

iGuide: Child Relocation

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It is an inevitable consequence of the movement of international families that when, or after, parental relationships break down, one parent may wish to relocate. This iGuide summarises the law in relation to the following key areas:

1. International relocation
2. Opposing a relocation application
3. Relocation within the UK
4. Temporary relocation

1. International Relocation

If you are a parent seeking to relocate and move abroad permanently with your child, you must have either:

- The consent of the other parent (preferably in writing); or
- The permission of the Court

(Technically, permission may not be needed when only one parent has parental responsibility and that parent wishes to relocate, however, you should always seek legal advice. It is in any event good practice and responsible parenting to seek the permission of the other parent.)

If you do not have the consent of the other parent or permission of the Court, you could be guilty of child abduction (which is a criminal offence) (see iGuide *'What is child abduction?'*).

Applications to relocate abroad with a child are very finely balanced. They raise strong emotions and much opposition. One parent fears having much reduced contact with their child. The other fears being prevented from moving to their preferred country, very often their country of origin. Specialist advice from an experienced lawyer is essential at an early stage to ensure your case is handled correctly from the outset.

In all cases, the welfare of the child is the Court's paramount consideration. England has historically been one of the most liberal countries in the world in allowing relocations, although in recent years, and owing to an increase in shared parenting (amongst other factors), parents seeking to relocate face greater challenges, although very many cases still succeed.

For many years, the leading case was *Payne v Payne* [2001] EWCA 166. In that case the Court posed the following test:

- Is the application genuine i.e. not motivated by some selfish desire to exclude the father from the child's life?
- Is the mother's application realistic i.e., founded on practical proposals both well researched and investigated?

If the application is genuine and realistic the Court will consider:

- Is the opposition 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 the so-called left behind parent and their future relationship with the child, were the application to be allowed?
- To what extent might that be offset by extension of the child's relationship with the maternal family and homeland, where applicable?
- What would be the impact on the applicant either as a single parent or as a new wife/husband of a refusal of the application to relocate?
- The outcome of these questions must then be brought into an overriding view of the child's welfare as his paramount

consideration, directed by the statutory welfare checklist insofar as appropriate.

This case also confirmed that the effect upon the child of the denial of contact with the other parent and in some cases his family is very important. The opportunity for continuing contact between the child and the parent left behind may be very significant.

However, following the Court of Appeal's decision in *MK v CK* [2012] 2 FLR 880 (or simply known as 'Re K'), the most important relocation case since *Payne*, the emphasis has shifted back to the welfare principle. Although *Payne* said that the welfare of the child is paramount, it was interpreted in such a way that cast doubt on this. Significant emphasis was placed on the effect of a refusal on the applicant parent. *Re K* therefore clarifies the weight to be given to the *Payne* guidelines, which had, over the years been elevated to 'principles' of law by judges and consequently many lawyers, but that the overriding principle is the question as to what is in the child's best interests. Furthermore, the weight attached to the impact of the refusal on the applicant parent will not be so great and will not be given precedence over the loss of the parental relationship to the child.

Applications to relocate should therefore be made in accordance with *Re K* but also *Payne*, as whilst the welfare principle remains the paramount consideration, the guidance in *Payne* is still relevant. However, it is important to remember that every relocation case is unique and will turn on its own facts.

The welfare checklist

The welfare checklist is set out in section 1(3) of the Children Act 1989 and provides that the Court must have particular regard to:-

1. The ascertainable wishes and feelings of the child (considered in light of her age and understanding)
2. Her physical, emotional and educational needs
3. The likely effect of any change in her circumstances
4. Her age, sex, background and any characteristics of hers which the Court considers relevant
5. Any harm which she has suffered or is at risk of suffering
6. How capable each of her parents and any other person in relation to whom the Court considers the question to be relevant is of meeting her needs
7. The range of powers available to the Court under the Children Act 1989

Key to a successful application:

This lies in very careful and tactical planning and ensuring that the evidence covers all factors, including:

- Your reasons for wanting to relocate
- Where you propose to live (including full information of the amenities and maps of the area)
- How the move is to be funded
- Information about what the area has to offer the child e.g. nurseries/school, after school and sports clubs, medical facilities etc
- How far you will be from your support network of friends and/or family members
- Full details of your proposed employment, working hours, who will look after the child and take to/from nursery/school
- Impact of changes in language and culture on the child
- Full information of schools, whether a place will be available, what fees and continuity or interruption with existing education
- Proposals for contact between the child and the other parents – and who will pay for it
- The effect on you, emotionally, physically and financially of a refusal to relocate

2. Opposing a relocation application

Although many relocation applications are successful, it is possible to oppose them successfully. A realistic approach, careful planning and detailed preparation are all very important. Opposing a well-prepared relocation is possible with

careful presentation of the adverse impact on the child to include loss of his/her roots, friendships and wider family. You must be able to show that it is in the child's best interests to remain in this country. You will therefore need to consider the welfare checklist, and highlight other factors: for example, education, health, recreational activities and also relationships with the proposed 'left behind parent' and other family members. In some cases, although your first reaction may be to oppose the relocation application vigorously and aggressively, always consider with an experienced solicitor the prospects of success and the likely best interests of the child. It may be advisable not to oppose but instead to put energies and representation into putting safeguards in place to ensure very good future contact before the relocation goes ahead. Obtain advice from a specialist lawyer in the country of the proposed relocation to highlight any contact difficulties you may encounter once the relocation has taken place. Mirror orders may also be required in some cases.

3. Relocation within England and Wales and the UK

A parent with primary care does not have a specific obligation to apply for permission from the Court to relocate within England and Wales. However, it is a matter of good and responsible parenting is to notify the other parent and all those with parental responsibility and to provide full details of the proposed move well in advance of the move itself.

The welfare of the child is the Court's paramount consideration.

If a parent proposes to move with a child from England or Wales to another part of the United Kingdom and does not have the consent of everyone with parental responsibility, a specific issue order under s 8 Children Act 1989 should be obtained well in advance of the proposed move.

If the other parent does not want the child to move within the UK, he or she should apply to the Court either for a prohibited steps order to request that the Court to prevent the other parent from moving with the child or to impose a condition to a residence order. This condition may prevent a parent moving the child from a particular geographic area e.g., a town or city or county.

It was previously the case that it was only in exceptional cases that a Court will impose a condition on a residence order restricting the primary carer's right to choose his or her place of residence. However the Court of Appeal has since said that the 'exceptionality' test wrongfully put a 'gloss' on the welfare principle.

There is no distinction in principle between a 'shared care' case and a case where there is a clear primary carer – the Court must look at all the circumstances and facts of the case in order to make a decision as to whether a relocation is in the child's best interests.

The Court of Appeal has confirmed that even in those cases where there is a shared residence order it was not an automatic bar or 'trump card' preventing a parent and child from relocating. The Court must determine what is in the child's best interests.

All internal cases must also now be considered in light of *MK v CK* above.

4. Temporary removal from the jurisdiction

In an application for a temporary removal from the jurisdiction (i.e., a holiday abroad or for a temporary stay), the criteria is not as stringent although again great care should be taken to ensure all the safeguards have been put in place to facilitate the child's safe and prompt return to this jurisdiction.

As with permanent relocation cases, cases in respect of temporary removal with reliance on *Payne* should be read in the light of the re-emphasis on the welfare checklist in *MK v CK*.

It is fundamental in temporary removal cases to make sure that the removal is in fact only temporary and does not become permanent with any change of habitual residence which may be a matter of fact rather than necessarily consent of one parent. Provisions must be included in any Court order. If the move is, for example, for a contract of employment, it will be important to examine the documentation and make sure it is for a fixed period only. If it is for a long holiday, then return tickets must be seen. Considerable caution should be exercised, and documents should be produced and statements verified before consent is given even in proposed temporary removal cases. Be cautious if there is any uncertainty by one parent as to whether the proposed move is only temporary.

Safeguards may need to be put in place to rebut an argument being raised by the moving parent that the child has a new habitual residence and to prevent a '*settlement argument*' i.e., where the moving parent wishes to remain in the jurisdiction of the new country perhaps after forming a new relationship, extended work opportunities, or having another child with someone in that jurisdiction or similar. Specialist advice should be sought.

Key points to remember:

- If you want to move abroad permanently with your child, you must either have the consent of the other parent (preferably in writing) or permission of the Court
- Relocation cases require very special and tactical planning from the outset with strong evidence
- This is a very specialist area of law so whether applying or opposing, consult a solicitor with strong expertise in these cases.

For more information about child relocation or other questions you may have, please contact a member of our specialist family law team.

You can do so via our website, by email to enquiries@iflg.uk.com or telephone on +44 (0) 203 178 5668.

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