Leave to Remove and Schedule 1 - Detecting Trends

Mary-Jane Taylor & Christina Morris
Coram Chambers
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About the presenters

Mary-Jane Taylor

Before being called to the Bar Mary-Jane had a varied and interesting number of employment positions. She lectured in economics at the University of KwaZulu Natal and did research in the area of gender income differences in the South African Labour market for 3 years. She also taught A level economics at a school in Hackney London for 2 years.

Her interest in women and domestic violence led her to work for Domestic Violence Intervention Project in New York, a state funded organisation working with victims of domestic violence and BEWARE an organisation in Brooklyn working with and supporting Rape victims.

Mary-Jane was called to the New York Bar in 1996. During the period when she was studying for her LLM at UEA and her Bar exams she worked for REUNITE part time. She was a trustee for Reunite for 2 years from 2003-2005.

Mary-Jane practices in all areas of family law including international child abduction, private law children, Family Law Act proceedings, public law children acting for parents, local authorities and guardians.

Mary-Jane also undertakes financial remedies proceedings including Schedule 1 Children Act and TOLATA proceedings.

Mary-Jane’s experience leads her to frequently represent vulnerable clients as well as the more demanding clients who need robust handling.
Christina Morris

Christina is a specialist in all aspects of property and financial provision with particular expertise in the property and financial rights of unmarried couples and children, applications pursuant to s.14 Trusts of Land and Appointment of Trustees Act and Schedule 1 Children Act. She has experience at all levels of court and in all types of cases.

Christina is always thorough and well prepared in her cases and has a particular skill in working with difficult people. She excels in “hard-ball” negotiations but equally should they fail she is also ready for the fray.

Christina has delivered lectures to solicitors, and other professionals on a variety of topics including TOLATA, Stack v Dowden and the Return of the Mesher Order.

Christina is a qualified Arbitrator
RECENT CASES

• The starting point of *Payne v Payne* Lord Justice Thorpe judgment:
  • a) is application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask, is the application realistic, founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow.
  • (b) If application passes these tests then there must be a careful appraisal of the opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment the future relationship with the child were the application granted? To what extent would that be offset by extension of the child’s relationships with the maternal family and homeland?
  • (c) What would be the impact on the applicant, either as the single parent or as a new wife, of a refusal of the realistic proposal?
RE F

- **Re F (Relocation) [2012] EWCA Civ 1364 [2013] 1 FLR 645**
- "Adopting conventional terminology, this was neither a ‘primary carer' nor a ‘shared care' case. In other words, and like a number of other international relocation cases, it did not fall comfortably within the existing taxonomy. However, the last thing that this very difficult area of family law required was a satellite jurisprudence generating an ever-more detailed classification of supposedly different types of relocation case. Any move in that direction was to be firmly resisted. But so too advocates and judges must resist the temptation to try and force the facts of the particular case with which they are concerned within some forensic straightjacket. Asking whether a case was a ‘Payne type case', or a ‘K v K (Relocation: Shared Care Arrangement) type case' or a ‘Re Y (Leave to Remove from Jurisdiction) type case', when in truth it may be none of them, was simply a recipe for unnecessary and inappropriate forensic dispute or worse and was to be avoided (see para [60])"
• **K v K (Relocation: Shared Care Arrangement)** [2011] EWCA Civ 793

• **Per Thorpe LJ:** there was now clear authority that the guidance in Payne v Payne was not to be followed in shared care cases; the judge should have applied Re Y (Leave to Remove from Jurisdiction) instead. The guidance in Payne v Payne was posited on the premise that the applicant was the primary carer; once care was shared the children were not so dependent upon the stability and wellbeing of an individual parent, and the role of each parent might be equally important.
K v K

- Per Black LJ: the decision in Re Y (Leave to Remove from Jurisdiction) was not representative of a different line of authority from Payne v Payne, applicable where the child's care was shared between the parents as opposed to undertaken by one primary carer, but was a decision within the framework of which Payne v Payne was part, and exemplified how the weight attached to the relevant factors altered depending upon the facts of the case. Cases should not become bogged down with arguments as to the label to be attached to the way in which the particular parents had provided for the care of their children, which were, and should be, infinitely varied (see paras [144], [145]).
RECENT CASES

• Re O (Residence) [2012] EWCA Civ 1955
• [2014] 1 FLR 89 – New Evidence
• Re E (Relocation: Removal from Jurisdiction) [2012] EWCA Civ 1893 – Rejecting CAFCASS
• Re L (Relocation: Shared Residence) [2012] EWHC 3069 (Fam) – Refusal Shared Residence order made
• Re TC and JC (Children: Relocation) [2013] EWHC 292 (Fam) [2013] 2 FLR 484 – Immigration status key
• **Re Z (Relocation) [2012] EWHC 139 (Fam)**
  • [2012] 2 FLR 653 - a residence order in favour of the mother and permission to relocate to Australia; declaring that the child will become habitually resident in Australia 6 weeks after her arrival

• **C v C (International Relocation: Shared Care Arrangement) [2011] EWHC 335 (Fam)**
  • [2011] 2 FLR 701 – Shared care prevailed and application refused

• **Re S (Relocation: Interests of Siblings) [2011] EWCA Civ 454** : held that when considering an application for leave to remove siblings, the welfare of each child must be considered separately.
TIPS IN PREPARING THE CASE

• WHAT TYPE OF CASE IS IT?

• Applications for leave to remove children permanently abroad generally fall into the following categories:
  
  • (1) “Going Home” cases, where a parent is seeking to return to the country of origin after the breakdown of a marriage/relationship, where they will have practical and emotional support from family and friends.
  
  • (2) Applications where a parent has a new partner or spouse from another jurisdiction and wishes to move abroad to live with him or her in that country.
  
  • (3) Applications where a parent wishes to move abroad in order to take up a new job opportunity or whose partner/new spouse wishes to take up a new job abroad.
  
  • (4) “Lifestyle” cases, where a parent wishes to move to a country to which they have no close connection but which they feel will offer better lifestyle opportunities for themselves and their children. Where such considerations apply, it is generally harder to get permission to relocate than the other three categories.
ACTING FOR PARENT WHO WANTS TO RELOCATE

- WHAT TYPE OF CASE IS IT? PRIMARY CARER /SHARED CARE ARRANGEMENT
- WHAT EVIDENCE IS REQUIRED?
- APPLICANT’S STATEMENT
- WITNESS STATEMENT OF OTHERS PARTNER / EMPLOYER?
- WILL VIDEO EVIDENCE BE REQUIRED?
- ANY EXPERT EVIDENCE REQUIRED?
- – MEDICAL?
- CAFCASS – WISHES AND FEELINGS
- ENFORCING CONTACT
WITNESS STATEMENT

• The statement should include the following:
  • (1) A history relationship with the other parent, an outline of any court proceedings details of respective roles in the care and upbringing of your children, financial issues etc.
  • (2) reasons for wanting to relocate.
  • (3) Information about accommodation in the new country.
  • (4) Details of schools and other educational arrangements for each of the children.
  • (5) Financial issues, demonstrating that the proposed relocation is financially viable.
WITNESS STATEMENT

• (6) Any immigration or visa issues.
• (7) How childcare will be organised in the new country.
• (8) links to the new country.
• (9) Healthcare arrangements in the new country.
• (10) The children’s knowledge and experience of the new country, if any.
• (11) Provide a map of the area where you propose to live.
WITNESS STATEMENT

• (12) Any special factors such as cultural, racial or religious issues.
• (13) Details of any new partner/spouse and his/her job in the new country.
• (14) The wishes and feelings of each of the children in relation to the proposed move, dealing with any possible objections that any of the children may have
• (15) What the emotional effect would be of any refusal of permission to move abroad.
CONTACT

• Contact: crucially the witness statement needs to demonstrate applicant’s commitment to promoting as good as possible a relationship between the children and the other parent in the event of successful relocation.
• The practical arrangements must be set out to ensure that regular direct and indirect contact takes places
• The ease and the practicalities of **travel** to the other country for contact: Are there direct flights or trains? How much does it cost? Are flight schedules such as the other parent can come for a weekend at a time, or will he need to take time off work?
CONTACT Continued

- **Accommodation during contact:** Hotels are artificial homes for children and no good long-term solution, so can the other parent stay in holiday houses (at least outside the season) or buy or rent a small flat or house?
- **Practicalities of contact:** Are there facilities for activities the other parent can do with the children, such as swimming pools, playgrounds etc.
- **Indirect contact:** Time between contact visits can be bridged by telephone contact, which in most cases works well for older children, but very young children can not say much on the telephone and find it often difficult to concentrate.
- Internet video telephony, such as through Skype or other providers are a low-cost effective way of engaging children who can then see the other parent. In addition the other parent may be able to read bedtime stories to the child and record them and either send tapes or CDs or send the files to be downloaded online.
ACTING FOR THE RESPONDENT

WHAT APPLICATIONS TO CONSIDER?

(a) shared residence order;
(b) sole residence (if that parent is able to offer a home to the children as their main carer);
(c) a prohibited steps order, when there is a real risk of the relocating parent taking matters into their own hands and leaving the country with the children, without the other parent’s consent or leave of the court.

Specific Issue - Passports held by solicitors
RESPONDENT’S WITNESS STATEMENT

• (1) The extent of the loss of contact between respondent and the children and its effect on the children and respondent, including practical difficulties over the contact arrangements in the new country.

• (2) The current contact arrangements and/or current involvement in caring for the children and how respondent and the other parent could continue to co-parent in the event that relocation does not take place.
• (3) Scrutinise the other parent’s proposed practical arrangements in the new jurisdiction very carefully including
  • (a) the network of support, or lack of it, in the new country;
  • (b) educational arrangements and their suitability or otherwise for each child, as compared to the present arrangements;
  • (c) financial issues;
  • (d) language and cultural differences.
• (4) Any other concerns about the new country.
• (5) Each child’s wishes and feelings and what respondent’s understanding to be their view of the proposed move and wish to remain here, if that is the case.
• (6) Emphasise the links the children have and the impact of the loss of significant relationships with the children’s friends and wider family network (including grandparents) as well as the loss of everything else that the child has in the UK.
• (7) The likely emotional effect of the children’s relocation on respondent.
ENFORCING CONTACT

- All of the EU, aside from Denmark, has signed up to the Brussels II Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility - “BIIR”.
- In relation to BIIR countries, there exists a special procedure in relation to recognition and enforcement of contact orders, which fall under the head of “judgments relating to parental responsibility”.
- Signed Article 39 Annex II certificate which can be downloaded on-line. Such a certificate allows for the judgment in relation to contact to be directly recognised in another BIIR country. It is important to provide such a certificate to the Judge at the time of judgment for signing such that it is already to hand if any difficulties arise after relocation.
- The certificate itself is relatively straightforward and merely records the basic details. Clearly in a more complex case, it may well also be wise to obtain a transcript of the judgment in relation to contact, such that this can be translated if necessary.
ENFORCING CONTACT

• Article 37 BIIR makes it clear that the Article 39 certificate is only one of the documents needed for a judgment to be recognised, together with: “(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity”.

• Providing the draft Article 39 Certificate with the statement is a useful addition to any application to remove to BIIR Member State as it shows foresight and goodwill on the part of the removing parent.

• Clearly at the end of the hearing the party who may wish to enforce the contact order will also need a signed and sealed copy of the judgment.
• **Re Z [2012] EWHC 139 (Fam)** Mrs Justice Pauffley allowed a removal to Australia but effectively retained jurisdiction over the child for a 6 week period until the child did in fact become habitually resident in Australia. This retention of jurisdiction by the sending court is of course a very useful mechanism for ensuring that the relocation is indeed carried out as proposed to the court. Within that period, the English court is still seized to consider any applications in relation to the child.
NON BRUSSELS CASES

• **Re S [1999] 1FLR 850** in which the mother had to obtain at her own expense authentication of the contact order in the Chilean courts and to lodge £135,000 in a deposit account pending notification to the father that the authentication had been implemented.

• **K v B [2006] EWHC 1783** the mother prior to being given permission to relocate to the USA had to provide various undertakings in respect of mirror orders. An order was also made in relation to the proceeds of the mother’s flat in England which were held to the order of the court for an initial period to be extended or terminated as required.

• Whilst undertakings can be extracted from a parent, they may have no force whatsoever in a foreign country.
• **Family Mediation**
  
  Mediation explores the options in a less formal way to see if there is any possibility of reaching agreement or at least exploring the issues in a non-confrontational way.

  If acting for the parent opposed to relocating abroad and the other parent has a strong case, mediation can be a neutral forum to try and negotiate extensive contact arrangements without committing to agreeing to the relocation.

  The other parent may be more willing to agree extensive contact and to make a contribution to the financial costs involved as a condition of respondent agreeing to the relocation to avoid the expense of a contested hearing.
RECENT RELOCATION CASES

Re A (Removal from Jurisdiction) [2012] EWCA Civ 1041
[2014] 1 FLR 1
Court of Appeal
Thorpe, Black LJJ and Sir David Keene
22 June 2012

Relocation — Turkish mother applied for permission to take child on holiday to Turkey — Views of maternal grandfather caused judge alarm — Whether the judge's refusal could be upheld

The Turkish mother and English father met and had a child in England. When the relationship ended a shared residence order was granted with the child spending weekends with the father. Some months later the mother applied for leave to take the child and relocate to Turkey on a permanent basis. That application was refused and a year later the mother, opposed by the father, sought permission to take the child to Turkey on holiday. The judge imposed a prohibition on the mother taking the child on holiday to Turkey for 1 year with liberty to apply for a review before the expiration subject to the mother obtaining the views of her family on such a holiday. Eight months after the prohibition was imposed the mother renewed her application to take the child on holiday to Turkey and the maternal grandfather gave evidence on his views. In refusing the application the judge highlighted the concerns she had following the grandfather's evidence which included: the dynamics of the family consisting of three maternal uncles and the grandfather; the lack of open communication; the fact that the uncles exercised the financial power; the fact that they supported the mother's application to relocate and emphasised the higher standard of living to be enjoyed in Turkey. These were matters that failed to offer reassurance to the judge and weighed against the grant of the application. The mother appealed.

Held – dismissing the appeal –

(1) It was for the judge below to see, hear and evaluate the evidence of the maternal grandfather. There was no doubt that his performance in the witness box was the cause of the heightened anxiety to the judge. Far from reassuring her as no doubt she had in advance anticipated, he caused her something close to alarm. It was not for the Court of Appeal to minimise that key consideration. She alone heard the voice of the grandfather, she alone had the opportunity of assessing the dynamics (see para [11]).

(2) The judge was not speaking forever and she had actively encouraged the mother to reapply once the child was older and they had established a regular routine in this country (see para [12]).
Residence — Permission to relocate granted — Appeal — Fresh evidence of mother's early retirement — Whether the judge would have reached a different conclusion

After her parents' separation, the girl, now aged 10, remained living with the mother and had contact, although not overnight, with the father. The parents were on bitter terms and only communicated through the child. The mother worked long hours for an Irish bank and sought permission to relocate to southern Ireland in order to work closer to home and spend more time with the child. The mother proposed substantial periods of staying contact with the father. The judge found it to be a finely balanced case but decided in favour of permitting relocation. A prominent factor in the reasoning was the financial security the mother would experience in moving to Ireland. He also found that the mother's contact proposals were practical and reasonable. Prior to the hearing the father had withheld periodical payments from the mother as a reaction to her application and before the order was perfected, he offered to discharge the arrears, secure future periodical payments and make a substantial payment on account of costs. In view of that offer he sought a reconsideration of the issues but at the later limited hearing, the judge came to the same conclusion. The father appealed. In the mother's updated statement she stated that she had taken the decision to take early retirement from the bank in return for a lump sum of £100,000 plus £15,000 per annum. Coupled with the £60,000 equity in her current home she would have a good capital sum with which to fund the child's university education and whatever she earned from part-time employment would equate to the father's periodical payments. The father asserted this information should have been made available to the judge and had it been, it might have led to a different decision.

Held – dismissing the appeal –

(1) The answer to the key matter for consideration of whether, had the judge had the information about the mother's retirement, it might have led him to a different conclusion, was that it would not. In many ways it could be said that it would have fortified his conclusion that relocation was the right course for the child as it had the same advantages of relieving the mother of any financial anxiety and it had the advantage of leaving the mother even freer to be available to the child on a daily basis than she would have been under the repatriation scheme (see para [25]).

(2) The suggestion that the order below should be quashed on the basis of the fresh evidence was bold but without any solid foundation. At the most it could be said to demonstrate a need for remission, but remission was always an order of last resort and the idea of setting up a third trial between the two parents and inevitably to embroil the child in the midst of that was, as a matter of common sense and welfare evaluation, unthinkable, absent some necessity of a fundamental nature in order to establish due process or in order to do justice. There would also be continuing financial cost to the family, neither party being legally aided (see para [26]).
Re E (Relocation: Removal from Jurisdiction)
[2012] EWCA Civ 1893
[2013] 2 FLR 290
Court of Appeal
Thorpe, Moore-Bick and Etherton LJJ
11 December 2012

Relocation — Mother granted permission to relocate to USA with two children —
Appeal — Whether the judge had been entitled to reject the recommendation of the Cafcass officer

When the parents of two children, now aged 11 and 5, separated, the children
remained in the care of the mother, who was granted a residence order, and had
contact with the father. The mother had formed a relationship over the internet
with a man who was an American citizen and she began visiting him in the USA.
When the relationship became more serious the mother applied for permission to
relocate to the USA with the children and proposed generous contact with the
father of 3 months each summer and alternate Christmases. A Cafcass officer
wrote a full report and recommended against granting permission, citing the
impact relocation would have on the father. The judge granted the mother
permission to relocate on the basis that she obtain a mirror contact order from the
US court. The father appealed, submitting that the judge had failed to give cogent
reasons for rejecting the recommendation from Cafcass.

Held — dismissing the appeal —

(1) The judge's departure from the recommendation of the Cafcass officer was
entirely permissible. He was entitled to conclude that the Cafcass officer had
failed to take into account the quality of the proposals submitted by the mother
and that the report lacked the necessary breadth and balance (see paras [8], [10]).

(2) Given the proper approach expressed by the classic line of cases from Poel
v Poel [1970] 1 WLR 1469 to Payne v Payne [2001] EWCA Civ 166, the mother's
application entered the lists on firm foundations. Throughout the lives of the
children the mother had been a dedicated primary carer and only with the making
of the contact order for 26 weekends per year did the father's role in the children's
lives achieve definition. The mother's motivation for relocating, finding a partner
she wished to marry, was classically strong. While the removal of the children
would not necessarily diminish the nights the children spent with their father, it
would certainly destroy the pattern of alternate weekends. However, the mother's
proposals for contact were certainly generous in terms of quantum (see paras [5],
[6]).
Re L (Relocation: Shared Residence) [2012]
EWHC 3069 (Fam)

[2013] 1 FLR 777
Family Division
Stephen Bellamy QC sitting as a Judge of the High Court
9 October 2012

Relocation — Mother unlawfully retained child in USA — Upon return sought permission to relocate — Father and child had good but not strong relationship — Whether the mother's contact proposals were genuine and realistic — Whether relocation was in the child's paramount welfare interests

The American mother and English father met while the mother was a student in London. They married in New York City but decided to settle in England, although the mother made frequent trips to the USA. During the marriage the couple had a son, now 3 years old. When the child was a year old the mother took him to the USA and although the father visited and requested that the mother return to England, she refused to commit to a return date. The mother eventually returned but expressed her wish to permanently relocate to the USA. The parents engaged in marriage counselling and mediation which resulted in an agreement that the mother and child could visit the USA for a temporary period of 4 months but that the mother would return the child. Just prior to her scheduled return the mother petitioned for divorce in Kansas City and sought sole residence of the child. She informed the father via email that she would not be returning until the divorce was final. The father issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and after a return order was made in the High Court, the father issued an application for sole residence of the child. The mother refused to return the child and Hague Convention proceedings took place before the Federal Court. In the meantime the mother enrolled the child at a Montessori preschool. A further judgment from the High Court declared the child's place of habitual residence to be England and Wales and that he had been unlawfully retained in the USA in flagrant breach of the agreement with the father. The Federal Court dismissed the mother's objections and made a return order. Upon the mother and child's return the High Court ordered the seizure of their passports, made an order prohibiting the removal of the child from the jurisdiction and a shared interim care arrangement was put in place. Generous contact was granted to the father but his application for an interim sole residence order was dismissed. The mother now sought sole residence and permission to relocate permanently to the USA. The father opposed the mother's proposed relocation.

Held — refusing the mother's application to relocate; making a shared residence order —

(1) The only principle of law enunciated in Payne v Payne was that the welfare of the child was paramount; all the rest was guidance. Difficulty had arisen as a result of treating that guidance as if it contained principles of law from which no departure was permitted. Guidance of the kind provided in Payne v Payne was very valuable both in ensuring that judges identified what were likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also played a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions had to be made varied infinitely and the judge in each case had
to be free to weigh up the individual factors and make whatever decision he or she considered to be in the best interests of the child (see para [8]).

(2) The law was clear: (i) the child's welfare was paramount in relocation cases as it was in relation to applications for residence orders. That was the only principle of law; (ii) in assessing the child's welfare regard must also be had to the statutory list of matters in s 1(3) of the Children Act 1989 but different weight and importance would be attracted to these matters depending on the individual circumstances of each case; (iii) further regard must also be paid to the guidance and the disciplines identified as to how the court should approach certain important aspects which were peculiar to relocation cases in assessing the child's welfare, the impact of refusal on the child's welfare, the genuineness of the motive to relocate, the well thought out, realistic and practical proposals associated with it and the genuineness of the opposition to relocation (see para [9]).

(3) In applying the guidance from Payne v Payne to the instant facts, there was no doubt that the mother's application to relocate was genuine to enable her to be with her family in her homeland. However, her proposals for contact had not been honestly and accurately thought through. Her proposals changed during the hearing and were characterised by her lack of commitment to contact, an impaired insight into the importance of the father's relationship with the child, a need to control it, and the obstacles she had placed in the path of contact in the past (see para [59]).

(4) While the father and son were found to have a good relationship it was uncertain whether it had the strength to withstand the child's relocation to the USA at such a young age. The father's concerns had substance and were genuine. His relationship with the son would be unlikely to be sustained and supported by the mother's contact proposals. His relationship should be on an upward trajectory that could be better provided if the child were living in England (see paras [62], [66]).

(5) The child's welfare required a shared residence order which would serve as a reminder to the parents that neither had greater entitlement or rights than the other and that each had much to contribute to their child's life (see paras [68], [69]).
Re TC and JC (Children: Relocation) [2013]  
EWHC 292 (Fam)  
[2013] 2 FLR 484  
Family Division  
Mostyn J  
21 February 2013

Relocation — Children returned from Australia following Hague Convention proceedings — Mother applied for permission to relocate — Unsuccessful parent would relocate with children — Mother's immigration status less clear than father's — Whether relocation was in the best interests of the children

The mother was Australian and the father British, but he was a permanent resident of Australia. During their relationship they had lived in both Australia and England but decided to move to England latterly with their two children. The mother was unhappy living in England and her GP notes record that she was missing home and feeling depressed. When the parents' marriage ran into difficulties the mother took the children, aged 3 and 2, and flew to Australia without informing the father. The children were returned under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention) procedures and the mother now sought permission to relocate to Australia permanently. The parents had come to an arrangement that whatever the decision of the court as to which country the children should live in, the unsuccessful parent would relocate to live in that country. During proceedings the immigration status of both the parents was investigated. The father's position was that his Australian residency would not be affected by the marriage coming to an end and that he would be able to alter the nature of his visa upon arrival. The mother's immigration status was less clear and she would be required to make an application for leave to enter or remain in the UK which could take between 40 and 50 weeks during which time the mother would not be permitted to work or claim State benefits and would be financially reliant on the father. She would need specialist immigration lawyers and an estimate of the likely fees incurred was in the region of £3,000. The mother was already heavily indebted to both credit card companies and her family.

Held – granting the mother permission to relocate to Australia –

(1) The only authentic principle to be applied when determining an application to relocate a child permanently overseas was that the welfare of the child is paramount and overbears all other considerations, however powerful and reasonable they might be (see para [11]).

(2) Presumptions had no place in relocation applications. There was no presumption in favour of the applicant mother. The determination had to involve a factual evaluation and a value judgment. The guidance formulated in the Court of Appeal was not determinative or even necessarily tendentious. It was merely an aid to the determination of the ultimate single question, which was: what was in the best interests of these children? (See paras [10]–[18]).

(3) The capacity of the mother to meet the needs of her children was likely to be diminished were she to have to stay in the UK to negotiate the immigration labyrinth for up to a year, and to be exposed to the risk of bankruptcy in relation to her hard debts. The children would be adversely affected if she were forced to return to Australia and to be separated from them once again in order to make an out-of-country application for leave. Even if (or more likely when) the mother
were granted leave her position would remain very precarious for 5 years, for she would not be able to access State benefits were she to lose her employment, for whatever reason (see para [50]).

(4) It was clear that the impact would, if favourable to the father, bear far more heavily on the mother than the other way around. That was the decisive factor which moved the decision off the knife edge in favour of the mother's proposal, which was the one most in the children's interests (see para [51]).
Re F (Relocation) [2012] EWCA Civ 1364
[2013] 1 FLR 645
Court of Appeal
Pill, Toulson and Munby LJJ
24 October 2012

Relocation — Spanish family moved to UK with son — Mother returned to Spain and granted permission to relocate — Appeal — Whether the judge had incorrectly applied the Payne guidelines

The Spanish parents relocated to the UK with their son P, who was now 7 years old, due to the father obtaining an employment contract. Two years later the contract was extended but by this time the parents' relationship was breaking down. They travelled to Spain for a holiday but upon their return to the UK, the mother stayed only a few days before going back to Spain. She left the child with the father in the belief that it would be for a short period. However, the child had since remained with the father. The father issued an application for a residence order and the mother made a similar application in Spain. Both sets of proceedings were stayed once the mother issued Hague proceedings in the High Court. The High Court judge concluded that at the material date the child was habitually resident in the UK, not Spain and, therefore, refused to make an order for return. Thereafter the parents sought a shared residence order which was granted along with the mother's application to permanently remove from the jurisdiction and to relocate to Spain. The father was ordered staying contact in the UK. The judge described the decision as one that was very well balanced; that the child would be afforded advantages both if he stayed in the UK and if he returned to Spain; and that both parents, although they would be immensely distressed if either one were to lose primary care of the child, would not collapse. The child's views were similarly balanced but the judge found that he would be returned to a tried and tested care regime that was familiar to him and due to the parents' work commitments it would be marginally easier for the mother to be able to make the child available for more generous contact with the father. The father appealed on the basis of the judge's application of the principles of Payne v Payne [2001] EWCA Civ 166 and K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793.

Held – dismissing the appeal –

(1) There could be no presumptions in a case governed by s 1 of the Children Act 1989. From beginning to end the child's welfare was paramount, and the evaluation of where the child's best interests truly lay was to be determined having regard to the 'welfare checklist' in s 1(3) (see paras [37], [61]).

(2) There had been no error of law. The judge, in his reasoning, had asked himself if this had been a case to which Payne v Payne applied. He then proceeded to take into account the guidelines from that case. Having considered the discipline outlined by Thorpe LJ, he then turned to an investigation and evaluation of the child's best interests having regard to the welfare checklist and came to his overall conclusion (see para [48]).

(3) Although this was not a case where the application was being made by the primary carer, the judge was entitled to have regard to Thorpe LJ's 'discipline' as set out at para [40] of Payne v Payne which is not confined to cases in which the applicant is the primary carer. He correctly appreciated that the case had to be
decided by reference to the child's best interests and that is what he did (see paras [45], [49]).

(4) The judge carefully took into account the child's current circumstances in this country, the quality of his father's care of him and the father's own plans, wishes and feelings. There was nothing which began to suggest that he started off with any presumption in favour of the mother's claim. He acknowledged that the father was the primary carer and recognised the importance the father was attaching to the argument based upon the status quo. He gave appropriate weight to both points, whilst correctly appreciating that neither could be decisive. There was no sustainable basis for any complaint that the judge either took into account irrelevant factors or failed to take into account any relevant factors. Nor was there any sustainable basis for a complaint that he erred either in the weight he chose to attach to the various factors he had to take into account or in his evaluative decision as to where the ultimate balance fell. That being so there was no proper basis upon which the Court of Appeal could intervene (see para [52]).

(5) The present case was a good example of what could happen if appropriate heed was not paid to the warning given by Black LJ in *K v K (Relocation: Shared Care Arrangement)* that cases should not become bogged down with arguments about whether this was 'a Payne case' or 'a Re Y case'. In the event the judge did not fall into the error of getting bogged down with arguments about whether the time spent with each parent made it a particular type of case. However, the prominence given in his judgment to 'the Payne guidelines', no doubt reflecting the prominence they had been given in the course of argument, led to the father being given the permission to appeal which otherwise, it may be, would have been refused (see para [59]).

(6) Adopting conventional terminology, this was neither a 'primary carer' nor a 'shared care' case. In other words, and like a number of other international relocation cases, it did not fall comfortably within the existing taxonomy. However, the last thing that this very difficult area of family law required was a satellite jurisprudence generating an ever-more detailed classification of supposedly different types of relocation case. Any move in that direction was to be firmly resisted. But so too advocates and judges must resist the temptation to try and force the facts of the particular case with which they are concerned within some forensic straightjacket. Asking whether a case was a 'Payne type case', or a 'K v K (Relocation: Shared Care Arrangement) type case' or a 'Re Y (Leave to Remove from Jurisdiction) type case', when in truth it may be none of them, was simply a recipe for unnecessary and inappropriate forensic dispute or worse and was to be avoided (see para [60])
K v K (Relocation: Shared Care Arrangement)

[2011] EWCA Civ 793

[2012] 2 FLR 880

Court of Appeal

Thorpe, Moore-Bick and Black LJ

Permission to remove — Shared residence order — Applicability of Payne guidelines

The Canadian mother and the Polish father married and made their home in England; the two children were raised in England. After the couple's divorce a shared residence order was made. Both parents worked in banking, and both worked less than full time to enable them to be more involved with the children. Under the order, the children spent 5 nights in every 14 with the father, whose work schedule allowed him to be at home with them throughout their stay, and the remaining 9 nights with the mother, whose work schedule allowed her to spend every weekend plus one weekday with the children, but who otherwise relied on a nanny. The mother applied to remove the children, now 2 and 4, to Canada, where she had a supportive family; she reported feeling isolated in England and had been prescribed medication for stress and depression. The father, whose own supportive family was based in England and Poland, resisted the mother's application. The Cafcass officer, who described the decision as a finely balanced one, suggested that in a few years' time a return to Canada might be in the children's best interests but recommended refusal of the mother's current application. The judge treated this as a recommendation that the mother's application be adjourned. The judge granted the mother permission to relocate, applying Payne v Payne [2001] EWCA Civ 166.

Held – allowing the appeal –

(1) The decision in Payne v Payne was binding on the court only in respect of the legal principles identified therein: the single legal principle to be extracted from the case was the paramountcy of the welfare of the child; the rest of the decision, which identified the factors that might be relevant in a relocation case, explained their importance to the welfare of the child, and suggested helpful disciplines to ensure that the proper matters considered in reaching a decision, was guidance, whose effect was not to be overstated. It was incumbent upon judges to heed detailed guidance of this kind, departing from it only after careful deliberation and when it was clear that the particular circumstances of the case required this in order to give effect to fundamental principles, but such guidance was not to be treated as if it contained principles of law from which no departure was permitted, or as though it could dictate the outcome of the case. Application of the detailed guidance given in Payne v Payne ought not, therefore, to be unduly mechanistic: Payne v Payne required the court to make whatever decision was in the best interests of the child, and did not interfere with the judge's freedom to weigh up the relevant individual factors when identifying those interests; in particular, Payne v Payne stated in terms that there was no presumption in favour of an application to relocate, and it was not appropriate to isolate other sentences from the judgment for re-elevation to a status akin to that of a determinative presumption (see paras [39], [40], [86], [87], [141]–[144]).

(2) When a judge gave reasons for a decision, especially a decision that called for a balance to be struck between competing factors, those who read the judgment were entitled to regard it as containing a full description of the judge's
intellectual process. If a relevant matter had not been mentioned it would not usually be possible to assume that it had been considered by the judge, although in some cases that could be inferred from the nature of the subject matter and the terms of the decision (see para [92]).

(3) The judge had failed to give sufficient consideration either to authority subsequent to *Payne v Payne* or to the need to consider the particular facts of the case. The judge had failed to give sufficient weight to the Cafcass report, which had not been recommending adjournment of the application, but its rejection, and had also given insufficient reasons for rejecting the report's recommendations. Finally, the judge had failed properly to take into account the father's emotional relationship with the children and their right to enjoy family life with each other: these factors might not ultimately have weighed decisively in the balance, but they had to be considered and given appropriate weight (see paras [25], [30], [87], [91], [92], [96], [146]).

**Per curiam**: strictly speaking *Re G (Leave to Remove)* [2007] EWCA Civ 1497, which had reaffirmed the importance of the guidelines set out in *Payne v Payne*, was, as an ordinary refusal of permission to appeal, not authority and ought not to be cited; this was also true of *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50 (see paras [79], [80], [129]).

**Per Thorpe LJ**: there was now clear authority that the guidance in *Payne v Payne* was not to be followed in shared care cases; the judge should have applied *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 instead. The guidance in *Payne v Payne* was posited on the premise that the applicant was the primary carer; once care was shared the children were not so dependent upon the stability and wellbeing of an individual parent, and the role of each parent might be equally important. What was significant was not the nature of the residence order, but the practical arrangements for sharing care between two equally committed carers. The comments made in *Re L (Shared Residence Order)* [2009] EWCA Civ 20 concerning the application of the same criteria to cases involving a shared residence order as to cases involving an ordinary residence order had to be viewed in the specific legal context of that case, which concerned an application for internal relocation, not permission to remove (see paras [25], [30], [35], [41], [46], [49]–[55], [57]).

**Per Black LJ**: the decision in *Re Y (Leave to Remove from Jurisdiction)* was not representative of a different line of authority from *Payne v Payne*, applicable where the child's care was shared between the parents as opposed to undertaken by one primary carer, but was a decision within the framework of which *Payne v Payne* was part, and exemplified how the weight attached to the relevant factors altered depending upon the facts of the case. Cases should not become bogged down with arguments as to the label to be attached to the way in which the particular parents had provided for the care of their children, which were, and should be, infinitely varied (see paras [144], [145]).
Re Z (Relocation) [2012] EWHC 139 (Fam)

[2012] 2 FLR 653
Family Division
Pauffley J
2 February 2012

Family proceedings — Leave to remove child from jurisdiction — Mother wished to permanently relocate to Australia — Whether relocation was in the child's best interests

The Australian mother and Belgian father married in Australia where their 6-year-old daughter was born. The family relocated to Belgium not long after the child was born but for the remainder of the parents' marriage they also lived in London and Belfast. When the parents separated the mother began divorce proceedings in England and issued an application for residence and permission to relocate permanently to Australia. The father simultaneously brought proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for the child's summary return to Belgium claiming wrongful removal. That application was dismissed and the child's habitual residence was found to be in England. Following a period of contact between the father and child in Belgium the father wrongfully retained the child for 11 months and brought proceedings there on the false basis that the child had lived and attended school in Belgium for the previous 2 years and was granted a residence order. The mother brought proceedings seeking enforcement of the English declaration of the child's habitual residence. The Belgian Appeal Court recognised and enforced the return order but for 5 days the father went into hiding with the child and only handed her over following police involvement. The mother claimed she felt isolated in England and wanted to return to Australia where all her family lived. She proposed the father and child could keep in weekly contact via Skype and have direct contact in Australia and England. The child's wishes and feelings about relocating were balanced and she was undecided about whether she wanted to move to Australia.

Held — granting a residence order in favour of the mother and permission to relocate to Australia; declaring that the child will become habitually resident in Australia 6 weeks after her arrival —

(1) The child's welfare needs were the paramount consideration and they were most appropriately satisfied by a residence order in favour of the mother. The consequences of the father's wrongful retention of the child had been utterly devastating and there were repercussions for her emotional wellbeing. The notion that she should be removed from her mother and placed with her father was unthinkable. To unsettle, destabilise and disorientate the child once in that manner was harmful enough. To contemplate a repeat would be manifestly contrary to her welfare needs (see paras [51], [52]).

(2) In accordance with the reasoning in Payne v Payne [2001] 1 FLR 1052 there was real potential for deterioration in the mother's mental wellbeing if her application were unsuccessful. She was isolated, lacking support in England and feared the child being abducted again. The father had become more focused upon his own selfish needs than those of his daughter and there was no doubt as to where the child's best interests lay (see paras [66], [70], [74]).
C v C (International Relocation: Shared Care Arrangement) [2011] EWHC 335 (Fam)

[2011] 2 FLR 701
Family Division
Theis J
24 February 2011

Leave to remove — Shared care — Unequal division of time — Whether mother primary carer — Relevant considerations

The mother and the father met in the USA: their first child was born in the USA; their second child was born in the UK. Both parents ran and operated successful businesses; both had been based in the UK for about 12 years, but travelled extensively for work and leisure purposes. After the breakdown of the relationship the couple agreed equal shared care of the children. When the father became engaged to a woman living in Northeast USA, he sought to change the practical arrangements so that during term time each parent would have a 2-week block of time with the children, holidays to continue to be shared equally. The mother refused, offering instead to divide term time so that the children were with her for 20 days, followed by 10 days with the father. He agreed to this arrangement on a trial basis. The mother then entered into a relationship with a man who was based in South USA, but who himself travelled extensively for work and family reasons; eventually she sought leave to remove the two children, now 13 and 8 to South USA, so that she could establish a more settled family life with the man. The father, who had business connections in Northeast USA, but none in South USA, opposed this. The father's relationship with the woman in Northeast USA had now broken down, and he was also seeking a return to equal shared care during term time. The evidence made it clear that the children were currently thriving, and that they moved seamlessly from the house of one parent to the house of the other, genuinely regarding both as homes, and viewing both parents as equal. It was established that it would be logistically impossible for the father to see the boys for 10 days every 30 days during school time if they relocated to South USA. The children were both somewhat ambivalent about the move; the 13-year-old was more enthusiastic about the relocation, the 8-year old less so; however neither of them had discussed the possibility that the move might mean seeing less of the father.

Held – dismissing both the mother's application to relocate and the father's application to revert to an equal division of time –

(1) It was relevant that there was no clear primary carer; where a relocation application involved a shared care arrangement a modified approach was required. The fact that in this case the shared care had not been precisely equal did not undermine the fact that this was a shared care arrangement, a significant part of which was the children's home life with the father (see paras [19], [57], [60]).

(2) Granted that the move to South USA would significantly enhance the mother's happiness, the importance for the children of seeing their parents happy and settled needed to be balanced with other relevant considerations, in particular the impact of the move on the children's relationship with the father. The relocation would involve a significant change from the current shared care arrangement: the father would not be able to replicate in South USA the current parenting time he had in his London home, either in quantity or in quality. Unlike the current arrangement, the move would not meet the children's needs and would
not be in the children's best interests (see paras [40], [44], [50], [54], [60], [61], [65]).

(3) The current contact regime had been shown to work, and any change to it, especially given the refusal of the mother's application to relocate, might send a confused message to the children, causing further uncertainty and confusion, which would not be in their interests (see para [67]).
Re S (Relocation: Interests of Siblings) [2011]

EWCA Civ 454

[2011] 2 FLR 678

Court of Appeal

Sir Mark Potter, Lloyd and Patten LJJ

18 April 2011

Leave to remove — Appeal — Permission to remove granted in respect of 16 and 12 year old — Whether welfare interests of each child should have been considered individually

Appeal — Leave to remove — Permission to remove granted in respect of 16 and 12 year old — Whether welfare interests of each child should have been considered individually

The father sought permission to relocate his two sons, aged 16 and 12, to his home country of Canada. The mother, from whom the father had been separated for 4 years and who had been the children's primary carer since the separation, objected to their removal. Subsequently she accepted that if the eldest child wished to go to Canada, upon completion of his secondary education, to attend university, she would not object. Both parents and the Cafcass officer agreed that the children should not be separated whatever the outcome. The judge granted the father permission to remove the children based on the strength of their views expressed in a letter written by the eldest boy and signed by both expressing their reasons for wanting to move to Canada and also based on a meeting the judge held with the eldest child in which he found him to be wholeheartedly committed to going to Canada. The younger child did not meet with the judge and his views were taken to have been expressed in the ‘joint’ letter. Following the hearing, the eldest child left for Canada of his own accord, took up residence with his paternal aunt, and commenced school, stating that he had no intention of returning. The mother accepted that state of affairs and appealed the order only insofar as it related to the younger child. Updated Cafcass reports found the younger child to be unwilling to shoulder the burden of having to make a decision himself on whether to move to Canada. Reports indicated that he had been performing well at school, did not miss his brother to any significant extent and was not showing any signs of disappointment or resentment at being left in the UK. The judge granted the father leave to remove; the mother was granted leave to appeal but the judge did not stay the order.

Held — allowing the appeal, setting aside the order permitting the father to remove the younger child from the jurisdiction —

(1) The judge had fallen into error in not considering the welfare interests of the children individually in light of their different ages, stages of development and the nature of their needs. In balancing the interests of the children, priority should have been given to the welfare interests of the younger child who was still at a tender age, in secure surroundings where there had been no compelling reason to uproot him. Unlike the elder boy, he lacked the maturity to make up his own mind and was of an age when the care, support and influence of his mother as primary carer were still the major factors in his life. In contrast – the 16 year old was able to form and express his own views; even if the application had been refused he would have been able to move to Canada to attend university in 18 months' time (see paras [56], [57], [61]).

(2) The status quo had been satisfactory and therefore there was a heavy onus...
on the father to establish that the long-term interests of both children were served by removing them from their secure home background and educational progress to move to relative uncertainty of a new life in Canada.

(3) In conducting the necessary balancing exercise in relation to the combined welfare interests of the children, the judge had adopted a ‘top down’ approach which accorded with the views and interests of the elder boy, when he should have used a ‘bottom up’ approach which emphasised the welfare interests of the younger boy. Had the judge separately considered the welfare interests of each boy he would have been driven to the conclusion that the application for removal be refused.

Shared Residence and Leave to Remove
Cases Since 2011:

1) K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793 [where parents shared care of children and Father sought appeal against order granting Mother leave to remove children]

2) Re F (A Child) [2012] EWCA Civ 1364 [where both parties sought a shared residence order and Mother sought a leave to remove order]

3) Re L [2012] EWHC 3069 (Fam) [where judge refused a removal order and granted a shared residence order]

4) Re A (Removal from Jurisdiction) [2012] EWCA Civ 1041 [FLR Fast Reporting] [where Mother and Father shared residence and Mother sought to relocate to Turkey]

5) Re TC and JC (Children: Relocation) [2013] EWHC 292 (Fam) [where Mother sought to remove children to Australia but would have shared residence regardless of decision judge made]
Family proceedings — Leave to remove child from jurisdiction — Mother wishing to return to USA with child — Parents divorced but both caring devotedly for child — Whether removal promoting child's welfare

The American mother had come to Wales to pursue her studies in Welsh under the instruction of the father. The father, who was English, settled in Wales as a young man and was an authority on Welsh language and culture. They married, had one child, but later divorced. The child was subject to an informal shared-care arrangement between the parents and lived with them on an almost equal basis. They had achieved remarkable harmony as far as his upbringing was concerned. The child made excellent progress at his Welsh medium education school, where he was genuinely bilingual, with Welsh as his preferred language. Meanwhile the mother, who had maintained her links with her family in the USA, felt increasingly isolated in Wales and she wanted to return with the child to the USA. In response to the mother's application to remove the child from the jurisdiction the father applied for a residence order.

Held — application to remove from jurisdiction refused — shared residence order made —

(1) The case fell factually outside the ambit of well-established authorities where the child was living with one parent who wished to leave the jurisdiction. Here the child's home was equally with both parents, who had conducted themselves with the utmost decency and unfailing concern for the child's welfare, whose positions were entirely understandable and potentially congruent with the best interests of the child but unfortunately mutually exclusive. It only remained for the court to refer to the opening provisions of the Children Act 1989 which provided that the ultimate test was the welfare of the child, overbearing all other considerations, however powerful and reasonable.

(2) In those circumstances, considering the gain and loss for the child of a move to the USA, it must be concluded that the course of least detriment to the child would be for him to continue to live in Wales. Therefore, while recognising the consequence to the mother who would see herself as forced, out of regard for the child, to remain in Wales, the welfare of the child compelled the court to refuse her application.
Family proceedings — Leave to remove child from jurisdiction — Forced return to jurisdiction following abduction to New Zealand — Whether presumption in favour of applicant parent — Whether domestic law in conflict with European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

Human rights — Right to respect for family life — Leave to remove child from jurisdiction — Whether domestic law created presumption in favour of applicant parent — Whether in breach of Convention

The mother, a citizen of New Zealand, applied for leave to remove her child permanently from the UK, seeking to take her to live in New Zealand. The mother and child had been required to return to the UK from New Zealand following proceedings brought by the father under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Since their return, the father and the paternal grandmother had regular staying contact with the child, which was acknowledged as exceptionally good. The father was seeking a residence order, and opposed the mother's application for leave to remove the child. The judge rejected the father's residence application, and gave the mother leave to remove the child permanently to New Zealand, applying the relevant case-law and finding that the move would be in the child's best interests because it would make her mother happy. The father appealed, arguing that the principles applied by the courts to applications for leave to remove from the jurisdiction created a presumption in favour of the applicant parent which was in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and in conflict with the Children Act 1989.

Held — dismissing the appeal —

(1) There was no conflict between the domestic case-law on applications for leave to remove a child permanently from the jurisdiction and either the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, or the Children Act 1989.

(2) The proposition that a refusal of a primary carer's reasonable proposals for the relocation of the family life was likely to impact detrimentally on the welfare of her dependent children did not amount to a presumption in favour of the primary carer.

(3) The welfare of the child was always paramount. Section 13(1)(b) did not create a presumption in favour of the applicant parent. The reasonable proposals of the parent with a residence order wishing to live abroad carried great weight; those proposals had to be scrutinised with care and the court needed to be satisfied that there was a genuine motivation for the move and not the intention to end contact between the child and the other parent. The effect of refusal of leave upon the applicant parent and the child's new family was very important; the effect upon the child of the denial of contact with the other parent and in some cases his family was very important; and the opportunity for continuing contact between the child and the parent left behind might be very significant. Where there was a real dispute as to which parent should be granted a residence order, and the decision as to which parent was the more suitable was finely balanced, then the future plans...
of each parent for the child were clearly relevant, and a proposed removal of the child from
school, surroundings and other family might be another important factor. However, where, as here, the residence issue was clear then plans for removal from the jurisdiction would not be likely to be significant in the decision over residence.

Thorpe LJ sets out a four-fold test at 488B or [40]

However, there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption, then there would be an obvious risk of the breach of the respondent's rights not only under article 8 but also his rights under article 6 to a fair trial. To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask, is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests, refusal will inevitably follow.

(b) If, however, the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist in so far as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological wellbeing of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor."

The “summary” of Butler-Sloss P (as she then was) at [85] emphasises the importance of considering the potential effect on the child of the lack of contact with the parent left behind:

“In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. [...]"

(a) The welfare of the child is always paramount.

(b) There is no presumption created by section 13(1)(b) of the Children Act 1989 in favour of the applicant parent.
(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. [...]“
Children Act Schedule 1 –Detecting Trends

Some Basics

Schedule 1 to the Children Act 1989 is short being made up of 16 Paragraphs, it essentially sets out: -

- Who can apply?
- For what?
- In what circumstances?

1 Who can apply?

Those who can apply for a financial order are set out in Para 1 (1), they are:

- Parent
- Guardian
- Special guardian
- Person who has a Residence Order in respect to a child

The court can also make an order under Schedule 1 when making, varying or discharging a residence order, even if no application has been made to the court (Para 1 (6)). This is also true in wardship proceedings (Para 1 (7))

Note: Adult children

The right to apply is extended at Para 2, to an adult child, that is a child who has reached the age of 18 and is in, or will be in, education or training or where special circumstances exist, for example a disability. An adult child can only apply, however, for a periodical payments and/or a lump sum, not a settlement or transfer of property order. Further the adult child can make an application against either parent but only if the parents are not living together.

One other point to note is that an adult child has no right to apply if, immediately before their 16th birthday, a periodical payments order in their favour was in force. This limitation creates a lacuna in those cases where the periodical payments order in favour of a child ceases at the age of 17 or full time secondary education, whichever is the earlier, and then the child goes on to tertiary education. The best advice would be to ensure that the wording of the original order extends the child’s periodical payments to the age of 17 or
ceasing full time tertiary education to first degree, whichever is the later, or further order.

2 For what?

The range of financial orders is set out in Para 1 (2) (a) – (e)

- Periodical payments
- Secured periodical payments
- Lump sum
- Settlement of property
- Transfer of property

**Periodical payment and secured periodical payment orders**

An order can be made for periodical payments or secured periodical payments and they will generally *commence* on the date of making the application or any later date and will *cease* on:

(i) the child’s 17th birthday, unless the court thinks it right in the circumstances of the case to specify a later date, which shall not in any event be beyond the child’s 18th birthday (Para 3 (1) (a)-(b))

(ii) the court has the power to make an order which continues beyond the child’s 18th birthday if the child is or will be or would be in full time education or undergoing training for a trade profession vocation (Para 3 (2) (a))

(iii) the court also has the power to make an order which continues beyond the child’s 18th birthday if there are “special circumstances” (Para 3 (2) (b))

Other events where the order will cease include, the death of the person liable to pay (Para 3 (3)) and where the person liable to pay and the person to whom the payment is made live together for a period of more than 6 months (Para 3 (4)).
An order for periodical payments and secured periodical payments can be varied or discharged (Para 1 (4)) and there can be any number of applications for periodical payments and secured periodical payments (Para 1 (5) (a))

**Note : Restrictions on making periodical payments**

- Of course the Child Support Act 1991 s.8 (CSA) and the application of that Act by the Child Maintenance Enforcement Commission (“CMEC”, replacing the Child Support Agency), means that in the vast number of cases an application for periodical payments and secured periodical payments cannot be made to the Court as it does not have jurisdiction to deal with such applications.
- Where CMEC would have jurisdiction to make a child maintenance assessment the court does, however, retain jurisdiction to make an order where the parties have made a written agreement and the court order is in the same terms (CSA s. 8.(5)). With, of course the proviso that after a period of 12 months either one of the parties can apply to CMEC for a maintenance assessment (CSA s.4 (10) (aa)).

**Note : If there is a maintenance assessment in place the court can still make an order where:**

- The payer’s income exceeds £104,000 p.a, the court can then make a periodical payments order to “top-up” the maintenance assessment CSA s.8 (6). Generally the assessment has to be a maximum assessment in order for there to be a top up, but the case of **CF v KM [2010] EWHC 1754** suggests that even if the assessment isn’t a maximum one the court would be able to act on the basis of its’ own assessment that the payers’ income will be at this level. However, this suggestion is made obiter, the point wasn’t argued, and it does run counter to the scheme which intended for the Agency to have jurisdiction where there income was below £104k. So as things stand if the assessment reduces below the maximum the court would not have the power to make a top up order unless the Judge can be persuaded to make “new law” following the suggestion made in CF v KM.
• the child’s educational expenses need to be met CSA s.8 (7), these include school fees and expenses directly related to education and training for a vocation, trade or profession.

• the child is in receipt of Disability Living Allowance or where the child is disabled, then the court can make an order for periodical payments to meet some or all of the expenses attributable to the child’s disability CSA s 8 (8). Disability is defined at CSA s 8(9) as being blind, deaf, substantially and permanently handicapped by illness, injury, mental disorder, congenital deformity or such other disability as may be prescribed.

**Note: court has jurisdiction where the CSA does not**

• Where the non-resident parent is habitually resident outside the UK then the person with care can then make an application to the Court as CMEC does not have jurisdiction to make a maintenance assessment (CSA s 44).

• As the definition of parent in the CSA s54 includes an adoptive parent but not a step parent then, in the event that an application is being made by or against a step parent, that application will have to be pursued in the Court.

**Lump Sum Orders**

An Applicant can apply to the court at any time and on any number of occasions for a lump sum (Para 1 (2) (c)). Whilst Para 1 contains the general provision for a lump sum, Para 5 sets out some specifics relating to lump sums they are:

• a lump sum order can be made of the purpose of enabling any liabilities or expenses incurred in connection with the birth of the child

• or in maintaining the child

• and the expenses were reasonably incurred before the making of the order
If the Applicant is applying to the Magistrates Court for a lump sum then the maximum sum that can be claimed is £1,000 (Para 1 (1) (a)-(b))

As stated above the court has the power to vary or discharge an order for periodical payments or secured periodical payments and in that event that court has power to make a lump sum (Para 5 (3)). It would appear at first blush that this provision would enable the court to capitalise the Applicant’s claims for periodical payments, however, there are no authorities to that effect and it would seem unlikely that there could be such capitalisation of a child’s maintenance.

A lump sum order can be ordered to be made in instalments (Para 5 (5)), those instalments are capable of variation in terms of the number of instalments, the amount of any instalment the date on which any instalment becomes payable (Para (5) (6)).

**Settlement and Transfer of Property**

Para 1 (2) (d) – (e) gives the court the power to make an order requiring a settlement or transfer of property to be made for the benefit of the child, this includes the power to transfer a joint tenancy (see K v K Minors: Property Transfer) [1992] 2 FLR 220)

Although the early reported cases suggest that there was some uncertainty as to whether a property could be settled or transferred for a period longer than the child’s dependency (and indeed it was argued by some that the Schedule allowed for an outright transfer of property see A v A [1994] 1 FLR 657 Ward J) it became clear that was not the case. Indeed Ward J in A v A observed that Para 2 gives an adult child the ability to only apply for a periodical payment order and/or a lump sum not a settlement or transfer of property, he goes on to say “That restriction serves to confirm that property adjustment orders should not ordinarily be made to provide benefits for the child after he has attained his independence.” (p661)

Once it is decided that there should be some provision under this part ie for there to be a settling or transfer of property and the amount that is needed
then the only other matter up for discussion are the terms of the order. The duration of a capital order was considered in the case of *Re N (Payments for Benefit of Child)* [2009] 1 FLR 1442 where Munby J found that the first instance judge had erred in principle in directing that the property should be settled until the child reached the age of 21. The correct interpretation of Schedule 1 was that apart from special or exceptional circumstances dependency terminated upon the child attaining the age of 18 or completing full time tertiary education although he also held that it would be appropriate for there to be provision for a gap year either before or after the completion of the first degree course.

Other considerations in making a settlement or transfer of property order would include such things as:

- the ability for the person with care to purchase an alternative property to provide them with some flexibility as to their housing (ie changing location)
- to purchase at open market price
- not to have to sell on her cohabitation and remarriage
- provision of insurance costs and upkeep

Unlike lump sum orders, property orders can only be made once against the same person when using Schedule 1. However, where there have been divorce proceedings the housing situation can be looked at again, as in the case of *MB v KB* [2007] 2 FLR 586 Baron J. In this case the Father and Mother had come to financial terms in their divorce; at that time the father had no direct financial assets (he had very wealthy parents) the terms they reached included the Mother’s right had right to occupy a property under a short hold tenancy, there was no other capital provision. Following the divorce the father’s position changed and he then had substantial financial resources.

The Mother applied under Schedule 1 for a settlement of property. The Father sought to strike out her application on the basis that it had already been effectively decided in the divorce case (issue estoppell) but his application was dismissed. Baron J held that, in respect of housing for the child, no compromise can oust the jurisdiction of the court. As the child’s needs had
changed and the circumstances had changed, the court had the power to look at the housing issue.

The situation was different, however, in the case of *PK v BC (Financial Remedies: Schedule 1) [2012] Moor J* where the mother had received a lump sum of £950,000 from the father on a clean-break basis in financial proceedings in divorce. The mother went on to buy a mortgage free property but when the fathers situation changed (for the worse) the mother then made an application pursuant to schedule 1 for a further sum for housing. Moor J held that whilst the court had the jurisdiction to make an order no order should be made because the mother was clearly appropriately housed.

3 In what circumstances - in deciding what order to make the court will take into account all the circumstances of the case, including those set out in the Schedule at Para 4 (1) a-f they include:

   a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
   
   b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;
   
   c) the financial needs of the child;
   
   d) the income, earning capacity (if any), property and other financial resources of the child;
   
   e) any physical or mental disability of the child;
   
   f) the manner in which the child was being, or was expected to be, educated or trained.

Additionally if the court is considering making an order against a person who is not the mother or father (ie a step parent) it will also consider those factors set out at Para 4 (2) a-c

   a) whether that person had assumed responsibility for the maintenance of the child, and, if so, the extent to which and basis on which he assumed
that responsibility and the length of the period during which he met that responsibility;
b) whether he did so knowing that the child was not his child;
c) the liability of any other person to maintain the child.

As can be seen there is no express reference to contributions, or to standard of living, or to the duration of the relationship. The early cases have mostly dealt with these factors, or lack of them.

The cases – the trends

1. substantive
2. parsimonious orders
3. the gap
4. opening the flood gates
5. closing the flood gates
6. broadening the issues
7. Provision for costs
8. But not a free ticket to ride

1. The Substantive

The early days of Schedule 1 the cases were much more about the substantive law:

- One of the early issues was the duration of any order and whether an order for periodical payment or property transfer/settlement could run beyond the child’s minority or education or training with reversion thereafter to the paying parent – this issue was decided in the cases of T v S (Financial Provision for Children) [1994] 2FLR 883 and A V A (A Minor : Financial Provision) [1994]1FLR 657

- Another early issue in the authorities was the requirement to focus on the needs of the child and not the parent either directly or indirectly, so
any provision in budgets for pension contributions, endowment premiums or savings or any surplus at the end of each year would be disallowed, see Thorpe LJ in *Re P (Child: Financial Provision) [2003] 2 FLR 865*

- However, what is accepted in the early authorities is that in providing for a child there must also be an element for the carer – the carer’s allowance. That line of authority started with a pre Children Act case - *Haroutunian v Jennings [1980] 1 FLR 62* and over time the Court has approached the carer’s allowance in a more generous with a broader brush, again see *Re P*

- There is no over-arching welfare test nor is there any provision in Schedule 1 for the first consideration being given to the child as there is in s.25 MCA. The early cases have dealt with this issue by finding that although welfare isn’t in the Schedule it is a relevant circumstance and moreover “a constant influence on the discretionary outcome..” see *J v C (Child: Financial Provision) 1 FLR 152 and Re C (Financial Provision) [2007] 2 FLR 13*

- The length and nature of the parents relationship has no bearing whatsoever on the welfare issue and so is invariably of no relevance to the outcome see *Re P*

- Standard of living, another factor not mentioned in Schedule 1, again the authorities have explored this and have generally concluded that there will be some entitlement for the child to be brought up in circumstances which bear some sort of relationship to the paying party again Hale J in the case of *J v C (Child: Financial Provision) [1999] 1 FLR 152* observed that whilst this was not a factor set out in the Act it is right that the child should be brought up in circumstances which bear some relationship to the Father’s. This was confirmed by Singer J *F v G (Child: Financial Provision) [2005] 1 FLR 261* when he held that the lifestyle which the child had become accustomed to could impact on the child’s needs.
• The court will not generally consider the conduct of the parties as a relevant factor, for example in the case of \textit{Av A} [1994] 1 FLR 657 Ward J the Mother had misled the father as to the true parentage of her 2 other children, and the father argued that as the 2 other children were not his there should be a reduction in the maintenance. Ward J held that there should be no such deduction. Further in the case of \textit{J v C} Hale J held that no great weight should be attached to the length and/ or the quality of the parent’s relationship or the fact of whether or not the child was wanted.

2. \textbf{The parsimonious orders}

The orders made in the early cases were also, generally (and relatively) on the mean side see \textit{Phillips v Peace} [1996] 2 FLR Johnson J

• father worth 2.6m, he had 3 cars worth in total £160k
• he ran a property company and showed no income so there was a nil CSA assessment
• mother sought £350k to rehouse – she got £90k

The Mother obtained a lump sum order for furnishings (£15k) medical, nursing and hospital costs (£14k) and further clothing and baby equipment (£9k). The Judge thought that some of her claims were extravagant but also found that she shouldn’t have limited the furnishing schedule to just those rooms the child would use or occupy and he refers to the schedule she produced as being “quantitatively deficient” (p.238).

3. \textbf{The gap}

There were no reported cases between 1996 to 2003 when \textit{Re P} was decided other than the “lottery winner” case of \textit{J v C (Child : Financial Provision)} [1999] 1 FLR 152 Hale J

• father was a lottery winner
• mother received £70k to rehouse (father had a house worth £180k)
• she also had a lump sum for a family car (second hand Ford Mondeo £9,000), the judge allowed this sum but as mother had not passed her driving test the sum was conditional on her passing
• past expenditure and items immediately needed, her schedules were closely scrutinised in the evidence and some items were deemed to be of a recurring/day to day nature expenses (eg nappies, baby food) and they were disallowed as they should have come out of income
• furnishings for the new property mother provided quotations for things such as soft furnishings, carpets furniture, kitchen equipment, TV total £18,435, again these schedules were closely scrutinised, the Judge found that she had not gone to extravagant places to get quotes but he did find that some of the items were not directly referable to the child’s need (but other children in the mother’s household) and so removed or discounted those items
• the mother also sought (but did not pursue) a lump sum to cover nursery fees whilst she retrained so she could return to work fulltime, however, It was felt this was a revenue expense and so could not be part of a capital claim.
• The mother also sought a maintenance fund of 30k to be held in trust, her plan was to use the income to cover the upkeep on the property and the capital would revert to the father. In the alternative the mother argued that the capital sum could be used to replace her car in future. The Judge did not allow this and found that if such money was needed in the future then she could make a further application for lump sum. It should be noted that such a maintenance fund was allowed in the case of A v A [1994] 1 FLR 657 but the distinguishing feature of that case was that the father lived abroad and his involvement with the property was more removed.

4. Opening the “floodgates”

Then after years of dearth and parsimony came the case of Re P (Child : Financial Provision) [2003] 2 FLR 865 Thorpe LJ
• father fabulously wealthy
• mother wanted £1.2m to rehouse, she got £1m
• she wanted £170k as lump sum, she got £100k

**Note: the lump sum**

At first instance mother was awarded a lump sum of £30k for decoration and furnishings, on appeal that was increased to £100k (to cover finishing, furnishing and equipping), on the basis that her housing fund was also increased. To support her claim for a lump sum the mother had obtained estimates from a “top-end” store and the father had countered with estimates from John Lewis. It was argued by the mother that the judge’s original allowance “would only furnish a shoebox”.

The mother also obtained a lump sum order of 20k for a car and for it to be replaced by father every 4 years

Thorpe LJ did, however, want the mother to give full details to the father as to how the money was going to be spent he said “Of course father is entitled to proof that the whole sum has been spent on the making of L’s home and none of it has gone into the mother’s pocket.” Para 52

**Note: the carer’s allowance**

• A further important theme dealt with in Re P was that of the carers allowance when considering the level of periodical payments. Thorpe LJ endorsed the much earlier (pre Children Act) case of Harantounian v Jennings [1980] 1 FLR 62 which first proposed that a child’s maintenance order could include an element of a carer’s allowance. Thorpe LJ observed that in previous cases there had been a restrictive approach to the carers allowance he, however, allowed a more “generous approach” Thorpe LJ also held, however, that while the mother should have control over her own budget she must also spend what she receives within the
year for which it is provided, so that there can be no slack for the mother to save or put away on a rainy day.

- The Mother had argued on appeal that she should get just over £100k periodical payments of which £34,500 represented the mother’s carer’s allowance. Thorpe LJ referred to the balance that had to be struck between two conflicting points that is that the Applicant has no personal entitlement and secondly she is entitled to an allowance as the child’s primary carer. The Court must recognise the responsibility and often the sacrifice of the unmarried parent who is the primary carer.

In the case of *F v G (Child : Financial Provision) [2005] 1FLR 261 Singer J* the Father offered to pay for the nanny at a cost of £24,000 p.a, school fees at £10,000 p.a and maintenance for the child at £20,000 p.a, so £54k in total. However, he wanted to pay the nanny direct rather than pay the mother this figure. Singer J held that

- the Mother should be in control of the payments to the nanny so that she can decide to what extent a nanny is used and to what extent she works, so he ordered that the father pay her the sum to cover the cost.

- once the mother had paid for childcare, then her own earned income should be hers to use as she thought best. The Mother’s earned income was 37k and if she paid £24,000 for the nanny that would leave her with a balance of 13k left over which she can then use as she wants, maybe for her future financial security. Singer J distinguishes this case from *Re P*, where Thorpe LJ had said there should be no slack to save; on the basis that this is the mother’s own income from which she is saving.

In assessing the evidence for either the carer’s allowance or indeed in support of a lump sum it is clear from the authorities that the mother is expected to keep good records with receipts on what she spends. This was a practice encouraged in the case of *Re P* by Thorpe LJ and followed in *Re N (Payments for Benefit of Child) [2009] 1 FLR 1442 Munby J where* the Judge held that the
mother was to account to the father in respect of a lump sum of £20,000, in particular the father was entitled to receipts for all items costing more than £20.00.

5. Closing “the floodgates”

The floodgates weren’t flung as open as the mother would have wished in *Phillips v Peace [2005] 2 FLR 1212 Singer J*) when she returned to court seeking a further property order and in the alternative a substantial lump sum for rehousing, both claims were roundly dismissed. Further the mother sought a lump sum of £50,000 for work that needed to be done at her present property; however, she did not provide a breakdown of that work. After her property claims were dismissed the amount left in respect of her lump sum claim was about £70k, which included £30k for a new car.

6. Broadening the issues

The courts were (are), however, taking more account of the mother’s/father’s overall financial position including their indebtedness:

*Morgan v Hill [2006] 1 FLR 1480 Thorpe LJ*

- The background to the claim for the lump sum was that following an earlier agreement the mother had decided to move to a larger property and she took on a large mortgage which drove her into debt (97k at the time of the first trial). The mother sought a lump sum in order to clear her debts and at first instance the Judge ordered a lump sum of £100k and a further sum of £35k for her to buy a new car.
• On appeal Thorpe LJ reduced the lump sum to £50k on the basis that as the larger home was partly needed to house her other child as well (the mother had had another child) so there was no justification for this father to be responsible for the whole of the indebtedness.

• The Father also argued that the mother had a flat in Paris which could be sold and the equity put to reducing her debts

Thorpe LJ says:

“Whilst in principle any order under (Schedule 1) should not include a benefit for the recipient otherwise than qua mother, there is no rule or principle which obliges the mother to contribute her own capital. The disparity between her present and likely fortune and the appellants is so great as to be almost incalculable.” (p. 1492 para 51)

**DE v AB (Financial Provision for Child) [2012] “FLR 1396 Baron J**

• At first instance the Mother was awarded a lump sum of £85k to pay towards her debts of £129k but the lump sum was reduced to £40k on appeal.

• Baron J found that although the court had a broad discretion and it did not have to specify precise amounts for each category of claim, there has to be some form of analysis not least as to the net effect of such an order on the father. In this case the lump sum of £85k left the father without enough to rehouse himself.

• The Father also argued that the mother’s debt of £129k included some revenue costs such as mortgage interest and therefore there was an element of double accounting as they should have been covered by the
CSA maintenance assessment. Baron J found that the Father was only paying a nominal sum through the CSA and so there was inadequate provision for running costs in those circumstances the court is entitled to supplement such expenditure by way of capital provision.

7. Provision for Costs

It is well known that Schedule 1 was being used, more or less exclusively, by the wealthy, and there was little guidance from the authorities as to how to weigh up and balance the competing factors in Schedule 1 in modest and middle money cases. The cases seem to suggest an “opening up” in respect of the issues being litigated and a factor which is likely to have contributed to this is the ability for costs to be provided for at the outset or at least at an early stage in the proceedings.

• If you think your client does have a good case, but no way of funding it then the case law has developed in such a way as to make it clear that you can make an application against the Respondent for provision for costs at an early stage.

• The prospect of being able to apply for provision for costs was flagged up in the case of Re S (Child: financial provision) [2005] 2 FLR 94 when Thorpe LJ said that the term “for the benefit of the child” should be given a wide construction and could (in limited circumstances) include a parents’ legal fees.

• Then in the case MT v T [2006] EWHC 2494 (Fam) it was held that the court has jurisdiction to make an interim payment by way of a lump sum to cover the applicant’s legal costs.
However, it is not until the more recent case of *G v G (Child Maintenance: Interim costs provision) [2010] 2 FLR 1264* that the Court has set out the test to be met in cases where there is an application for provision of costs. *G v G* dealt with the jurisdiction to make an order for provision of costs within a periodical payments order.

The test set out by Moylan J

- Is public funding available
- Does the applicant have assets or other means ie borrowing from family/ friends
- Can the applicant borrow money by way of raising a commercial loan
- Can the Applicant offer a charge on any property

Then in the case of *CF v KM (Financial Provision for child: costs of legal proceedings) [2011] 1 FLR 208* the Court held that it has jurisdiction to make an order for periodical payments or a lump sum which includes a provision for costs.

So the door is now firmly open for the Applicant to apply for provision for costs to be paid by way of interim lump sum or maintenance, as long as it is a “top-up” case.

**8. Not a free ticket to ride**

However, Charles J (in *CF v KM*) is at pains to ensure that the open door does not become an open floodgate and sets out some further elements to the test in *G v G*. Charles J says that costs provision should only be made in limited circumstances having regard to such matters as:

- would such an order be unfair to the paying parent
• is there any real prospect of a substantive award being made against the Respondent at the final hearing

• what are the prospects of recouping from the award made in favour of the Applicant

Sometimes, however, merits can be difficult to assess at an early stage as in the case of N v C [2013] EWHC 399 (Fam) and where the Mother lost pretty comprehensively at the final hearing it was said that she “..has been able to pursue her claim in the manner that she has because the father has already provided for her costs of doing so.”

However if the Applicant has got it completely wrong or even partly wrong and they have not got what they ask for at the final hearing then the Court has also made it clear that they will not hesitate to make a costs order against an Applicant, as in the very recent case of KS v ND [2013] EWHC 464 when Mostyn J made an order that an successful applicant should pay the Respondent costs.

So the risks of pursuing litigation are significant, but at least if the client has a good case and the Respondent enough money then funding the application should not be a problem.

Christina Morris

Coram Chambers

25th February 2014
Children Act 1989
Schedule 1
Cases
<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Income p.a</th>
<th>School fees</th>
<th>Housing</th>
<th>Other capital</th>
<th>Costs order</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>Haroutunian v Jennings [1980] 1 FLR 62</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Not wrong in principle for maintenance for child to include an allowance for the mother</td>
</tr>
<tr>
<td>1992</td>
<td>K v K (Minors: Property Transfer) [1992] 2 FLR 220</td>
<td>Transfer of council tenancy</td>
<td>Transfer of council tenancy</td>
<td>£29,000 to discharge arrears of school bills</td>
<td>Unknown</td>
<td>Application brought under Guardianship of Minors Act 1971</td>
<td></td>
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<tr>
<td>1994</td>
<td>T v S (Financial Provision for Children) [1994] 2FLR 883</td>
<td>N/A</td>
<td>N/A</td>
<td>£36,000</td>
<td>£29,000 to discharge arrears of school bills</td>
<td>Unknown</td>
<td>Property to be held on trust for father until youngest child 21 or completed full time tertiary education if later</td>
</tr>
<tr>
<td>1994</td>
<td>A V A (A Minor : Financial Provision) [1994] 1FLR 657</td>
<td>£20,000 including £8000 as element of carers allowance (Norland nannies)</td>
<td>Yes</td>
<td>M to retain current home on trust</td>
<td>N/A</td>
<td>Unknown</td>
<td>Trust to continue until 6 months after the child attained 18 or finishes full time education including tertiary And father ordered to keep property in good repair and to equip house and keep it equipped with furniture and “the usual appliances”</td>
</tr>
<tr>
<td>1996</td>
<td>Phillips v Peace 2FLR 230</td>
<td>N/A although the father was wealthy there was a nil CSA assessment</td>
<td>N/A</td>
<td>£90,000</td>
<td>£15,000 for furniture and just over £14,000 for costs relating to the birth</td>
<td>F to pay 2/3rds of M’s costs because M had pitched case too high</td>
<td>Trust to continue until end of tertiary education and to include a gap year</td>
</tr>
<tr>
<td>1998</td>
<td>C v F (Disabled Child: Maintenance Orders) [1998] 2 FLR 1</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Court has power to make maintenance order beyond 18th birthday if there are “special circumstances”</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Income p.a</td>
<td>School fees</td>
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<td>Other capital</td>
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<tr>
<td>1999</td>
<td>J v C (Child: Financial Provision) 1 FLR 152</td>
<td>£70,000</td>
<td>Yes</td>
<td>£70,000</td>
<td>£9,000 for second hand Ford Mondeo £2,000 for layette.</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>2003</td>
<td>Re P (Child: Financial Provision) [2003] 2 FLR 865</td>
<td>£70,000</td>
<td>Yes</td>
<td>£1m</td>
<td>£100,000</td>
<td>F to pay M's costs</td>
<td>Father was “fabulously wealthy” Order of the lower court was significantly lower in every respect On appeal a more “generous approach to the calculation of the mothers allowance.”</td>
</tr>
<tr>
<td>2004</td>
<td>W v W (Joinder of Trusts of Land Act and Children Act Applications) [2004] 2 FLR 321</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ToLATA and Sch 1 applications should be conjoined and the Sch 1 Application should take the lead</td>
</tr>
<tr>
<td>2005</td>
<td>Re S (Child: financial provision) [2005] 2 FLR 94</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>The term “for the benefit of the child” should be given a wide construction and could (in limited circumstances) include a parents’ legal fees</td>
</tr>
<tr>
<td>2005</td>
<td>F v G (Child: Financial Provision) [2005] 1FLR 261</td>
<td>£60,000</td>
<td>Yes</td>
<td>£900,000</td>
<td>N/A</td>
<td>Unknown</td>
<td>Court considered the fact the mother was working and the parties respective standards of living</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Income p.a</td>
<td>School fees</td>
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<tr>
<td>2005</td>
<td>Phillips v Peace 1 FLR 1212</td>
<td>N/A</td>
<td>Yes</td>
<td>Refused</td>
<td>Refused</td>
<td>M to pay F’s costs</td>
<td>Essentially court can only order a housing fund on one occasion under Schedule 1</td>
</tr>
<tr>
<td>2005</td>
<td>A v M [2005] EWHC 1721 (Fam)</td>
<td>£4,500</td>
<td>N/A</td>
<td>£175,000</td>
<td>N/A</td>
<td>Unknown</td>
<td>Not a big money case. On appeal HC didn’t interfere with housing award but did reduce maintenance order on the basis that F had obligations to 3 older children</td>
</tr>
<tr>
<td>2006</td>
<td>Re S (Unmarried parents: financial provision) [2006] 2 FLR 950</td>
<td>N/A</td>
<td>N/A</td>
<td>£800,000</td>
<td>N/A</td>
<td>Unknown</td>
<td>Re P not a “benchmark” case</td>
</tr>
<tr>
<td>2007</td>
<td>Morgan v Hill [2007] 1 FLR 1480</td>
<td>£60,000</td>
<td>Yes</td>
<td>£700,000</td>
<td>£50,000</td>
<td>Unknown</td>
<td>Only 1 order for settlement for property order. Consider separate representation for children.</td>
</tr>
<tr>
<td>2007</td>
<td>Re C (Financial Provision) [2007] 2 FLR 13</td>
<td>£72,000</td>
<td>Yes</td>
<td>£2m</td>
<td>£39,000</td>
<td>No Order</td>
<td>DJ Million comments on the need to spend the budget within a year and the records that need to be kept</td>
</tr>
<tr>
<td>2007</td>
<td>MB v KB [2007] 2 FLR 1480</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>F’s application to strike out a Sch 1 application on the basis that there had been an order under MCA s.25. Court found concept of issue estoppel not appropriate especially when dealing with the developing needs of the child.</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Income p.a</td>
<td>School fees</td>
<td>Housing</td>
<td>Other capital</td>
<td>Costs order</td>
<td>comment</td>
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</tr>
<tr>
<td>2008</td>
<td>MT v OT [2008] 2 FLR 1311</td>
<td>£78,000</td>
<td>Yes</td>
<td>£875,000</td>
<td>£100,000</td>
<td>F to pay 2/3rds of M’s costs</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>W and S (Children [2008] EWCA Civ 1207)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>A simple change in property values is not sufficient grounds to vary a lump sum or property adjustment order.</td>
</tr>
<tr>
<td>2009</td>
<td>Re N (Payments for Benefit of child) [2009] 1FLR 1442</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2 litigants in person asked court various questions which Munby J answers. One answer he give is that property order should go to 18 or completing full time tertiary education plus gap year either before or after university course.</td>
</tr>
<tr>
<td>2009</td>
<td>H v C 2 FLR 1540</td>
<td>£90,000</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>Unknown</td>
<td>Very wealthy non-disclosing father. Comments on backdating</td>
</tr>
<tr>
<td>2009</td>
<td>B V R [2009] EWHC 2026 (Fam)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Out of Jurisdiction issue dealt with</td>
</tr>
<tr>
<td>2010</td>
<td>G v G (Child Maintenance: Interim costs provision) [2010] 2 FLR 1264</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Court has jurisdiction to make an order for periodical payments which include provision for costs Test set out</td>
</tr>
<tr>
<td>2011</td>
<td>DE v AB [2011]EWHC 3792</td>
<td>N/A</td>
<td>N/A</td>
<td>£40,000</td>
<td>N/A</td>
<td>No order</td>
<td>The order made took into account M’s Debts</td>
</tr>
<tr>
<td>Year</td>
<td>Case</td>
<td>Income p.a</td>
<td>School fees</td>
<td>Housing</td>
<td>Other capital</td>
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<tr>
<td>2011</td>
<td>CF v KM (Financial Provision for child: costs of legal proceedings) [2011] 1 FLR 208</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Court has jurisdiction to make an order for periodical payments or a lump sum which includes a provision for costs</td>
</tr>
<tr>
<td>2011</td>
<td>FG v MBW 2011 EWHC 1729 (Fam)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>M allowed to adjourn her application for housing until F’s situation improved. Carer’s allowance considered</td>
</tr>
<tr>
<td>2012</td>
<td>C v N [2012] EWCA Civ 168</td>
<td>£120,000</td>
<td>N/A</td>
<td>£2.5m</td>
<td>N/A</td>
<td>N/A</td>
<td>Biggest award so far</td>
</tr>
<tr>
<td>2012</td>
<td>PG v TW (Child: Financial provision: legal funding) [2012] EWHC 1892 (Fam)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>F initially paid £35,000 (by agreement) towards M’s legal costs M made an application for further provision</td>
</tr>
<tr>
<td>2012</td>
<td>PG v TW (No 2)</td>
<td>£57,850</td>
<td>Yes</td>
<td>£300,000 (for housing in African country)</td>
<td>£50,000</td>
<td>F to pay M’s costs on an indemnity basis - £208,000</td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>N v C [2013] EWHC 399 (Fam)</td>
<td>Refused</td>
<td>N/A</td>
<td>Refused</td>
<td>N/A</td>
<td>No order</td>
<td>No order but F had provided for m’s costs by way of interim payments M to pay F’s costs of appeal at £13,000</td>
</tr>
<tr>
<td>2013</td>
<td>KS v ND [2013] EWHC 464</td>
<td>£18,000 plus 20% of F’s annual bonus</td>
<td>Yes but capped at £24,000</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td>M to pay F’s costs of appeal at £13,000</td>
</tr>
</tbody>
</table>