

## **THE WISDOM OF SOLOMON: RELOCATION ON RELATIONSHIP BREAKDOWN**

***K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ  
793***

*Judith Bray\**

### **THE BACKGROUND TO THE CASE**

Solomon, the eleventh century King of Israel, was credited with great wisdom and sense. He was asked to decide which of two women was the mother of a child. Obviously in those days medical tests were not available to decide the issue. Solomon declared that the only solution would be to divide the child in two. The true mother, realising the awful consequences of this decision, came forward and declared that the other woman should take the child. Solomon knew immediately that she was the true mother and accordingly the child was given to her.<sup>1</sup> The decision of a court with regard to relocation is reminiscent of the decision which faced Solomon. It is one of the most difficult of family law where decisions are never straightforward. Speaking before a committee at the House of Representatives in Australia, Diana Bryant stated:

“Relocation cases are the hardest cases that the court does... If you read the judgments in almost every judgement... you will see the comment that these cases are heart-wrenching, they are difficult and they do not allow for an easy answer. Internationally, they pose exactly the same problems as they pose in Australia. I have heard them described as cases which pose a dilemma rather than a problem. A problem can be solved: a dilemma is insoluble...”<sup>2</sup>

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<sup>1</sup> See the Old Testament 1 Kings 3:16-28.

<sup>2</sup> The Hon Diana Bryant speaking before the House of Representatives Standing Committee (Australia) on Legal and Constitutional Affairs Report on the Exposure Draft of the Family law amendment (shared Parental Responsibility) Bill 2005 in August 2005 p 22.

## CASE COMMENTARY

Where a parent who has a residence order for a child requests leave from the court to relocate to another country the implications on contact with that child for the other parent are manifold. If both parents have a shared residence order then the issue of relocation becomes even more complex and difficult to decide. Even the wisdom of Solomon would be sorely tested in such cases. There are a whole host of issues for the court to unravel, not least to examine carefully the reasons why relocation is sought. In *Re AR (A Child: Relocation)*<sup>3</sup> Mostyn J commented that whilst accepting that great weight should be placed on the psychological impact of refusal to leave on the parent who is the primary carer, paradoxically it appeared to penalise selflessness and virtue whilst rewarding selfishness and uncontrolled emotions. In these cases the court has to be ever mindful of the reasons why a parent wishes to object to the relocation of a child. Thorpe LJ suggested in *Payne v Payne*<sup>4</sup> that there must be careful appraisal of the opposition of the other parent. Is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive?<sup>5</sup> The inevitable emotive nature of the arguments of each party can cloud the issue.

Under s 13(1)(b) of the Children Act 1989, a child cannot be removed from the United Kingdom for longer than one month whilst there is a residence order in force without written consent of every person with parental responsibility or with leave of the court. Where leave of the court is sought, the welfare of the child will be the paramount consideration.<sup>6</sup> The underlying difficulty in these cases lies in the fact that the welfare of the child may be equally affected by the improved well-being of the parent with residence if granted permission to relocate and by the reduction in contact with the non-resident parent. The decision on relocation therefore involves amongst other issues a careful balancing act between these two considerations.

The recent decision in *K v K*<sup>7</sup> has given the courts the chance to review the law on relocation of a parent and to decide whether previous cases, in acting in the best interests of the child have placed too great emphasis on the needs of the parent wishing to relocate. The case concerned an application by the mother of two children, aged four and two to relocate with the children from the United Kingdom to Canada, the country of her birth. A shared residence order had been granted and care had been shared between the parents since the birth of the children, so relocation to Canada would mean that the children would see their father at best three or four times a year. Since 2001 relocation

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<sup>3</sup> [2010] 2 FLR 1577.

<sup>4</sup> [2001] EWCA Civ 166.

<sup>5</sup> *Ibid*, at para 40.

<sup>6</sup> Children Act 1989, s 1(1).

<sup>7</sup> [2011] EWCA 793.

applications have been subject to principles laid down in *Payne v Payne*<sup>8</sup> and that decision came under close scrutiny in *K v K*. The decision in *Payne* has been the subject considerable academic and judicial criticism for its limited approach to challenges by a parent against an application by a primary carer to relocate abroad.<sup>9</sup> Such criticism was summed up in 2010 by Wall LJ in *Re D (Leave to Remove; Appeal)*

“There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done to children by a permanent breach of the relationship which children have with the parent left behind.”<sup>10</sup>

## PAYNE V PAYNE

*Payne v Payne* concerned a child aged four who lived with her mother after the relationship of her parents had broken down. The child had had regular contact with her father. She spent a little under half her time with him in any two month cycle. The judge<sup>11</sup> accepted that the child had a very good relationship with the father and her paternal grandmother and extended family and spent considerable time with them all. The mother wished to relocate to New Zealand to live closer to her family. She felt isolated and depressed living in London and she did not like the area where she lived which she felt to be unsafe because of its high incidence of crime. The few friends and family members that she had all lived some distance away. The judge granted leave to the mother to relocate to New Zealand with the child. He applied the earlier decision in *Poel v Poel*<sup>12</sup> which held that leave should generally be granted where the mother’s proposal to relocate is genuine, practical and reasonable and not a surreptitious attempt to cut off the father’s contact with the child. Sachs LJ had stated in *Poel*:

“When a marriage breaks up, a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a

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<sup>8</sup> See above n 4.

<sup>9</sup> See generally J Herring and R Taylor “Relocating Relocation” [2006] *Child and Family Law Quarterly* 517 and M Hayes “Relocation Cases: Is the Court of Appeal Applying the Correct Principles?” [2006] *Child and Family Law Quarterly* 351.

<sup>10</sup> [2010] EWCA Civ 50.

<sup>11</sup> His Honour Judge Langan sitting in the Cambridge County Court.

<sup>12</sup> [1970] 1 WLR 1469.

## CASE COMMENTARY

single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such a reasonable way of life as is selected by that parent to whom custody has been rightly given.”<sup>13</sup>

The effect of the decision in *Payne* on the father’s future contact with the child was quite devastating. Although the father could afford the airfare to New Zealand several times a year he would no longer have the day to day care which he had previously enjoyed. He appealed to the Court of Appeal. He argued that a presumption had been created in the case law in favour of the primary carer which was impossible for a father to overcome because it was based on the established principle that a request by the primary carer to relocate would be granted unless the court concluded that it was incompatible with the welfare of the child. He argued that this was inconsistent with principles under the Children Act 1989 as it failed to place sufficient importance on maintaining contact with the absent parent and it was incompatible with the father’s rights under the Human Rights Act 1989. The Court of Appeal, in dismissing the appeal, held that the recognition and support given to the primary carer did not amount to a legal presumption. It held that the Human Rights Act 1998 had not required a revision of the judicial approach in cases of relocation because the welfare of the child remained paramount in spite of the fact that there may be some conflict with the rights of adults.<sup>14</sup>

Such a limited approach to human rights issues has since been criticised.<sup>15</sup> Stephen Gilmore commented that the approach of the Court of Appeal in this case fails to acknowledge the difference between the paramouncy principle (in which the focus is solely on the child) and the wider principles within Article 8<sup>16</sup> where the paramouncy principle is displaced.<sup>17</sup> Andrew Bainham also criticised the approach of the Court of Appeal<sup>18</sup> in *Payne* and its failure to address the issue of continuing contact of the father with the child. He cited Article 9(3) of the United Nations Convention on the Rights of the Child which provides that States parties must:

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<sup>13</sup> Ibid, at 1473.

<sup>14</sup> See above n 4 Thorpe LJ, at para [82].

<sup>15</sup> See generally J Herring and R Taylor above n 9 and S Gilmore “The Payne Saga: Precedent and Family Law Cases” [2011] *Family Law* 970.

<sup>16</sup> Article 8 ECHR Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

<sup>17</sup> See Gilmore above n 15, at 977.

<sup>18</sup> A Bainham “Taking Children Abroad: human rights, welfare and the courts” [2001] *Cambridge Law Journal* 489 at 492.

“respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”

and observed that it was regrettable that the Court of Appeal did not address the question of continuing contact between the father and the child with greater urgency in the light of these international obligations.

Dame Elizabeth Butler-Sloss set out the considerations<sup>19</sup> that should be in the forefront of the mind of a judge trying a case concerning relocation:

- (a) The welfare of the child is always paramount;
- (b) There is no presumption created by s 13(1)(b) 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 with the other parent to an end;
- (e) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important;
- (f) The opportunity for continuing contact between the child and the parent left behind may be very significant.

Although she was at pains to emphasise that there was no presumption in favour of the parent applying for relocation, the decision in *Payne* left any parent challenging a claim to relocate with little hope of success. Indeed Dame Butler-Sloss held that a reasonable proposal made by the applicant parent, the refusal of which would have adverse consequences upon the stability of her new family and therefore an adverse effect upon the welfare of the child would continue to be a factor of great weight.<sup>20</sup>

The vast majority of cases decided in the years following *Payne* upheld the application of the parent seeking to relocate. In spite of critical comments made by Wall LJ in *Re D (Leave to Remove; Appeal)*<sup>21</sup> the application by a father for leave to appeal a decision by the county court granting leave to remove the children from the jurisdiction was refused because the judge declared that the appeal would stand no reasonable prospect of success. Likewise the Court of Appeal dismissed the appeal of a father challenging the

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<sup>19</sup> See above n 4, at para [85].

<sup>20</sup> See above n 4, at para [84].

<sup>21</sup> See above n 10.

## CASE COMMENTARY

decision of the county court in *Re H (Leave to Remove)*<sup>22</sup> allowing a mother to relocate to the Czech Republic refusing to review the guidelines laid down in *Payne*. The court held that on the facts this was a clear case for the grant of permission to relocate, irrespective of the binding guidance given by *Payne*, by reference simply to the welfare of the child. Where leave to relocate was refused, refusal was based on the welfare of the child. Leave was refused in *Re Y (Leave to remove from Jurisdiction)*<sup>23</sup> where an American mother sought the right to return to America with her child who lived equally with her and his Welsh father. Hedley J held that relocation would be disruptive to the child. This child had become integrated into the culture of Wales to such an extent that he spoke Welsh. He accepted that refusal to grant the order would affect the mother but in refusing leave he explained:

“...in reaching a decision in this case I have tried to focus on Y’s welfare and to postpone the interests of both the parents, however fair and reasonable, to that one consideration. It truly is a case in which the paramountcy of the child’s welfare has led to one parent being dealt a crushing disappointment...”<sup>24</sup>

Earlier in his judgment Hedley J had assessed the overall impact on the mother of a refusal to grant leave:

“...his mother – even though she is free to go as she pleases – will doubtless stay in Wales, but equally doubtless will remain feeling isolated, distressed and frustrated in circumstances where all those feelings may intensify over time, depending on how things works out. And of course all that may have consequences for Y, not only in terms of the quality of care he receives from the mother but in the sense of being exposed to her continued unhappiness, and those are real issues when I have serious regard, as I do, to the emotional welfare of this child...”<sup>25</sup>

### THE FACTS OF K v K

*K v K* concerned an application by the mother of two children for leave to relocate to Canada. Both parents had come to England from Canada as adults. The mother was Canadian and the father was Polish although he had spent his early years in Canada. The parties met at the University of Toronto in 1992.

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<sup>22</sup> [2010] EWCA 915.

<sup>23</sup> [2004] 2 FLR 330.

<sup>24</sup> *Ibid*, at para [24].

<sup>25</sup> *Ibid*, at para [11].

They came to England and eventually married in 2004 and within five years they had had two daughters, the first daughter 'I' born in 2006 and 'A' born in 2009. Both parents were employed in the banking world. Soon after the birth of A the relationship broke down, the parties separated and divorce proceedings were filed in 2010. Both parents were involved with their care and both had reduced employment hours in order to enable this. A shared residency order was made in August 2010, the effect of which was that the two children spent five nights with their father and nine nights with their mother over the period of a fortnight. In January 2011 the mother made an application to relocate with the children to Canada. She argued that her health and well-being was suffering whilst she remained in England and she missed the support of her family. There was evidence that both parties that they were suffering from stress and depression at the time of the hearing before the court at first instance.

### THE DECISION AT FIRST INSTANCE

The case for the mother rested on her isolation and unhappiness whilst she remained in England. Medical evidence from her doctor showed that she suffered from depression and stress for which she received medication. She wished to return to Canada where she had a supportive family, indeed if she were to be allowed to relocate to Canada she intended to live with her parents. The father argued that he had great commitment to his family and he had genuinely shared in the children's care. Evidence was presented by the Cafcass officer who emphasised that the judge needed to weigh the balance between the detriment to the children if they remained and the detriment that would result from a diminished relationship with their father.<sup>26</sup> The Cafcass officer concluded that the balance came down against the move and recommended the refusal of the application. The judge found for the mother in spite of the strong recommendation from the Cafcass officer that her application should be refused. The judge placed great weight on the potential effect of refusal on the mother:

“.....Importantly, I have to consider the effect on the mother and, consequently, upon the children of a refusal of her application. In my judgment she would feel increasingly isolate and depressed, which would be damaging for the children....If the mother were required to remain in London where I am satisfied she has not been happy in recent times, her distress is highly likely to increase with consequential impact on the girls' welfare....”<sup>27</sup>

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<sup>26</sup> See above n 7 at para [22].

<sup>27</sup> See above n 7, at para [33].

## THE COURT OF APPEAL

The father appealed on three grounds:

- i) The judge rejected the recommendation of the Cafcass officer without proper analysis and explanation;
- ii) The judge directed herself by reference to the guidance offered by Dame Butler-Sloss P at paragraph 85 in *Payne v Payne* (guidance apt for applications by primary carers) rather than by reference to the decision of Hedley J in *Re Y (Leave to Remove from Jurisdiction)*<sup>28</sup> (the only authority then available directly considering a relocation application by a parent who shared the care of his child)
- iii) In explaining her conclusion the judge referred only to the case that the mother presented. Even when that deficit was raised by Ms Bazley,<sup>29</sup> she had not remedied the defect by referring to the case presented by the father.<sup>30</sup>

Thorpe LJ concluded that the court should find in favour of the father. He considered the grounds of appeal and upheld the applicant on all three grounds. Firstly, he reflected that the views of the Cafcass officer had not been given sufficient weight. He held that the judge had not explained why she did not give effect to the clear recommendation that the mother's application should be refused.<sup>31</sup> Secondly, he accepted that it was not appropriate to apply *Payne v Payne* to cases where the applicant shares the care of the children more or less equally with the respondent as in this case. He held that there had been a misdirection in law by the judge at first instance:

“...Given the extent to which the father was providing daily care, the judge should have considered and applied the dicta of Hedley J in *Re Y* rather than those of the President in *Payne*...”<sup>32</sup>

In spite of arguments on behalf of the mother that care had been shared in *Payne v Payne* since the children were shown to be in the care of their father

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<sup>28</sup> See above n 23.

<sup>29</sup> Miss Janet Bazley QC Counsel who appeared for the father in the court at first instance.

<sup>30</sup> See above n 7, at para [25].

<sup>30</sup> See above n 7, at para [25].

<sup>31</sup> *Ibid*, at paras [31-32].

<sup>32</sup> See above n 7 at para [35].

for 40% of the time Lord Justice Thorpe held that different principles should apply where there is a shared residence order as opposed to shared care between a primary and secondary carer.<sup>33</sup> Thirdly, he addressed the final grounds of appeal by concluding that the judge ignored a range of factors that should have been brought into consideration when deciding the issue. He concluded that:

“...her conclusion is not the result of a balancing of pros and cons. She lists only the pros upon which she pronounces her conclusion. That is, in my judgment, a fatal deficit...”

The judgment of Moore-Bick LJ is significant not least for the fact that on his own admission he had little familiarity with family law and practice. This gave his judgment particular weight since he was considering the case law from a new perspective. He considered a range of recent cases on relocation starting with *Payne* pointing out that its facts were less complicated than those of *K v K* as in *Payne* the mother was the sole carer of the child although the child spent extended periods with the father. He suggested that the case should be read and understood in the particular context in which it was given. His comments on the use of *Payne v Payne* as an authority in subsequent cases is useful and suggests that subsequent courts have failed to distinguish between legal principle and guidance. He held that:

“...having considered *Payne v Payne* itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance... As I read it the only principle of law enunciated in *Payne v Payne* is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted....”<sup>34</sup>

He continued by suggesting that courts may have adopted an “unduly mechanistic application of the guidance given in *Payne v Payne*” and it was this approach that had given rise to current concern. He too upheld the father’s appeal.

The third judge, Black LJ found for the father but took a different route in her judgment from Thorpe LJ and Moore-Bick LJ. She suggested that “the effect of the guidance from *Payne* must not be overstated.”<sup>35</sup> She argued that

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<sup>33</sup> Ibid, at paras [28-29].

<sup>34</sup> Ibid, at para [86].

<sup>35</sup> See above n 7, at para [143].

## CASE COMMENTARY

relocation cases should not rest on whether or not a child spent a certain amount of time with the non-resident parent or “other aspects of the care arrangements”. In her view when cases concerning the relocation of a child were considered by a court she expected not:

“...to find cases bogged down with arguments as to whether the time spent with each of the parents or other aspects of the care arrangements are such as to make the case “a Payne case” or “a Re Y case” nor would I expect preliminary skirmishes over the label to be applied to the child’s arrangements with a view to a parent having a shared residence order in his or her armoury for deployment in the event of a relocation application.... when a relocation case falls to be determined, all of the facts need to be considered...”<sup>36</sup>

### COMMENTARY

*K v K* is an important case on the development of the principles on which the courts act in relocation cases. An important fact in this case was that a shared residency order had been made. All three judges in the Court of Appeal referred to this although Lady Black was anxious to note that all the facts of the case should be considered in relocation cases and too much emphasis should not be placed on whether there was shared care or not. In her view cases should not turn on whether the case fell into a group she referred to as “a Re Y case” or “a Payne case”. However it is clear that the fact that the parties had shared residence in *K v K* had made a difference to the way the Court of Appeal approached the issue. Ultimately the court held that it would not be in the children’s best interests if the mother were to be granted the right to relocate because this would undermine the regular contact that the father had with his children which would be destroyed and replaced by intermittent visits to Canada. This had to be balanced against the reasons for the application of the mother. The court accepted that her application to return to Canada was for genuine medical reasons but balanced against the need for the children to maintain regular contact with the father the court decided it was in the best interests of the children to remain in England. Thorpe LJ commented on the failure of the judge to give sufficient weight to the care provided by the father:

“...I am in no doubt that that is a misdirection as to the law. Given the extent to which the father was providing daily care, the judge should have considered and applied the dicta of Hedley J in *Re Y* (*Leave to*

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<sup>36</sup> Ibid, at para [145].

*Remove from Jurisdiction*) rather than those of the President in Payne...<sup>37</sup>

In *Re Y* the court was presented with evidence of the mother's feelings and sense of isolation and the effect on her health of continuing to live in Wales. As in *K v K* this constituted one of the main reasons for her wish to relocate to America but Hedley J balanced these factors against what he perceived as the best interests of the child.

The court is bound by the welfare principle in relocation cases and what the court perceives to be the best interests of the child but as many practitioners and academics<sup>38</sup> have pointed out there is little real research on what is the best interest of a child who is caught in the middle of a relocation dispute.<sup>39</sup> Research is difficult because of the problem of deciding on the correct comparators. As pointed out by Rob George "the difficulty is that the findings risk comparing apples with oranges".<sup>40</sup> He suggests that comparisons made between "children who move" and "children who do not move" uses the wrong comparator. Instead the correct comparison is between "children who move *where one parent applied to court unsuccessfully to prevent the move*" and "children who do not move *where one parent applied to court unsuccessfully to be allowed to move*". He continues "a comparison which includes all children who move or who do not move is irrelevant to the relocation debate, because it brings into the equation a great many children whose parents never wish to relocate, and children whose parents did not litigate in opposition to the relocation plans."<sup>41</sup> There is little research on how a child fares after a court has refused permission to relocate to a parent. Some weight may be placed on findings from research in the United States although this research focuses primarily on interstate relocation as opposed to international relocation. William Austin evaluated research findings in the United States<sup>42</sup> and concluded that children of divorced parents who relocate

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<sup>37</sup> Ibid, at para [35].

<sup>38</sup> M Freeman "Relocation Research: Where Are We Now?" (2011) *International Family Law* 131; M Freeman "The Reunite Research Project" (2010) *International Family Law* 161.

<sup>39</sup> Note the research project conducted by M Freeman in 2009 "Relocation: the Reunite Research". Research Unit of the Reunite International Child Abduction Centre as one of the few examples of research in this area.

<sup>40</sup> R George "Reviewing Relocation? *Re W* (relocation: Removal outside jurisdiction) [2011] EWCA Civ 345 and *K v K* (Relocation: Shared Care Arrangements) [2011] EWCA Civ 793" [2012] *Child and Family Law Quarterly* 108.

<sup>41</sup> Ibid.

<sup>42</sup> See generally W Austin "Relocation, Research and Forensic Evaluation, Part 1 Effects of Residential Mobility on Children of Divorce" (2008) *Family Court Review* 137.

## CASE COMMENTARY

seem to fare less well in a number of respects such as education and social well being. He cites research from Tucker in 1998 which showed that children of divorce who move only one time increase their chances of having problems at school by forty per cent.<sup>43</sup> However Austin prefaces his article by stating that although the research he reviews shows that there is convincing evidence that relocation significantly expands the level of risk for children of divorce, the literature should not be viewed as creating a basis for a bias or legal presumption against relocation.<sup>44</sup> He suggests that to conclude that a child's education may be affected by relocation is only part of the discussion in contested relocation disputes and does not necessarily address the issue of the break in contact with the other parent, perhaps simply a case of comparing "oranges with apples"<sup>45</sup> and concentrating more on the general effect of divorce than the more contentious effect of relocation. The lack of research in the United Kingdom is being currently addressed by a research project which aims to review every relocation case heard in any family court in England and Wales during 2012.<sup>46</sup>

If the effect of *K v K* is to be that the courts will look at the facts of cases of shared residency differently from those of sole residency then a further question for research should be the merits of shared residency and its effect on children. Shared care may arise in cases of sole residency which may amount to as much time being spent with the children by the non-resident carer as in shared residency cases. There is little research on this in the United Kingdom so conclusions must be drawn from studies in Australia, New Zealand and the United States. A review of the research by Liz Trinder in 2010 considered a number of aspects of shared care such as the level of satisfaction for both parents and children, the length of time that shared care genuinely lasted and whether shared care could be perceived as "good for children".<sup>47</sup> She cites one major study of school age children undertaken by McIntosh et al<sup>48</sup> in Australia which, amongst a number of issues, considered children's satisfaction with shared care arrangements. The study concluded that arrangements for equal or substantial sharing of time may in some circumstances suit parents better than

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<sup>43</sup> C J Tucker, J Marx and L Long "Moving on": Residential Mobility and Children's School Lives" (1998) *Sociology of Education* 71.

<sup>44</sup> See above n 42, at 137.

<sup>45</sup> Ibid.

<sup>46</sup> The Relocation Research Project 2012 under Dr Rob George, authorised by Sir Nicholas Wall P under FPR rule 10.73(c): see Family Law Week 13/04/2012.

<sup>47</sup> L Trinder "Shared Residence: A Review of Recent Research Evidence" [2010] *Family Law* 1192.

<sup>48</sup> J McIntosh, B Smyth, M Kelaher, Y Wells and C Long (eds) *Post-Separation Parenting Arrangements and Developmental Outcomes for Infants and Children. Three Reports Prepared for the Australian Government Attorney-General's Department* (Canberra: 2010).

the children. The key messages drawn from research by Liz Trinder are two-fold. Firstly, that children should have far more influence over arrangements for their care and secondly, that the focus of apportioning time between the parents reflects an adult agenda rather than a child agenda. She writes:

“...If it were children who made the applications or decided cases or redesigned the family justice system, then it is likely that most would want to refocus the attention of adults on the quality rather than the quantity of relationships....”<sup>49</sup>

Children’s views are a relevant issue under the Children Act 1989.<sup>50</sup> The welfare checklist includes the ascertainable wishes and feelings of the children in the light of their age and understanding and so the court must consider their views where appropriate. The views of the children in the recent case of *C v D*<sup>51</sup> were an important issue and influenced the outcome of the application for the mother to relocate to the United States. In this case the children were aged thirteen and eight, it is more difficult where the children are younger. The children in *Payne* and *K v K* were very young so their views were difficult to ascertain although the evidence of the Cafcass officer on the effect of relocation on the children’s relationship with their father proved influential in the Court of Appeal decision in *K v K*.

The decision in relocation case is an almost impossible choice to make for any court and it is reminiscent of the decision of Solomon in finding the mother of the child. He took a risk in making his decision. In retrospect it turned out to be the right decision. The problem today is that without understanding the true effect of either granting or refusing an order to relocate the court cannot be confident that the decision has been made in the best interests of the child and so relocation cases continue to involve an element of risk.

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<sup>49</sup> See above n 47, at p 1197.

<sup>50</sup> S 1(3) ...a court shall have regard in particular to – (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding).

<sup>51</sup> [2011] EWHC 335 (Fam).