Family law news: Don't pack your bags yet!

20 FEBRUARY 2012

CATEGORY:
ARTICLE

For the past 40+ years, there have been many cases on child relocation, with varying degrees of emphasis placed on the approach to be taken when one party wishes to move to another country with the child or children of the family. Through the decades, the changes appear to have been evolutionary rather than revolutionary, taking into account social change since the 1970s.

In *Re K*, the mother was Canadian and the father was Polish, although he spent his formative years in Canada. He moved to England in 1993 and the mother in 2003. They had two young daughters aged four and two. Divorce proceedings commenced in July 2010. Both parents were employed in the banking sector and both were able to work part time to enable each to be involved with the children. A Shared Residence Order was made by the Court in August 2010 which provided that the girls were to spend five consecutive nights with their father and nine nights with their mother in every 14-day period.

The mother decided that she wished to return to Canada and applied to the Court for leave to relocate. Up to this point, the leading case on this issue was the 2001 case of *Payne v Payne* [2001] EWCA Civ 166, which set out guidance for deciding cases with a strong reference to the emotional well-being and happiness of the primary carer (in practice, most usually with the mother). The Judge hearing the *Re K* case followed the guidance set out by the Court of Appeal in *Payne*, and allowed the mother to relocate to Canada with her two children, despite the fact that there was a definite sharing arrangement between the parents. The Judge considered that the effect of a refusal on the mother to relocate would cause her feelings of increased isolation and depression. However, in contrast the Judge did not address the effects of the relocation on the father. On appeal by the father, the Court of Appeal overturned the Judge's decision.

Lord Justices Thorpe and Moore-Bick were prepared to lay the guidance in *Payne* to one side in cases involving shared care. In his leading judgment, Lord Justice Thorpe reiterated the law by stating that 'the only principle to be extracted from *Payne v Payne* is the paramountcy principle'. Essentially, Lord Justice Thorpe was saying that the welfare of the child as set out in S1 (3) of the Children Act 1989 is paramount and that everything else is merely guidance. The Court must consider the statutory checklist contained in S1 (3) in exercising discretion, but the guidance laid out in the case of Payne is applicable where the applicant is the primary carer. Consequently, *Payne* is no longer the leading authority in cases involving a shared care arrangement.

Lord Justice Black disagreed with this approach and set out her case, albeit cautiously, in support of the *Payne* guidance, even in a sharing situation. This may open the door in future cases to considerable judicial 'cherry-picking' in relation to the judgments in *Re K*, but, for the moment, the case against relocation where care of children is shared can be more robustly argued. The decision strikes a victory not only for children, but for the left-behind parents whose relationship with their children would be irrevocably altered once leave is given to remove a child from the jurisdiction.