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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London .EC4A 1NL
Monday, 8 October 2012

BEFORE:

MR STEPHEN BELLAMY QC

sitting **as a deputy judge of the High Court**

BETWEEN:
KSL Applicant
- and -
LRL Respondent

MR J ROSENBLATT (instructed by James Maguire & Co) appeared on behalf of the Claimant
MR J TUGHAN (instructed by Brethertons LLP) appeared on behalf of the Defendant

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Judgment
(As Approved)

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(Official Shorthand Writers to the Court)

THE JUDGE:

1. These proceedings concern FMSL, whom I shall refer to as F in this judgment. He is a young boy born on 10 March 2009. He is therefore 31/2 years old. The applications in date order are first the Father's for sole residence; secondly, the Mother's for sole residence and leave to remove F to live in Kansas City, Missouri, U.S.A. These applications follow on from international child abduction proceedings under The Hague Convention in the United States of America, in which the mother was ordered to return F to England and Wales despite her opposition to a return. The father's application was issued prior to The Hague Convention proceedings; the mother's applications were issued after she F had returned with F to England. This judgment is delivered at the end of a two

day hearing in which I heard oral evidence from the father, mother and Mrs Julian, a Cafcass reporter.

2. The law in relocation cases has been set out in a series of cases, culminating in *Payne v Payne* [2001] EWCA (Civ) 166 which was more recently considered by the Court of Appeal in *K v K* [2011] EWCA 793.

3. In *Payne*, Thorpe LJ, having said that the welfare of the child is the paramount consideration, pointed out that refusing the primary carer's reasonable proposals for the relocation of his or her family life is likely to impact on the welfare of independent children, and that an application to relocate would be granted unless the court concludes that it is incompatible with the welfare of the children. But he was careful to point out that there is no legal presumption in favour of the primary carer's proposals. The impact point, however, is made and, like other aspects of the guidance, is a matter that falls for serious consideration, albeit under the legal umbrella of the paramount welfare of the child. Thorpe LJ went on to advise at paragraph 40:

"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: 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. 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 children'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? What would be the impact on the mother either as the single parent or as a new wife of a refusal of her realistic proposals?

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

4. In *Payne* the President made reference to those references where residence may be a live issue coupled with an application by one parent to take the child abroad, a relevant consideration in this particular case:

"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."

5. In *MK v CK* Thorpe LJ said:

"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). 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. [27-28]

He continued at paragraph 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."

6. In *K v K* (supra) Black LJ having said (96) she would not put the dicta in *Payne* quite so much to one side said this:

"*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.

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."

7. But principles of law and guidance are not the same legal and forensic creatures, and it is important to maintain that distinction when considering these cases. In *re H*, leave to remove, Wilson UJ, as he then was, drew attention to this distinction, cautioning against an endorsement of a parody of *Payne* and referred to the subsidiary guidance in *Payne*.

8. Moore-Bick UJ also gave judgment in which he reviewed some of the leading authorities and some decisions at first instance. I wish to draw attention in particular to paragraph 87, where he approved the judgment of Eleanor King J in *re J v VS*, leave to remove, in 2010, where she had emphasised that the effect on the mother of the refusal of permission to remove from the jurisdiction was only one component of an assessment of what was in their best interests. Nowhere in his judgment does he agree with Thorpe UJ that *Payne* does not apply to cases where residence is shared more or less equally.

   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 U.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. (Emphasis supplied)

9. In summary the law is clear:

   a. the child's welfare is paramount in relocation cases as it is in relation to applications for residence orders. This is the only principle of law.

   b. In assessing the child's paramount welfare regard must also be had to the statutory list of matters in section 1(3), the commonly referred to welfare checklist, but different weight and importance will be attracted to these matters depending on the individual circumstances of each case.

   c. Further regard must also be paid to the guidance and the disciplines identified as to how the court should approach certain important aspects which are peculiar to relocation cases in assessing the child's paramount welfare, by which I mean the impact of refusal on the child's welfare, the genuineness of the motive to relocate and the well thought out, realistic and practical proposals associated with it and the genuineness of the opposition to relocation.

10. In reviewing the historical background it has been necessary to make some findings of fact and what follows is the factual background as I find it.

11. The father is British. He was brought up in Prestwich, a suburb of Manchester. The paternal grandmother, father's brother and his family live nearby. His sister lives in Harrogate in North Yorkshire. He is 49 years old. He works for himself in the tourism

industry and his business occupies a niche market particularly concerned with tourists and delegations that are involved in sporting events.

12. The mother is American. She was brought up in Kansas City in Missouri. Her parents separated when she was about eight and she and her younger brother, Michael, went to live with their father. Her mother remarried. Her stepfather is a former marine. She is 39, and her younger brother, Michael, aged about 35, lives at home with his mother and stepfather. She is a qualified teacher.

13. The mother and father met while she was on a student holiday in London in 1995. The father was, for part of that time, her tour guide. At the time the mother was 22 to 23 years and the father was 32 years. Their relationship developed and in 1999, four years later they married in New York City.

14. They agreed that their future married life would be made in England. The mother moved here and her teaching qualifications from the USA were recognised so she could teach in the United Kingdom; she was employed as a supply teacher as she chose not to take full time employment. She also would do face painting at fetes and parties. She made regular lengthy visits to the United States each year, so she could engage in face painting at the Renaissance Festival which ran over several weeks from August to September/October. She would stay with her family.

15. The mother and father chose not to have any children for several years after their marriage. In her statement to this court, the mother says she did not wish to bring a child into an 'unstable' situation, but by 2008 she says she had decided they should have a child and informed the father of her decision. I infer from her decision that by 2008 she considered that her marriage was stable. She became pregnant very quickly. During her pregnancy she went to the United States and stayed with her mother and saw a midwife whilst there. Nevertheless, she returned to Manchester prior to the birth and F was born there on 10 March 2009. Later that year the father, mother and F visited the United States. The father returned to this country ahead of the mother and F.

16. In 2010 the mother again visited the United States with F. However, she extended her stay far longer than the father had expected and when he spoke about this she would not commit to a return date. During this extended period the father visited on three occasions in October 2010, December 2010 and March 2011, but still the mother would not give any date for her return with F to Manchester.

17. In May 2011 she returned with F but very soon she was insisting that she intended to return to the United States with F by early August. Her ticket expired some time in the first week of August. The father was naturally concerned and realised his marriage was in difficulties and that she wanted to take F back to the USA. He suggested some marriage guidance counselling, which both attended; it was unsuccessful. He therefore wanted to be assured that if he agreed to F returning to the USA after a period of time the mother would return him to Manchester. They went to see a family mediator and a mediation agreement was reached between them. That can be found in the papers at page B9. It is perfectly clear to me, from both a reading of that agreement as well as a draft letter which the father's solicitors prepared and was given to the mother, that F's was a visit and temporary stay in the United States. All the evidence points that way and I have

no doubt at all that the mother knew that this was to be a temporary period for F in the USA.

18. The mother was due to return to Manchester with F no later than 11 December 2011. On 9 December 2011 without any warning to the father she presented a petition for divorce to a court in Kansas City; she also sought the sole residence of F. The following day, 10 December 2011, she emailed the father to say that she would not be returning with F to Manchester. She has proffered her reasons for refusing to return F in accordance with the mediation agreement. First, that she was seeking assurances from the father that F's and her return to the United States would not be impeded. Secondly, that she did not wish to return until the divorce in the USA was final.

19. During the both the agreed period in the USA from August to December 2011 and beyond this time the father complained that the mother would obstruct his contact to F in one way or another. He gave written evidence of the difficulties he had keeping in touch with F by internet video and telephone. He said his contact to his son was being 'stifled'. Having seen the parties give evidence, and having studied the written documentation carefully, I accept the mother did obstruct reasonable contact and I accept the father's evidence.

20. After he had had returned to England following his December 2011 visit, the father consulted solicitors. The Hague proceedings were initiated through the appropriate channels and reached the State Department in Washington. Simultaneously, orders had been obtained on the father's behalf in the High Court here in London. On 24 February 2012 Baker J made an order for F's return to England and Wales. On 29 February 2012 the father issued his application for sole residence of F. By late February early March the mother had been served with the English proceedings and order.

21. By March the mother also became aware of the involvement of the USA authorities since she was contacted by The State Department in Washington, who invited her to return F voluntarily to England otherwise Hague proceedings would be commenced; she declined to return F. The Hague proceedings were therefore started before the Federal Court. Notwithstanding her knowledge of the legal proceedings in both England and USA both of which sought F's return to England, in March 2012 she enrolled F at a Montessori pre-school in Kansas City and she herself started to assist at the school.

22. On 19 April 2012 Moor J granted a declaration that F's habitual residence was England and Wales and that he had been unlawfully retained in the United States by his mother. His order and his judgment are to be found in the bundle at A43-9. In the course of his judgment he held that the mother was in 'flagrant breach' of her agreement with the father on two occasions.

23. The mother's opposition to F's return under the Hague Convention on several grounds. First, that F was habitually resident in the United States and not in England and Wales; secondly that the father had consented or acquiesced in F's removal and/or retention in the United States, and thirdly, the adverse effect a return would have on F. The US Federal Court judge, Judge Marten, dismissed all the mother's grounds and objections and on 19 May 2012 ordered F's return to England and Wales.

24. In anticipation of F's return, on 29 May 2012 Moor J ordered the seizure of F's and his mother's passports on their return and made an order that F should not be removed from the jurisdiction of England and Wales. On 13 June 2012 the mother and F arrived at Heathrow Airport, not Manchester Airport. On the same day Moor J ordered a shared interim care arrangement.

25. On 29 June 2012 the matter came before His Honour Judge Tyzack QC who made various directions and ordered generous contact to the father, but he refused the F's application for F's day-to-day care pending a final hearing.

26. Upon her return, the mother took up residence in a rented property in Hebden Bridge in West Yorkshire. The father had remained in the former family home in Prestwich. Hebden Bridge is apparently between 45 minutes to one hour's drive from Prestwich, depending on traffic. The mother also enrolled F as a part-time pupil at a Montessori preschool in Hebden Bridge. The weekend and Wednesday contact ordered by Judge Tyzack QC has been taking place without any problems.

27. The mother's proposal is for a sole residence order and permission to relocate F to Kansas City, USA. She argues she was the primary carer for F. She advances reasons as to why she wishes to relocate to the United States: (1) she is American and it is her homeland; (2) she has no family in this country but family in the United States; (3) she would obtain both practical and emotional support there. I quite understand the reasons she advances. She also says they are 'an international family' that as a family they had seriously considered moving to the USA; the father denies this. She puts forward her proposals for a home, education, health and contact. Initially she would live in her mother's home in Kansas City with her mother, stepfather and brother. She proposes contact to the father. Her proposals changed during the course of the hearing from that which she had set out in her statement. She says she would be devastated if she were refused permission to relocate F.

28. The mother's initial contact proposals were for contact over the internet three times per week at pre arranged times. Each summer she offered to bring F to England for one month when father could have staying contact in blocks of five nights on three occasions, making a total of fifteen nights. Every alternate Christmas she would bring F to the UK so that Christmases could be shared. She also added that father could visit the US around F's birthday.

29. Mrs Julian's report made it clear she did not regard the mother's proposals as sufficient. By the time the hearing started the mother had advanced these proposals modestly to four weeks in the summer holidays but each week split up so that F spent from noon on each Saturday to Sunday at 6pm with her in 2013 and two consecutive weeks from 2014. She proposed Christmas which would alternate between the US and UK during which time F would stay with his father for 6 nights. Additionally she proposed six nights around his birthday and in September in the USA. She proposed indirect contact by internet three times a week and telephone contact once a week.

30. The father's seeks a sole residence order, alternatively a shared residence order, but regardless of which order is made he opposes his son's relocation to the United States. His case, in relation to a sole residence order, is F would live with him in the former family home with which he is familiar. This would give him security and continuity.

Secondly, that there had been an agreement that the family would make their home in England and F has been habitual resident here since his birth. He says that in contrast to the mother he can provide more stability, security and a first class education at his former school. He says he works from home and that, having reorganised his work so that he could share F's parenting more than most fathers, he would continue to do so. He would have the support of his own mother, his brother and his wife and F would have his cousins nearby. He says the mother has demonstrated a lack of concern for F's stability and needs by her behaviour, that she is not committed to contact, and has placed obstacles in his way when he tried to maintain his relationship with F whilst he was in the USA. He raises issues over the maternal family and their home being an unsuitable environment for F and has concerns over F's future health care in the USA. If she were given permission to relocate he says his contact would wither as a result of the mother's behaviour and F would end up having very little if any contact with him and his paternal family. He would not be in a position to do anything about this.

31. I heard oral evidence from the mother and father, and Mrs Julian. Both these parents have a lot to offer their son. The mother is a teacher and an intelligent woman. I have no doubt that she wants the very best for F. She is in many respects a good mother and can meet all his physical needs, but I entertain some doubts about her ability and commitment to meet all of F's emotional needs. In forming my impressions of her I made allowances for the fact she was giving evidence in a stressful situation but overall I found she lacked emotion and came over as cold and detached.

32. The father is self-employed and an intelligent man; he speaks several languages. He is a good father and I am sure he wants the best for his son. He too can meet the physical needs of F. He struck me as a warmer and more emotional character than the mother. I believe he can meet F's emotional needs. I found him sincere and genuine.

33. I read a great deal of written evidence prior to oral evidence and I have reread all of it after final submissions. Cases involving relocation from one jurisdiction to another, when one parent is to remain behind are always difficult. Parents' emotions run very high. There are only two diametrical solutions; one to allow relocation, the other to refuse it; there is nothing between the two. At the end of Mr Tughan's and Mr Rosenblatt's submissions on Friday I did not have a fully decided view about the outcome of this case and I was grateful for the time to reflect over the weekend before giving judgment. The oral evidence of the mother and father, and the impressions I formed of them, have been influential in coming to my findings and overall conclusions.

34. The mother argues she was and is the primary carer. Looking at the reality she has provided more one-to-one care for F than has the father, particularly because on two occasions since his birth she has remained in the USA with F beyond the periods agreed with the father. Whilst in the USA she was F's primary carer since the father was not there, but I am not satisfied that when in England the mother was F's primary carer in the way that she portrays it. This father, although working hard, did play a significant role in F's care. He says he reorganised his work to spend more time at home, his office was in the home and he was therefore in a position to care for and see F more than many fathers who work outside of their homes. Whilst mother probably did more care than the father, he played a role greater than many fathers who do not work from home. I accept his evidence on the care he provided. There were times, however, when his work did take

him out of the house and times when he may have had to travel and did not return home. These occasions, however, were less than the time he did spend at home with his son.

35. In 2008 the mother says that she and the father seriously considered moving to the United States and that the father applied for 'a green card'. The father says they were never going to move permanently to the United States and they were only enquiring about a small property, which they could use during visits to the United States. In the end his financial resources would not allow them to purchase a house there. He said that as he was entitled to 'a green card' because he was married to an American citizen, and having one would have considerably reduced the long time to pass through American immigration whenever he travelled to there and that the mother and F did not have the same delays he experienced because both have American nationality. I accept his evidence that this family never seriously considered moving to the United States full time and that his application for a green card was for the reasons he advanced and is not evidence of a decision to relocate there. I do not accept the mother's assertion that she made the father aware of her desire to live in the USA before F's birth and this was not apparent to him until the end of 2010.

36. The mother says that from the time of F's birth she took him frequently to the United States; F therefore has familiarity with life there. I accept that F has spent lengthy periods there since his birth albeit two of those periods contained lengthy extensions without the father's approval and consent. Her argument they are "an international family" has some small validity. They are not an international family who were accustomed to living in different countries and thereby acquired an internationally itinerant life style. They are international only to the extent that she is an American, the father is English and that on a frequent basis they did visit her family in the USA.

37. This is a case where neither parent has a residence order or its equivalent. Without getting bogged down in labels such as primary or main carer, F has spent more of his short life in the sole care of his mother by virtue of the fact that she has taken him to the USA and remained there for lengthy periods.

38. I have seen photographs of the maternal grandmother's house and the area where she lives and it is an attractive area of Kansas City. The father makes some criticisms of that home; he is concerned about the attitudes, values and characters who live there, as well as some safety aspects. I have to say I do not feel myself in a position to make any judgment in relation to those matters, and do not take them into account in my decision.

39. The mother's plan is to return F to the Montessori pre-school he formally attended between March and June 2012; I accept it is a perfectly good pre-school. I have no reason to doubt her evidence that she would be given some employment at this school, although no specific written offer of employment was made available to the court. She gave me details of the income she could receive from that employment, and the fact that she would pay no income tax on it as a single parent.

40. She referred to a scheme called Healthwise, which would be available to low-income families and their children, but she provided no specific details of this scheme. The father says it provides only very basic medical attention. The court therefore has no actual knowledge of what health provision F would receive.

41. Contact is an important aspect to these applications and particularly given the father's criticism of the mother and the obstacles placed in the way of contact by her. He said she was trying to stifle his contact. The father argues she is not committed to contact, will cause problems and find excuses for it not taking place, makes unilateral decisions about F without any reference to him. This will result in difficulties over contact which he will not be in a position to challenge if she and F are living in the USA. He supports this by his evidence about what he says has happened in the past, and her remaining beyond agreed dates and unlawful retention of F in the USA. He argues her recent compliance with the June contact order has been for a limited period and under the scrutiny of the present proceedings. He also says the proposals are inadequate and are not practicable and his relationship with F, although good, is not sufficiently established to withstand the impact of living several thousand miles away, and with a long journey time by plane.

42. The mother left for the USA with F in August 2010 and was expected to return in October 2010. She remained there until May 2011. Although father visited and spoke to her several times, she would not agree a date for her and F's return home to Prestwich. During this period the father says he had difficulties speaking or seeing his son and the mother would have excuses or just not be available. He gives details in his statements.

43. Although she had only recently returned from the United States the mother made it perfectly clear that she wanted to go back there in August taking F with her. The father was clearly unhappy about this and did not want the marriage to end. He suggested and paid for marriage guidance which failed to achieve a reconciliation between them. He suggested a family mediator, as he did not want to take legal proceedings, which would antagonise the mother. The father made it clear to the mother that he did not agree to F living in the United States but to another temporary visit if he had an assurance she would return with F. During mediation an agreement was reached and recorded by the mediator for F's care for the following 12 months. F was not yet at school so any periods away did not jeopardise his education.

44. The mother claimed during oral evidence that she signed the agreement under duress. This was the first time that such a claim had been made. I do not accept she signed the agreement under the duress that would be recognised in law. She may have signed it under the pressure created by her own desire to return quickly to the United States in August with F and her knowledge that the father would not agree to this unless he had assurances that F would be returned. Before they signed the mediation agreement both parties had consulted solicitors so no doubt were aware of their legal rights and duties in relation to F. The agreement provided for F to be in the USA from August to December 11 2011 and again for a fixed period from February to May 2012.

45. I am satisfied the father signed that mediation agreement in good faith believing the mother would abide by its terms. The mother said in evidence that at the time she signed it she did intend to comply, but I was not convinced by her evidence which lacked conviction. I have doubts that she signed it in good faith and did intend to return F on the date fixed of 11 December, but I do not have the evidence to make such a finding.

46. Whilst in the United States she made the decision to instruct lawyers to institute divorce proceedings and to seek custody of F. This was done on 9 December. On 10 December she informed the father by email she did not intend to return F to England on 11 December. The reasons she has given for not returning F by the due date were that she

required assurances that her return to USA with F would not be impeded and that she would not return until her American divorce was finalised. I was unimpressed by her reasons. The mediation agreement itself provided for a return to the USA with F in 2012 and there was no reason for her to remain in the USA pending the finalisation of the divorce, which may have taken a considerable time.

47. I find that when she went to the United States in August 2011 she knew perfectly well that the father did not consent to F staying in the USA and that she should have returned him by 11 December. She deliberately chose not to and resisted both the father's and The State Department's efforts to return F voluntarily to England. Further she ran arguments in the Federal Court in the United States which, given the judgment of Federal Judge Marten, as well as the evidence to this court, were not true and raise questions about her trustworthiness and credibility.

48. There were repeated difficulties in the period following for both indirect and direct contact by the father to F. I have concluded that following her decision to divorce the mother wanted to be in charge of the situation to her own advantage, and showed little insight into the effect her prolonged absences and her control of contact would have on F's relationship with his father. Mr Rosenblatt on behalf of the father put to her she was manipulative and deceitful. I find there is some truth in that proposition when it comes to her own desires and objectives.

49. This was the second time that the mother had not returned F to England when expected to do so. I can well understand why Moor J found her to be in flagrant breach on two occasions. That judgment has not been appealed, nor has the mother challenged it in any way. It is also clear from Judge Marten's judgment that the mother was presenting a case against F's return to England, which was based on premises she must have known were false.

50. The father is very concerned that, with the mother's history of unilateral actions and behaviour, F would loose his relationship with him and his extended family if he was allowed to relocate to the USA. Both from her written evidence and oral evidence, I formed the firm impression that notwithstanding her final proposals for contact she is not as committed to contact as she would have the court and Mrs Julian believe. Mrs Julian in her report and oral evidence said the mother needed to do more in advancing contact and to be less involved over time. I agree. Overall the mother's approach and attitude to contact was characterised by a begrudging reluctance, a possessiveness and a need to be in control to an unwarranted extent. I detected no real remorse or apology for her past behaviour. This does not forebode well for the future if relocation is allowed. I have concluded that the father is right in what he says happened over contact about the obstacles and difficulties he had getting contact to F both over the internet and in person and that his contact would wither and his relationship with F sufffer.

51. The father has complained the mother did not consulting him about matters affecting F; she would make decisions and present them to the father as accomplished fact. I accept what he says about this. This mother does act unilaterally and autocratically in these matters. She behaved very highhandedly on the two occasions when she deferred F's return to England beyond that expected and pointedly refused to return him except under a court order. But she also acted strategically and manipulatively. Just before she was due to return F to England she commenced divorce proceedings and sought custody of F

in the USA. Then when she knew about the English proceedings having started and The Hague proceedings in the USA having started or about to start, she enrolled F in a Montessori school in Kansas City, and took some work there herself. I can only infer that she was seeking to strengthen her case and anchor F and herself in the USA as much as she was able.

52. On her return to England and without any approach to the father she took up residence with F some distance away from the father in Hebden Bridge and placed him in a school there. She says she chose Hebden Bridge for two reasons: (1) that she was away from what she perceived was a hostile environment in and around Prestwich; (2) that Hebden Bridge had a Montessori school and that this would be a continuation of a system of education that F had become familiar with in the United States between March 2012 and June 2012, a matter of three months. The father has pointed out that there are Montessori schools nearer the former family home in Prestwich and there was no reason to locate herself so far from him.

53. Those points having been made, I do, however, find that since the order of Judge Tyzack QC she has complied with the contact ordered, although I accept with Mr Rosenblatt's point that she did so knowing she was under very close scrutiny and that not to comply would adversely affect her application to relocate to the United States

54. Over and above these concerns for contact I heard evidence about the parents' present and future incomes and the cost of the contact between England and Kansas City. The father gave evidence about his financial resources. The proceedings and his expenses have so far cost him over £70,000. He has no capital left that because this and he even used money set aside for tax to fund his expenses and legal costs. He had to borrow from his family to meet part of his expenses he could not afford. He gave evidence that over the last few years his income has been dropping and is now at a level, which would give him net after tax about £1500 to 1600 per month. The mother gives evidence as to her income from the promised job at the school and from face painting. She said she would have no tax to pay as a single parent. If that is correct her income will be roughly the same as the father's net income. I have no documentary evidence of these matters but have no reason to doubt what either of them says about their financial affairs. I received some evidence about the travel and accommodation costs associated with contact and I not satisfied that these parents could afford these expenses. F could not travel unaccompanied from Kansas City to Manchester. There is no direct flight. The journey takes approximately 15 hours in flight time and requires changes at either New York or Chicago. This aspect of the case would not be of particular importance if I were able to find this mother was very committed to contact taking place and would do everything to ensure it did, but I cannot make those findings. I find there would be a continuation of excuses the father experienced in the past and if there were he could not afford to litigate in the USA. Even if she gave the contact proposals her full commitment, I am not satisfied that they would be affordable by these parents over the period of F's childhood.

55. In coming to conclusions about this case, I must have regard, not only to F's paramount welfare but also the welfare checklist and the guidance contained in the authorities. F's ascertainable wishes and feelings have not been sought, and rightly so. He is of an age and understanding where whatever he said in relation to the complex issues this court has to grapple with would be of little weight. F has no special needs and no special characteristics other than those generally of a child of his age. F has an entitlement to be

provided with stability and security as best as can be achieved in the circumstances. Changes to established parenting, as opposed to changes of environment, should be avoided unless there are strong welfare reasons to do so. Like all children of separated parents, he needs to know and develop a relationship with both his parents and, if possible, with his maternal and paternal extended families. The need for these relationships to continue and develop and the benefits they bring to a child are now very well recognised and accepted. I have no doubt he has two loving parents who both have much to contribute to his life and from whom he will derive enormous benefit. Both are highly intelligent and articulate; both have had a good education. Both have his best interests to the forefront of their minds. Both can provide very well for his physical needs and both, subject to what I have said are capable of satisfying his emotional needs.

56. I have already commented upon my impressions of the mother and father and the allowances I made for the stressful nature of the proceedings. I found the impression the mother made on me was one of being quite self-absorbed, tense, withholding of her full thoughts and feelings and her looking at the situation very much from her own and not F's perspective. At the end of her evidence I was left wondering if I really had been given by her a full and honest account and her evidence and the way she gave it left an uncomfortable feeling. The father gave clear evidence, showed insight into the situation, save in one important respect, and displayed empathy which I found the mother was lacking. Unlike the mother I found him revealing of himself and his thoughts and feelings. There was one aspect of the father's evidence which caused me some concern, and that was his lack of insight into F's needs when persisted in his application for a sole residence order. He did not seem to appreciate the effects such a dramatic change would have on F. Overall however his evidence and the way he gave it, impressed me much more than the mother's; I found him honest and plausible and I have no doubt that his opposition to relocation and his application for residence was based on a genuine belief in F's welfare and not a tactical ploy by him.

57. I find I can place trust and have confidence in him which I was unable to find in the mother. If F were living with him he would ensure frequent and regular contact between F and his mother. I do not have that same trust and confidence in the mother if F were living with her. She has demonstrated an ability not to act in F's best interests when it involves his relationship with his father. I hope that will improve over time but at present it does not exist to a sufficient extent. She acts unilaterally and autocratically in this area and I have no confidence this would change if I granted permission to relocate. The contact which has been taking place recently since early July 2012 has helped to re-establishing the relationship between F and his father, but this is a relatively short period and it is early days. Further when viewed in the context of the time F has spent in America in the sole care of his mother since August 2010 with very little direct contact to his father, it is a tribute to the father's abilities that his relationship is described as a good one. In making my findings about the mother's approach to contact, I do not think she is hostile to the principle of paternal contact in general or that she is especially malevolent or malign towards the father, but that she does not see the value in his relationship with F as much as she ought. She is prone autocratically to reach decisions on these matters, believing that she knows best. If her application to relocate were successful I foresee future problems over contact F's contact with his father, which would encounter serious difficulties and would be curtailed by her because she does not have the required amount of commitment to it. The causes of this do not concern me and whether this has come about as a result of her own life experiences would be speculation.

58. The father does not persuade me that his application for a sole residence order is in F's paramount welfare. I do not regard the father as incapable of providing good physical and emotional care, and providing security and stability for his son, I am perfectly satisfied that he can provide more than adequately for these matters and he would be a very good parent, stimulating and hugely supportive of F. But and I cannot ignore those periods in F's life when he has been solely with his mother and experienced her care. F should not suffer any risk of harm to his welfare, notwithstanding his mother's actions in keeping F in the United States for those two lengthy periods. From F's experience and perspective it is his mother who has looked after him in those periods and during them he had only unsatisfactory contact with his father. F achieved some security and stability in his mother's care, his physical and many, but not all, of his emotional needs, were met by her. To change that regime and place him with his father is likely to undermine his sense of security and place him at risk of suffering emotional harm, confusion and upset. This is not to reward the mother for what she has done but is a reflection of the reality for F.

59. As to the mother's application for sole residence, I of course bear in mind the totality of her proposals and the intrinsic element of them to relocate to the United States. In looking to the guidance in *Payne*, I examine first of all the genuineness of mother's application to relocate. I have no doubt that she wishes to live in the United States. After all, she is an American, it is her homeland and she has family there and she would be able to call on them for support. She has thought out many of the practicalities that this would involve of a home, education and employment, and these are realistic. What I find she has not thought through accurately and honestly are her proposals for contact and their practicability. Her proposals changed during the hearing but were characterised as I have found by a maternal lack of commitment to contact, an impaired insight into the importance of F's relationship with his father, a need to control it, and the obstacles she has placed in father's path of contact in the past. Over time I do not believe this mother would sustain the contact between F and his father and she would easily tire of it.

60. I have considerable anxiety for F's future contact with his father if I were to grant permission to relocate. I am deeply troubled that this father will be faced with a similar situation as he has already experienced with trying to see his son and would be subject to this mother's dictates in relation to the contact. Further, once an order for relocation is made, and even if a mirror order is obtained in the USA, the control over contact would shift from this jurisdiction to the USA. This father would not have the financial resources to take legal proceedings in the USA to obtain redress over contact. Further I am not persuaded the financial resources are available to provide for contact. She failed to persuade me that I should reach conclusions on these matters in her favour. In the future I find these problems would be likely to recur and the mother completely failed to persuade me otherwise. The combination of these matters would I find result in very little contact taking place and certainly not enough to sustain any adequate and proper relationship between F and his father.

61. If F were to remain in the United Kingdom, his relationship with his father through regularly seeing him would be strengthened. He has spent a great deal of his short life away from his father. I bear in mind Mrs Julian's evidence that whilst she thought that there was a good relationship between father and son in the one hour she saw them together, she also said that she had not assessed its strength and depth. When she was asked about the relocation application being premature, the effect it would have on the father /son relationship and their present relationship being able to withstand the effects

of relocation she was hesitant. She said she had not assessed their relationship to that extent. I find she had not considered this aspect of the case.

62. I am not satisfied that the roots of this relationship would be strong enough to withstand the several thousand miles distance, a 15 hour plane journey, only occasional contact which is not adequately supported by the mother. In my judgment, the relationship between father and son would severely suffer. In any event it needs to have stronger foundations than presently exist to sustain the impact of a relocation on it. F is still only 3 years old and his relationship with his father has only recently recommenced; it needs time to develop further. To that extent there is some strength in the submission by Mr Rosenblatt that this application is premature.

63. The father's opposition to relocation is I find is genuine and not motivated by malice but by his view of F's welfare. He does not have any ulterior motive, and I reject the submission that he is motivated by seeking to punish the mother for her past behaviour. On that I heard more evidence than Mrs Julian did, when she is alleged to have said to Judge Tyzack QC at the hearing in June that she felt that the father wanted an interim residence order as a means of punishing the mother. That was her opinion at that time but it is not one I share, having heard all the evidence.

64. This mother is not just highly intelligent but resourceful. She and the father have both shielded F from this current litigation; that is to their credit. Her own statements evidence her ability to find employment both in this country as well as in the United States, and I have no doubt she would. She is clearly very capable as a teacher as the evidence demonstrates, able to make friends and obtain support from them. She has already arranged accommodation in the United Kingdom, with someone she has recently made friends with in Hebden Bridge, if she needed accommodation when returning F to this country for contact with his father. The father says that the mother had and could still have a wide circle of friends in this country and that she is not as isolated as she makes out. She also has qualifications which would bring her employment as a teacher. There is other evidence that she has already started to make friends there in the last few months. She would also, I am sure, start to make far more friends once F is regularly in his preschool and at school, and be in a good position, even as a single parent, if she were to remain in this country, to find support, both emotional and physical.

65. I recognise the mother would be upset and distressed if I were to refuse her relocation application, but on the evidence, including her own, I do not accept that she would be devastated. The impact of refusal on her will be negative and clearly not positive but in my assessment, and bearing in mind what Mrs Julian has said, it is not of such an order as would impact adversely on F's welfare. She is very capable of safeguarding against such an eventuality. In any event this is just one component of the matters I need to take into account. Further subject to appropriate safeguards she and F will be able to visit her family in the USA and F will be able to maintain his relationships with this side of his heritage.

66. Bearing in mind the law and guidance to be applied to the facts of this case I have come to the clear conclusion that F's paramount welfare requires that I should reject this application to relocate. Her proposals are although in many respects reasonable and thought through are in other respects inimical to F's paramount welfare. In summary I have made conclusions on this mother's commitment and approach to contact and I find

it lacking. I do not have the confidence she would provide the contact she proposes and I believe she would cause problems for future contact if F were living in the USA. Even were I wrong on this I am not satisfied that she and the father could afford to provide financially for this level of contact. I find the father's concerns about relocation to have substance and his opposition to relocation is genuine. His relationship is such that at present it would be unlikely to be sustained and supported by the contact proposed. His relationship should be on an upward trajectory and this can be better provided for if F were living in England. F, as the son of separated parents, needs a relationship with both parents to meet his long term emotional and developmental needs which I do not accept on the evidence before me can be met if he lives in the USA with his mother.

67. I have come to a different decision in relation to relocation than Mrs Julian. I have done so because I heard the evidence, which she had not, and I have reached views on aspects of the evidence that were outside her compass. I have made findings of fact which she was not in a position to do in relation to contact, the mother's behaviour, her unilateral and autocratic decisions, the practicability of the contact proposed, an assessment which she had not undertaken of the father-and-son relationship as it exists at present, and the impact relocation would have on this relationship, and of the impact on the mother if this were refused.

68. Although I have rejected a sole residence order to the father, a sole residence order to the mother does not follow. A shared residence order is sought by the father. F will be living in this country. Both his parents are capable of offering F a good home and care and the issue as to with whom F should make his main home finely balanced. Both are committed parents with much to offer their son. The mother does act unilaterally and feels she is the more important parent. A sole residence order to her would in my judgment of her only seek to encourage her to act in accordance with that aspect of her character and personality. Mrs Julian pointed to the fact that this couple do not, at the present, communicate very well, and this was her only real reservation about a shared residence order. Any improvement in their communication is to be encouraged. They both have parental responsibility; they each have a duty to discuss and consult over the major aspects of F's life and to try and reach an accord. If they have a shared residence order it is reminder to both of them that neither has greater rights or entitlements than the other and each has much to contribute to F's life; to achieve this they must communicate.

69. This is a father who has much to offer his son and who wants to be a fully participating parent. F will benefit from this if his father carries through his commitments and sense of responsibility. There are no sufficient welfare factors which indicate that a shared residence order is not in F's paramount welfare and many which favour it. I am perfectly satisfied that his paramount welfare requires that I make a shared residence order and that the time F should spend with his father should be under a shared residence order. I therefore make such an order. It is an order which has become increasingly common over the last few years and one which properly reflects the part both parents have played and should play in his future, whether or not the majority of his time is spent with one or the other.

70. Before setting out how that shared residence order will operate, I would like to invite both parents to agree on how F's time should be divided between them on the basis he remains living in the country. I do so on the basis that the majority of his time will be spent with his mother. I will hear submissions in the absence of their agreement.