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[13/02/2001; Court of Appeal (England); Appellate Court]
Payne v. Payne [2001] EWCA Civ 166

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

13 February 2001

Before: The President Dame Elizabeth Butler-Sloss, and

Lord Justice Thorpe and Lord Justice Walker

P. v. P.

Case No: 2000/3457

Lord Justice Thorpe:

1. This was an expedited appeal with the permission of Ward LJ from an order of His Honour Judge Langan made on 20 October 2000 in the Cambridge County Court. The order relates to a little girl, S, who has just attained the age of four. The judge refused an application for a residence order made by S's father, and acceded to an application by S's mother to remove S permanently from the United Kingdom and take her to live in New Zealand. The appeal raised questions of principle of some general importance. At the conclusion of the argument the appeal was dismissed for reasons to be subsequently given in the form of a handed down judgment. The facts set out below reflect the position at the date of the hearing on 21 December 2000.

The Facts

2. The facts fall, as the judge said in his careful reserved judgment, into three distinct periods, with the scene shifting from England to New Zealand and then back again to England. The summary which follows is closely based on the judge's judgment.

3. The father is British. He is 33 years of age. He lives in Newmarket, as do other members of his family. He is a self-employed controls engineer working in the construction industry, and earning between £40,000 and £50,000 a year.

4. The mother is a citizen of New Zealand. She is 28 years of age. She comes from North Shore, a suburb of Auckland, which is where her mother, her stepfather, her brother and his partner all live. The mother is at present living in a small flat in Plumstead in South London.

She has experience in the financial services industry and she is at present working in the settlements department of an insurance company and earning about £21,000 a year.

5. The mother came to London when she was in her early twenties. She obtained a job in a bank and intended to use London as a base for travel in Europe. In March 1996 she met the father, who was then living in a house which he had bought in Stamford Hill in north-east London. They fell in love, the mother became pregnant, and they got married on 19 September 1996. S was born on 16 January 1997. The judge thought, after hearing the evidence, that S's parents would probably have got married in any case, but that the pregnancy accelerated their decision. The mother gave up work in order to be at home with S.

6. Unhappily problems arose soon after S's birth. S's maternal grandmother, Mrs C, came over from New Zealand to help, but she did not get on with the father and she moved out of the house at Stamford Hill. In July the parties separated, but only for two weeks. The mother complained that the father was domineering. It also appears (not so much from the judgment of Judge Langan but from the judgment of Judge O'Donovan in family proceedings in New Zealand in May 1999) that part of the trouble was that the mother did not like living in Stamford Hill, in a house without any garden, and in a part of London which she did not find congenial. Even before S was born, her parents had been talking of selling the house. It was put on the market but it was not sold until February 1998.

7. By then S's parents had definitely decided to go abroad, but there was a conflict of evidence at the first instance hearings in New Zealand and England as to what their plans really were. The mother's case was that they would all live in New Zealand, after the husband had first carried out a contract in Kuala Lumpur. The father's case was that the stay in New Zealand was to be exploratory, with no firm commitment, especially as his work prospects were uncertain. That issue was of great importance to Judge O'Donovan, sitting in New Zealand, since he had to deal with Hague Convention issues, as reflected in sections 12 and 13 of the Guardianship Amendment Act of New Zealand. Judge Langan took the view that those past controversies had little if any relevance to decisions about S's future.

8. So the family left England, the mother and S for Auckland and the father for Kuala Lumpur. The mother and S were in New Zealand for about fourteen months, from March 1998 until May 1999. For three months they lived with Mrs C and her husband. Then they moved into a two-bedroom flat.

9. Until August 1998 the father was mostly working in Kuala Lumpur, but with one short visit (of about a week) to New Zealand in June. The father made enquiries about employment opportunities but was not encouraged. He also observed a lack of warmth on the part of his wife. This was more marked when he arrived in New Zealand for a second time on 27 August 1998, after the completion of the contract in Kuala Lumpur. Indeed, the couple separated within a week. On 3 September 1998 the mother applied to the North Shore Family Court for custody and an order preventing the father from removing S from New Zealand. The father made a cross-application for custody and permission to remove S from the country. There were fairly lengthy proceedings in which both parents gave oral evidence. Judge O'Donovan did not find the mother a convincing witness. He thought it likely that even before they left England she had decided to separate from the husband once they got to New Zealand. He thought that their problems on his arrival in August 1999 were (in Judge O'Donovan's words):

" due to the attitude of the wife, which clearly was that she did not want to remain in the marriage and had turned her back completely on the possibility of living other than in New Zealand."

10. On 4 May 1999 Judge O'Donovan ordered that S should be returned to the United Kingdom and she travelled back on 16 May 1999 by a Malaysian Airlines flight, accompanied by both her parents. So began the third and most recent chapter of her life. When they arrived at Heathrow the father went to Newmarket and the mother took S, not to her uncle and aunt in Finchley (whose address the mother had given to the father) but to another address unknown to the father. The father traced them within a few days, with the help of the police, but the incident caused him distress. Judge Langan said of this episode:

" ... the mother's conduct at this stage was, as I believe she now recognises, of a most discreditable kind even if one makes every allowance for the aftermath of the Hague Convention proceedings and the stress of the flight from Auckland. What she did was bound to cause hurt and genuine anxiety to S's other parent ..."

11. Proceedings were then instituted in the Cambridge County Court, and a consent order was made on 2 June 1999 which regulated S's life from then until the recent applications. A residence order was made in favour of the mother, but she was prohibited from removing S from the jurisdiction. The father was to have contact with S under provision which the judge described as follows:

"S is to have contact with the father on alternate weekends, from Thursday evening to Sunday afternoon, together with an additional period of seven days in every eight weeks. In fact, by agreement between the parties, the alternate weekend contact has been extended so that it starts on Wednesday evening. If my calculations are correct, what all this means is that, in every cycle of 56 days, S spends 23 nights with the father."

12. The judge then described S's life with her mother:

"The mother lives, as I have already stated, in a one-bedroom flat in Plumstead. Most of the units in the development are occupied by elderly people, so that the environment is not ideal for a mother who is bringing up a young child. The mother's job is in Borough High Street, London SE1. Apart from times when S is with the father, the mother and S leave home at 0730 on working days. The mother drives to a nursery some 10 to 15 minutes away, and leaves S there for the rest of the day. She continues her journey to work by car, walking, train and walking again, and is at work from 0900 to 1700. In the evening she makes the return journey, collecting S on the way, and they get home at about 1815."

13. The judge then summarised the mother's financial position (earnings of £21,000 a year, maintenance for S paid by the father of £75 a week, and no social security benefits; rent of £400 a month and nursery fees of nearly £100 a week payable even if S attends for only part of the week). The judge then described the mother's feelings about her present way of life, and the position about contact during the preceding year:

"The mother has an intense dislike of life in London. She feels isolated and gets depressed. She does not like the area in which she lives. Last year her car was stolen, and crimes (including a rape) have been committed just outside her house. Such friends as she has live a considerable distance from Plumstead, although she does have two stepbrothers who live not too far away. Because of her working arrangements, and social difficulties (she does not have much chance to meet other young mothers), she is, in her own words, 'unable to facilitate S's need to meet other children to play with or do outside activities much'.

I have already mentioned the schedule of contact, as ordered by the court and extended by agreement of the parties. The point for pick-up and return is outside Redbridge underground station. The father is usually accompanied by the paternal grandmother. The mother unhappily feels unable to communicate with the other adults, which must make these occasions at best artificial, if not fraught. The mother did in evidence say that she realises that her 'attitude is exceptionally unhelpful'.

This is a case in which, as everyone involved has acknowledged, contact goes exceptionally well. S engages in a wide range of both day-to-day and leisure activities with the father and, when he is at work, with the paternal grandmother. It is clear that she is greatly loved by the father and by the other members of his family in the Newmarket area. Going home puts something of a blight on the last day of contact, and a good deal of evidence was given about S's reluctance to leave the father's car at the end of the journey back to London. I am sure that S finds the parting painful, but the evidence falls a long way short of demonstrating that she is in any way unhappy once she is securely back in the care of the mother. I accept what the mother says about S's settling down in her car within a couple of minutes after leaving the father and his family."

14. For about a year the mother has had a close relationship with a boyfriend, Mr Holmes. He works in financial services and has his own flat in Bromley. The mother sees him mainly at weekends when S is with her father.

15. The judge said of S herself:

"Everyone describes S as a healthy, intelligent, lively and happy little girl. She is devoted to both her parents and they love her. She has a strong attachment to the paternal grandmother and, whilst she has seen comparatively little of the maternal grandmother over the past months, I am sure that she has been (and may again be) no less attached to that lady."

The Law

16. The modern law regulating applications for the emigration of children begins with the decision of this court in *Poel v Poel* [1970] 1 WLR 1469. I doubt that the judges deciding the case recognised how influential it would prove to be. Whilst emphasising that the court should have regard primarily to the welfare of the child, both Sachs LJ and Winn LJ emphasised the importance of recognising and supporting the function of the primary carer. That consideration was most clearly expressed by Sachs LJ when he said:

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

17. In the later case of *Nash v Nash* [1973] 2 All ER 704, Davies LJ said:

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

18. The subsequent development of this approach was achieved by Ormrod LJ. In *A v A* [1979] 1 FLR 380 it appears that the decision in *Poel v Poel* was cited by counsel for the father appealing the grant of leave to the mother by the Family Division judge. For at page 381 he said:

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

19. He adopted the same approach in the unreported case of *Moodey v Field* in 1981 when he said:

"The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is clearly shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible."

20. This approach was questioned in the Family Division by Balcombe J in the case of *Chamberlain v de la Mare*. He emphasised that his duty was to regard the welfare of the child as the first and paramount consideration and that each factor should be weighed one against another no factor taking priority against another. His decision was reversed in the Court of Appeal. Lord Justice Ormrod held that Balcombe J had misdirected himself in questioning whether the decisions in *Poel* and *Nash* were consistent with the statute. Ormrod LJ emphasised that the court in *Poel* had not weighed the interests of the adults against the interests of the children but rather had weighed the effect on the children of imposing unreasonable restraints on the adults. Having cited his earlier decision in *Moodey v Field* he said at 443:

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

21. In the case of *Lonslow v Hennig* [1986] 2 FLR 378, Dillon LJ reviewed and applied these authorities in allowing a mother's appeal from the refusal of her application to emigrate with the children to New Zealand. Having reminded himself that so far as the law was concerned the first point was that the welfare of the children was the paramount consideration and secondly that previous cases decided on other facts could only provide guidelines, he noted that there was a consistent line of guidance throughout the decisions of this court since 1970.

22. In *Belton v Belton* [1987] 2 FLR 343 Purchas LJ in allowing a mother's appeal against the refusal of her application to emigrate to New Zealand said:

"I sympathise and understand, where a lay person such as a father is concerned, the difficulty of reconciliation with the concept of such a separation being in the paramount interests of the child in the long term, but the long-term interests of the child revolve around establishing, as Griffiths LJ (as he then was) said in *Chamberlain*, a sound, secure family unit in which the child should go forward and develop. If that can be supported by contact with the father, that is an immense advantage, but, if it cannot, then that is no reason for diverting one's concentration from the central and paramount issue in the case."

23. He summarised the authorities by saying:

".... the authorities and the law dictate the hard and difficult decision which must be made once it is established that the custodial parent genuinely desires to emigrate and, in circumstances in which there is nothing adverse to be found in the conditions to be expected, those authorities are quite clear in the course that the court must take, whatever the hardship and distress that may result."

24. In *Tyler v Tyler* [1989] 2 FLR 158 Kerr LJ, having been referred to virtually all the reported cases in which an issue of this kind had arisen, offered this summary:

"I also accept that this line of authority shows that where the custodial parent herself, it was the mother in all those cases, has a genuine and reasonable desire to emigrate then the court should hesitate long before refusing permission to take the children."

25. In more recent times both at first instance and in this court I have sought to apply this line of authority to a series of cases giving rise to differing facts and circumstances. We have been referred to *MH v GP* [1995] 2 FLR 106, *Re H* [1998] 1 FLR 848 and *Re C* [2000] 2 FLR 457. However in the first case I referred to the ratio in *Chamberlain v de la Mare* as creating 'a presumption in favour of the reasonable application of the custodial parent'. Equally in the last case I said at 459 that 'a balance then had to be struck to determine whether or not the resulting risk of harm to S was such as to outweigh the presumption that reasonable proposals from the custodial parent should receive the endorsement of the court'. In both passages I was using the word presumption in the non-legal sense. But with the advantage of hindsight I regret the use of that word. Generally in the language of litigation a presumption either casts a burden of proof upon the party challenging it or can be said to be decisive of outcome unless displaced. I do not think that such concepts of presumption and burden of proof have any place in Children Act litigation where the judge exercises a function that is partly inquisitorial. In the context of applications for contact orders I expressed my misgivings in the use of the language of presumptions: see in *Re L: Re V: Re M: Re H, (Contact: Domestic Violence)* [2000] 2 FLR 334.

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.

The Value of the Guidance

27. Few guidelines for the determination of individual cases, the facts of which are never replicated, have stood so long in our family law. Where guidelines can be formulated there are obvious benefits. The opportunity for practitioners to give clear and confident advice as to outcome helps to limit the volume of contested litigation. Of the cases that do proceed to a hearing clear guidance from this court simplifies the task of the trial judge and helps to limit the volume of appeals. The opportunity for this court to give guidance capable of general application is plainly circumscribed by the obvious consideration that any exercise of discretion is fact dependent and no two cases are identical. But in relocation cases there are a number of factors that are sufficiently commonplace to enhance the utility of guidelines. I instance:

(a) the applicant is invariably the mother and the primary carer;

(b) generally the motivation for the move arises out of her remarriage or her urge to return home; and

(c) the father's opposition is commonly founded on a resultant reduction in contact and influence.

28. Furthermore guidance of this sort is significant in the wider field of international family law. There is a clear interaction between the approach of courts in abduction cases and in relocation cases. If individual jurisdictions adopt a chauvinistic approach to applications to relocate then there is a risk that the parent affected will resort to flight. Conversely recognition of the respect due to the primary carer's reasonable proposals for relocation encourages applications in place of unilateral removal. Equally as this case demonstrates, a return following a wrongful retention allows a careful appraisal of welfare considerations on a subsequent application to relocate. Accordingly it is very desirable that there should be conformity within the international community. At the international common law judicial conference arranged in Washington in September 2000 by the United States an additional session was allocated to the discussion of the approach adopted by the seven delegate jurisdictions to relocation cases. That discussion demonstrated that for all jurisdictions the welfare of the child is the paramount consideration. However some jurisdictions afford greater weight than others to the harm that the refusal of the primary carer's reasonable proposal is likely to cause to the children. In my judgment there is some prospect that standardisation at a point close to the approach adopted in this jurisdiction is achievable. There may an opportunity for evaluation across a much wider range at the Fourth Special Commission to review the operation of the 1980 Convention at the Hague in March 2001.

The Foundation of the Guidance

29. A review of the Court of Appeal authorities over the last thirty years demonstrates that although not the originator of the guidance, Ormrod LJ was its principal exponent. He rationalises it and its strongest statement comes in his judgment in *Moodey v Field* as well perhaps in the judgment of Purchas LJ in *Belton v Belton*. Since the direction has stood for thirty years and since its amplification by Ormrod LJ, first in *A v A* over twenty years ago, it

is perhaps necessary to question whether changing perceptions of child development and welfare in the interim undermine or erode his exposition. That exposition, as he himself said, was very much based on common sense. But even generally accepted perceptions can shift within a generation. The shift upon which Mr Cayford relies is in the sphere of contact. He asserts that over the last thirty years the comparative importance of contact between the child and the absent parent has greatly increased. No authority for the proposition is demonstrated. Without some proof of the proposition I would be doubtful of accepting it. Throughout my professional life in this specialist field contact between child and absent parent has always been seen as an important ingredient in any welfare appraisal. The language may have shifted but the proposition seems to have remained constant. I believe that conviction is demonstrated by the review of the contact cases over much the same period to be found in my judgment in *Re L*, cited above, at 29. Furthermore practicalities are all against this submission. International travel is comparatively cheaper and more competitive than ever before. Equally communication is cheaper and the options more varied.

30. Quite apart from Mr Cayford's submission, I do not believe that the evaluation of welfare within the mental health professions over this period calls into any question the rationalisation advanced by Ormrod LJ in his judgments. In a broad sense the health and well-being of a child depends upon emotional and psychological stability and security. Both security and stability come from the child's emotional and psychological dependency upon the primary carer. The extent of that dependency will depend upon many factors including its duration and the extent to which it is tempered by or shared with other dependencies. For instance is the absent parent an important figure in the child's life? What is the child's relationship with siblings and/or grandparents and/or a step-parent? In most relocation cases the judge will need to make some evaluation of these factors.

31. Logically and as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks. Although fathers as well as mothers provide primary care I have never myself encountered a relocation application brought by a father and for the purposes of this judgment I assume that relocation applications are only brought by maternal primary carers. The disintegration of a family unit is invariably emotionally and psychologically turbulent. The mother who emerges with the responsibility of making the home for the children may recover her sense of well-being simply by coping over a passage of time. But often the mother may be in need of external support, whether financial, emotional or social. Such support may be provided by a new partner who becomes stepfather to the child. The creation of a new family obviously draws the child into its quest for material and other fulfilment. Such cases have given rise to the strongest statements of the guidelines. Alternatively the disintegration of the family unit may leave the mother in a society to which she was carried by the impetus of family life before its failure. Commonly in that event she may feel isolated and driven to seek the support she lacks by returning to her homeland, her family and her friends. In the remarriage cases the motivation for relocation may well be to meet the stepfather's career needs or opportunities. In those cases refusal is likely to destabilise the new family emotionally as well as to penalise it financially. In the case of the isolated mother, to deny her the support of her family and a return to her roots may have an even greater psychological detriment and she may have no one who might share her distress or alleviate her depression. This factor is well illustrated by the mother's evidence in this case. As recorded in Miss Hall's note she said:

"Things happen and I think I can't stand it. I've got to go home. But then I see S and I calm down and I think I can't leave her .... I would give it a really good try to be a mother to S here but in my heart of hearts I think I would not be able to do it."

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.

The Impact of Statutory Reform

33. So if changing perceptions of child welfare do not require a reformulation of the direction formulated by this court for the guidance of trial judges have statutory reforms? Prior to the Children Act 1989 relocation applications were brought either within the divorce suit alternatively in wardship. With the advent of the Children Act 1989 relocation applications have been brought either under section 13, where there is a residence order in force, or under section 8. They are therefore subject to the welfare paramouncy principle in section 1(1) and, where the application is under section 8, the welfare check-list in section 1 (3). (Although technically an application brought under section 13(1) is not subject to the welfare check list it has been held that the trial judge should nevertheless take the precaution of regarding the check list factors when carrying out his welfare appraisal.) In my opinion these changes were of form and not of substance. A jurisdiction which had been either inherent or under other statutory powers received a new and comprehensive codification. These essentially procedural reforms did not, in my opinion, require any reconsideration of this court's consistent direction for the determination of relocation cases.

34. However with the commencement of the Human Rights Act 1998 on 2 October 2000 it was not hard to foresee that a father responding to a relocation application would submit that the emigration of his child to a distant land constituted a breach of his right to family life under Article 8. This court indeed anticipated the development in its rejection of an application for permission to appeal reported as *Re A* [2000] 2 FLR 225. Although the Convention was not then of direct application and although the court was not determining an appeal, the opinions expressed are obviously persuasive. There has of course been some evolution in the application of the Convention over the course of the last nine months and the view expressed by Buxton LJ to the effect that the Convention has perhaps no place in this area of litigation seems no longer sustainable, in the light of the decision of the European Court in *Glaser v The United Kingdom* [2000] 3 FCR 193 and the decision of this court on 21 December 2000 in the case of *Douglas, Zeta Jones and Northern Shell plc v Hello plc*.

35. I am in broad agreement with the views expressed by Ward LJ to the effect that the advent of the Convention within our domestic law does not necessitate a revision of the fundamental approach to relocation applications formulated by this court and consistently applied over so many years. The reason that I hold this opinion is that reduced to its fundamentals the court's approach is and always has been to apply child welfare as the paramount consideration. The court's focus upon supporting the reasonable proposal of the primary carer is seen as no more than an important factor in the assessment of welfare. In a united family the right to family life is a shared right. But once a family unit disintegrates the separating members' separate rights can only be to a fragmented family life. Certainly the absent parent has the right to participation to the extent and in what manner the complex circumstances of the individual case dictate.

36. But despite the fact that this appeal has raised only the asserted Article 8 rights of the secondary caring parent, we should not lose sight of the Article 8 rights of the primary carer, although not specifically asserted in argument. However an appeal may well arise in which a

disappointed applicant will contend that section 13(1)(b) of the Children Act 1989 imposes a disproportionate restriction on a parent's right to determine her place of habitual residence. This right was recognised by the decision of this court in *Re E (Imposition of Conditions)* [1997] 2 FLR 638 within the confines of the jurisdiction of the court and indeed beyond within the United Kingdom. But why should the same right not extend to anywhere within the European Union (having regard to Article 48 of the Treaty of Rome) or, beyond that, within wider Europe? From that point to a right to world-wide mobility seems but a short step. The European Convention does specifically recognise this right of mobility in Article 2 of Protocol 4 which provides:

"1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everybody shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedom of others."

37. Although Protocol 4 has yet to be ratified by the United Kingdom, it undoubtedly lends force to the argument that a failure or refusal to recognise a right of mobility beyond the somewhat fortuitous jurisdictional boundary represents a stance of disproportionate parochialism. Although for the purposes of this appeal this paragraph is digressive it does serve to illustrate the generalisation that each member of the fractured family has rights to assert and that in balancing them the court must adhere to the paramouncy of the welfare principle.

38. The acknowledgement of child welfare as paramount must be common to most if not all judicial systems within the Council of Europe. It is of course enshrined in Article 3(1) of the United Nations Convention on the Rights of a Child. Accordingly the jurisprudence of the European Court of Human Rights inevitably recognises the paramouncy principle, albeit not expressed in the language of our domestic statute.

39. In *Johansen v Norway* [1996] 23 EHRR 33 the court held that 'particular weight should be attached to the best interests of the child .... which may override those of the parent ....'. In *L v Finland* Application No 25651/94 (27 April 2000) the court stressed that 'the consideration of what is in the best interests of the child is of crucial importance'. In *Scott v UK* [2000] 1 FLR 958, a case concerned with whether the mother's Article 8 rights had been breached by a local authority who had applied to free her child for adoption, the court once again stated that 'the best interests of the child is always of crucial importance'. As early as 1988, the House of Lords stated that the European Convention in no way conflicted with the requirements in English law that in all matters concerning the upbringing of a child, welfare was paramount (*Re KD (A Minor) (Ward: Termination of Access*) [1988] AC 806. This has been restated recently in *Dawson v Wearmouth* [1999] 1 FLR 1167, *Re A (Adoption: Mother's Objections)* [2000] 1 FLR 665 and *Re N (Leave to withdraw care proceedings)* [2000] 1 FCR 258. I take this succinct review of the relevant authorities both in the Strasbourg and London jurisprudence from paragraph 11 of Miss Hall's skeleton which I cannot better.

40. However there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent's rights not only under Article 8 but also his rights under Article 6 to a fair trial. To guard against the risk of too perfunctory an

investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

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

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

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

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

41. In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

Cross Applications

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

The Present Appeal

43. It remains to apply all the preceding considerations to the present appeal. First I emphasise the difference between Mr Cayford's case on behalf of the father in this court and in the court of trial. As his written submissions in opening and in closing in the county court demonstrate he made no criticism of the case law nor did he invoke the Human Rights Act. Both counsel invited the judge to decide the issues by applying the *Poel v Poel* line of

authorities to the facts as he found them. Thus the case was essentially fought on the facts. The case in this court has been fought on an entirely different basis. Mr Cayford has not criticised the judge's findings of fact, save in one respect to which I will return. Rather he has made a full scale attack on the law, albeit the very law that he invited the judge to apply in the court of trial. Mr Cayford explains this apparently impermissible divergence by pointing out that it would have been futile to question the *Poel v Poel* line in the county court and further that he was discouraged from raising the ECHR arguments by the preliminary views expressed by this court in *Re A* [2000] 2 FLR 225.

44. So Mr Cayford's first submission to the court is that the approach that has predominated over the last three decades is inconsistent with the Children Act 1989 and with the importance which the courts now attach to maintaining contact between the child and the absent parent. He submits that the *Poel* approach is understood and applied in the county court as a presumption which it is impossible or difficult for the father to overcome. In consequence there is often no even handed survey of all the factors relevant to the determination of the child's welfare.

45. Secondly he submits that the *Poel v Poel* approach is incompatible with the Human Rights Act and accordingly this court must formulate a new approach which would properly acknowledge the father's human rights. Mr Cayford submits that the culmination of this restatement should be to impose upon the applicant a burden of proof which should be a high one, since she seeks to deprive the child and the father of contact. His subsidiary submissions are that the judge was bound by the findings of fact made by Judge O'Donovan sitting in the Family Court at North Shore in the earlier proceedings in New Zealand. He also criticises the court welfare officer whose enquiry and report was contaminated, as he submits, by a fundamental misunderstanding of the law applicable to relocation cases. He invites this court to give guidance to prevent future contamination.

46. In her powerful and comprehensive skeleton argument Miss Hall submits that the *Poel* approach, properly understood and applied, is perfectly consistent with the rights afforded a father under Article 8 and therefore requires no reformulation. She naturally emphasises that the judge faced a difficult choice in a finely balanced case, he applied the law which the parties agreed, and he reached a discretionary conclusion which it is not open to this court to disturb.

47. I emphasise that the trial in the county court took place over three days commencing on the 12 October. The reserved judgment was handed down on 20 October. Its structure is signposted by headings. After an introductory section the relevant history is recorded. The judge then records the present circumstances including the relationship between the mother and her current boyfriend. Mr Cayford submitted that the mother's case was fatally deficient since she had not called her boyfriend as a witness. But on the judge's findings it was no more than possible that he had a future part to play in S's life and the judge was rightly satisfied that his uncertain future role was a sufficient explanation of his absence from the case. The judge then considered the court welfare officer's contribution and, in the light of the criticisms made by Mr Cayford, sensibly distinguished between the first 45 paragraphs dealing with the history and the parties, which he found extremely useful, and the following assessment and conclusions, which he put 'very much on the margins of the case to use as no more than a cross check on his own independent conclusions'.

48. The judge then considered and rejected the father's application for a residence order before turning to the mother's application to relocate. He then reviewed the case law, stated the mother's proposals, assessed those proposals, set out the father's objections in full and finally stated his conclusions.

49. There has been some criticism of this structure. It is said that the judge should not have considered and dismissed the father's application before considering the mother's cross application. Any decision on her application had to give full weight to the alternative future for S proposed by her father. However I can well understand why the judge structured his judgment as he did. The mother's residence order was achieved by consent on 2 June 1999. The father's application for the variation of that residence order in his favour was issued on 24 May 2000. Its foundation was that the mother was not discharging her responsibility satisfactorily and that he could do better. Seemingly the mother's cross application for permission to return home was responsive, having been issued on 14 June 2000. However during the course of argument Miss Hall informed us that the mother's intention to issue had been communicated in correspondence between solicitors prior to 24 May. Nonetheless there was some obvious logic in first deciding the father's challenge to the mother's standard of care. If it were well founded at the date of issue then the mother would cease to be the primary carer and without the necessary foundation for a relocation application. Nevertheless I recognise it is impossible to compartmentalise issues in that way; for instance the mother might answer the challenge to her standard by ascribing any shortcomings to the strictures of her life in this jurisdiction. However although it would have been preferable for the judge to have expressed his conclusion on both applications together it is plain from the judgment read as a whole that he never lost sight of the reality that his task was to determine which of the three options was likely to prove least damaging to S's welfare.

50. Before considering Mr Cayford's other criticisms and submissions I would like to pay tribute to the quality of Judge Langan's judgment in each and all of its compartments. Clearly he formed a broadly favourable view of the mother. He said of her:

"I form the opinion that she is a woman who means what she says, and will adhere to it."

51. Within his assessment of the mother's proposals he made this crucial finding:

"Finally, the effect on the mother of being forced to stay in England would, in my judgment, be devastating. Having read and (at length) heard her evidence, I have no doubt that her unhappiness, sense of isolation and depression would be exacerbated to a degree which could well be damaging to S."

52. That finding led him to his conclusion and its justification in the following paragraph:

"S's welfare is, of course, the paramount consideration. If any single factor which leads to the decision of this case is more important than any other, it is that S's future happiness will be best assured by her being brought up in a place in which the mother is not just content, but happy. This, as much as the balancing exercise which I have had to perform, must lead to my making an order permitting the mother to remove S permanently from England and Wales to New Zealand."

53. He reached that conclusion having recorded the inevitable reduction in the father's contact, whilst noting that that factor was mitigated by the father's ability to afford the fare to New Zealand two or three times a year and his capacity as a self-employed contractor to organise his holidays.

54. Equally impressive is the judge's direction as to the law. Having cited from the decisions of this court in *Poel v Poel*, *Chamberlain v de la Mare,* and in *Re H*, he said:

"I will endeavour to apply these principles to the situation which I have to consider. I will first set out the mother's proposals. I will then examine these proposals with a view to deciding whether they can be said to be reasonable. I will then set out, and make findings

about, the father's objections. Finally, I will balance the objections against the proposals and what may be said in support of the proposals and, taking the welfare of S as the paramount consideration, decide whether the mother has made good her case."

55. That citation shows that, far from reading the decisions of this court as creating a presumption in favour of the applicant, the judge correctly identified S's welfare as the paramount consideration and reviewed all factors relevant to S's welfare in an even handed fashion.

56. The following conclusions result:

(a) An analysis of the judgment reveals no misdirection or error of law.

(b) The judge carried out an impeccable investigation of the relevant facts and circumstances as a prelude to clear findings on the mother's reliability, both as a parent and as a witness, as well as upon her proposals and the impact of their rejection both on her and on S.

(c) The judge's discretionary choice of the option least damaging to S's welfare is not open to challenge in this court.

57. My view on the wider submissions raised by Mr Cayford in this court has already been made plain. He succeeds in his submission that this court's direction to the effect that great weight should be attached to the impact on the primary carer of the rejection of her reasonable proposals should not be elevated into any sort of legal presumption. But that did not happen in this case and I have yet to see an instance of a trial judge applying the case law in that way. Secondly whilst the advent of the Human Rights Act 1998 requires some revision of the judicial approach to conclusion, as a safeguard to an inadequate perception and application of a father's rights under Articles 6 and 8, it requires no re-evaluation of the judge's primary task to evaluate and uphold the welfare of the child as the paramount consideration, despite its inevitable conflict with adult rights.

58. In conclusion I consider Mr Cayford's subsidiary submissions. There can be little doubt that Judge O'Donovan formed a less favourable view of the mother during the course of the proceedings in his court to determine whether she was wrongfully retaining S within that jurisdiction within the meaning of Article 3 of the Hague Convention. That leads Mr Cayford to this proposition in his skeleton:

"The judge was bound by the New Zealand court's findings of fact in the Hague Convention proceedings by the doctrine of res judicata."

59. Mr Cayford advanced no authority in support of the proposition and without authority it strikes me as inherently unsound. The purpose of the doctrine is to prevent unnecessary or repetitive pursuit of issues already decided between the parties. But an order for return will not infrequently lead to an application to relocate issued in the jurisdiction to which the child has been returned. In each case the judge must necessarily survey areas of family history relevant to each proceeding. Equally in each proceeding the judge is likely to have to make some assessment of the credibility and responsibility of the mother, respondent in the first case and applicant in the second. In my opinion the judge in the second application must be free to carry out a fully independent function unfettered by the earlier conclusions of the judge in the other jurisdiction. I do not regard this as any breach of the important principle of comity. The functions of the judges are distinctly different and will require assessments of the adults as they are rather than as they were.

60. Whilst Mr Cayford was entirely justified in investigating whether or not the court welfare officer had brought a sufficiently independent mind to her task the evidence now available to us persuades me that she is not open to any substantial criticism. Insofar as any criticism is made good it was fully noted by the judge who took great pains to ensure that he was not over influenced by her recommendation.

61. Mr Cayford's case was that the welfare officer had decided that the father's case was almost bound to fail before meeting the parties. This pre-judgment resulted from a note made by another welfare officer of a lecture given by Mr Setright of counsel to members of the Inner London Probation Service. His further complaint was that the court welfare officer had in interviewing the father wrongly used notes which Mr Cayford described, somewhat disparagingly, as a crib sheet. During the course of his cross examination Mr Cayford had sight of the lecture notes and the crib sheet. They were not seen by the judge but they enabled Mr Cayford to put his concerns and criticisms to the welfare officer in the witness box. Mr Cayford wished to resurrect these documents to support his submissions in this court and we received them during the course of the hearing under cover of a letter addressed to the court by Mr John Mellor, the Senior Family Court Welfare Officer at First Avenue House. Mr Mellor confirmed that the lecture notes were taken by the welfare officer's line manager at a seminar given by Mr Setright on the law relating to removal from the jurisdiction. Mr Mellor adds:

"The notes were circulated by Mr Hunt among his colleagues who were unable to attend the seminar as an item of interest. I myself have circulated similar notes I have made at other seminars, for example about Islamic family law."

62. Now interdisciplinary exchanges of this sort are much to be encouraged. Obviously every court welfare officer cannot attend every relevant seminar. The distribution of lecture notes or a full paper to those unable to attend seems to me a sensible use of resources. But this case does illustrate the danger of notes either taken during the lecture or shortly thereafter by a professional from another discipline. Within the three typed pages of the notes there are numerous errors, a few of them of substance. The obvious solution is for the lecturer himself to make available either the full text of the lecture, alternatively an accurate summary of the principal points.

63. Mr Mellor does not refer separately to what Mr Cayford has called the check-list. The welfare officer accepted that she used this checklist either in preparation for or in the course of her meeting with the father. I am not clear whether she herself was the author of the list or whether it is a list in general use throughout the service. The considerations that the list emphasises seemed to me to be unobjectionable with one exception. The penultimate bullet point is potentially misleading. It reads:

"Whilst it is a presumptively child centred jurisdiction, it is not straightforwardly so."

64. The danger of that sentence is obvious. It needs to be rewritten to state clearly that in relocation cases, as in all cases affecting the future of children the paramount consideration is the welfare of the children.

Lord Justice Robert Walker:

65. I have had the advantage of reading in draft the judgments of the President and Thorpe LJ and I respectfully agree with both judgments. I wish to add nothing apart from a brief reference to my own judgment (with which Simon Brown LJ agreed) in *Re A (Children).* In that case, which was heard and decided as an expedited appeal on 1 September 2000, this court dismissed an appeal from His Honour Judge Gee's direction, contrary to the mother's

wishes, that two children should go to school at the Lycée Francais in Kensington. *Poel v Poel* [1970] 1 WLR 1469 was cited but was not the subject of full argument. Since *Re A (Children)* may be reported I wish to say that the vague doubts which I expressed as to the extent of *Poel*'s continuing authority (since the Children Act 1989) have been fully resolved by the judgments of the President and Thorpe LJ.

Dame Elizabeth Butler-Sloss, P:

66. This was an appeal by the father from the grant by His Honour Judge Langan of leave to the mother to remove a little girl of nearly four permanently from the jurisdiction to live in New Zealand. The appeal was expedited and we heard it on the 21st December 2000. Since the mother had considerable problems of accommodation beyond Christmas, we gave our decision immediately. We dismissed the appeal; refused an application for leave to appeal to the House of Lords and refused a stay. We reserved our reasons for dismissing the appeal.

67. I gratefully adopt the outline of the facts in the judgment of Thorpe LJ which I have read in draft. Section 13 (1)(b) of the Children Act 1989 requires a parent wishing to remove a child permanently from the jurisdiction to obtain the leave of the court in order to do so. The requirement for leave to remove from the jurisdiction is however long-standing and section13(1)(b) sets out the current statutory position. This application raises difficult emotional issues affecting both parents and their child or children. If, as is so often the case, the departing parent wishes to remove to the other end of the world, for instance to Australia or New Zealand, it will have a dramatic effect upon the relationship between the child and the parent left behind. In a case where the child has a good relationship with both parents but the parent with a residence order has good reasons to settle elsewhere, the decision to be made can be an agonising one.

68. The general principles established in a line of cases dating back to 1970 have been challenged in this appeal by Mr Cayford, for the father, on the grounds that they are incompatible with the Children Act 1989, and with Articles 6 and 8 of the European Convention on Human Rights. He submitted that the effect of the appeal decisions was to raise a presumption in favour of the applicant, requiring the objecting parent to justify his objections. I propose therefore to look briefly at some of those decisions to see how far the principles applied are compatible with section 1 and Articles 6 and 8.

69. The decision of this Court in *Poel v Poel,* [1970] 1 WLR 1469, set out the general principles which have been broadly followed in subsequent decisions. In *Poel* the mother of a child of two and a half had obtained a custody order with weekly access to the father. She wished to emigrate with her new husband and expected child of that marriage to New Zealand. She applied to remove the child permanently from the jurisdiction. If they were not allowed to take the child with them they were prepared to give up their plans to emigrate. The county court judge refused the application. Winn LJ said at page 1473:

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

70. Sachs LJ said , on the same page,:

"When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in

the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my Lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

71. That decision was followed in this Court in *Nash v Nash* [1973] 2 All ER 704 and in *Chamberlain v de la Mare* [1983] 4 FLR 434. In the latter case, which was an application by the mother with custody of two children to take them with her new husband to New York for his job requirements, Balcombe J, at first instance, having referred to the two decisions of this Court (above), said that he did not propose to be a judicial iconoclast but the only principle which applied was that set out in section 1 of the Guardianship of Minors Act 1971 that the child`s welfare was the first and paramount consideration. He decided that the welfare of the children required the mother to remain in England with them so as to maintain contact with their father. This Court allowed the appeal. Ormrod LJ considered that the judge had misunderstood the judgment of Sachs LJ in *Poel* (above) and said at page 442:

"What Sachs LJ was saying, I think, is that if the court interferes with the way of life which the custodial parent is proposing to adopt so that he or she and the new spouse are compelled to adopt a manner of life which they do not want, and reasonably do not want, the likelihood is that the frustrations and bitterness which would result from such an interference with any adult whose career is at stake would be bound to overflow on to the children.

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

In my own judgment in (*Moody v Field,* 13 February 1981), the facts of which were not altogether dissimilar from this case, I tried to summarize the position in these words:

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

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

72. Ormrod LJ then referred to the speech of Lord MacDermott in *J v C* [1970] AC 668 in which Lord Macdermott reasserted the paramountcy of the interests of the child in all these

cases. Ormrod LJ pointed out that the decision was first reported in 1969 but its impact might not have been immediately felt. He said at page 443:

"…..it may well be that Sachs LJ did not have that speech in the forefront of his mind as we all have. I think he might perhaps have expressed his view slightly differently, making it specifically clear that his judgment was based on the interests of the children which was the paramount consideration."

73. Griffiths LJ said at page 445:

"The welfare of young children is best served by bringing them up in a happy, secure family atmosphere. When, after divorce, the parent who has custody of the children remarries, those children then join and become members of a new family and it is the happiness and security of that family on which their welfare will depend. However painful it may be for the other parent that parent has got to grasp and appreciate that fact. If a step-father, for the purposes of his career, is required to live elsewhere the natural thing would be that he will wish to take his family, which now includes his step-children, with him, and if the court refuses to allow him to take the step-children with him he is faced with the alternative of going and leaving the family behind which is a very disruptive state of affairs and likely to be very damaging to those step-children or alternatively he may have to throw up his career prospects and remaining this country. If he has to do that he would be less than human if he did not feel a sense of frustration and, do what he may, that may well spill over into a sense of resentment against the step-children who have so interfered with his future career prospects. If that happens it must reflect upon the happiness and possibly even the stability of this second marriage. It is to that effect that the court was pointing in the decisions of *Poel v Poel* and *Nash v Nash* and it was stressing that it was a factor that had to be given great weight when weighing up the various factors that arise when a judge has to decide whether or not to give leave to take children out of the jurisdiction."

74. Belton v Belton [1987] 2 FLR343 was an application by a mother to remove a child of two to New Zealand with her new husband, a New Zealander. This Court allowed an appeal against the decision of the trial judge to adjourn the decision whether to give leave for two and half years, until the child reached the age of five and gave leave to remove permanently. Purchas LJ said at page 346:

"….in carrying out the exercise of assessing what was in the interest of A as a paramount consideration, the judge omitted what to my mind was a crucial factor. That factor was the stability of the new family unit in which A was to grow up, the tensions that might be created in it during the ensuing 2 years or so, and the effect that that would necessarily have on A - of great gravity if the union in fact broke up under those stresses and still of considerable gravity if that union came under tensions which would almost certainly arise if the plans to go to New Zealand were frustrated."

75. And at page 349:

"I sympathise and understand, where a lay person such as the father is concerned, the difficulty of reconciliation with the concept of such a separation being in the paramount interests of the child in the long term, but the long term interests of the child revolve round establishing, as Griffiths LJ (as he then was) said in *Chamberlain,* a sound, secure family unit in which the child should go forward and develop. If that can be supported by contact with the father, that is an immense advantage, but, if it cannot, then there is no reason for diverting one`s concentration from the central and paramount issue in the case.

I have therefore come to the conclusion that the learned judge erred in law in two ways: (1) in providing for this excessive adjournment on a matter which required immediate decision and was of critical importance to all the family; and (2) that he misapplied the authorities and the law which dictate the hard and difficult decision which must be made once it is established that the custodial parent genuinely desires to emigrate and, in circumstances in which there is nothing adverse to be found in the conditions to be expected, those authorities are quite clear in the course the court must take, whatever the hardship and distress that may result."

76. In *Tyler v Tyler* [1989] 2 FLR 158 this Court upheld the decision of the circuit judge refusing to permit a mother to emigrate to Australia where her family lived. In that case the judge found that there was a close bond between the children and their father and that contact between them would cease after emigration. He found that the mother`s wish to remove the children was unreasonable and that she would be able to cope with her disappointment without adverse effect upon the children. Kerr LJ commented that there had not been a reported case in which an application to remove a child permanently from the jurisdiction had been refused. But each case depended upon its own facts. This Court did not interfere with the proper exercise of discretion by the circuit judge. The principles in *Poel* as restated in *Chamberlain* were regularly referred to and applied in the courts.

77. The implementation of the Children Act in 1991 gave the courts a larger menu of possible orders and a greater flexibility. The Children Act gave to the majority of parents the new concept of parental responsibility, (see sections 2 and 4) and diminished the impact of a former custody order and the perceived control of the custodial parent over the decision -making with regard to the children of the family. In section 8 residence orders replaced custody orders and the non-residential parent had greater responsibility and rights over the child during periods of access, now called contact. The earlier emphasis upon the rights of the custodial parent had therefore to be reconsidered in the light of the philosophy of the Children Act. *In MH v GP (Child:Emigration)* [1995] 2FLR 106 Thorpe J was asked to approve the application of a single mother to remove permanently to New Zealand with her four year old son. The father had regular contact with his son. Thorpe J said at page 110:

"….in approaching the first question, whether or not there should be leave for permanent removal, I apply the principles which have stood largely unchanged since the decision of the Court of Appeal in *Poel v Poel*. In the later case of *Chamberlain v de la Mare* a strong Court of Appeal stated that, in considering whether to give leave, the welfare of the child was the first and paramount consideration, but that leave should not be withheld unless the interests of the children and those of the custodial parent were clearly shown to be incompatible.

That statement of principle creates a presumption in favour of the reasonable application of the custodial parent, but in weighing whether the reasonable application is or is not incompatible with the welfare of D, I have to assess the importance of the relationship between D and his father, not only as it is but as it should develop. The relationship with the father is the doorway through which D relates to other members of the family, particularly his half-sister L, his paternal grandmother, and his paternal first cousins. That is the crux of this case."

78. The judge, on the facts, refused the mother`s application. He also stressed the importance of the child`s relationship with the father and through him with the paternal family.

79. In *re H (application to remove from jurisdiction)* [1998] 1 FLR 848, the mother remarried and wished to move to the United States with her new husband, an American. The father had played an unusually large role in caring for the child as a baby and continued to keep

closely in touch with her. The judge said that it was a finely balanced case but gave the mother leave to remove the child permanently from the jurisdiction. The father appealed. Thorpe LJ, (as he became), referred to *Poel* and subsequent reported cases in his judgment and said at page 853:

"……these applications for leave are always difficult cases that require very profound investigation and judgment. But not a lot is to be gained by seeking support from past decisions, however superficially similar the factual matrix may appear to be. In my judgment, the approach that the court must adopt in these cases has not evolved or developed in any way since the decision of this court in *Poel v Poel*."

80. In *re C (leave to remove from the jurisdiction)* [2000] 2 FLR 457 this Court, (Morritt, Thorpe and Chadwick LJJ) took the same approach, citing *Poel, Chamberlain* and *MH v GP*, although they differed on the outcome.

81. The Human Rights Act 1998 came into force in October last year and all the previous decisions have to be scrutinised in the light of the European Convention on Human Rights. In anticipation of the Convention, on an application for permission to appeal Ward and Buxton LJJ in *re A (permission to remove child from jurisdiction: human rights) [2000] 2 FLR 225,* refused the father permission to appeal. In that case the mother had been given leave by the Recorder to remove a ten month old girl permanently from the jurisdiction to the United States in circumstances where the mother`s job prospects were better in New York than in England. The father, (in person) raised the question of a breach of his right under Article 8 (1). The Court considered the effect of Article 8 but saw no reason to interfere with the established line of authority followed by the judge and which bound this Court. Buxton LJ doubted whether the difficult balancing exercise performed by the judge came within the purview of the Convention at all. The question whether the Convention applied to private proceedings would appear to me to have been settled by the decision of the European Court in *Glaser v The United Kingdom*, [2000] 3 FCR 193 in which a Chamber of the Court held that there were no violations of Article 8 and of Article 6 in a case where a father`s application related to failures in enforcing contact orders both in England and in Scotland. The Court rejected the application on its merits, see also the decision of this Court in *Douglas, Zeta-Jones and Northern Shell plc v Hello plc* [21st December, [2000] unreported].

82. All those immediately affected by the proceedings, that is to say, the mother, the father and the child have rights under Article 8(1). Those rights inevitably in a case such as the present appeal are in conflict and, under Article 8(2), have to be balanced against the rights of the others. In addition and of the greatest significance is the welfare of the child which, according to European jurisprudence, is of crucial importance, and where in conflict with a parent is overriding (see *Johansen v Norway* [1996] 23 EHRR 33 at pp 67 and 72). Article 8 (2) recognises that a public authority, in this case the court, may interfere with the right to family life where it does so in accordance with the law, and where it is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others and the decision is proportionate to the need demonstrated. That position appears to me to be similar to that which arises in all child-based family disputes and the European case law on children is in line with the principles set out in the Children Act. I do not, for my part, consider that the Convention has affected the principles the courts should apply in dealing with these difficult issues. Its implementation into English law does however give us the opportunity to take another look at the way the principles have been expressed in the past and whether there should now be a reformulation of those principles. I think it would be helpful to do so, since they may have been expressed from time to time in too rigid terms. The judgment of Thorpe J in *MH v GP* (above) was the first time to my knowledge that the word `presumption` had been used in the reported cases, and I would respectfully suggest

that it over-emphasised one element of the approach in the earlier cases. I can understand why the word was used, since in *Tyler* (above) the reformulation by Purchas LJ of the principles in *Poel* and *Chamberlain* may itself have been expressed unduly firmly.

83. Section 13(1)(b) of the Children Act does not create any presumption and the criteria in section 1 clearly govern the application. The underlying principles in *Poel,* as explained in *Chamberlain*, have stood the test of time and give valuable guidance as to the approach the court should adopt in these most difficult cases. It is, in my view, helpful to go back to look again at the reasons given in both those decisions. They were based upon the welfare of the child which was the first and paramount consideration by virtue of section 1 of the Guardianship of Minors Act 1971. The view of both Courts was well summarised by Griffiths LJ in *Chamberlain,* see above, that the welfare of young children was best met by bringing them up in a happy, secure family atmosphere. Their happiness and security, after the creation of a new family unit, will depend on becoming members of the new family. Reasonable arrangements made by the mother or step-father to relocate should not in principle be frustrated, since it would be likely to have an adverse effect upon the new family. It might reflect upon the stability of the new relationship. The stress upon the second family would inevitably have a serious adverse effect upon the children whose welfare is paramount. Even if there is not a new relationship, the effect upon the parent with the residence order of the frustration of plans for the future might have an equally bad effect upon the children. If the arrangements are sensible and the proposals are genuinely important to the applicant parent and the effect of refusal of the application would be seriously adverse to the new family, eg mother and child, or the mother, step-father and child, then this would be, as Griffiths LJ said, a factor that had to be given great weight when weighing up the various factors in the balancing exercise.

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

Summary

85. In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them.

(a) The welfare of the child is always paramount.

(b) There is no presumption created by section 13(1)(b) in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

86. All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence. The mother in this case already had a residence order and the judge`s decision on residence was not an issue before this Court.

The Appeal.

87. In the present case the judge in a careful and excellent judgment dealt with all the relevant considerations which arose in this case. He did not rely on any presumption and clearly made the welfare of the little girl the paramount consideration. The mother's reasons for her desire to return to New Zealand were appropriate and entirely understandable. Her situation in England was not a happy one. The judge found that the effect of her being forced to stay in England would be devastating. He found that her unhappiness, sense of isolation and depression would be exacerbated to a degree that could well be damaging to the child. The father who has had a close relationship with his daughter would be able to afford to visit her or have her visit him two or three times a year which mitigated the loss to the child and to him. I can see no fault in the approach of the judge to this difficult case and no grounds to set aside the order which he made.

88. I agree with the judgment of Thorpe LJ and with his reasons for dismissing the appeal.

Order: Appeal dismissed; no order as to costs; legal aid assessment.

Mr P. Cayford (instructed by Miller Sands, Cambridge, CB2 1BE for the Appellant)

Miss Joanna Hall (instructed by Hodge Jones & Allen, London, NW1 9LR for the Respondent)

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