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Relocation: A lesson in welfare, not fairness

Families living in England and Wales are increasingly global in their makeup, often with one or both parents having moved to this jurisdiction from their native countries. When family breakdown occurs, the international dimension for such families can bring its own strand of legal complications. This is especially so for arrangements concerning children and the fraught issue when one parent wishes to "go home" taking a child with them.

The legal framework is clear: a child cannot be taken permanently abroad and without the permission of the other parent or person with parental responsibility. Without permission, removal of a child from England and Wales is child abduction. If permission is refused, then it often falls to the Court to decide whether to grant a parent's application for 'leave (meaning permission) to remove' a child from the jurisdiction of England and Wales to relocate abroad.

The legal framework may seem straightforward: the decision to be made by the Court is frequently more complex.

It was such a complex and difficult decision which came before Mr Justice Mostyn in the case of ***Re TC and JC (Children: Relocation) [2013] EWHC 292 (Fam)*** the judgment of which was reported this week.

The facts before the judge

Two children are born to a British Father and an Australian Mother. Sadly, difficulties arise in their relationship to the extent that the Father asks for a divorce. A few days later, as normal, the Mother leaves the house with the children after breakfast. The Father anticipates that as usual, the children will be dropped at nursery before the Mother goes on to work. It is only later that day that the Father realises that something is amiss – the children are not at nursery. On making further enquiries with the Mother's place of work, she is no longer there. Later that afternoon he learns that she and the children have "gone home" to Australia.

The Mother and children had in fact boarded a flight to Melbourne at 3pm that day.

It was in the words of Mr Justice Mostyn, *'an open and shut case of child abduction'*. Crucially, no permission was obtained from the Father in breach of his parental responsibility. The judge found that the Mother's *'conduct was abysmal'*; *'an act of 'deliberate cruelty to her husband, the father of her children' and was 'directly contrary to the interests of the children for them abruptly to have been removed from the society of their father.'*

It would be two years before the children would return to England.

During this time, the parents engaged in protracted proceedings in Australia following the Father's application for the return of the children under the Hague Convention on the Civil

Aspects of International Child Abduction 1980. After two years, the Mother finally conceded her case in Australia, the children were returned to England and this jurisdiction became the forum to decide their futures.

On her return, the Mother issued an application for permission to remove the children from this jurisdiction and to return to Australia – this is the permission she should have sought two years previously. Notwithstanding her behaviour, would the High Court grant her the permission she should have sought prior to the abduction?

It was this decision which Mr Justice Mostyn grappled with in February this year.

An unusual feature of the case was that whatever the Court's decision, the 'unsuccessful' parent was prepared to relocate so that the children would be raised by both their parents under a shared care agreement. If the Mother's application for leave to remove the children was successful, the Father would relocate to Australia. Alternatively, if Mother's application was unsuccessful, she would remain here. Such a child centred approach is to the parents' credit and the judge found that this made the decision *'less heart rending as is often the case in these relocation disputes'* where, if the Court grants permission, the consequence often is that there is a huge geographical separation between the child and the 'left behind' parent.

It was this same feature which meant that the judge found the decision before him as *'exceptionally difficult as the merits each way are very evenly balanced.'*

The Law

The judge considered the well known case law which has developed in this area from the Court of Appeal decision of ***Payne v Payne [2001] EWCA Civ 166***, reconsidered in 2011 in the case of ***K v K (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793*** both of which were recently summarised and the principles enunciated in ***Re F (A child) [2012] EWCA Civ 1364.***

The principle underlying the Court's consideration in determining a leave to remove application is that the welfare of the child is the Court's paramount consideration (following the factors in Section 1 of the Children Act 1989 http://www.legislation.gov.uk/ukpga/1989/41/section/1;) the application is to be determined by the answer to a single question – what is in the best interests of the child?

The case law above has provided guidance for how this welfare decision should be made: is the application genuine? Is it realistic? What is the motivation for opposing the application? What would be the detriment to the left behind parent if the application was granted? What would the impact be if the application was refused?

It would be the answer to this last question which was most significant for this case.

Judgment

On the issue of fairness, the judge referred to the paradox so often found in relocation cases: the greater the evidence which can be presented by a parent of the negative impact upon them of the application being refused, the less likely it indeed will be refused. If the parent, like the Father in this case, would agree to make the best of the decision if leave was given to the other person to relocate the more likely it is that leave indeed will be given. The Father in this case may well become a *'victim of his virtues'* as Mr Justice Mostyn commented in his judgment.

But this was not an application to be decided on fairness. The judge had to put to one side any feelings of sympathy to the Father or a temptation to punish the Mother for her conduct – the welfare of the children was the only principle to be applied.

In making this welfare decision the judge considered the welfare checklist, the cornerstone of the Children Act 1989, and found that all factors were evenly balanced: the children were too young for any weight to be given to their expressed wishes; their needs would be equally met in England or Australia; the children, in the judge's view would adapt to any change in circumstance; the children were not at risk of harm.

It was therefore the likely impact of refusing the application on each parent which would take the judge's decision '*off the knife edge*.'

On balance, the judge formed the view that the impact of granting the Mother's application would bear far more heavily on her, and accordingly on the children, than it would on the Father and that she was less well equipped to face the financial and immigration challenges of remaining in England than the Father would if he were in Australia. It was this factor which persuaded the judge of the Mother's proposal: permission was granted. The children will live in Australia. The Father will relocate there. The Mother had her wish to "go home."

This is a brief summary of just one case on the issue of relocation of a child. The wider complexities of leave to remove applications, child abduction and other private children law matters are outside the scope of this article. This is a fast changing area of law and so seeking advice at the earliest possible stage is likely to be helpful.

For advice on your particular situation please contact one of the specialist family lawyers at Russell-Cooke.

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