the SOLICITORS group

Will the Family Justice Review Recommendations have an Impact on Relocation?

The world is a more accessible place to individuals; countries are no longer so far away. The lines of communication are also more advanced and there are better and cheaper ways for us all to travel and communicate with one another which continue to be developed in order to bring us closer together but also assist in the fluid movement from city to city or country to country.

We live in a multi-cultural society where inter-racial relationships are now a more common occurrence and more openly accepted by society. No family unit is the same, each functioning in a way that works best for them. When parents separate it is never easy to make arrangements for the children when there are two households to consider. Both parents want to have an equal role in the lives of their offspring, spending equal amounts of time with them.

Shared residence or shared care arrangements are perhaps now more common, the days requiring exceptional circumstances now long gone. Shared care will however remain a topical issue, particularly in light of the recommendations in the Family Justice Review (the Review).

Private law is covered in Section 4 of the Review[1] examining various aspects of private law disputes. It is likely that many fathers, (because it usually is the father) will be disappointed by the recommendations **not** to introduce legislation creating a presumption that there is a parental right to substantially shared care or equal time for both parents.

Despite the change in emphasis focusing on shared parental responsibility, the other disappointment will be the decision not to recommend a change in legislation to encompass a statement reinforcing the importance of the child continuing to have a "*meaningful relationship"* [emphasis added] with both parents, alongside the need to protect the child from harm, which to some would have gone some way closer to reduce the perceived inequality towards fathers (although this was not found to be a conclusion of the Review).

Fathers also seem to have drawn the short straw in relocation cases. So what will happen now when the family unit breaks up having worked hard to produce the recommended Parenting Agreement, where the parents both share the care of the children, and when one of them decides they no longer wish to live in the same country anymore? Will the proposals of the Review have any impact in such cases?

Under the Review, Residence Orders are to be replaced with Child Arrangement Orders but consent from all those with parental responsibility or permission from the Court will still be required in order to remove a child from the jurisdiction; therefore such cases will still come before the Courts unless parents agree to the relocation or there is a provision contained within the Parenting Agreement.

Payne v *Payne*[2] [2001] EWCA Civ 166, has been considered the leading authority in relocation cases with practitioners using those guidelines to argue their case for removal.

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[1] Family Justice Review, Final Report November 2011 Page 133 - 178

[2] http://www.bailii.org/ew/cases/EWCA/Civ/2001/166.html

The recent Court of Appeal case of *MK* v *CK* [2011] EWCA Civ 793 makes it clear that the only principle to be taken from *Payne* is that when determining such cases the welfare of the child is paramount which is in line with the Family Justice Review which itself echoes the guiding principle of the Children Act 1989.

In *MK* v *CK* father and mother met at university in Toronto in 1992, married in London in July 2004 and subsequently went on to have two children. The marriage failed and in 2010 they divorced. Nonetheless, the parties remained on amicable terms and were able to agree arrangements with regard to the care of their children. Both parties were bankers and worked part- time enabling them both to be more involved with the child care; a Shared Residence Order was made on the 23rd August 2010 under which the children spent five nights a fortnight with the father and nine with the mother. What is of interest is the fact that the father persuaded his employer to allow him to fit two full working weeks into seven working days so that he was free to make himself available for the children for six full days in succession. The mother on the other hand, who also worked, was only able to be free one day a week and at week-ends. The rest of the time she was assisted by a full-time nanny.

The mother issued the classic application for relocation following the failure of the marriage. She wanted to return home to Canada. In the United Kingdom she was isolated and stressed, but in Canada she would be able to live within her parents' home receiving emotional and material support. In response the father pointed to his great commitment to the girls and the significance of the arrangement for shared care.

The CAFCASS report concluded that the balance came down against the move, recommending refusal of the mother's application. The learned judge however granted the mother's application leading to the father's appeal.

On appeal Thorpe LJ's view is clear and with which Moore-Bick LJ and Black LJ concur, that the only principle to be taken from *Payne* is the paramountcy principle and all the rest is "*guidance as to the factors to be weighed in search of the welfare paramountcy*."

Interestingly, Thorpe LJ also makes a distinction between cases where there is a clear sole "primary carer" in which *Payne* v *Payne* should apply and those where there is "shared care" not by name alone but from the practical day to day arrangements. In cases like this where the time is virtually split equally then *Re Y (Leave to move from jurisdiction)* [2004] 2 FLR 330 is to be applied; at paragraph 56 Thorpe LJ refers to the judgment of Hedley J in *Re Y,* "*What it seems to me I must do is to remind myself of the opening provisions of the Children Act 1989. Section 1(1) says that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration, and in considering these issues I have to take a number of matters into account as required by s 1(3). … It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided."*

Moore-Bick LJ emphasises the distinction between principle and guidance at paragraph 86 stressing, "*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*."

Black LJ is clear that she arrives at the same conclusion as Thorpe LJ and Moore-Bick LJ but not entirely via the same route as Thorpe LJ. At paragraph 144, she concludes, *"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, 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."*

The Family Justice Review seeks to remove old titles of residence and contact with new Child Arrangement Orders which have a more neutral tone. It will be interesting to see how *Payne* cases will be decided under the recommendations where there is no Residence Order but the time with each parent is virtually equal as in the latest authority and, some may say, the case of *Payne*, given the actual division of time was a ratio of 59:41, virtually equal - just a label of "residence" attached.

It will also be interesting to see what impact the new proposed Parenting Agreements will have if given any evidential weight. Practitioners may find that the proposed template is similar to that in *Re Z (Shared Parenting Plan: Publicity)* [2006] 1 FLR 405. If detailed, such a document will set out the true practical arrangements and will assist the Court when balancing the competing factors and may alleviate the need to be "*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'",* as highlighted by Black LJ in *Re Y*.

One thing that remains clear and unchanged is that in any decision pertaining to the child the child's welfare will always be paramount.

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