have Canadian and British citizenship.

64. If the parties are agreeable, mediation is available within the Court of Appeal scheme. However mediation may not be agreed or may fail and accordingly consideration may need to be given as to the where and when a retrial should be fixed.

Lord Justice Moore-Bick:

65. The issue for decision in this case is whether the respondent, Mrs. K ("the mother"), should be allowed to remove the couple's two children, A, now aged 2, and I, now aged 4, permanently to Canada. The children's father, Mr. K ("the father"), resisted the application on the grounds that it would not be in the best interests of the children to sever their connection with him at this stage in their lives. The judge below exercised her discretion in favour of allowing the application, but the father says that she failed to consider certain important aspects of the family's circumstances which pointed strongly against the removal of the children, failed to consider his right to enjoy family life with them and failed properly to apply the law as it has developed in recent years.

66. The background to this appeal has been described by Thorpe L.J. and I need not repeat it. The essential facts are that the father and the mother met at university in Toronto in 1992, were married in London in July 2004 and subsequently had two children, A and I. Unfortunately the marriage did not last and in the autumn of 2010 the couple were divorced. Nonetheless, they remained on amicable terms and were able to agree arrangements under which the children spend five nights a fortnight with the father and nine with the mother. Those arrangements have been working well since September 2010. The father's devotion to the children is demonstrated by the fact that he has persuaded his employer to allow him to fit two full working weeks into seven working days so that he is free to make himself available for the children for six full days in succession. The mother also works, but is able to be free one day a week and at week-ends. She is assisted by a full-time nanny.

67. The father is Polish, but has spent a considerable part of his life in Canada. He has a sister living in this country and parents living in Poland. The mother is Canadian, with family living in Canada. She wishes to return to Canada to live near her family and to enjoy the particular benefits of living in that country. She also considers that Toronto, where she wishes to live, would provide better surroundings in which to bring up the children. However, her main reason for wishing to return to Canada is that she feels isolated and lonely living in this country. As a result her mental health has suffered to the point at which she has

been prescribed medication for stress and depression. She regards herself as the primary carer of the children and is concerned that, despite her best efforts to conceal it from them, her distress will adversely affect them. She submits that she should therefore be allowed to return with them to Canada. The father says that the mother is not the primary carer; there is a shared residence order and in reality the care of the children is shared almost equally between them. That, in his submission, is a factor which makes this case different from other relocation cases that have come before the courts.

68. I think it is helpful to begin by considering the law applicable to cases of this kind. Miss Eaton Q.C. began by reminding us of the decision of this court in *Poel v Poel* [1970] 1 W.L.R. 1469. In that case the mother of a two year old boy who had been granted custody of the child following her divorce from his father wished to emigrate to New Zealand with her new husband and take the child with her. The court granted her permission to do so on the grounds that it would be in the best interests of the child to allow his mother to emigrate, taking him with her. The case was cited to us principally for the observations of Winn and Sachs L.JJ. Winn L.J. said at page 1471C-H:

> "It seems to me that in approaching this very finely balanced problem — which involves a difficult and a sad decision — the court should have regard primarily to the welfare of the child. Just as in disputed custody cases, so in a case which substantially is concerned with the subsequent issues resulting from the making of a custody order, the welfare of the child is the primary consideration which should weigh with the court. Further, it is to be regarded, I think, as a very dominant factor in such a dispute that there has been an order (which in fact was not resisted) for custody in favour of the one parent, in this case the mother, and that there is every indication that the custody thus ordered has been working satisfactorily in every respect; and that although, naturally, the other parent will feel — and this father does feel — that the access permitted to him is not all that he would wish, in no other respect is it suggested in the slightest degree that the custody arrangements have been anything but entirely beneficial to the child and satisfactory in general to the parties concerned.
> . . .
> . . . It is a grave thing that the boy will be deprived of the advantage, which he would have had if he had been brought up in close contact with his natural father, of having the advice of his father from time to time, and, in case of need, of falling back upon him for protection and care. But, save in emergency, there is no reason to fear that the arrangements which are being made for his protection, support and upbringing are in any respect to be regarded as inadequate properly to serve the protection of his welfare, physical or mental."

69. Sachs L.J. said at page 1473D-F:

> "When a marriage breaks up, 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 my Lord has pointed out, produce considerable strains which would not only be unfair 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."

70. Those passages reflect a different age and a different approach to the care of children following a divorce, but they are still relied on by parents who wish to make new lives for themselves in another country, often with a new spouse.

71. In *A v A (Child: Removal from Jurisdiction)* (1980) 1 FLR 380 the mother of a two year old child of whom she had obtained custody following her divorce sought the court's permission to take him with her back to Hong Kong. Ormrod L.J., with whom Brandon and Brightman L.JJ. agreed, emphasised that the fundamental question in cases of this kind is what is in the best interests of the child.

72. In *Chamberlain v De La Mare* (1983) 4 FLR 434 the mother of two children aged 9 and 7 who had obtained custody of them following her divorce sought permission to take the children to the United States. Since the divorce she had re-married and had a child by her new husband, who wished to live in the United States for business reasons. When setting aside the judge's decision and allowing the application this court emphasised that the welfare of the children is the paramount consideration, but recognised that to prevent the parent with custody from emigrating may cause a deep sense of bitterness and frustration which may have a damaging effect on them. That is a factor of particular importance in a case where the mother has custody of the children, has re-married and wishes to emigrate with her new husband. As Griffiths L.J. said at page 445:

"If a step-father, for the purposes of his career, is required to live elsewhere the natural thing would be that he will wish to take his family, which now includes his step-children, with him, and if the court refuses to allow him to take the step-children with him he is faced with the alternative of going and leaving the family behind which is a very disruptive state of affairs and likely to be very damaging to those step-children, or alternatively he may have to throw up his career prospects and remain in this country. If he has to do that he would be less than human if he did not feel a sense of frustration and, do what he may, that may well spill over into a sense of resentment against the step-children who have so interfered with his future career prospects. If that happens it must reflect upon the happiness and possibly even the stability of this second marriage."

73. That brings me to *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam. 473, [2001] 1 FLR 1052, a decision which has been much criticised by some practitioners in recent times on the grounds that it is unduly prescriptive and requires the courts to adopt an approach that is unduly favourable to those, almost invariably mothers,

who seek to remove children from the jurisdiction (and thereby almost invariably from contact with their fathers) in order to pursue a new life abroad. In that case the father argued that through their decisions the courts had created a presumption in favour of applicants that was incompatible with the European Convention on Human Rights and with the Children Act 1989.

74. In paragraph 25 of his judgment Thorpe L.J. emphasised that there was no such presumption in Children Act cases, but he noted in paragraph 26 that for many years relocation cases had been decided on the twin bases that the welfare of the child is paramount and that refusing the primary carer's reasonable proposals is likely to have a detrimental effect on the welfare of the children. The application would therefore be granted unless incompatible with their welfare. He also explained in paragraphs 27-28 why guidance from this court is valuable, particularly in relocation cases. In paragraph 31 he explained why the mental and physical welfare of the primary carer is of such importance for the welfare of the child and observed in paragraph 32 that in most cases the effect of a refusal on the mother is likely to be crucial. Later, when suggesting in paragraph 41 how judges should approach these cases, he emphasised that in any evaluation of the welfare of the child great weight should be given to that factor.

75. In paragraph 84 of her judgment Dame Elizabeth Butler-Sloss P. reiterated that there is no presumption in favour of the applicant, while at the same time recognising that reasonable proposals made by the applicant parent, the refusal of which would have adverse consequences upon the stability of the new family and therefore an adverse effect upon the welfare of the child, remained a factor of great weight. She continued:

> "As in every case in which the court has to exercise its discretion, the reasonableness of the proposals, the effect upon the applicant and upon the child of refusal of the application, the effect of a reduction or cessation of contact with the other parent upon the child, the effect of removal of the child from his/her current environment are all factors, among others which I have not enumerated, which have to be given appropriate weight in each individual case and weighed in the balance."

76. Finally, in paragraphs 85-86 the President summed up the position as follows:

> "85. In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.
> (a) The welfare of the child is always paramount.
> (b) There is no presumption created by section 13(1)(b) of the Children Act 1989 in favour of the applicant parent.
> (c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.
86. All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear, as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence. The mother in this case already had a residence order and the judge's decision on residence was not an issue before this court."

77. *Payne v Payne* was in one sense a less complicated case than the present in as much as the mother had a residence order in her favour and was treated for practical purposes as the sole carer of the child, even though the father also provided a significant amount of care. There was evidence that continuing to live in England rather than being able to return to her family in New Zealand was having an adverse effect on her mental well-being and thus on the welfare of the child. No doubt the guidance which the judgments contain is of great value, but it must be read and understood in the particular context in which it was given.

78. In *Re Y (Leave to Remove from the Jurisdiction)* [2004] 2 FLR 330 the circumstances were different in some material respects. In particular, the child was the subject of an informal arrangement between his parents under which they shared his care almost equally and he had become integrated into the culture of Wales where he and both his parents lived. Having considered *Payne v Payne*, Hedley J. held that many of the factors to which the court there drew attention carried less weight than might otherwise have been the case because of the particular circumstances of the parties before him. He declined to allow the mother to take the child with her to the United States, even though there was evidence that she felt isolated and distressed living in the United Kingdom and wished to return to her own country. The judge reminded himself, rightly in my view, that the welfare of the child was "the lodestar by which the court at the end of the day is guided" and which in the last analysis "overbears all other considerations, however powerful and reasonable they may be."

79. If matters had remained there, I doubt whether the decision in *Payne v Payne* would have attracted much, or indeed any, criticism, but they did not. In *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008]1 FLR 1587 the father sought to challenge an order giving the mother permission to remove the children to

Germany on the grounds that the guidance in *Payne v Payne* had become outdated and was being wrongly applied in cases where there were shared residence orders. In that case the children were in fact spending almost half their time with him. When refusing permission to appeal Thorpe L.J. expressed the view that the court was bound by the decision in *Payne v Payne* as long as there had been no clear social change that required its reconsideration and that there had been none. Strictly speaking, this decision, although reached after full argument and with the benefit of the assistance of eminent leading counsel, is not authority and ought not to have been cited: see *Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001 (CA). The court's attention does not appear to have been drawn to *Re Y (Leave to Remove from the Jurisdiction)* and the decision appears to have been treated as reinforcing the view that the detailed guidance given in *Payne v Payne* is to be followed regardless of the particular circumstances of the case.

80. Counsel also sought to refer us to the decision in *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50, [2010] 2 FLR 1605, another case in which the father of a child sought permission to appeal on the grounds that the guidance in *Payne v Payne* placed too much emphasis on the wishes and feelings of the relocating parent and ignored the harm done by severing the child's relationship with the parent left behind. Wall L.J. refused the application and in doing so expressed the view that the principles and guidelines in *Payne v Payne* could be altered only by legislation or by a decision of the Supreme Court. This is another decision made on an application for permission to appeal, in this case one at which only the father, appearing in person with the assistance of a Mckenzie friend, had been heard. Again, it is not authority and ought not to have been cited.

81. In *Re H (Leave to Remove)* [2010] EWCA Civ 915, [2010] 2 F.L.R. 1875 a further attempt was made to challenge what was seen as a too rigid application of *Payne v Payne*. Wilson L.J. said (paragraph 21):

> "In this court we are well aware of the criticisms made, both domestically and internationally, of its decision in *Payne*. Nevertheless one must beware of endorsing a parody of the decision. Both Thorpe LJ, at [26(a)], and the President, Dame Elizabeth Butler-Sloss, at [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."

82. He then referred to paragraphs 26(b), 32 and 40 of the judgment of Thorpe L.J. which, he said, had given rise to some controversy among family lawyers. He also referred to the Washington Declaration and rejected the submission that this court should replace the guidance given in *Payne v Payne* with that contained in paragraphs 3 and 4 of the Declaration, describing it as "lacking elementary legal discipline".

83. In *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 Mostyn J. made a shared residence order on the basis that the mother would remain the primary carer, but dismissed the mother's application for permission to take the child to France. In the course of his judgment he expressed the view that *Payne v*

Payne "placed heavy, arguably decisive, emphasis on the impact on the primary carer of a refusal of leave", with the result that there was a tendency towards almost invariable success of the application, save in cases where it was demonstrably irrational, absurd or malevolent (paragraph 7). That led him to express the view that a review of the guidance given in *Poel v Poel* and *Payne v Payne* was urgently required.

84. In *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam) Eleanor King J., while loyally recognising the authority of the guidance given in *Payne v Payne*, emphasised, rightly in my view, that the effect on the mother of refusal of permission to remove the children from the jurisdiction was only one component of an assessment of what was in their best interests. Having considered the line of authority to which I have referred, she said in paragraph 81 of her judgment:

> "Mr Scott-Manderson [counsel for the respondent father] properly and appropriately accepted in submissions that this court is bound by the Court of Appeal decision in *Payne*. I have, therefore, to decide this case on the basis of the *Payne* discipline regardless of whatever a growing tide of opinion may or may not say about that approach. What Mr Scott-Manderson says is that, at the end of the day, *Payne* says one thing namely that the welfare of these two children is paramount. I agree. This court, he submits, must be careful not to allow itself to become confined in a strait-jacket, with the series of questions presenting the only test. Care, he says, must be taken to ensure that the question of the impact of refusal of the mother is but one component of an assessment of the best interests of the boys and not the only feature. I unhesitatingly agree."

85. Finally, it is necessary to refer briefly to the decision of this court in *Re W (Children)* [2011] EWCA Civ 345, in which Sir Nicholas Wall P. re-emphasised that in relocation cases judges must apply the criteria and guidance set out in *Payne v Payne*. Elias and Lloyd L.JJ. agreed, but it is interesting to see a note of caution appearing in the comment of Elias L.J. that "*Payne* is binding, to the extent at least that guiding principles can be said to bind a court."

86. I accept, of course, that the decision in *Payne v Payne* is binding on this court, as it is on all courts apart from the Supreme Court, but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles. I am conscious that any views I express on this subject will be seen as coming from one who has little familiarity with family law and practice. Nonetheless, having considered *Payne v Payne* itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance. In my view Wilson L.J. was, with respect, quite right to warn against endorsing a parody of the decision. As I read it, the only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from

which no departure is permitted. Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child. As Hedley J said in *Re Y*, the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in *Payne v Payne* intended to suggest otherwise.

87. In the present case the judge referred briefly to *Payne v Payne* and to subsequent authorities, including *Re L (Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157 (a case on internal relocation) and *J v S*, but she did not discuss them in any detail, referring only to paragraph 85 of the President's judgment in *Payne v Payne*. I agree with Thorpe L.J. that the judge did not give sufficient consideration either to subsequent authority or to the need to consider the particular facts of the case before her and the weight to be given to different aspects of them. When detailed guidance has been given by this court one can understand that a busy judge may be tempted simply to apply it without detailed enquiry, but it is an unduly mechanistic application of the guidance given in *Payne v Payne* that lies behind the current concern.

88. The judge had the benefit of a CAFCASS report prepared by Ms Suzy Mullally which was based on her consideration of the witness statements and meetings with the father and the mother individually, both with the children present and without. She also spoke to the head teacher of I's nursery school. She described the mother as being tearful throughout both meetings and recorded her as saying that she felt isolated and lonely and imprisoned in this country. She felt unable to give herself as fully as she would have wished to the task of caring for the children. Ms Mullally described the father's concern that his relationship with the children, particularly I, would be seriously affected if they were to move to Canada. He considered that it was essential for him to continue in a day to day parenting role if he were to maintain a strong relationship with them. He was concerned that A would forget him altogether if they were to move abroad.

89. Ms Mullally noted that the children had strong positive attachments to their father, whom they saw as a day to day parent. She recognised that there were benefits to be gained from their moving to Canada with their mother, but she was concerned about the emotional effect on them both, but particularly I, of a significantly altered relationship with their father. A move would mean a fundamental change in who they would see as their close family and would remove the possibility of their experiencing hands on parenting from both their mother and their father. She regarded the mother's emotional health, if she were required to remain in this country, as a factor to which a good deal of significance should be attached. She accepted that if in three to four years' time the mother still wished to return to Canada that was likely to be in the best interests of the children, but she proposed that they should remain in this country for the time being under the shared care arrangements and therefore recommended that the application be refused.

90. The report strikes me as informed, thorough and well-balanced. The recommendation that the application be refused was made after careful consideration of all the factors involved in this case, including the mother's emotional condition and its likely effect on her ability to care for the children. It is a report which deserved to be taken very seriously and if the judge was to reject the recommendation it was necessary for her to explain clearly and cogently why she had decided to do so. Unfortunately, the judge did not, in my view, give the report the respect it demanded. She regarded the report as proposing, in effect, an adjournment of the application, a fault which she was inclined to attribute to Ms Mullally's relative inexperience in dealing with relocation cases. The judge thought that if the parents were still at odds in three or four years' time they would be unable to afford the costs of a second hearing and that from the children's point of view the upheaval would be even greater. They would have started school and would have begun to build up their own circle of friendships which would be disrupted as well as the bonds with the father. She also considered that the uncertainty and anxiety over their longer term future would adversely affect their sense of security. She therefore reached the conclusion that it was not in the best interest of the children to defer a decision.

91. In my view the judge's approach to the CAFCASS report was flawed in two respects. First, Ms Mullally's proposal was not to adjourn the application. She recognised that it might be in the children's best interests to move to Canada in due course, but she was clear that it would not be in their best interests to move to Canada now. Second, she reached that conclusion having taken into account the potential difficulties to which the judge referred. It is not, therefore, as if she had overlooked important aspects of the case, thereby undermining the validity of her recommendation. Nor, in my view, was the force of her recommendation diminished by the fact that this was her first relocation case. The report stands or falls by the quality of the investigation and the strength of its reasoning. In my view the judge did not attach the weight to Ms Mullally's recommendation that it deserved and her reasons for rejecting it were not sufficient.

92. Finally, Miss Eaton drew our attention to the exchanges between the judge and counsel then appearing for the father immediately following the delivery of judgment. Counsel invited the judge to deal with certain aspects of the father's case to which she had not specifically referred, including the genuineness of his opposition to the application, the effect on him of the removal of the children and also the effect of their removal on his relationship with them. Those were all matters that tended to weigh against the mother's application and ought in fairness to the father to have been considered explicitly. Counsel's intervention, intended no doubt to be helpful, placed the judge in a difficult position, since it was impossible in practice for her to re-write her judgment on the spot. Not surprisingly, perhaps, she assured counsel that she had taken everything into account and it may well be that she had, but the difficulty for anyone reading the judgment, including the father, is to know how much, if any, weight she had given to those factors and why, together with everything else, they were insufficient to tip the balance in his favour. When a judge gives reasons for a decision, especially one that calls for a balance to be struck between competing factors, those who read the judgment are entitled to regard it as containing a full description of the judge's intellectual process. If a relevant matter has not been mentioned, it will not usually be possible

to assume that it was considered, although in some cases that can be inferred from the nature of the subject matter and the terms of the decision. That is not the case here, however, and I therefore agree with Thorpe L.J. that the judgment is flawed by the failure to take those matters properly into consideration. The father's emotional relationship with the children and their right to enjoy family life with each other may not ultimately have weighed heavily in the balance in a case of this kind, but they were factors that had to be taken into account and given appropriate weight.

93. For all these reasons I agree that permission to appeal should be granted and the appeal allowed.

Lady Justice Black:

94. I have arrived at the same conclusion as my Lord, Lord Justice Thorpe, and my Lord, Lord Justice Moore-Bick and agree that permission must be granted and the appeal allowed.

95. However, as I have come to this conclusion by a route that is not entirely the same as Thorpe LJ's, I should explain how my reasoning differs.

96. Thorpe LJ has taken the view that Ms Eaton succeeds in all three of the criticisms she made of the judgment below which he sets out in paragraph 25. I agree that this is the case in relation to points i) and iii) and intend to say nothing further about those points. Where my reasoning and that of Thorpe LJ diverge is in relation to point ii), in particular in relation to the treatment of *Payne v Payne*. Thorpe LJ considers that *Payne* should not be applied in circumstances such as the present and that the judge should instead have applied the dicta of Hedley J in *Re Y*. For my part, as will become apparent, I would not put *Payne* so completely to one side. Whilst this makes no difference to the outcome of this case, it may not be without significance more generally.

97. I have found it helpful first to consider *Payne* in its historical context, which begins with *Poel v Poel* [1970] 1 WLR 1469. In these early cases I detect a struggle to reconcile a disinclination to interfere with the reasonable choice of the parent with custody as to how, and in particular where, they should live with the undoubted principle that the welfare of the child is the primary consideration in deciding whether to give that parent permission to move to live outside the jurisdiction. The answer to the conundrum was found in the conviction that the child's welfare was inextricably bound up with the happiness of the custodial parent and the stability of the home that he or she could provide and that that happiness and stability would be likely to be threatened if the parent was compelled to adopt a manner of life that he or she reasonably did not want.

98. *Poel v Poel* concerned a boy of two who was in the custody of his mother and saw his father regularly for about two and a half hours a week. His mother wanted to emigrate to New Zealand with her new husband by whom she was pregnant. The trial judge refused permission on the basis that it would cut the boy off from his father. The Court of Appeal permitted the move. Winn LJ said at page 1471C:

"It seems to me that in approaching this very finely balanced problem — which involves a difficult and a sad decision — the court should have regard primarily to the welfare of the child. Just as in disputed custody cases, so in a case which substantially is concerned with the subsequent issues resulting from the making of a custody order, the welfare of the child is the primary consideration which should weigh with the court. Further, it is to be regarded, I think, as a very dominant factor in such a dispute that there has been an order (which in fact was not resisted) for custody in favour of the one parent, in this case the mother, and that there is every indication that the custody thus ordered has been working satisfactorily in every respect; and that although, naturally, the other parent will feel — and this father does feel — that the access permitted to him is not all that he would wish, in no other respect is it suggested in the slightest degree that the custody arrangements have been anything but entirely beneficial to the child and satisfactory in general to the parties concerned."

99. The two major factors which were considered by the court were the loss of the child's relationship with his father and the anticipated adverse impact upon his mother of a refusal to go to New Zealand.

100. Of the former, Winn LJ said this:

"It is a grave thing that the boy will be deprived of the advantage, which he would have had if he had been brought up in close contact with his natural father, of having the advice of his father from time to time, and, in case of need, of falling back upon him for protection and care. But, save in emergency, there is no reason to fear that the arrangements which are being made for his protection, support and upbringing are in any respect to be regarded as inadequate properly to serve the protection of his welfare, physical or mental. The natural father can offer a perfectly good home, and so far as his relations with the boy are concerned he is not in the very slightest degree to be blamed: his conduct as a father has been impeccable. There is no reason to suppose that he is not very affectionate and responsible and fit to bring up the boy."

101. Of the latter, he said:

"I am very firmly of opinion that the child's happiness is directly dependent not only upon the health and happiness of his own mother but upon her freedom from the very likely repercussions, of an adverse character, which would result affecting her relations with her new husband and her ability to look after her family peacefully and in a psychological frame of ease, from the refusal of the permission to take this boy to New Zealand which I think quite clearly his welfare dictates."

102. Sachs LJ approached the problem in this way:

"*When a marriage breaks up, 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 my Lord has pointed out, produce considerable strains which would not only be unfair 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." [my italics]

103. He identified additional matters which he doubted were fundamental factors but which he considered "not irrelevant when one looks at this case in the round", namely that during the marriage the father himself had contemplated emigrating to Australia so must have thought moving to the southern hemisphere a reasonable thing to do and something he might well be able still to do if he chose, thus bringing him closer to the child.

104. *Poel* influenced judicial thinking considerably in the years that followed. Some cases which exemplify this were cited to us and there are others, some of which I will also mention although I do not think there is any need for an exhaustive review of this stage of the evolution of the jurisprudence, not least because it is set out very clearly in Thorpe LJ's judgment in *Payne v Payne*. The number of reported decisions concerning applications by a parent to remove a child from the jurisdiction is notable and no doubt reflects the almost intractable difficulties which such cases so often pose for all those involved.

105. Notwithstanding that the facts were "vastly different" in *Nash v Nash* [1973] 2 All ER 704 (the mother wished to take up employment in South Africa, having been unable to get a job that suited her in this country), the Court of Appeal adopted a similar approach to that adopted in *Poel*, citing the passage from Sachs LJ's judgment that I have italicised. Davies LJ said:

> "I emphasise once more that when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody."

106. *A v A (Child: Removal from Jurisdiction)* [1980] 1 FLR 380 concerned two Chinese parents who had married in England and had a child who was not quite two years old. The trial judge gave custody to the mother on the basis that she would return to Hong Kong with the child, having concluded that the child would have a better prospect of a happy and secure future there with his mother and her family than he would have in England with either parent. The mother had no roots here, no family here, and spoke very little English. The father sought to persuade the Court of Appeal that the mother and child should remain in England. Ormrod LJ commented:

> "I do not think that that is a reasonable proposition or one which is likely to result in the future happiness or success of this little boy. The mother's

difficulties on her own in this country seem to me to be so great as to make the proposal virtually unpractical."

107. What he had to say about *Poel* is interesting in that he did not regard the "test" there "suggested" as apt in the circumstances of *A v A* and saw the fundamental question as being what was in the best interests of the child. The relevant passage is at page 381:

> "It is always difficult in these cases when marriages break up where a wife who, as this one is, is very isolated in this country feels the need to return to her own family and her own country; and, although Mr Swift has argued persuasively for the test which was suggested in the case of *Poel v Poel* [1970] 1 WLR 1469, the test which is often put on the basis of whether it is reasonable for the mother to return to her own country with the child, I myself doubt whether it provides a satisfactory answer to this question. The fundamental question is what is in the best interest of the child; and once it has been decided with so young a child as this that there really is no option so far as care and control are concerned, then one has to look realistically at the mother's position and ask oneself the question: where is she going to have the best chance of bringing up this child reasonably well? To that question the only possible answer in this case is Hong Kong. It is true that it means cutting the child off to a large extent – almost wholly perhaps – from the father; but that is one of the risks which have to be run in cases of this kind. If it is wholly unreasonable, as I think it is in this case, to require the mother to remain in England, assuming even the court ought to put her in the position of choosing between staying very unhappily and uncomfortably in England and going home to her own country, then I still think the answer is that where she can best bring up this child is the proper solution to this case."

108. In *Chamberlain v de la Mare* [1983] 4 FLR 434, the Court of Appeal revisited *Poel* and *Nash* which Ormrod LJ, giving the main judgment, described as "two very well-known cases.…[which] have been referred to countless times in applications for leave to take children out of the jurisdiction". He did so because although the trial judge had disavowed any intention to be "a judicial iconoclast", he appeared to the Court of Appeal to have cast some doubt on the authority of those cases on the basis that they were or might be inconsistent with the statutory obligation in s 1 Guardianship of Minors Act 1971 to decide all questions relating to children with the welfare of the child as the first and paramount consideration.

109. Ormrod LJ said (at page 441) that he did not "think for one moment that Sachs LJ had ignored the fundamental principle" that the welfare of the children was paramount when he made the pronouncement in *Poel* that I have set out at paragraph 101 above. He said at page 442:

> "I think the judge read that passage as bringing into the balancing exercise the interests and welfare of the parent and the new spouse as such. He seems to have thought that the court was there weighing up the interests of the children on the one hand, and the interests of the custodial parent on the other. I do not read it in that sense at all. What Sachs LJ was saying, I think, is that if the court interferes with the way of life which the custodial parent is proposing to

adopt so that he or she and the new spouse are compelled to adopt a manner of life which they do not want, and reasonably do not want, the likelihood is that the frustrations and bitterness which would result from such an interference with any adult whose career is at stake would be bound to overflow on to children. It would be bound to prejudice the relationship between the step-father in this case and the children, whom he must see as a drag on him (to put it no higher). It is that factor which is so important which has to be brought into account when the balancing exercise is done."

and later on that page:

"In the present type of case I believe that the true balancing exercise must take into account the effect on the children of seriously interfering with the life of the custodial parent."

110. He quoted from his own unreported decision in *Moodey v Field*, 13 February 1981, where he said:

"The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible. One might postulate a situation where a boy or girl is well settled in a boarding school, or something of that kind, and it could be said to be very disadvantageous to upset the situation and move the child into a very different educational system. I merely take that as an example. Short of something like that, the court in principle should not interfere with the reasonable decision of the custodial parent."

and he then went on to say (at page 443):

"The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children, is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach."

111. Read on its own, this passage might have been taken as supplanting the plain welfare test in cases of this type but in context it is quite clear that it was not intended to do so. It is preceded by the clear statement from Ormrod LJ that Sachs LJ had "not ignored the fundamental [welfare] principle" and followed by a reference to "a matter of history", namely the case of *J v C* [1970] AC 668 which reasserted the paramountcy of the interests of children in all these cases and which had been so recently determined when *Poel v Poel* was decided that Ormrod LJ felt that:

"it may well be that Sachs LJ did not have that speech in the forefront of his mind as we all have. If he had I think he might perhaps have expressed his

view slightly differently, making it specifically clear that his judgment was based on the interests of the children which was the paramount consideration."

112. The last case to which I will refer from the pre-Children Act era is *Lonslow v Hennig (formerly Lonslow)* [1986] 2 FLR 378. Two girls, aged 12 and 10, were in the custody of the mother who had remarried and had two sons by her second husband. The girls had a "long, steady and profound relationship" with their father and paternal grandparents. They saw their father every other weekend and during the holidays for staying access and had "in effect….a second home" at his house. The mother and step-father wished to emigrate with the children to New Zealand. The trial judge refused leave and the Court of Appeal reversed that decision on the basis that he had not directed his mind sufficiently to the detriment to the children through the stresses that a refusal of leave might impose on their new family.

113. All members of the court concluded that the loss of close contact with the father did not justify interfering with the reasonable decision of the mother and step-father to emigrate. It is clear from all three judgments that this decision was an application of the welfare principle. Dillon LJ prefaced his review of the authorities, which he described as "a consistent line of guidance" starting with *Poel,* with these words:

> "So far as the law is concerned, the first point is that the welfare of the children is the paramount consideration. The second point, as I see it, is that no two cases are precisely the same on their facts, and decisions on other facts in other cases provide really guide-lines [sic] for the exercise by the court of its discretion in the particular case."

114. Lloyd LJ referred to the balancing exercise that the judge had to carry out, saying:

> "….to avoid any misunderstanding, by 'balancing exercise' I do not mean balancing the interests of the natural father against those of the mother, or the interests of the mother and the step-father against the children, but the balancing exercise as to what was in the best interests of the children. I prefer that way of putting it to asking the question whether the interests of the children were incompatible with the interests of the custodial family."

115. The Children Act 1989 replaced the previous law but, by virtue of s 1(1), the child's welfare continued to be the court's paramount consideration when determining any question with respect to a child's upbringing. In many relocation cases, the checklist of factors in s 1(3) will also apply.

116. Ten years further on, the Court of Appeal reviewed the law on external relocation in *Payne v Payne.* The child concerned was aged 4. Her father was British, her mother a citizen of New Zealand where her family lived. She wished to return there with the child. Mother and daughter had spent about 14 months living in New Zealand already but had returned to this country in compliance with an order of the New Zealand court. A residence order was granted here in favour of the mother. There was to be extensive contact with the father which the trial judge calculated amounted to her spending 23 nights in every 56 days with him and which was described as going "exceptionally well".

117. At paragraph 25 of *Payne*, Thorpe LJ referred to a series of cases in the Children Act era, some of which he had decided. He took the opportunity to make clear that in referring in those cases to a presumption that reasonable proposals from the custodial parent should receive the endorsement of the court, he had not been intending to suggest there was any legal presumption (see also paragraph 40 and paragraph 57). He then said:

> "26. In summary a review of the decisions of this court over the course of the last 30 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."

118. At paragraph 35, he summarised the court's approach in this way:

> "reduced to its fundamentals the court's approach is and always has been to apply child welfare as the paramount consideration. The court's focus upon supporting the reasonable proposal of the primary carer is seen as no more than an important factor in the assessment of welfare."

119. The principle is therefore clearly identified in the earlier authorities and in these passages of Thorpe LJ's judgment in *Payne* as being that a relocation application must be determined with the welfare of the child as the paramount consideration and, of course, this has statutory force in s 1 Children Act 1989.

120. The status of other observations of the Court of Appeal over the years on the subject of relocation is more difficult to determine. Thorpe LJ's judgment in *Payne* is illuminating on this question. He terms the observations "guidance", continuing immediately following his summary in paragraph 26 with this passage:

> *"The value of the guidance*
> 27. Few guidelines for the determination of individual cases, the facts of which are never replicated, have stood so long in our family law. Where guidelines can be formulated there are obvious benefits. The opportunity for practitioners to give clear and confident advice as to outcome helps to limit the volume of contested litigation. Of the cases that do proceed to a hearing, clear guidance from this court simplifies the task of the trial judge and helps to limit the volume of appeals. The opportunity for this court to give guidance capable of general application is plainly circumscribed by the obvious consideration that any exercise of discretion is fact dependent and no two cases are identical. But in relocation cases there are a number of factors that are sufficiently commonplace to enhance the utility of guidelines. I instance: (a) the applicant is invariably the mother and the primary carer; (b) generally the motivation for the move arises out of her remarriage or her urge to return home; and (c) the father's opposition is commonly founded on a resultant reduction in contact and influence.

28. Furthermore guidance of this sort is significant in the wider field of international family law. There is a clear interaction between the approach of courts in abduction cases and in relocation cases. If individual jurisdictions adopt a chauvinistic approach to applications to relocate then there is a risk that the parent affected will resort to flight. Conversely recognition of the respect due to the primary carer's reasonable proposals for relocation encourages applications in place of unilateral removal. Equally, as this case demonstrates, a return following a wrongful retention allows a careful appraisal of welfare considerations on a subsequent application to relocate. Accordingly it is very desirable that there should be conformity within the international community….."

121. Thorpe LJ was not persuaded by counsel's attempt in *Payne* to dislodge the foundations of the established guidance on the basis that perceptions of child development and welfare had changed over the preceding 30 years with the importance of contact having greatly increased. He considered that it continued to be the case that

"30. ……..[i]n a broad sense the health and wellbeing of a child depends upon emotional and psychological stability and security. Both security and stability come from the child's emotional and psychological dependency upon the primary carer. The extent of that dependency will depend upon many factors including its duration and the extent to which it is tempered by or shared with other dependencies. For instance is the absent parent an important figure in the child's life? What is the child's relationship with siblings and/or grandparents and/or a step-parent? In most relocation cases the judge will need to make some evaluation of these factors."

"31.Logically and as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks…. The disintegration of a family unit is invariably emotionally and psychologically turbulent. The mother who emerges with the responsibility of making the home for the children may recover her sense of wellbeing simply by coping over a passage of time. But often the mother may be in need of external support, whether financial, emotional or social. Such support may be provided by a new partner who becomes stepfather to the child. The creation of a new family obviously draws the child into its quest for material and other fulfilment. Such cases have given rise to the strongest statements of the guidelines. Alternatively the disintegration of the family unit may leave the mother in a society to which she was carried by the impetus of family life before its failure. Commonly in that event she may feel isolated and driven to seek the support she lacks by returning to her homeland, her family and her friends. In the remarriage cases the motivation for relocation may well be to meet the stepfather's career needs or opportunities. In those cases refusal is likely to destabilise the new family emotionally as well as to penalise it financially. In the case of the isolated mother, to deny her the support of her family and a return to her roots may have an even greater psychological detriment and she may have no one who might share her distress or alleviate her depression…..

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."

122. At paragraph 40, there follows the very well known formula for decision making in relocation cases which has assisted judges for over a decade:

"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 Art 8 but also his rights under Art 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."

123. It is necessary also to look at the judgment of Dame Elizabeth Butler-Sloss P.

124. At paragraph 82, she said:

"……..I do not, for my part, consider that the Convention has affected the principles the courts should apply in dealing with these difficult issues. Its implementation into English law does however give us the opportunity to take another look at the way the principles have been expressed in the past and whether there should now be a reformulation of do so, since they may have been expressed from time to time in too rigid terms. The judgment of Thorpe J in *MH v GP (Child: Emigration)* [1995] 2 FLR 106 was the first time to my knowledge that the word 'presumption' had been used in the reported cases, and I would respectfully suggest that it over-emphasised one element of the

approach in the earlier cases. I can understand why the word was used, since in *Tyler v Tyler* [1989] 2 FLR 158 the reformulation by Purchas LJ of the principles in *Poel v Poel* [1970] 1 WLR 1469 and *Chamberlain v de la Mare* (1983) 4 FLR 434 may itself have been expressed unduly firmly. "

125. She analysed the guidance to be derived from the earlier cases. In paragraph 83, she focused on the impact on a child's welfare of the frustration of reasonable plans made for relocation, culminating in the observation that:

> "If the arrangements are sensible and the proposals are genuinely important to the applicant parent and the effect of refusal of the application would be seriously adverse to the new family, e.g. mother and child, or the mother, stepfather and child, then this would be, as Griffiths LJ said, a factor that had to be given great weight when weighing up the various factors in the balancing exercise."

126. In paragraph 84, she turned to the other considerations that would be relevant in the following terms:

> "84. The strength of the relationship with the other parent, usually the father, and the paternal family will be a highly relevant factor, see *MH v GP (Child: Emigration)* [1995] 2 FLR 106. The ability of the other parent to continue contact with the child and the financial implications need to be explored. There may well be other relevant factors to weigh in the balance, such as, with the elder child, his/her views, the importance of schooling or other ties to the current home area. The state of health of the child and availability of specialist medical expertise or other special needs may be another factor. There are, of course, many other factors which may arise in an individual case. I stress that there is no presumption in favour of the applicant, but reasonable proposals made by the applicant parent, the refusal of which would have adverse consequences upon the stability of the new family and therefore an adverse effect upon the welfare of the child, continue to be a factor of great weight. As in every case in which the court has to exercise its discretion, the reasonableness of the proposals, the effect upon the applicant and upon the child of refusal of the application, the effect of a reduction or cessation of contact with the other parent upon the child, the effect of removal of the child from his/her current environment are all factors, among others which I have not enumerated, which have to be given appropriate weight in each individual case and weighed in the balance. The decision is always a difficult one and has not become less so over the last 30 years. "

127. There then follows the summary to which reference is often made:

> "*Summary*
> 85. In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and

weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them:
(a) The welfare of the child is always paramount.
(b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.
(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.
(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.
(g) The opportunity for continuing contact between the child and the parent left behind may be very significant."

128. Our attention was invited to a number of authorities which post-date *Payne*. They reveal the extent of the continuing efforts to circumvent that authority or at least to expose it to judicial criticism and amendment.

129. In *Re G (Leave to Remove)* [2007] EWCA Civ 1497, the father was granted joint residence and the children were to spend 41% of their time with him but the judge granted the mother's application to relocate to Germany. The Court of Appeal refused the father permission to appeal. It would not normally be permissible to cite a decision refusing permission as authority unless the court that made the decision expressly made provision for that in the decision (see *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001). There is no record of that having been done. As it happens, however, *Re G* is not of great assistance in any event as the attempt by counsel to argue that the principles enunciated in *Payne* were much misunderstood and frequently misapplied by lower courts was despatched very shortly. *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50 to which we were also referred is another refusal of permission and I would be even more cautious about placing any reliance on that decision, firstly because Wall LJ (as he then was) had the assistance only of one side, the father in person, and secondly because in the later case of *Re W (children)(relocation: removal outside jurisdiction)* [2011] EWCA Civ 345 at paragraph 128 Sir Nicholas Wall P. (as he had become) said that undue prominence had been accorded to *Re D* and retracted some of what he had there said. *In the matter of H* [2011] EWCA Civ 529 is a further refusal of permission upon which reliance should not be placed.

130. *Re H (Leave to Remove)* [2010] EWCA Civ 915 concerned a Czech mother who wanted to relocate to the Czech Republic with the child, now aged 7. The trial judge permitted her to do so. The father's appeal was dismissed.

131. Wilson LJ (as he then was) acknowledged the criticisms made of *Payne* in this way at paragraph 21:

> "In this court we are well aware of the criticisms made, both domestically and internationally, of its decision in *Payne*. Nevertheless one must beware of

endorsing a parody of the decision. Both Thorpe LJ, at [26(a)], and the President, Dame Elizabeth Butler-Sloss, at [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. I therefore acknowledge the controversy that surrounds the proposition expressed by Thorpe LJ, at [26(b)], that:

> '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.'

Equally, I acknowledge the controversy which surrounds his conclusion, at [32], that:

> '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.'

22. There is also, as most family lawyers know, an attack on the series of questions which, at [40], Thorpe LJ suggested as apt for a judge to put to himself in determining such an application. The charge is that they represent an impermissible gloss on the inquiry into welfare, by reference in particular to the checklist of specified considerations, mandated by s 1(1) and (3) of the Children Act 1989. There is also a significant argument to the effect that, although the case of *Payne* was determined only nine years ago, it represents the culmination of domestic jurisprudence which had evolved since 1970, ie over a time when (so it is said) the value to the child of a relationship with the non-residential parent was far less well recognised.

132. Wilson LJ commented also on the Washington Declaration of March 2010 but I do not need to refer further to that for the reasons that he gave at paragraph 26.

133. *Re W (children) (relocation: removal outside jurisdiction)* (supra) concerned an Australian mother with two children, aged 12 and 8, who sought permission to relocate to Australia. The children had not been having good contact with their father until the court intervened, following which intervention contact was improving. Concluding that there might not be the same constructive and harmonious co-operation in future over contact if the mother relocated, the judge held that the welfare of the children required that the mother's application be dismissed. The Court of Appeal allowed the mother's appeal and granted her permission to relocate.

134. Sir Nicholas Wall P. commented at the outset of his judgment upon how highly fact specific relocation applications are. This is an important point, quite frequently made in the authorities, which must always be borne in mind. Sir Nicholas returned to it later in his judgment, for example in paragraph 117 where, after going through the factors listed by Thorpe LJ and Dame Elizabeth Butler-Sloss P. in *Payne*, he said:

> "It is not, of course, a numerical question. Each case turns on its own facts, and the weight to be given to various factors will change from case to case."

and in paragraph 109 where he said:

> "…..the balancing exercise has to be carried out on the facts of the particular case. For the English Judge at first instance the facts may show a case in which the importance of the continuing relationship with a left behind parent tips the scale against relocation. Such cases do, of course, exist: see, for example, the decision of Mostyn J in *Re AR (a child: relocation)* [2010] EWHC 1346, to which the father refers."

135. Sir Nicholas did not embark upon his own assessment of the criteria to be taken into account when deciding a relocation application saying only:

> "All that I am prepared to state at this stage is that the decision falls to be taken on what the court perceives to be in the best interests of the children concerned. Their welfare is our paramount consideration. The court must also apply the criteria and guidance set out in *Payne v Payne*."

136. Finally, I must mention *Re Y (Leave to Remove from Jurisdiction)*, the decision of Hedley J to which Thorpe LJ makes reference. There, the American mother wanted to return to the USA with the child who was 5 ½ years old. The child was the subject of an informal shared care arrangement, living with his parents on an almost equal basis (4 nights a week with the mother and 3 nights a week with the father).

137. Hedley J set out the consequences for the child if he were to go to Texas; it would mean losing the experience of shared care with his father, his school, friends, surroundings and preferred language (Welsh), subject to maintaining contact in various ways. Dealing with the situation if permission were not to be given for the child to go to Texas, the judge said:

> "his mother – even though she is free to go as and where she pleases – will doubtless stay in Wales, but equally doubtless will remain feeling isolated, distressed and frustrated in circumstances where all those feelings may intensify over time, depending on how things work out. And of course all that may have consequences for Y, not only in terms of the quality of care he receives from the mother but in the sense of being exposed to her continued unhappiness, and those are real issues when I have serious regard, as I do, to the emotional welfare of this child."

The judge concluded that the welfare of the child compelled him to refuse the mother's application.

138. Hedley J saw the case as falling "factually outside the ambit of well-settled authorities in this area of the law" (paragraph 25). In the passage which Thorpe LJ has set out in paragraph 56, he commented that where the child's home is equally with both parents, many of the factors identified in *Payne*, whilst relevant, may carry less weight than otherwise they commonly do. He therefore turned directly to s 1(1) Children Act 1989 and the factors listed in s 1(3). His review of the factors relevant to the case he had to determine included a consideration of the impact on

the mother but it was in no way determinative. In his concluding remarks at paragraph 25, Hedley J said that the case

> "demonstrates, in a way few cases can, quite how, when everything has been said, done and considered the ultimate test remains the welfare of the child, which in the last analysis overbears all other considerations, however powerful and reasonable they may be."

139. Very recently Theis J in *C v D* [2011] EWHC 335 (Fam) took the same approach as Hedley J in a case in which the children spent 20 days with their mother/10 days with their father during term time and the holidays were split equally.

140. Looking back over what is now nearly 40 years of jurisprudence in this area of family law, I have come to a number of conclusions. I am indebted to my Lord, Moore-Bick LJ for his judgment which, like that of Thorpe LJ, I have read in draft, and in particular for its analysis in paragraph 85 of the approach to be taken to *Payne* in the light of the conventional treatment of principle and guidance.

141. The first point that is quite clear is that, as I have said already, the principle - the *only* authentic principle - that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.

142. Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else - the valuable guidance - can be ignored. It must be heeded for all the reasons that Moore-Bick LJ gives but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law where the facts of individual cases are so infinitely variable.

143. Furthermore, the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in *Payne* and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of paragraph 26 ("Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children") for re-elevation to a status akin to that of a determinative presumption. It is doubly inappropriate when one bears in mind that the judgments in *Payne* must be read as a whole, with proper weight given to what the then President said. She said that she wished to reformulate the principles since they may have been expressed from time to time in too rigid terms with the word 'presumption' over-emphasising one element of the approach (paragraph 82) whereas the criteria in s 1 Children Act govern the application (paragraph 83) and there is no presumption in favour of the applicant (paragraph 84). Dame Elizabeth referred, of course, to the effect on the parent with residence (paragraphs 83 and 84) but she also stressed that the relationship with the other parent is highly relevant and that there are many other factors which may arise in an individual case (paragraph 84). I detect in her discussion of the factors and in her summary at paragraph 85 no weighting in favour of any particular

factor. She said that the reasonable proposals of the parent with a residence order wishing to live abroad carry "great weight" whereas the effect on the child of denying contact with the other parent is "very important" but I do not infer from that phraseology any loading in favour of the reasonable proposals as opposed to the effect of the loss of contact.

144. *Payne* therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's decision in *Re Y* as representative of a different line of authority from *Payne*, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which *Payne* is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.

145. Accordingly, I would not expect to find cases bogged down with arguments as to whether the time spent with each of the parents or other aspects of the care arrangements are such as to make the case "a *Payne* case" or "a *Re Y* case", nor would I expect preliminary skirmishes over the label to be applied to the child's arrangements with a view to a parent having a shared residence order in his or her armoury for deployment in the event of a relocation application. The ways in which parents provide for the care of their children are, and should be, infinitely varied. In the best of cases they are flexible and responsive to the needs of the children over time. When a relocation application falls to be determined, all of the facts need to be considered.

146. Despite my rather different view of *Payne* from that of Thorpe LJ, I agree with him that the judgment and the exchange with counsel that follows do not demonstrate that all the relevant factors were put properly in the balance. In particular, the contribution that the father was making to the children's welfare and the advice of the CAFCASS officer received insufficient attention. I associate myself also with the comments of Moore-Bick LJ on these matters.

147. I should make clear that in this case, I have been addressing only the issue of relocation outside this jurisdiction. The so-called "internal relocation" cases have followed a slightly different path, outside the reach of *Payne,* and such argument as there may be about them is not for today. In so far as we were referred to that line of authorities, the reference was, I thought, rather too oblique to justify giving any prominence to it in the present context.