Homesick Blues…

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CATEGORY:
BLOG

What is the current state of play when one party makes an application to remove a child or children permanently from the jurisdiction? Will it carry more weight if the applicant is the primary carer? What if the care is shared, either 'more or less' equally, or wholly equally? What if both parents are fully involved, committed people with much to offer their child or children? What if the case is, as we frequently hear, 'finely balanced'? The guidance found in the case law has been an exercise in evolution from Poel v Poel [1970] 1 WLR 1469, to Payne v Payne [2001] EWCA Civ 166, [2001] 1 FLR 1052, to K v K (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793, and Re F (Relocation) [2012] EWCA Civ 1364. When a Judge determines whether a parent can relocate, practitioners of family law frequently wondered how much discretion he or she actually has in the application of the paramountcy principle. In October 2011, Munby LJ (as he then was) wrote in an article (Trusts & Trustees, Vol 17, No 9, that '*on the same evidence, two different minds might reach widely different conclusions without either being appealable_.' The arguments in the father's appeal in_Re F* were predicated on the basis that the Judge had felt entitled to look at the *Payne* guidelines on the basis that the father was the primary carer. The father submitted that the Judge had erred because *Payne* only applied where the applicant is the primary carer, and in *Re F*, the father was the respondent. In the postscript to the Court of Appeal judgment, Munby LJ discussed the problems that have arisen, when the law appears to have a 'menu' of categories of relocation cases, akin to a two tier system of applications: primary care cases, to which Payne is applied and shared care cases as in *K v K*. He said that we should avoid categorisation of cases. However, in his judgement in *K v K*, Lord Justice Moor-Bick, did not elucidate on whether primary care applications and shared care applications should have different treatment in international leave to remove applications (as opposed to Lady Justice Black, who saw shared care as part of the framework of which *Payne* was a part). Moor-Bick LJ said quite firmly that the welfare of the child was paramount and everything else was guidance. He emphasised that the difficulties that have echoed down the ages came about as a result of treating the guidance in *Payne* as if '*it contained principles of law from which no departure is permitted_.' In_Re F*, Munby LJ conflated the two appeal judgements in *K v K* (incorrectly, in my view) and opined that Lord Justice Moor-Bick was '*of the same view_' as Lady Justice Black. Lord Justice Moor-Bick was clear that judges must test the relevant factors in each individual case, because of the obvious and simple reason that the circumstances of each case will vary. It has therefore fallen to Mostyn J in_TC v JC* (Children: Relocation) [2013] EWHC 292 to draw the threads together, so that it all boils down to a factual evaluation, with a value judgement by the Judge. He set out the guidance he identified from the earlier cases, to which practitioners and Judges must take heed in these difficult international relocation cases, going forward. In *TC v JC*, he said: '*The guidance given by the Court of Appeal as the factors to be weighed in search of the welfare paramountcy, and which directs the exercise of the welfare discretion, is valuable. Such guidance helps the judge to identify which factors are likely to be the most important and the weight which should generally be attached to them, and incidentally promotes consistency in decision-making._' Mostyn J also said that hearings must not become mired in 'taxonomical arguments or preliminary skirmishes' as to what label should be applied to the case_'by virtue of either the time spent with each of the parents or other aspects of the care arrangements*.' He further emphasised that there is no legal principle in favour of a primary carer's application to relocate. Thus, the field is now wide open for a range of arguments to be marshalled. The guidance will certainly be pored over and cases constructed accordingly. What is certain is that the outcome of such cases remain far from certain and indeed, those cases which are 'finely balanced' still remain poised on the knife-edge of uncertainty.