Relocation cases: talk for LawWorks, 12 February 2020, Simon Bruce

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Over a third of babies born in England and Wales have at least one parent born outside the UK. We are living in an increasingly internationally mobile world. It is therefore not surprising that we are seeing more and more cases where, following separation, one party wishes to move abroad with the children. It may be that a parent does not wish to move abroad, but wants to move within the UK, but that this would have an impact on the "left-behind" parent's relationship with the children.

Whether international or within the UK, relocation cases are one of the rarer breeds in family law in that the outcome is binary. The children either relocate or they do not. They are, understandably, often the most emotive of cases for clients.

I am going to consider with you the approach adopted by the courts in these cases, and the steps that we, as practitioners, must therefore take on behalf of our clients.

I will then go on to consider the position in relation to temporary relocation issues, in particular where one party wishes to take the children abroad for a holiday to a non-Hague country, as these cases can result in some tricky issues.

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The starting point is to consider carefully the legal position of the relocating parent, in light of any orders that are already in force, and where that parent wishes to go.

The Children Act 1989 provides that:

Where there is a 'lives with' child arrangements order in force, a parent may not remove his or her child from the United Kingdom without the written permission of each and every person with parental responsibility for the child or the leave of the court, with the exception that the person named in the order can remove the child for a duration of time less than a month (section 13(2) Children Act).

If there is no 'lives with' child arrangements order in force, although the Children Act does not require written permission before a child is removed from the UK, failure to seek such consent could result in the commission of the criminal offence of child abduction (even where the left behind parent does not have parental responsibility). Best practice is, therefore, that written permission is obtained before a parent leaves.

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Technically, there is no legal requirement for permission to relocate when the planned relocation is within the UK (subject to any court orders that might be in place). However, a parent wishing to relocate within the UK may well be faced with (i) a request for an undertaking that they will not do so pending an agreement or a court order, or (ii) an application for a Prohibited Steps Order by the parent seeking to prevent the move or (iii) a Specific Issue Order, for example that the child continue to be educated at a particular school, which would have the effect of thwarting a move pending agreement or the ultimate decision of the court regarding the child's arrangements. In these circumstances the burden is on the 'left behind' parent to justify the need for PSO or SIO.

If the parent wishing to relocate within the UK does so without the other parent's permission, the 'left behind' parent can seek peremptory return of a child or children, but the application

must be made urgently and as soon as the parent realises the child or children have moved. Otherwise the ‘left behind’ parent risks facing a ‘fait accompli’ by the time a court considers, from a welfare perspective, the move and the children’s arrangements.

Slide 5: Alternative methods of resolving the dispute: mediation and arbitration

Before we immerse ourselves in the case law on the topic, I wanted to emphasise that alternative methods of dispute resolution can help to resolve relocation cases.

Mediation may assist parents in agreeing a more creative solution than would likely be imposed on them by the court process, and help them avoid the full court process which can be very expensive and emotionally damaging for all.

Although relocation disputes can be difficult to compromise, do not assume that simply because it is a binary issue, mediation will not be of assistance. It may well flush out ancillary or underlying issues which can be resolved, or explore potential compromises, or at least aid each parent to understand the other’s motivation and position. Anything that can be done to maintain a good co-parenting relationship whether the children move or not is of course of value.

The arbitration scheme for private law cases was launched in July 2016. Currently international relocation cases are not within the scope of the scheme, including temporary leave to remove. Internal relocation cases are.

Slide 6: Making the Application

Think about timing: You should consider carefully at the outset whether it is important that the relocation application is determined by a particular point, for example, before the end of the child's school year.

Whilst proceedings are underway, ADR options can still be explored, such as mediation.

Do the children need separate representation? Although it remains unusual for a child to be a party to the litigation and separately represented, it does occasionally happen albeit usually with older children. Under Rule 16.2 of the Family Procedure Rules (FPR) 2010, the court can make a child a party to proceedings if it considers it in the best interests of the child to do so. The matters which the court will take into consideration before making a child a party are set out in Practice Direction 16A of the FPR.

Rule 16.4 of the FPR provides that the court must appoint a children's guardian for a child who is the subject of proceedings if the court has made the child a party under Rule 16.2.

Follow the correct procedure. The relevant court forms are as follows:.

- Leave to remove under section 13(1)(b) on Form C2 (with Form C1A if required);
- A specific issue order or a child arrangements order with permission under section 8 on Form C100 (with Form C1A if required).

Slide 7: The Law

This area of the law has developed significantly in recent years.

The overriding principle is that the welfare of the child is the paramount consideration. The court must consider the welfare checklist and undertake a global holistic evaluation. Where there is more than one proposal before the court, each one must be analysed and considered on its own merits. This prevents one option (often in a relocation case the proposals from the absent or left-behind parent) from being side-lined. It is often most helpful to consider the options side by side in a comparative evaluation.

Slide 8: Think about your evidence

a. Evidence from CAFCASS/Independent Social Worker

The child's wishes and feelings are usually ascertained by a CAFCASS officer and presented to the court in the CAFCASS officer's report. In some cases, an independent social worker is appointed to ascertain the child's wishes and feelings or undertake a welfare analysis instead of a CAFCASS officer.

A particular benefit of an ISW – usually for the parent wishing to relocate - is that they can travel to the proposed new 'home' and visit the proposed schools and meet family members etc.

The older the children and the greater the level of their maturity and intelligence, the more weight will be given by the court to their wishes and feelings.

b. Statements

Each parent will provide at least one (sometimes two) statements. Consider whether any other witnesses will be helpful.

The court will wish to consider the welfare checklist and so the evidence must address this. In addition, a Judge may well find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.

The statements should therefore deal with:

- The child's physical, emotional and educational needs – consider the children's age, stages, relationship with each parent, siblings, friends, family etc.
- The likely effect on him or her of any change in circumstances – the parent seeking the change must show that such a change is in the child's interests.
- Any harm which he or she has suffered or is at risk of suffering. This can include harm from primary carer being unhappy, harm from severance of relationship with left behind parent or harm from the loss of their life here.
- How capable each of his or her parents (or any other person the court considers relevant) is of meeting his or her needs.
- Is the motivation to move genuine?
- Demonstrate that there are practical proposals that are well researched and investigated – the devil is in the detail (practice the alleged travel arrangements, try out and time the proposed new school run at the right time of day etc.).

- Is the opposition to the move motivated by genuine concern? What is the detriment to the non-resident parent and can it be offset?

- What would be the impact of refusal on the parent wishing to relocate?

- To what extent can contact continue and what would be the impact of the reduction in contact with the left behind parent? Can the parent seeking to move be trusted to promote the relationship with the other parent – has history demonstrated this? What is the quality of the contact? How will it work in practice given the ages and stages of the children?

- Could the left behind parent also move? What connections, if any, does the other parent have with the new area? How easy or difficult would it be to establish some? Is there a language barrier? Are there any visa/ immigration requirements? Could the other parent work (if they intend to do so)? What would be the impact on the other parent of separation from his home environment?

Slides 9 and 10: Some examples - AY v AS and A [2019] EWHC 3043

This was a relocation application by a mother, heard by Mr Justice Mostyn.

The father was 51 and a self-employed builder. He was English. The mother was born in Kazakhstan and was 36. She was highly skilled, being fluent in Kazakh, Russian, English and French. The parties met through a mutual friend in May 2014 and became engaged in 2015. At this point they lived in separate countries and would travel to visit each other every two months.

In April 2016, the mother moved to Devon to live permanently with the father. She became pregnant the following month and they were married in June 2016. The mother was granted a spousal visa in July 2016. Their child, A, was born in January 2017.

In July 2017, the mother and A travelled to Kazakhstan for a month-long holiday. By this time the marriage was declining. By October 2017, the parties were discussing separation and the mother raised with the father the possibility of returning to Kazakhstan with A.

In December 2017, the mother and A travelled to Kazakhstan with the father's consent for a holiday. Whilst she was there, the parties discussed their relationship. During this conversation, the mother told the father that if they were to separate, she wanted to live in Kazakhstan with A. The father said that he would agree to this, but that she must return to England first so that he could have some time with A before she left and also so that the paperwork could be dealt with. The mother and A returned on 16 January 2018. The father then removed A's passport.

In his evidence, the father admitted that he had made an insincere promise in order to get both mother and child back into this country.

The father continued to say that he would not hinder the mother's return to Kazakhstan but insisted that the paperwork needed to be completed properly before she did so and that he was arranging for this to be done. Mostyn J found that at this point the father was genuinely agreeing that the mother could return to Kazakhstan, taking A with her. However, soon afterwards, the father changed his position, and this had resulted in a "burning sense of resentment" on the part of the mother.

In March 2018 the mother and A left the family home and moved to the home of a friend of the mother, sharing a single room in that property. The father agreed to pay her rent.

Nevertheless, the mother found herself living with her child in a single room in a friend's house with an income of just £70 a week. This continued for over a year when the mother was awarded universal credit.

The mother made her application for relocation on 26 April 2018.

Mostyn J found that the mother was in an objectively intolerable position: she was living alone, close to the breadline, unemployed and isolated geographically and socially. There was no Kazakhstani community to speak of in Exeter. She had one close friend and had made some other less close friends from her NCT classes. She had been recommended for anti-depressants by her GP.

Her case was that she would only find personal contentment and reasonable employment commensurate with her level of education if she were to be permitted to return to Kazakhstan, where she would have access to an apartment which she owns together with her brother. She could obtain stimulating and reasonably paid employment there. She would have the comfort and benefit of regular contact with her sister and brother, as well as her parents.

However, earlier in the proceedings she referred to the fact that she had raised with the father the possibility of relocating to London. In her first statement, dated 30 May 2018, the mother said that she would consider moving to London if she was able to find a job there, that she had mentioned this to the father, but that he had told her that she must live within half an hour's drive of his home.

If the mother were granted leave, her proposal for contact was that A should spend around 70 days a year with her father, half of which would be in Kazakhstan. She also proposed regular WhatsApp video contact. However, the guardian had opposed the mother's proposal on the basis that these would be very poor substitute for the essential human interaction that direct contact allows. She said that she felt that the mother's proposals would give rise to an appreciable risk of the essential nature and quality of the bond between the father and A being lost or diminished. Mostyn J agreed with this. Was this a price worth paying, in order to give the mother the personal contentment, and functional fulfilment that she so ardently craved?

Mostyn J's answer to that question at present was no.

He stated that until an internal relocation had been offered to the mother and had been authentically and in good faith tried and failed, the mother's proposal for contact between the father and his daughter was objectively unreasonable and contrary to A's best interests.

For this reason, Mostyn J considered that the secondary solution should be adopted and the mother's application for leave to remove would be dismissed.

Slide 11: Some examples: Re N-A (Children)

The children were 15 and 13. They lived with their father and spent time with their mother.

Their father made an application for leave to remove the boys to Iran. The boys expressed a desire to go. However, the Cafcass Officer advised against the move, concluding that a move would harm their relationship with their mother, on their education and on their social relationships. She considered that the move may cause them further emotional harm, in addition to that which they had already suffered as a result of the breakdown in their parents' relationship.

She stated, *"I acknowledge this is not in line with the children's wishes and feelings. However, I am of the view this recommendation would promote their best interests*."

During the first instance hearing, the children met with the judge, Hogg J, who concluded that neither boy really understood what a permanent move to Iran would entail, and that their best interests 'demanded' that they stay in the UK.

The father appealed arguing (amongst other things) that the boys' wishes and feelings were given insufficient weight.

It was important to remember that, even with older children, their wishes and feelings are only ever one of the factors that have to be considered in arriving at a decision as to what is in their best interests.

The judge was entitled to find that the boys had been influencd by their father, and that, although they knew what Iran was like by virtue of the time they had spnt there, they did not really understand what a permanent move would entail.

The judge had had no faith in the father encouraging contact, and had grave doubts about how much would actually take place if the move occurred. The position in relation to the boys' relationship with their mother was a heavy weight on the scales against the move, and the court was right to have regard to it alongside the boys' own wishes and feelings.

Slide 13: After permission has been granted

What about after permission has been given? Which court has jurisdiction and how are orders enforced?

If new country is a signatory to Brussels II bis (until the end of the transition period)

Pursuant to Article 8, there is an assumption that once relocation has been granted, the child's habitual residence becomes that of the state into which relocation has taken place. However, pursuant to Article 9, the courts of the child's former habitual residence retains jurisdiction for three months following the move, for the purposes of modifying the judgment on access rights issued before the move, as long as the left behind parent still has his habitual residence in the member state of the child's former habitual residence. This does not apply if the left behind parent has accepted the jurisdiction of the courts of the new country by participating in those proceedings without contesting jurisdiction.

Article 12(3) allows parents to prorogue the jurisdiction of the state from which relocation has been granted for a defined or indefinite period of time. If you are going to prorogue make it clear on the face of the relocation order. If there is nothing in the relocation order about which jurisdiction will deal with future, substantive issues regarding child's welfare, it will be assumed that article 8 applies (save for article 9 derogation).

Make sure you get your BIIR certificates issued by the court that grants relocation at the time that the order is made:

Annex II Certificate - removal part of the order (judgment on parental responsibility)

Annex III Certificates - contact/access order (judgment on access rights)

Article 41 of BIIR is the governing section for enforcement of access orders. Bear in mind:

• Enforcement procedure is governed by the law of the member state (article 47(1) BIIR)

• Any judgment made in state A shall be enforced in state B in the same conditions as if had been delivered in state B (article 47(2) BIIR)

• A judgment cannot be enforced if it is irreconcilable with a subsequent enforceable judgment (article 47(2) BIIR)

• How does the court treat an application to enforce contact? Does it decide the enforcement application by considering the child's welfare as it is now?

Enforcement outside Brussels II bis countries

Take advice from the jurisdiction the parent is intending to move to well in advance of your final hearing or reaching an agreement. Will an English order be recognised in the new jurisdiction? How could it be enforced? Could you obtain a mirror order in the new jurisdiction? Do you need to ensure that certain wording is contained in the English order for this to be done? Take advice on any draft Order to ensure it is worded appropriately for these purposes.

A sideways look at other countries

California: *The parent who has primary physical custody of the child and who has been the child's "primary caretaker" has a presumptive right to move with the child. His or her attachment to the child and the child's need to be with the parent are theoretically unaffected by a proposed move. The noncustodial parent has the burden of proving that the child will be hurt more by moving than by being separated from his or her primary caretaker. This is a difficult burden to meet.*

Florida: *The ultimate test is best interest of child. There is no presumption for or against removal. However, most applications are refused or reversed if granted.*

New Zealand*: The overriding consideration for the court in determining relocation cases shall always be the welfare and best interests of the child. Some of the factors to be considered in determining best interests include continuity of the child's relationship with each parent and their wider family group, the child's safety, and preservation of the child's cultural identity. The court's inquiry is intensely fact specific and multifaceted. No presumptive weight is to be given to one or mare factors and it is inappropriate for the court to apply a one size fits all' checklist in determining relocation cases. This means that it is often impossible to predict a likely outcome in any given relocation case. In any contested relocation case, the court must appoint a lawyer to represent the child. The child must be given an opportunity to express their views. The court must take the child's views into account.*

Scotland: *The test is the best interests of the child. Most applications to remove are refused. There is no formal presumption, but it is not at all easy to persuade the courts to allow children to be removed.*

Final thought

Sometimes parents simply cannot agree what is best for their children. Such is life. We as practitioners owe our clients a duty to handle relocation cases as respectfully and sensitively as possible. Being separated or divorced as parents does not mean, especially from a child's point of view, that you are no longer a family. We might be indirectly involved in these children's lives for a matter of months, or perhaps even a year or two, but when the case finishes, no matter what the outcome, the parents have to be able to co-parent successfully. We as practitioners should remind ourselves of that at every stage.