

Removal from jurisdiction

How do you overcome the endless difficulties associated with Child Arrangements Orders - especially where a parent seeks to take a child from the Jurisdiction and appoint a Guardian in a Will?

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In the Matter of F (A Child) (International Relocation cases) [2015] EWCA Civ 882

The father successfully appealed an order allowing the mother to remove their 12 year old daughter permanently to Germany. The father was Jewish while the mother, having converted, reconverted back to Catholicism following separation. The child met the judge to express her wishes and feelings, including her views on faith and belief.

Ryder LJ

- *“The continued use of the Payne guidance without putting it into the context of a welfare analysis perpetuated the problem”* (para 17)
- *“Selective or partial citation from Payne without any wider legal analysis is likely to be regarded as an error law. In particular, a judgment that not only focuses solely on Payne but also compounds that error by only referring to the other four point ‘discipline’ ... is likely to be wholly wrong”* (para 27).

WELFARE

s13 is governed by the welfare principle in s1(1)(a) CA 1989: “the child’s welfare shall be the court’s paramount consideration”

s1(4) – the “welfare check list” in s1(3) is not a necessary part of the court’s analysis on a s13; but is a helpful *aide memoire*

ss1(2A) and 1(2b) – presumption that involvement of each parent in life of child will further child’s welfare also not directly applicable but will “heighten the court’s scrutiny” of the parents’ proposed arrangements

Where a cross application for s8 order, check list and presumption directly applicable

OED definition of “holistic”

Philosophy: characterized by the belief that the parts of something are intimately interconnected and explicable only by reference to the whole.

Medicine: characterized by the treatment of the whole person, taking into account mental and social factors, rather than just the symptoms of a disease.

What is a holistic approach? (1)

- *“A welfare analysis is a requirement in any decision about a child’s upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one option (often in a relocation case the proposal from the absent of ‘left behind’ parent) from being side-lined in a linear analysis. Not only is it necessary to consider both parents’ proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse” para 30*

What is a holistic approach? (2)

“I apprehend that there is a danger that this adjective, and its purpose ... may become elevated into a free-standing term of art in a way which is entirely at odds with my original meaning” para 47 per McFarlane LJ

“In other cases, for example a case of international relocation, the factors that must be given due consideration and appropriate weight on either side of the scales of the welfare balance may be such as to require an analysis of some sophistication and complexity. However whatever the issue before the court, the task is the same; the court must weight up all the relevant factors, look at the case as a whole, and determine the course that best meets the need to afford paramount consideration to the child’s welfare. That is what, and that is all, that I intended to convey by the short phrase ‘global holistic evaluation’” para 50 McFarlane LJ

Proportionality

- International relocation cases engage Arts 6 and 8 of ECHR – *Glaser v UK* (Case No 32346/96), [2001] 1 FLR 153
- Where there is the possibility of a fundamental interference with the relationship between one parent and a child, parents plans' must be evaluated proportionately – does the preferred option represent a proportionate interference in the Art 8 ECHR rights of those involved?

Practical pointers

- Wishes and feelings of the child and the right of the child to participate in the decision-making (UNCRC to Re D [2016] 2 FLR 347)
- One of Ryder LJ's criticisms of Payne was "*the absence of any emphasis on the child's wishes and feelings or to take the question one step back, the child's participation in the decision making progress*"
- Effect on the relationship of left behind parent – both as to contact and involvement. Emotional harm, parental capacity and proportionality
- Plans of left behind parent given as much scrutiny as the other

Internal relocation

Re C (A child) (Internal Relocation) [2015] EWCA
1305

- Historically external and international relocation had been treated separately
- Same principles should apply to both – as above: namely the welfare principle.
- No test of exceptionality
- However ... no requirement of proportionality as difficult to see how it would work in practice

Child Arrangements Orders “CAO”

- Re K (Breakdown of Arrangements: Urgent Hearing) [2014] EWCA Civ 1195, [2015] 1 FLR 95 at para 6 per Ryder LJ
- *‘...The recent legislative changes have removed the labels of residence and contact so as to help emphasise that in a case where there is no distinguishing welfare element such as the risk of harm from a parent, that relationship is meant to be of equivalent importance i.e. it derives from the equivalence of the parental responsibility which each parent holds for each of their sons. There is no priority of one parent over another and where a child lives (formerly known as residence) is simply that, albeit that there are often very good reasons for ensuring stability of care supported by a practicable routine. The oft cited security, stability and permanence of care that every child needs are features of the parental relationship that they experience from both parents (where there are two parents who are available to exercise and share their parental responsibilities) not simply a consequence of the place where they live or exclusively from the parent with whom they live. Where there are two parents who share their parental responsibilities, they must have a plan or strategy to do that when they no longer have a relationship themselves.’*

Re K (continued)

- Teenage children removed from mother: one placed in foster care under ICO and one with father under CAO. Contact with mother suspended for 3 weeks. Appeal allowed.
- 5 errors of trial judge:
 - Failed to case manage and failed to identify the issues and the evidence to be required
 - Failed to take a holistic or 'balance sheet' analysis of options for care of children
 - Failure to consider proportionality of removing children from their mother by considering safety issues. Alternatives not explored
 - Failure to consider and evaluate the importance of sibling relationships
 - Judge interviewed the children at outset; should not have used interview for evidence-gathering purposes and had inappropriately relied on her impressions of them

Does a label matter?

- s13(2) gives a “right” to the person with whom the child is to live under a child arrangements order to remove for child for period less than one month
- ss5(1) and (7) gives a “right” to a parent, who was named in a CAO order as a person with whom the child was to live, to appoint a child’s guardian. Provided the order is in force on death, that appointment takes effect on death of parent who was named in the CAO

Re E-R (A Child) [2016] 1 FLR 529 CA

- Court of Appeal allowed an appeal by the carers of a child from a decision of trial judge who made CAO 'lives with' order in favour of the child's father. He relied on presumption in law in favour of natural parent which was held to be error in law.
- Child had lived with the carers together with her dying mother. Following breakdown of parents' relationship, The child had lived with mother following separation with her father. The mother has appointed the carers as testamentary guardian.
- Paragraph 5(7) Children Act construed by King LJ as requiring a CAO naming the guardian as the person with whom the child should live. However authors of Hershman and McFarlane consider otherwise: it is the parent making the appointment who is the person named in the CAO
- The appointment of a guardian does not generate preferential position for proposed guardian
- However fact of the appointment is 'another significant matter' to be taken into account in determining best interests of the child
- Case remitted to Cobb J undertook holistic welfare assessment and found in favour of carers/guardian: Re E-R (Child Arrangements) [2016] EWHC 805 (Fam). He found they had become the child's "psychological parents"