Neutral Citation Number: [2012] EWCA Civ 1364

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PORTSMOUTH COUNTY COURT
HIS HONOUR JUDGE MARSTON

Royal Courts of Justice
Strand, London, WC2A 2LL
24 October 2012

B e f o r e :

LORD JUSTICE PILL
LORD JUSTICE TOULSON
and
LORD JUSTICE MUNBY

In the matter of F (Child)

Ms Jacqueline Renton (instructed by Ellis Jones) for the respondent mother
The appellant father appeared in person
Hearing date : 3 October 2012

HTML VERSION OF JUDGMENT

Lord Justice Munby :

1. This is an appeal, pursuant to permission granted by Ward LJ on 31 August 2012, from an order made by His Honour Judge Marston in the Portsmouth County Court on 25 July 2012. Judge Marston was exercising the family jurisdiction in accordance with the Children Act 1989 in relation to P, a boy who had been born in November 2004. It was an international relocation case, though of a somewhat unusual kind.

Background

2. P and his parents are Spanish. His parents have never married but had been in a permanent relationship since about 1993. The family came to this country in August 2009 when the father was offered a posting here by his employer. Initially it was to be for two years but in May 2011 they decided to extend their stay here until at least 2013. In July 2011 the family returned to Spain for a holiday. By then the parents' relationship was in what proved to be a terminal crisis. The father returned to this country on 1 August 2011, followed by the mother and P on 17 August 2011. The mother stayed only

a few days, returning to Spain on 21 August 2011 but leaving P in this country with his father. Her case is that she anticipated P being returned to Spain by 10 September 2011. Be that as it may, P has remained living in this country with his father. It is common ground that prior to August 2011 the mother was P's primary carer but that since then the primary carer has been the father.

3. The mother wishes to go on living in Spain. The father intends at least for the time being to remain in England.

The litigation

4. Following these events the father began proceedings in the Portsmouth County Court on 26 August 2011 seeking a residence order. The mother began proceedings in Spain on 5 September 2011 seeking essentially the same relief. The father's proceedings were stayed once the mother began proceedings in the High Court seeking the return of P to Spain in accordance with the provisions of the Hague Convention. The proceedings in Spain were also stayed.

5. The Hague proceedings came before Holman J, who on 18 November 2011 dismissed the mother's application. P, he held, was at the material date habitually resident not in Spain but in this country: *F v S* [2011] EWHC 3139 (Fam). The father's proceedings in the Portsmouth County Court were revived. By the time they came on for hearing before Judge Marston in May 2012 there were cross-applications: both parents were seeking a residence order, in the mother's case coupled with an application for leave to remove P from the jurisdiction and take him back to live with her in Spain. By the time the matter reached the hearing before Judge Marston it seems that both parents were proposing a shared residence order.

The hearing before Judge Marston

6. At the hearing before Judge Marston both the parents were represented by counsel: the mother by Ms Jacqueline Renton and the father by Mr Edward Devereux. The hearing lasted three days. Judgment was reserved. It was sent to the parties in draft and handed down formally on 15 June 2012. The resulting order was finalised at a hearing on 25 July 2012.

7. Judge Marston made a shared residence order in favour of both parents but ordered that the mother have permission permanently to remove P from the jurisdiction. He ordered that P was to live with his father for one week during Easter school holidays, not less than five weeks during the Summer school holidays (no more than three weeks during any one period) and then in alternate years from 22-29 December and 29 December to 6 January. At all other times P was to live with his mother.

8. The father and the mother had each filed statements. There was a report dated 30 March 2012 from a CAFCASS officer, Mr Robin Moore. The report was commendably short, focused and to the point. It is no criticism whatever of Mr Moore that he felt unable to make a clear recommendation. He described it as being "a very difficult case which contains some uncommon characteristics." He continued:

"What is certain is that there are no particular risk issues beyond the emotional impact this dispute might be having upon P. That said, the school has commented that he is

happier now, which accords with my impression, and P knows that whatever happens he has two caring, able and loving parents who both would be able to meet his needs in perhaps differing ways.

… P is settled [in] school in … where he is popular and making good progress but to return to a school in Spain, particularly one he already knows, is unlikely to be too disadvantageous to him, certainly in the longer term.

P is only 7 and his views are not likely to be determinant. He has said "fine in both places" but he expresses misgivings about the length of the school day and refers to his friends and grandparents in Spain. Of course, there are many children who are cared for after school in some form or other and for various lengths of time.

Whatever happens, the principle of contact is not in dispute but there is obviously distance and cost to consider in any contact arrangements which are likely to centre on the school holidays."

He concluded:

"Under the circumstances outlined I feel unable to make a clear recommendation in this finely balanced case in which I understand and acknowledge both parents' positions. I would respectfully suggest that this is a matter upon which a judgement by the court is necessary."

9. Judge Marston heard oral evidence, first from Mr Moore, then from the father and then from the mother. In his judgment Judge Marston carefully set out the substance of the evidence as well as his conclusions on it. In relation to Mr Moore's evidence, Judge Marston said this:

"What came through the CAFCASS Officer's evidence very strongly were a number of what I might describe as bullet points:-

(a) P was well looked after and happy here but he would be well looked after and happy in Spain;

(b) He was doing well in school here but it was highly likely that he would do well in school in Spain;

(c) That he didn't like the long days at school here;

(d) That he regarded himself as Spanish and that all of the family on both sides apart from his Father were in Spain and many of them were in Guadalajara;

(e) The CAFCASS Officer accepted both parties commitment to contact with the other parent and that they would deliver on that commitment;

(f) That the court is dealing with two decent people who want what is in P's best interest;

(g) That there is still a residual distrust between them because of the events around the breakdown of the relationship and the hearing in front of Mr Justice Holman."

10. In relation to the father's evidence, Judge Marston identified a:

> "theme running through the evidence … that P was settled here. "He is fully integrated here". "He is happy, healthy, well cared for popular boy leading a normal life. He is not a sad boy in any way". His view was that the education that P would get would be better here particularly if in the future he could attend … Grammar School which was where they had agreed he would go. He is saying to the Court in effect if P stays with me you are betting on a certainty because I represent the status quo and the status quo works and it is currently producing this happy, well integrated little boy. However he also has to accept that historically the mother has been the main carer for the child up until September of last year."
>
> He added: "His case was really contained in the sentence: "I ask this court to acknowledge that P's life is here"."

11. In relation to the mother's evidence, Judge Marston said this:

> "What came out of the mother's evidence was that her proposal involved a return to P's roots, to the school that he was familiar with, to friends that he was familiar with and to an environment that he was familiar with. She further put forward the advantage that she would actually have more time available because of her working hours and school times in Spain to look after P. She also put forward the fact that P's maternal and paternal family would have much more relationship with him because he was in Spain and most of them were in Guadalajara in any event. And she pointed to the fact that she was already fostering these relationships. She was also able, because of the number of holidays she has, to put forward a contact schedule which was marginally more generous to the father than the father's contact schedule was to her. Although this is not a particularly decisive factor in this case, underlying all of this was her belief that she'd been the primary carer and that she should be the primary carer again and that P needed his mother. She expressed her respect for the father as a gentleman and as a figure in P's life."

Judge Marston's judgment

12. Judge Marston's judgment, if I may say so, is clear and careful in both its structure and its content. Having set out the background (paragraphs 3-4) and the litigation history (paragraphs 5-7), in the course of which he considered what Holman J had said in his judgment in the Hague proceedings, and then set out and analysed the evidence (paragraphs 8-20), Judge Marston turned to consider the law (paragraphs 21-22) before concluding with his findings (paragraphs 23-28).

13. Very much reflecting the way in which the case had been argued before him, Judge Marston in his consideration of the law focused on the decisions of this court in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052, which he described as the "leading case" on permission to remove, and *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134, from which he extracted the proposition that "when there are shared care arrangements, the guidance set down in *Payne* should not be followed, rather the court should exercise its discretion by reference to the statutory checklist in section 1(3)". He continued:

"Applying that law to this particular case it seems to me that this case has some unique features. Both of the parties are Spanish and the intention of both parties when coming to this country was to live in this country until the father's work had been completed. Both of the parties continue to regard themselves as Spanish and not only did they regard P as Spanish but he also is of that view. What is on offer from the mother is a return to the arrangements in terms of schooling, general location and so on in which P thrived for the first six years or so of his life. And finally it is highly likely that at some point if the father has residence of P he will return to Spain, either in 2013 when this contract finishes or sometime thereafter. Having heard the father I think it is more likely than not that he will go back in 2013 but I cannot be definitive about that. What I think I can find is that the father is, on the balance of probability, likely to return to Spain in 2013 to be nearer to P if he does not have residence of him."

14. He then posed the question: "Is this a case to which *Payne v Payne* applies?" His answer was as follows:

"I need to look at what was going on previously, what is going on now, and what is proposed in the future. First I find that up until the separation in August last year the mother was the prime carer for P with the father making significant contributions to the care of his son. Secondly, that since August the father has been the primary carer but with the mother again making very significant contributions to P's welfare when she was able to visit him for contact or when he went to Spain for contact. The parties propose a shared residence order in the future with large amounts of time being spent with the non-resident parent and I have already accepted from both of them that they will happen regardless of the outcome of the case. It seems to me that at this moment in time there is not shared care arrangements simply because of where P is. The father has the majority of care. That seems to me to entitle me to look at the *Payne* guidelines and I make the following findings on them."

15. Judge Marston then embarked upon Thorpe LJ's "discipline": see *Payne v Payne* paragraph [40]. Echoing Thorpe LJ's phraseology, he found that the mother's application was "genuinely motivated" and "realistic" and that the father's opposition was "motivated by genuine concern for the future of his child's welfare." He considered the "detriment to the father and his future relationship with P":

"there will be some. Inevitable it will be the difference between having your son with you on a day to day basis and having him on contact visits. No matter how extensive the contact is and how much you are able to communicate by e-mail, skype and the telephone, it is not the same. However the contact proposals either way seem to me to be sufficient to ensure that P has, in the circumstances of the separation, the best possible relationship with the other party. It is quite clear to me that there will be an extension of P's relationship with his maternal family in his homeland if he goes back to Spain. He is a Spaniard and his whole maternal family live either in Guadalajara or in other parts of Spain. I also find that there will be an extension of his relationship with other members of his paternal family. I have already accepted the mother's evidence that she will make P available for generous amounts of contact with the rest of the father's family."

16. He said that "The impact on the mother of my refusing the realistic proposal that she makes will be heavy. I think she would be immensely distressed". However, he continued:

"I have to say that I also think that the father will be similarly emotionally devastated. They will express their emotional loss in different ways because of their different personalities but neither of them, in my view, will collapse if P is with the other party. Their qualities of decentness, intelligence and fortitude, all of which I saw evidence of during the course of the proceedings, will make it possible for them to keep going, particularly as they have such strong commitments to their son and the contact regime here will be a relatively generous one."

17. At this point he observed: "What I have in the circumstances if I apply *Payne* is a very well balanced case. I now turn to what is in P's best interest". Having reminded himself of the 'welfare checklist' in section 1(3) of the Act, Judge Marston continued:

"The ascertainable wishes and feeling of the child concerned in the light of his age and understanding. He is an intelligent boy who is functioning at a higher level than his chronological age but not a very much higher level. I am dealing with an 8-9 year old. Given what he said to the welfare CAFCASS Officer I think he would enjoy returning to Spain in some ways and seeing his grandparents and so on and also having some likely reduced time at school. But I am also of the view that he would be content if he was to live here. His wishes and feeling don't help me very much. His physical, emotional and educational are all being met by his father. They would be met by his mother. The likely effect on him of any change in circumstance because of the high quality of care he would get from his mother I don't think that he would be affected in any way by the change of circumstances save that he would on occasions miss his father in the same way as on occasions he misses his mother now. His age, sex, background and any characteristics of his which the court consider relevant. He is still quite young, his background is Spanish. Both of these have marginal relevance to the case. P has not suffered any harm by the separation of his parents save both of them are no longer available to him all the time [I say save that of course I accept that the breakdown of the relationship inevitably causes some harm to the child, it is a testimony to the parents in this case that he has been so relatively unaffected. I hope that that continues to be the case and I can trust these parties to behave as civilised human beings with their son's best interests at heart in the future]. Both parents are capable of meeting his needs; the rest of that section isn't relevant nor is the last part of the checklist."

18. Judge Marston explained his decision and his reasons in the following passage which I set out in full:

"Balancing all of this up this is an incredibly evenly balanced case. However having heard the evidence of the two parties and the CAFCASS Officer and considering all the circumstances of the case I am driven to the conclusion that P should spend the majority of his time with his mother in Guadalajara in Spain. I say that for the following reasons:-

I weigh on the scales that by the nature of her job his mother will be marginally more available to him than his father. That she has been for the majority of his life the main carer for him and that he will be returning to his Spanish roots and into his extended Spanish family on both sides, whom it is obvious he enjoys seeing. See for examples his comments to the CAFCASS Officer. However he is being returned to a tried and tested care regime and there is absolutely no evidence whatsoever that he will be harmed by the change in the status quo. He is already bi-lingual; he has had his experience of being in England. No doubt he will miss his school friends but he is returning to a school and friends that only a couple of years ago he was attending and he has seen his compatriots

on a number of occasions since he moved. Furthermore, and I know the father will find it difficult to accept this, it seems to me that he will have a better relationship with his father in many ways if regular contact takes place. I did get the impression from the father's evidence and from P's statement to the CAFCASS Officer that an awful lot of the time he spent with his father was either at school or being fed and doing homework and not so much of it was time for P and his father to have fun together or to have an opportunity to interact in what might be called downtime. This will be available to his father on contact. Furthermore because of the mother's work commitments as measured against the father's work commitments it will be possible for the mother to make P available for contact on a somewhat more generous basis than the father although I have already said that I accept that the father's contact proposals were also realistic."

19. He added: "having said that it was an evenly balanced case, I have to say that once the balance has tipped as it has it tips decisively in the mother's favour." He concluded with these words about the parents:

    "I thought they were both frank and straightforward. They both have really genuine fears which I understand but I also must return to the comment of Mr Moore on the first day of the case. Like him I got the impression of two very decent human beings who wanted what was best for P."

The appeal

20. At the hearing before Judge Marston on 25 July 2012 the father applied for permission to appeal. His solicitor, Mr Parsons, who was representing him on that occasion, identified the matter of law on which he sought permission to appeal. I quote from the transcript of the colloquy:

    "… on the basis of your finding that the father was the primary carer, it is not the primary carer who is seeking to relocate the child: it is the supporting parent (for want of a better phrase). So I would submit that there is some interest in the fact that *Payne* does not actually apply to this particular set of circumstances. But strangely, perhaps, if you look at the *K v K* situation, which was dealing with a shared residence matter, that does not apply either because we are not in a shared care situation in relation to P because the court has found that the father was having primary care of the child, certainly since August of last year."

    Ms Renton submitted that "what you have done in your judgment is considered *Payne* guidance, considered *K v K* and ultimately applied the welfare checklist anyway." Refusing permission, Judge Marston said:

    "I found that this was a case in which I could consider the *Payne* guidelines. I worked my way through the *Payne* guidelines. I then looked at the issues of the child's best interests and applied the welfare checklist. This is, as I pointed out, a highly unusual set of circumstances and factual background. I do not think it has any general application and it seems to me that I followed the law in as much as I understood it."

    However he granted a stay until this court had determined whether or not to grant permission.

21. The father now acts in person. His appellant's notice was filed on 8 August 2012. He seeks the setting aside of Judge Marston's order and either an order that P remain in his primary care or, in the alternative, a new hearing. His grounds of appeal can be summarised as follows (I focus on the substance rather than the detail though I have of course had all the father's grounds very much in mind). Given that, as Judge Marston found, the father was the primary carer, that there were no concerns about his care of P, and that P is established and doing well in his school, the father's complaint is that Judge Marston erred:

    i) as a matter of law in his application of *Payne v Payne* and *K v K*;

    ii) in his evaluation of the facts, in particular (A) in failing to give adequate weight to (a) the fact that it had been a joint parental decision that P should come to and be educated in this country, (b) the desirability of maintaining the child's status quo, (c) the plans and wishes of the primary carer – in this case the father, and (d) the mother's conduct and Holman J's assessment of her, (B) in giving disproportionate weight to the fact of the shorter school day in Spain, (C) in relation to contact and what the father calls the mother's negating of contact, and (D) in basing his decision upon speculations as to the father's future plans.

22. In short, the father says that there were no compelling reasons to change the current arrangements. He says that Judge Marston failed to consider the importance of the child's status quo. He says that if Judge Marston had correctly evaluated the facts and properly applied the relevance guidelines and principles, he would have recognised that the circumstances, far from being very evenly balanced, in fact came down very plainly on the father's side.

23. The father's application was heard by Ward LJ on 31 August 2012. He gave the father permission to appeal: *Re F* [2012] EWCA Civ 1301. In the course of explaining why, Ward LJ said this:

    "So, willy-nilly, by dint of the circumstances and by reason of the mother's decision to return to Spain without him, father has become the primary carer of this boy. That is the actual position as it was when this case came before the judge. Nonetheless the judge seems to have treated the mother as the primary carer and to have applied *Payne v Payne* [2001] EWCA Civ 166 on the basis that her emotional needs have to be accommodated and so forth.

    I am not sure that that is the right approach and if on the contrary father is accepted to be the primary carer then his concerns should weigh if not more then at least equally to those of the mother. So I am not at all convinced that the judge approached the case in the right way. Ultimately of course it is a question of what is in the best interests of the boy. That is always a discretionary matter and it is difficult to appeal an exercise of discretion, but I do feel that this unusual case does require reconsideration and I give permission to appeal accordingly."

Ward LJ also ordered a stay until the appeal had been heard.

24. The appeal came on for hearing before us on 3 October 2012. The father appeared in person; the mother was represented by Ms Renton. At the end of the hearing we

announced that the appeal was dismissed. We said that we would give our reasons in writing in due course. That we now do.

The father's case

25. The father's most important complaint is that Judge Marston erred in law. He submits that this was not a *Payne v Payne* case, as the judge seems to have thought, because the applicant – the mother – was not the primary carer; he was. Nor was it a *K v K* case, because there was no shared care arrangement. Judge Marston, he says, approached the case with a presumption in favour of the mother. He should, on the contrary, have recognised the father's claims as the primary carer, given due respect to the father's wishes and plans, in particular his reasonable wish to remain living in this country, and not imposed unreasonable constraints on his choice of residence. He did not. In short, says the father, Judge Marston reversed the guidelines. Thus, it was the father, who was not seeking to relocate, who was being pressed for clarity about his future plans. Moreover, he says, Judge Marston failed to acknowledge the importance of maintaining the child's status quo. A proper regard to these points ought, says the father, to have tipped the balance in his favour.

The mother's response

26. Ms Renton disputes that Judge Marston erred in law. His use of Thorpe LJ's "discipline" was, she says, legitimate having regard to what was said in *K v K*; he did not approach the matter with a presumption in favour of the mother; he had proper regard to the fact that the father was the primary carer; and he acknowledged the arguments in favour of P remaining with the father in this country and at his present school. She makes the point that, whatever the basis of the parties' agreement before they arrived in this country, it assumed that the family would remain intact. At the end of the day, she submits, Judge Marston loyally applied the paramountcy principle, had proper regard to the 'welfare checklist', based his decision on findings that were securely founded on the evidence he had heard, and came to an ultimate evaluative conclusion that was open to him in the light of his findings and cannot be said to have been plainly wrong.

Discussion

27. I begin with the submission that Judge Marston erred in law.

28. I do not propose to go through all the learning on relocation. There is no need to do so and the exercise would most likely be unhelpful and, in all probability, counter-productive. The authorities down to 2001 were considered in some detail by this Court in *Payne v Payne* and again in *K v K*, and the authorities since then were considered, again in some detail, in *K v K*.

29. The starting point now must be *K v K*. Its central message is conveyed, succinctly and accurately, in the headnote in the Law Report:

    "that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was

valuable in so far as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (per Moore-Bick and Black LJJ), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted".

I need quote only what Thorpe LJ said (paragraph [39]):

"… 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."

30. Given Judge Marston's use of *Payne v Payne* it is, however, necessary to look back a little. It is convenient to start by recalling what Sachs LJ said in *Poel v Poel* [1970] 1 WLR 1469, 1473. It is so well known that there is no need to set it out; it can be found quoted in *K v K* paragraph [69]. Now, as Thorpe LJ pointed out in *K v K* (paragraphs [43]-[45]), the legal and social landscape has changed very significantly since 1970, and as Moore-Bick LJ commented in the same case (paragraph [70]) the observations in *Poel* "reflect a different age and a different approach to the care of children following a divorce". Yet the simple point about the reality of the human condition and the parent-child relationship made all those years ago by Sachs LJ (for that is all it is – it is not a legal principle, let alone some legal or evidential presumption) is as true today as ever. But it is important to note the qualifications expressed by Sachs LJ: he was talking about the custodial parent "to whom custody has been rightly given" and, moreover, contemplating the situation where "the custody is working well." To use more modern terminology, what Sachs LJ was addressing was the case where the application to relocate is being made by the primary carer.

31. *Payne v Payne* itself was a case where the applicant mother was the child's primary carer pursuant to a residence order that had earlier been made in her favour. Thorpe LJ's analysis of the principles was postulated on the applicant being the primary carer: see, for example, paragraphs [26], [40], [41]. So too was the analysis by Dame Elizabeth Butler-Sloss P: see, for example, paragraphs [83], [85]. As Thorpe LJ said in *K v K* (paragraph [41]), "*Payne* is posited on the premise that the applicant is the primary carer." He added: "It also reflects the fact that its foundation is the judgment of this court in *Poel*." He went on (paragraph [46]) to observe that:

"… the survival of the authority of *Poel* into this century … depends crucially upon the primacy of the applicant's care … The judgments in *Poel* consider only the position of the primary carer … *Payne* does not anywhere consider what should be the court's approach to an application where there is no primary carer."

32. It is important to note the context in which Thorpe LJ set out his "discipline" in *Payne v Payne*. Having gone through the authorities he said (paragraph [26]):

"In summary a review of the decisions of this court over the course of the last thirty years demonstrates that relocation cases have been consistently decided upon the application of the following two propositions:

(a) the welfare of the child is the paramount consideration; and

(b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children."

That is plainly a reference to the *Poel* line of authorities. He added (paragraph [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."

33. In paragraph [40] he said this:

"However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent's rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

(b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate."

34. He added (paragraph [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."

That, likewise, is a reference back to *Poel*.

35. Dame Elizabeth Butler-Sloss P set out (paragraph 85]) a list of points which, so far as relevant, were to be considered and weighed in the balance. I need not repeat them. It is important to note, however, that she went on (paragraph [86]) to make clear that all her observations had been made "on the premise that the question of residence is not a live issue." I draw attention to, but need not set out, what she went on to say and what Thorpe LJ had already said (paragraph [42]) to much the same effect.

36. In *Re Y (Leave to remove from jurisdiction)* [2004] 2 FLR 330, paragraph [14], Hedley J, in a passage subsequently cited by this court in *K v K*, distinguished between what he called "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* … whilst relevant may carry less weight than otherwise they commonly do."

37. In *K v K* there was a shared residence order. The mother sought to relocate to her country of origin. The importance of *K v K* for present purposes is its emphasis that even where the applicant is a primary carer there is no presumption in favour of the applicant. That, after all, was hardly new. As was pointed out in *K v K* both Thorpe LJ and the President had made this clear in *Payne v Payne*. As Black LJ said (paragraph [143]):

> "… 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."

> There can be no presumptions in a case governed by section 1 of the Children Act 1989. From beginning to end the child's welfare is paramount, and the evaluation of where the child's best interests truly lie is to be determined having regard to the 'welfare checklist' in section 1(3).

38. The present appeal focuses attention on one aspect of *K v K* where this court did not speak with one voice. Thorpe LJ, having approved of Hedley J's analysis in *Re Y*, said this (paragraph [57]):

> "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."

39. Black LJ (paragraph [96]) adopted a rather different approach:

"Where my reasoning and that of Thorpe LJ diverge is … 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."

40. Following a careful analysis of the authorities, Black LJ continued in this important passage (paragraphs [141]-[142]):

"The first point that is quite clear is that … 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.

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 … 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."

41. She continued (paragraph [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."

42. Finally, so far as is material for present purposes, Black LJ made this vitally important point (paragraph [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."

43. As I read his judgment, Moore-Bick LJ, with whom Black LJ explicitly agreed on this part of the case, was of the same view as her: see in particular paragraph [86] where he said:

"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."

44. On this point, therefore, the correct approach is that of the majority, that is to say Moore-Bick LJ and Black LJ.

45. In fact the gap between Thorpe LJ and Black LJ is not perhaps as wide as first appears. There are two aspects of the guidance given by Thorpe LJ in *Payne v Payne*. The first, set out in paragraphs [26], [32] and [41], reflects the *Poel* line of authority and, as Thorpe LJ made clear in *K v K* in the passage at paragraph [46] I have already cited, is applicable where the applicant is a primary carer. The other is the "discipline" set out in paragraph [40], and this, it seems to me, despite what Thorpe LJ himself said in *K v K*, stands in a rather different position. The four-stage process set out in sub-paragraphs (a) to (d) is of course highly relevant where the applicant is a primary carer. But as a consideration of the content of those sub-paragraphs demonstrates, the discipline is not relevant only to such cases. For the issues canvassed in sub-paragraphs (a) to (d) will arise in many relocation cases where the application is being made by someone other than a primary carer. So, despite what Thorpe LJ said in *K v K* at paragraph [57], and applying the approach indicated in *K v K* by Moore-Bick LJ and Black LJ, the guidance which Thorpe LJ gave in *Payne v Payne* at paragraph [40] is not, in my judgment, confined to cases where the applicant is the primary carer. It is guidance that, in my judgment, may be utilised in other kinds of relocation case if the judge thinks it helpful and appropriate to do so. In saying this I am merely agreeing with the majority view in *K v K*.

46. In the present case, as we have seen, Judge Marston asked whether this is a case to which *Payne v Payne* applies. This invites the question: What is meant by a *Payne v Payne* type case? If the expression has any meaning at all, and if it is still of any use (a matter to which I return below), it means a case in which the applicant seeking permission to relocate is the child's primary carer. It is quite clear that in this sense the present case is not a *Payne v Payne* case. The applicant was the mother. She was not, although she had in the past been, the primary carer. The primary carer at the relevant time was the father. Equally, it is quite clear that the present case is not one of shared care, in the sense in which that expression was used in *Re Y* and *K v K*.

47. This being so, and given his explicit reference to *Payne v Payne*, it is important to examine very carefully whether the use Judge Marston made of *Payne v Payne*, and in particular his application of Thorpe LJ's "discipline", led him into error. The father submits that it did; Ms Renton submits that it did not. In my judgment, Ms Renton is correct.

48. It is important to note both what Judge Marston said and what he did not say. He did not ask himself whether this was a *Payne v Payne* case. The question which he asked himself was "Is this a case to which *Payne v Payne* applies?" And the answer he provided is important: he was entitled, he said, to "look at" what he called "the *Payne* guidelines." Now what in fact did he look at? The answer is clear: what he looked at, and all he looked at, was Thorpe LJ's discipline as set out in *Payne* paragraph [40]. He did not, for example, refer to *Poel* or to what Thorpe LJ had said in *Payne* at paragraphs [26], [32] and [41]. Having concluded his consideration of the "discipline", he then turned, as we

have seen, to an investigation and evaluation of P's best interests having regard to the 'welfare checklist'. Finally, and in the light of that, he came to his overall conclusion.

49. In my judgment there was no error of law. Although this was not a case where the application was being made by the primary carer, Judge Marston was, for the reasons I have given, entitled to have regard to Thorpe LJ's "discipline" as set out in *Payne* at paragraph [40]. He correctly appreciated that the case had to be decided by reference to P's best interests. And, at the end of the day, that is precisely what Judge Marston did.

50. He carefully took into account P's current circumstances in this country, the quality of his father's care of him and the father's own plans, wishes and feelings. There is nothing which begins to suggest that he started off with any presumption in favour of the mother's claim. And if the complaint is that he did not recognise the presumptive weight of the father's claim, the short answer, as explained by Black LJ in *K v K*, is that he would have erred in law had he done so.

51. A reading of his judgment demonstrates that Judge Marston took into account and gave appropriate weight to each of the factors to which the father has drawn attention. He acknowledged that the father was the primary carer and recognised the importance the father was attaching to the argument based upon the status quo. He gave appropriate weight to both points, whilst correctly appreciating that neither could be decisive.

52. In my judgment there is no sustainable basis for any complaint that Judge Marston either took into account irrelevant factors or failed to take into account any relevant factors. Nor, in my judgment, is there any sustainable basis for a complaint that Judge Marston erred either in the weight he chose to attach to the various factors he had to take into account or in his evaluative decision as to where the ultimate balance fell. That being so there is no proper basis upon which this court can intervene.

53. I do not overlook the father's complaints that in various respects Judge Marston erred in his evaluation of the mother's behaviour and in his findings as to certain matters of fact. I do not propose to go through this in detail, though I make clear that I have the father's complaints very much in mind. The father has established no proper basis upon which we could possibly interfere. Indeed, at times his arguments amounted to little more than an attractively presented attempt to reargue the case on the facts.

54. In the course of his submissions the father referred to a number of other authorities. In my judgment, none of them helps him. None of them will bear the weight of the argument which he seeks to erect on them. He drew attention to what Ormrod LJ had said in *Moody v Moody* (1981) in a passage cited by Black LJ in *K v K* (para [110]). Ormrod LJ was postulating:

    "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",

    as one where the court might decline to accede to an application by the custodial parent. Similarly, he relied upon the decision of this court in *Re B (Residence Order: Status Quo)* [1998] 1 FLR 368, 371, where Thorpe LJ said that "The overwhelming importance for securing [the child's] future was plainly the status quo." These cases do not set out

principles of law, though they do identify factors which may be of importance in particular cases.

55. Nor, in my judgment, do we derive any assistance from another authority to which we were referred: the decision of Mostyn J in *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577. To repeat, I can detect no error of law or principle in Judge Marston's judgment.

56. I quite accept that the father's right to determine his place of residence is protected both by the European Convention and by the EU Treaty: see the discussion by Thorpe LJ in *Payne v Payne* at paragraph [36]. But so too, of course, is the mother's. As Thorpe LJ went on to observe (*Payne* paragraph [37]), "each member of the fractured family has rights to assert and … in balancing them the court must adhere to the paramouncy of the welfare principle." Thus, this point does not of itself take the father anywhere.

Conclusion

57. It was for these reasons that, at the end of the hearing, I agreed with my Lords that this appeal should be dismissed.

Postscript

58. Before leaving this case I need to return to what Black LJ said in *K v K* at paragraph [145]. I have already set it out in full and need not repeat it all. I should, however, emphasise the central core of what she said:

    "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."

    I endorse every word of that and wish to express my emphatic agreement with it.

59. The present case is a good example of what can happen if appropriate heed is not paid to that warning. In the event, as I have explained, Judge Marston did not in fact fall into error but the prominence given in his judgment to "the *Payne* guidelines", no doubt reflecting the prominence they had been given in the course of argument before him, led to the father being given the permission to appeal which otherwise, it may be, would have been refused.

60. There is another lesson to be learnt from this case. Adopting conventional terminology, this was neither a 'primary carer' nor a 'shared care' case. In other words, and like a number of other international relocation cases, it did not fall comfortably within the existing taxonomy. This is hardly surprising. As Moore-Bick LJ said in *K v K*, "the circumstances in which these difficult decisions have to be made vary infinitely." This is not, I emphasise, a call for an elaboration of the taxonomy. Quite the contrary. The last thing that this very difficult area of family law requires is a satellite jurisprudence generating an ever-more detailed classification of supposedly different types of relocation case. Any move in that direction is, in my judgment, to be firmly resisted. But

so too advocates and judges must resist the temptation to try and force the facts of the particular case with which they are concerned within some forensic straightjacket. Asking whether a case is a "*Payne* type case", or a "*K v K* type case" or a "*Re Y* type case", when in truth it may be none of them, is simply a recipe for unnecessary and inappropriate forensic dispute or worse. It is to be avoided.

61. The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court.

Lord Justice Toulson :

62. I agree.

Lord Justice Pill :

63. I also agree.