RE Y (LEAVE TO REMOVE FROM JURISDICTION)

Family Division

Hedley J

1 April 2004

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.

Statutory provision considered
Children Act 1989, s 1

Case referred to in judgment
Payne v Payne [2001] EWCA Civ 166, [2001] Fam 473, [2001] 2 WLR 1826, [2001] 1 FLR 1052, [2001] UKHRR 484, CA

Paul Hopkins for the applicant father
Matthew Rees for the respondent mother

Cur adv vult

HEDLEY J:

[1] I indicated that I would give this judgment in open court as indeed I am. Of course, nothing must ever be said or done which might tend to

identify the child with whom the court is concerned. I propose to call him Y. He was born on 26 August 1998, so he is 5½. He currently lives subject to an informal shared-care arrangement between his parents on an almost equal basis.

[2] In order to set the scene of the dispute with which I am required to deal, it is necessary to say something about each of the parents. Y's father is Mr PL, who was born in Devon. He is now aged about 55, but as a young man he had settled in West Wales. Although English is his first language, his preferred tongue is Welsh and he has, over the years, become a distinguished authority on Welsh language and culture. He has a settled home near Aberystwyth, where it is his present intention to remain. He is able to work from home and is able to operate to flexible working hours which facilitate the shared-care arrangement and perhaps could expand even beyond that.

[3] Y's mother, Mrs LL, was born in Plano, Texas, in the USA in 1965 and so she is now 38. Part of her undergraduate study at the University of Texas involved the Welsh language, and in 1994 she came to Wales in order to further her studies on a short course and Mr PL was a tutor on that course. In due course a relationship developed, and on 18 March 1995 they were married in Texas and then subsequently came to Wales to live. It is right that the mother has regularly maintained her links with Plano in Texas, has been a fairly regular visitor there, and indeed it is right that Y, too, has been a fairly regular visitor, and she remains in close touch with family and friends in Texas. While she was in Wales she embarked on a part-time postgraduate degree course in archive management, and it is the fact that she speaks what I might be permitted to describe as usable Welsh.

[4] The parents lived together in the property which the father continues to occupy. On 2 March 2002 the parties separated and the mother found, in due course, her own accommodation. Divorce proceedings had been instituted and were concluded by a decree absolute of divorce on 3 February 2003 and earlier, on 23 December 2002, a consent order in ancillary relief proceedings disposed of all outstanding matters between the parties. The effect of the ancillary relief order was that the father bought out the mother's interest in the matrimonial home and there has been payment of periodical payments in respect of Y. So far as I am aware, no order under the Children Act 1989 has been made.

[5] So far as Y's education is concerned, he attended a nursery unit from early 2001 in a school which was a Welsh medium education school. He started at school proper on 2 December 2002 and he remains at that school and all are agreed that he is flourishing at it and making excellent progress.

[6] It is one of the more remarkable facets of this case that although the parents have undoubtedly found their relationship with each other a difficult one, they have achieved remarkable harmony so far as the care and upbringing of Y is concerned, of which Y is the undoubted beneficiary. They have devised a system of shared care whereby the child spends 4 nights a week with the mother and 3 nights a week with the father. Those arrangements are open to flexible adjusting, particularly in relation to holidays. Y is genuinely bilingual, although probably his preferred language is Welsh.

[7] In the light of all that, it may be wondered how the case comes to be in a dispute before the court; and of course what has happened is this – that after the separation and as a consequence of it, the mother has felt increasingly isolated and unsupported, and wishes to return to Texas. That is where her

family is. That is where the bulk of her confidante friends are. And that is where she believes she has better employment prospects for the future. And of course she wants to take Y with her. Hence the involvement of the court.

[8] We are today facing in this case an increasingly common problem that arises out of an international marriage, a decision to become parents, and a subsequent separation. No longer do we confront the old problem as the common problem, of an ex-spouse wanting to make a new life with a new partner and needing to go overseas to do so, but rather, increasingly that of partners, sometimes one and sometimes both, wishing to return to the country home and culture from which they had come in the first place. It is beyond argument, in my view, that the mother's feelings in this regard are entirely genuine; that her motivation is entirely genuine; and that this was a problem in one sense always waiting to happen.

[9] What makes this case particularly difficult, however, is that both parents have made a real and indeed successful effort to conduct their affairs in a reasonable way, to see the best in each other as parents, to deal with each other in good faith, and to ensure that Y remained the focus of their concerns in the decisions that they took. But the plain fact is that there does not exist in this case a solution acceptable to everyone.

[10] The consequence for Y if he goes to Texas is that he will remain in the care of his mother. He will lose the experience of shared care of his father. He will, of course, lose his school, friends, surroundings and preferred language, though those losses will not be absolute because arrangements can be made for significant contact to be maintained, no doubt twice a year in Wales, and no doubt with regular use of telephone and email, which would have amongst other benefits the sustaining of his use of the Welsh language and of course the father would always remain welcome to visit in the USA.

[11] The consequence for Y if he does not go to Texas is that whilst he will keep all those matters to which I have just referred, his mother – even though she is free to go as and where 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 work out. And of course all that may have consequences for Y, not only in terms of the quality of care that 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.

[12] The law in this case has been reviewed by the Court of Appeal in the case of *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052. And as this is the only case that I intend to refer to, I propose to set out in this judgment the observations of the Dame Elizabeth Butler-Sloss P that appear at paras [85] and [86] of the judgment, where she says this:

> 'In summary I would suggest that the following consideration should be in the forefront of the mind of a judge trying one of these difficult cases. They are not, and could not be, exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious, but in view of the arguments presented to us in this case it may be worthwhile to repeat them.

(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 between the child and the other parent to an end.
(e) The effect on the applicant parent and the new child of the family of a refusal to 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. If one parent intends to set up home in another country and remove the child from school, surroundings, and the other parent in his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear, as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence.'

[14] Now, the court clearly contemplates two different states of affairs. The one, the more common and in some ways the more obvious, is where the child is clearly living with one parent, and it is that parent that wishes to leave the jurisdiction, for whatever reason. The other, and much less common state of affairs, is where that does not exist and either there is a real issue about where the child should live, or there is in place an arrangement which demonstrates that the child's home is equally with both parents. In those circumstances, which are the ones that apply in this case, many of the factors to which the court drew attention in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052 whilst relevant may carry less weight than otherwise they commonly do.

[15] The father does have an application for a residence order in this case, but it was raised only in response to the mother's application for permission to remove, and the father's actual proposal is for a continuation of the present position.

[16] This case accordingly falls outside the main run of cases that one encounters where this problem is raised, and certainly within my own experience is unique. What it seems to me I must do is to remind myself of the opening provisions of the Children Act 1989. Section 1(1) says that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration, and in considering these issues I have to take a number of matters into account as required by s 1(3). It seems to me that of those matters, the ones that are

important in this case are the educational and emotional needs of Y, the likely effect on him of any change in his circumstances, and his age and background so far as his life is presently concerned. It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided.

[17] I have stated the case within a very short compass, because there really is no significant dispute either as to the essential facts in the case or as to the factors which the court ought to take into account. The position of both parents is entirely reasonable, entirely understandable and potentially congruent with the best interests of Y. The problem is that the respective positions are mutually exclusive, and thus one reasonable, honest and decent parent is going to have to receive a devastatingly disappointing blow.

[18] Mr C Rees, a most experienced and bilingual children and family court reporter, has investigated on behalf of the court into this matter and has reported in writing in a report of 3 March and also gave evidence before me. He has identified many of the matters to which I have already referred. Nevertheless, I think I should record one matter that he says on p 14 of his report. He is considering the welfare checklist and under the heading of 'The parents' ability to meet the child's needs', he writes:

> 'Without reservation it is my observation that Mrs L and Mr L are excellent and capable parents and each holds Y's well-being and best interests uppermost. To their respective considerable credit they have consistently worked together since the separation in an impressively mature way that has been fair, flexible and pragmatic, to provide the highest levels of care for their son. Whatever the outcome of today's hearing, it seems unlikely that the parties will surrender such constructive goodwill.'

[19] Mr Rees was rightly at some pains to emphasise that perception throughout his oral evidence, but it is right too that I should set out his conclusion, to which he also adhered in his oral evidence. On p 15 of his report he says this:

> 'In many ways this case is perhaps one of the saddest scenarios to come before the court. The child concerned is clearly much loved by each of his parents and each is well equipped to provide Y with not only high levels of essential material care, but also with a range of intellectual and other stimuli. It is readily apparent also that Y loves his parents in equal measure, and I do not think he would find it at all easy, therefore, to deal with a major disruption to the current shared-care arrangement with which he has become familiar and comfortable. Whilst Mrs L's application is, I do not doubt, based upon her genuine belief as she sees it, that the advantages involved for Y outweigh all other considerations, I am unable to share such a view at this time and therefore feel unable to endorse her application.'

[20] This case, as I say, is so difficult precisely because both parents have tried and succeeded in conducting themselves with the utmost decency and an unfailing concern for Y's best interests.

[21] Insofar as any criticisms were made in this case, they were focused, first, on the mother's proposals as to what she would do on her return to Texas and, secondly, on the mother's pessimism as to her future prospects should she remain in Wales. I see no purpose in going through those matters in detail, but I should state my conclusions upon them. In my view the mother's proposals on her return are both properly thought out and reasonable. Of course there will have to be some transitional housing arrangements while she finds a job and puts herself in a position to purchase a modest property. She will start with her father but, although she hopes to avoid it, may have to rent property for a while. I am satisfied that she would in due course obtain congenial employment which, whilst comparatively modest in remuneration, will be sufficient to sustain her independently with Y. I accept that she may indeed be unduly pessimistic about her prospects in Wales. I think she would be able to obtain employment which would enable the present shared-care arrangement to continue. But, having said that, I accept also that she is more likely to obtain genuinely congenial appointments in Texas. Her quality of life, were she to remain in Wales, would in many emotional respects be less than it would be were she to return to the USA. I accept that her distress and frustration at not being able to take Y to the USA would have a genuine and reasonable basis. I accept, as indeed the father always has, that she would be scrupulous in complying with her obligations as to contact, which she genuinely supports.

[22] I have given this case my closest and most anxious attention. I am conscious of its unique circumstances and of the needs of this child, deeply attached as he is to both parents. I am only too conscious of how much this case means to both parents, who each see their preferred way of life put at risk by this decision, and I hate the prospect of disappointing anyone who has strived as these parents have to do things properly. Nevertheless, decision there has to be.

[23] In the end I have concluded that the welfare of this child compels me to refuse the mother's application. In my judgment the cost to this child of such a move is too high. He is settled into a way of life in which he sees effectively an equal amount of both parents; in which he is a settled member of a school with a circle of friends and interests; he is a bilingual and bicultural child. A move to Texas would not mean the complete loss of all this – of course it would not – it would, however, involve a major disruption and a significant loss. In this respect I have tested my conclusion by asking myself what the position would be had the mother had a settled determination to return to Texas with or without Y. Even in those circumstances, great though the loss of his mother's daily care would have been to him, I would still have concluded that Y's greater loss would have been to have moved to Texas. In my judgment, when one looks at his position in Wales, what he has and what he would lose by moving, and then compares that with his position in Texas – what he would have gained and what he would have lost – at the very least I find myself forced to conclude that the course of less detriment is for him to continue to live in Wales.

[24] I recognise the consequences of that for the mother, who will see herself as having been forced to remain against her will in Wales, and because she had made the decision to remain out of loyalty to Y's welfare, it is easy to understand why she should feel like that. 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.

[25] I have adjourned this case into open court with, of course, the consent of both parties, for two reasons. First, because this case falls factually outside the ambit of well-settled authorities in this area of the law. It demonstrates, in a way few cases can, quite how, when everything has been said, done and considered the ultimate test remains the welfare of the child, which in the last analysis overbears all other considerations, however powerful and reasonable they may be. Secondly, because this type of case of trans-national marriage is and will continue to become increasingly common, and it seems to me that there should be public awareness of and discussion about the intractable problems that it can raise and the sad consequences that can ensue.

[26] I said at the outset of these proceedings that it would be my intention to make a shared residence order whatever decision I made in this case, and that I propose to do. It does not seem to me, subject to any observations of either party, that any further consequential orders are required other than the refusal of the application before the court.

Order accordingly.

Solicitors: *Godwins* for the applicant mother
Morris & Bates for the respondent father

PATRICIA HARGROVE
Law Reporter