Neutral Citation Number: [2015] EWCA Civ 882

Case No: B4/2014/2939

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT sitting at BRIGHTON
Her Honour Judge Waddicor
HB13P00072

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2015

Before:

LORD JUSTICE MCFARLANE
LORD JUSTICE RYDER
and
LORD JUSTICE CLARKE

- -

In the Matter of F (A Child) (International Relocation Cases)

Between:

DF	**Appellant**
- and -	
N B-F	**Respondent**

- -
- -

Mr Henry Setright QC and Ms Alev Giz (instructed by **Dawson Cornwell Solicitors**) for the **Appellant**

Ms Elizabeth Isaacs QC and Ms Maria Hancock (instructed by **Warrens Solicitors**) for the **Respondent**

Hearing date: 31 March 2015

Approved Judgment

Lord Justice Ryder:

1. This appeal concerns the 12 year old daughter of parents who are parties to proceedings in the Family Court sitting at Brighton. I shall refer to her as 'L'. The appellant is L's father and the respondent is her mother. L's father appeals against the order of Her Honour Judge Waddicor who on 15 August 2014 gave the mother permission to permanently remove L from the jurisdiction of England and Wales to Germany. The order also provides for a minimum period of six weeks in every year that L is to spend with her father. The order was made on the cross applications of the parties: that of L's mother for leave to remove her from the jurisdiction in accordance with section 13 (1) of the Children Act 1989 [CA 1989] and that of L's father for contact (now a child arrangements order) in accordance with section 8 CA 1989.

2. Section 13(1) CA 1989 provides that:

> "(1) Where a child arrangements order to which subsection (4) applies is in force with respect to a child, no person may-
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> (a) [...]
>
> (b) remove him from the United Kingdom;
>
> without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> [...]
>
> (4) This subsection applies to a child arrangements order if the arrangements regulated by the order consist of or include arrangements which relate to either or both of the following-
>
> (c) with whom the child concerned is to live, and
>
> (d) when the child is to live with any person."

3. Section 13 is governed by the welfare principle in section 1(1)(a) CA 1989: "...the child's welfare shall be the court's paramount consideration". By reason of section 1(4) CA 1989, the 'welfare checklist' in section 1(3), i.e. the non exclusive list of factors which are to be considered by the court in respect of welfare, is not a necessary part of the court's analysis on a section 13 application. While the welfare checklist is not a required consideration for the analysis of welfare in section 13 cases, it is without doubt a helpful *aide memoir* and this court has commended its use on many occasions (see, for example in *Re F (A Child) (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645 at [37] where there is an overt assumption that the welfare checklist will be used in this way). In any event, on the section 8 cross application for a child arrangements order that was made by L's father in this case, the considerations in section 1(3) were directly applicable to the decision to be made.

4. In granting a stay of the order and permission to appeal I identified three bases upon which permission was granted (see *In the matter of F (A Child)* [2014] EWCA Civ 1510): a) should the court carry out a welfare analysis of the options and plans of each of the parents; b) should the court carry out a comparative evaluation of the options and plans; and c) if article 8 ECHR is engaged by reference to the gravity of the consequence (here that direct contact may cease) should the court also carry out a proportionality evaluation. That was characterised by leading counsel for the mother, Miss Isaacs QC,

as the court postulating 'an holistic evaluative analysis'. Miss Isaacs agrees with Mr Setright QC, who appears on behalf of the father, that the general question before this court is whether 'an holistic evaluative analysis [is] the appropriate approach to be taken in section 13 relocation cases'.

5. For reasons which I shall explain, Miss Isaacs accepts that this is the appropriate approach for the court to take. She submits that on the facts of this case the question on the appeal becomes: 'did the [court] engage with the long term welfare decisions and address them in an holistic way when coming to [its] decision in this case...'. Although it is arguable that the agreed position of the parties as to the law has the potential to re-craft yet again the well known jurisprudence of this court in relocation cases, I am firmly of the view that it does not. Accordingly, I shall take a little time in due course to explain how the approach described underpins and explains our existing jurisprudence rather than alters it. The court is very grateful to both Mr Setright and Miss Isaacs for the quality of their helpful submissions.

6. L's mother is a German national who came to England in the mid 1980s to learn English. She worked for the father's sister as an *au pair*. Approximately ten years later L's mother and father began a relationship which eventually led to L's mother coming to live with L's father at his home in Lewes. The parties married on 22 August 2002 and L was conceived through IVF prior to the marriage. Sadly, the parties separated but continued to live in the same accommodation until October 2012. L's mother petitioned for divorce on 2 April 2012 with the consequence that L's father left the matrimonial home and moved into rented accommodation in Hove where he remains. Decree nisi was pronounced on 6 June 2012.

7. L's father is Jewish. He identifies himself as being outside the orthodox tradition and says that he is keen to explore and enable constructive and beneficial relations between those who are adherents to the Jewish faith and those who are adherents to the Christian faith. L's mother was born Roman Catholic, but claims she was forced to convert to and adopt the Jewish faith well before the parties' marriage but no longer wishes to have any association with the family's Jewish cultural or religious heritage and chose to return to her own faith after separation. There was a clear issue on the papers before the Family Court as to what were L's wishes and feelings in this regard. To that end, there having been a request from L to have a meeting with the judge, a meeting took place on 23 July 2014. A note of that meeting was provided to this court.

8. The context and chronology of the applications in this case are important. The background as reported by L's father is that L's mother was very possessive of and over protective of L, not wanting others, including him, to share in her care. He says that these concerns have persisted to the present day. By the time L was in school, L's mother would insist on taking her to Germany to see her family during each and every school holiday and usually for the whole of that holiday.

9. The procedural chronology is that following upon her petition, L's mother made her first application which was for financial relief on 4 March 2013. There was a contested hearing leading to a final order which provided that the former matrimonial home should be transferred to L's mother, with a charge back of 50% of the equity not to be enforced until L reached 18 or ceased full time education, whichever was the later. It is submitted on behalf of the father, that mother's position in those proceedings might be thought to reflect a plan on her part to use that accommodation or any proceeds of sale to provide accommodation for herself and L in this jurisdiction given that no other intention was

evidenced. It is a reasonable submission to make that if she intended to relocate with L, then that was relevant to the section 25 factors in the Matrimonial Causes Act 1973, in particular the circumstances of the case that related to the welfare of a child in accordance with section 25(1). Furthermore, there is an obligation of full and frank disclosure in financial remedy proceedings. There is a dispute about when L's mother disclosed her intention and that may be relevant to the context.

10. L's father says that he tried without success to reach agreement with L's mother about the nature and extent of the time L should spend in his care. L's mother would not enter into mediation. Eventually on 15 March 2013 he issued an application for contact in the following terms:

> "There is ongoing contact between me and my daughter including telephone contact. There is no regular pattern of contact and the activities I can take part in with my daughter are controlled by the mother. I want a defined contact order for my daughter to be able to stay overnight with me and to take part in activities of our choice (mine and my daughter's). The mother says that the contact taking place is what [L] wants and that [L] does not want further or other contact"

11. The district judge hearing the application granted extensive interim visiting contact to the father on three weekday evenings and each Sunday. When the father's application was finally considered by the court on the merits on 7 May 2014, Her Honour Judge Probyn ordered visiting contact twice on weekdays for two and a half hours on each occasion and staying contact once every three weeks from Saturday into Sunday with a visiting Sunday contact in the second of each three week cycle. In essence, therefore, the court's strategy was to accept the father's plan and at least in part reject the mother's plan for the nature and extent of the relationship that L should have with her father. It is of note that Judge Probyn reasoned against the Cafcass advice which reflected L's stated wishes and feelings and which had been not to advise staying contact in the following terms:

> "...I do not accept that her relationship with her father will progress without proactive intervention. [L's] mother believes that it will resolve over time but I disagree. [L] needs the opportunity to have time with her father, which is currently inadequate. I accept the father's position that whilst he has frequent contact with [L] it is short and limits their activities together. He believes that [L] is influenced by her mother. It would be surprising if she were not given that they live together and have a close bond ... I do find that [L] is aware of her feelings towards the father and is inevitably loyal to her mother..."

> "...The mother told me that she could not force [L] to go to her father for overnight contact. I queried this with her and asked what the situation would be if [L] refused to go to school without good reason. [The Mother] thought this was different, I disagree. I understand that it is difficult to enforce but ultimately, her parents must act in her best interests which may conflict from time to time with [L's] wishes...I find that it is in [L's] best interests for contact to move to overnight stays in order to maintain and promote her relationship with her father, which includes a rich cultural heritage."

12. Although L's mother made no mention of any intention other than as was confirmed at the hearing on 3rd November 2014 in the financial remedy proceedings, she may then have had to seek leave to relocate L to Germany when she was involved in the financial remedy proceedings or at the first interim contact determination on 19 February 2014, by

the time Judge Probyn made her determination L's mother had not only made her intention known but on 3 April 2014 had made the application for leave. That application was couched in the following terms: "...in view of the fact that [the father] does not contribute to [L's] upbringing financially and only pays the minimum of £5 per week in maintenance, the consent of [L] being relocated to Germany should not have been unreasonably withheld...". It needs to be said that the premise for the application as stated was arguably wrong but the terms of the application are interesting in themselves. L's father had a CSA assessment which he was paying and, it is asserted, had made additional contributions outside of the financial remedy determination. Judge Probyn's decision represented a strategy for the maintenance of a relationship between father and daughter in the knowledge of a pending relocation application.

13. It would have been better if the relocation application could have been heard with the contact application but the latter was already 13 months old and if the same judge could carry forward the court's strategy and hear both applications, then consistency and internal coherence of decision making could be assured. Sadly, that was not to be and the application for relocation came to be heard by a different judge. It is not entirely clear why. There is a suggestion that by the time Judge Probyn made her decision she was already aware that she could not hear the relocation application. If that is right, then either there should have been some earlier consideration of who should hear both applications or steps should have been taken to change judicial itineraries to permit continuity. If the courts administration re-allocated the proceedings administratively then that was unacceptable.

14. Judge Waddicor's analysis in a careful and detailed judgment was initially loyal to Judge Probyn's evaluation. However, in her conclusions she deviated from the strategy that the evaluation represented. She was of course entitled to do so for good reason on the cross applications of the parties. The crux of the question on the appeal is whether she allowed herself to be deflected from a welfare analysis that was required in order to do justice to that exercise and instead, and despite what she records in her judgment, allowed herself to be constrained by the narrower guidance that was given by this court in *Payne v Payne* [2001] 1 FLR 1052. With some hesitation I have concluded that she did. To adopt and adapt Miss Isaacs' formulation, did the court engage with the long term welfare issues and address them in an holistic way, i.e. by reference to each parents options and plans, analysed separately and evaluated comparatively and proportionately in coming to its decision? I have concluded that the court did not. It is convenient in reasoning the answers to those questions to first consider the law.

The legal context

15. The approach to be taken to cases where one parent seeks permission to remove a child permanently from the United Kingdom has been considered exhaustively in the three leading authorities (*Payne, K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134 and *Re F*). In *Re F*, Munby LJ identified that *K v K* is now the starting point:

"[29]. The starting point now must be *K v K*. Its central message is conveyed, succinctly and accurately, in the headnote in the Law Report:

> "…that the only principle to be applied when determining an application to remove a child permanently from the jurisdiction was that the welfare of the child was paramount and overbore all other considerations however powerful and reasonable they might be; that

> guidance given by the Court of Appeal as to factors to be weighed in search of the welfare paramountcy and which directed the exercise of the welfare discretion was valuable in so far as it helped judges to identify which factors were likely to be the most important and the weight which should generally be attached to them and promoted consistency in decision-making; but that (per Moore-Bick and Black LJJ), since the circumstances in which such decisions had to be made varied infinitely and the judge in each case had to be free to decide whatever was in the best interests of the child, such guidance should not be applied rigidly as if it contained principles from which no departure were permitted".

I need quote only what Thorpe LJ said (paragraph [39]):

> "… the only principle to be extracted from *Payne v Payne* is the paramountcy principle. All the rest, whether in paragraphs 40 and 41 of my judgment or in paragraphs 85 and 86 of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy."'

16. The guidance given in *Payne* is usually summarised by reference to the three factors isolated by Thorpe LJ at [40] as being the most likely to be relevant in a relocation case:

> "(a) 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?.... Is the mother's application realistic, by which I mean, founded on practical proposals both well researched and investigated? ...
> (b) Is [the father's 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 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?..."

17. The *ratio* of the decision in *Payne* was more nuanced in the sense that the questions were always intended to be part of a welfare analysis and were not intended to be elevated into principles or presumptions. Regrettably that is not how they were perceived and the best intentions of the court were lost in translation. The caution expressed by Dame Elizabeth Butler-Sloss P in *Payne* went unheeded, namely that guidance that had been derived from authorities such as *Poel v Poel* [1970] 1 WLR 1469 was being expressed in "too rigid terms" and 'unduly firmly' with an over emphasis on one element of the case. I respectfully agree with her and with the benefit of hindsight the continued use of the *Payne* guidance by courts without putting it into the context of a welfare analysis perpetuated the problem.

18. Furthermore, in the decade or more since *Payne* it would seem odd indeed for this court to use guidance which out of the context which was intended is redolent with gender based assumptions as to the role and relationships of parents with a child. Likewise, the absence of any emphasis on the child's wishes and feelings or to take the question one step back, the child's participation in the decision making process, is stark. The questions identified in *Payne* may or may not be relevant on the facts of an individual case and the

court will be better placed if it concentrates not on assumptions or preconceptions but on the statutory welfare question which is before it, to which I will return in due course.

19. The approach which is now to be applied could not have been more clearly stated than it was in *Re F* where Munby LJ said at [37] and [61]:

> "[37] There can be no presumptions in a case governed by s 1 of the Children Act 1989. From the beginning to the end the child's welfare is paramount and the evaluation of where the child's interests truly lie is to be determined having regard to the 'welfare checklist' in section 1(3)"
>
> "[61] The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regards to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this Court"

20. That endorsed and reinforced the earlier and binding decision of this court in *K v K*. In the interests of clarity I will now set out those passages in *K v K* and in *Re F* which, in my view, are required reading by any judge faced with determining any international child relocation case. These passages state the law as it is to be applied. *Payne* is to be read in the context of these authorities and not in substitution for, or priority, over them. In *K v K* there was a divergence between Moore-Bick and Black LJJ, on the one hand, and Thorpe LJ, on the other, both as to the depth offered in their respective judgments in analysis of the approach to be taken and, in particular, on the question of whether *Payne* was confined solely to cases where it was possible to identify a 'primary carer'. Although Thorpe LJ's judgment appears first in the law report, I propose to set out the key parts in the judgments of the majority before turning to Thorpe LJ's judgment.

21. At paragraph [86] of *K v K* Moore-Bick LJ highlighted the important distinction between legal principle and guidance:

> "I accept, of course, that the decision in *Payne v Payne* is binding on this court, as it is on all courts apart from the Supreme Court, but it is binding in the true sense only for its ratio decidendi. Nonetheless, I would also accept that where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles. I am conscious that any views I express on this subject will be seen as coming from one who has little familiarity with family law and practice. Nonetheless, 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. In my view Wilson L.J. was, with respect, quite right to warn against endorsing a parody of the decision. 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. Guidance of the kind provided in *Payne v Payne* is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child. As Hedley J said in *Re Y*, the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in *Payne v Payne* intended to suggest otherwise."

22. For her part, Black LJ's judgment begins at paragraph [96] by explaining the point upon which she differs from the view taken by Thorpe LJ:

> "Where my reasoning and that of Thorpe LJ diverge is in relation to point ii), in particular in relation to the treatment of *Payne v Payne*. Thorpe LJ considers that *Payne* should not be applied in circumstances such as the present and that the judge should instead have applied the dicta of Hedley J in *Re Y*. For my part, as will become apparent, I would not put *Payne* so completely to one side. Whilst this makes no difference to the outcome of this case, it may not be without significance more generally."

23. After a comprehensive review of the existing authorities, Black LJ sets out her conclusions on the law beginning at paragraph [140]:

> "[140]. Looking back over what is now nearly 40 years of jurisprudence in this area of family law, I have come to a number of conclusions. I am indebted to my Lord, Moore-Bick LJ for his judgment which, like that of Thorpe LJ, I have read in draft, and in particular for its analysis in paragraph 86 of the approach to be taken to Payne in the light of the conventional treatment of principle and guidance.
>
> [141]. The first point that is quite clear is that, as I have said already, the principle - the only authentic principle - that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.
>
> [142]. Whilst this is the only truly inescapable principle in the jurisprudence, that does not mean that everything else - the valuable guidance - can be ignored. It must be heeded for all the reasons that Moore-Bick LJ gives but as guidance not as rigid principle or so as to dictate a particular outcome in a sphere of law

where the facts of individual cases are so infinitely variable.

[143]. Furthermore, the effect of the guidance must not be overstated. Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe LJ said so in terms in Payne and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of paragraph 26 ("Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children") for re-elevation to a status akin to that of a determinative presumption. It is doubly inappropriate when one bears in mind that the judgments in Payne must be read as a whole, with proper weight given to what the then President said. She said that she wished to reformulate the principles since they may have been expressed from time to time in too rigid terms with the word 'presumption' over-emphasising one element of the approach (paragraph 82) whereas the criteria in s 1 Children Act govern the application (paragraph 83) and there is no presumption in favour of the applicant (paragraph 84). Dame Elizabeth referred, of course, to the effect on the parent with residence (paragraphs 83 and 84) but she also stressed that the relationship with the other parent is highly relevant and that there are many other factors which may arise in an individual case (paragraph 84). I detect in her discussion of the factors and in her summary at paragraph 85 no weighting in favour of any particular factor. She said that the reasonable proposals of the parent with a residence order wishing to live abroad carry "great weight" whereas the effect on the child of denying contact with the other parent is "very important" but I do not infer from that phraseology any loading in favour of the reasonable proposals as opposed to the effect of the loss of contact.

[144]. Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child, and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's decision in Re Y as representative of a different line of authority from Payne, applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which Payne is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case.

[145]. Accordingly, I would not expect 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. The ways in which parents provide for the care of their children are, and should be, infinitely varied. In the best of cases they are flexible and responsive to the needs of the children over time. When a relocation application falls to be determined, all of the facts need to be considered."

24. Those passages from the majority judgments in *K v K*, endorsed as they have been by Munby LJ in *Re F*, in my view represent the current law with respect to any application for the permanent international relocation of a child. In *K v K* Thorpe LJ, at paragraph [39], was entirely in agreement with the majority on the all important point that the only principle of law to be extracted from *Payne* is that the child's welfare is to be afforded paramount consideration:

> "[39]. As My Lord, Moore-Bick LJ, pointed out in argument, the only principle to be extracted from *Payne v. Payne* is the paramountcy principle. All the rest, whether in paragraphs 40 and 41 of my judgment or in paragraphs 85 and 86 of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy. "

25. The point of divergence in *K v K* between Thorpe LJ and Black LJ arises from paragraph [41] where Thorpe LJ states:

> "I am in no doubt at all that the guidance in *Payne v Payne* is posited on the premise that the applicant is the primary carer. It so states in terms."

26. I have already set out the contrary view given by Black LJ at paragraphs [144] and [145] to the effect that *Payne* will have relevance to all categories of case, and is not confined to those where there is a 'primary carer'. Black LJ's conclusion on this point was roundly endorsed by Munby LJ at paragraphs [44] and [60] of his judgment in *Re F*:

> "[44]. On this point, therefore, the correct approach is that of the majority, that is to say Moore-Bick LJ and Black LJ."

> "[60]. There is another lesson to be learnt from this case. 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. This is hardly surprising. As Moore-Bick LJ said in *K v K*, "the circumstances in which these difficult decisions have to be made vary infinitely." This is not, I emphasise, a call for an elaboration of the taxonomy. Quite the contrary. The last thing that this very difficult area of family law requires is a satellite jurisprudence generating an ever-more detailed classification of supposedly different types of relocation case. Any move in that direction is, in my judgment, 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 is a "*Payne* type case", or a "*K v K* type case" or a "*Re Y* type case", when in truth it may be none of them, is simply a recipe for

unnecessary and inappropriate forensic dispute or worse. It is to be avoided."

27. Selective or partial legal citation from *Payne* without any wider legal analysis is likely to be regarded as an error of law. In particular, a judgment that not only focuses solely on *Payne*, but also compounds that error by only referring to the four point 'discipline' set out by Thorpe LJ at paragraph [40] of his judgment in *Payne* is likely to be wholly wrong. There are no quick fixes to be had in these important and complicated cases; the paragraph [40] 'discipline' in *Payne* may, or may not, be of assistance to a judge on the facts of any particular case (whether there is a 'primary carer' or not) in marshalling his or her analysis of the evidence prior to the all important analysis of the child's welfare.

28. Given the agreement of the parties to an holistic approach to the court's welfare analysis, I need to set out what that involves. The re-crafting of section 8 orders from residence and contact into child arrangements orders has *inter alia* the benefit of emphasising, absent adverse circumstances and welfare conclusions, the equality of parental responsibility that each parent has. Parents are to be expected to exercise their autonomy and to respect the autonomy of their children by entering into arrangements that plan for their children's long term welfare by providing for a meaningful relationship between each adult and each child. Where they cannot agree there is likely to be more than one proposal for the court to consider.

29. In *Re W (Care Plans)* [2013] EWCA Civ 1227, [2014] 2 FLR 431 at [76 - 78] I held that in relation to public law children proceedings the welfare analysis of realistic options that is required would be facilitated by a balancing exercise first recommended by Thorpe LJ in the different context of a medical treatment case in *Re A (Male Sterilisation)* [2000] 1 FLR 549 at 560. That approach had been identified by my Lord, McFarlane LJ in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, [2014] 1 FLR 670 at [54]:

> "What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

It was subsequently approved by Sir James Munby P in this court in *Re B-S (Children)* [2013] EWCA Civ 1146, [2014] 1 FLR 1935 at [36] and at [46] where the approach was described by him in these terms:

> "We emphasise the words 'global, holistic evaluation'. This point is crucial. The judicial task is to evaluate <u>all</u> the options, undertaking a global, holistic and ... multi-faceted evaluation of the child's welfare which takes into account <u>all</u> the negatives and the positives, <u>all</u> the pros and cons, of <u>each</u> option"

30. That approach is no more than a reiteration of good practice. Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary. That is neither a new approach nor is it an option. A welfare analysis is a requirement in any decision about a child's upbringing. The sophistication of that analysis will depend on the facts of the case. Each realistic option for the welfare of a child should be validly considered on its own internal merits (i.e. an analysis of the welfare factors relating to each option should be undertaken). That prevents one

option (often in a relocation case the proposals from the absent or 'left behind' parent) from being sidelined in a linear analysis. Not only is it necessary to consider both parents' proposals on their own merits and by reference to what the child has to say but it is also necessary to consider the options side by side in a comparative evaluation. A proposal that may have some but no particular merit on its own may still be better than the only other alternative which is worse.

31. Finally, a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same. There was no question of that before this court, nor could there have been. It is a proposition that has already been decided that international relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [ECHR]. Whatever earlier *obiter* observations on and doubts about the applicability of the Convention to these cases that there had been were settled by the Strasbourg court's decision in *Glaser v United Kingdom (Case No 32346/96)*, [2001] 1 FLR 153 at (57) to (65):

> (57) "[…] It is not disputed that these matters concern 'family life' within the meaning of Art 8 of the Convention and that this provision is applicable.
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> (63) The essential object of Art 8 is to protect the individual against arbitrary interference by public authorities. There may however be positive obligations inherent in an effective 'respect' for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps (see, amongst other authorities, *X and Y v The Netherlands* (1985) 8 EHRR 235, and, mutatis mutandis, *Osman v United Kingdom* [1999] 1 FLR 193. In both the negative and positive contexts, regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the State's margin of appreciation (see, amongst other authorities, *Keegan v Ireland* (1994) 18 EHRR 342).
>
> (64) Where the measures in issue concern parental disputes over their children, however, it is not for the court to substitute itself for the competent domestic authorities in regulating contact questions, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.
>
> (65) The court's case-law has consistently held that Art 8 includes a right for a parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such measures. This applies not only to cases dealing with the compulsory taking of children into public care and the implementation of care measures (see, inter alia, *the Olsson v Sweden (No 2)* (1992) 17 EHRR 134), but also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family (eg the *Hokkanen v Finland* (1995) 19 EHRR 139, [1996] 1 FLR 289)
>
> […]

> The key consideration is whether those authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case (mutatis mutandis, *Hokkanen v Finland* (1995) 19 EHRR 139, [1996] 1 FLR 289)."

32. That permitted Dame Elizabeth Butler-Sloss P to hold in *Payne at* [80] and [81] that the question whether the Convention applied to private law children proceedings was settled. The only caveat I would add is that it will not be every private law application that requires a proportionality evaluation. Many if not most private law children applications will be more than adequately protected by the domestic statutory regime and the jurisprudence of this court. International relocation applications under section 13 CA 1989 may require a proportionality evaluation because of the likelihood of the severance of the relationship between the child and one of her parents. That evaluation will inevitably focus on the welfare analysis of each of the realistic options and may amount to no more than an acknowledgement that one option is better than the other and that the preferred option represents a proportionate interference in the article 8 ECHR rights of those involved.

33. On an appeal, this court's primary function is to review the welfare analysis and proportionality evaluation and decide whether those value judgments were wrong within the meaning of that phrase, for example, as described by Lord Neuberger in *Re B (A Child)* [2013] UKSC 33 at [93]. I accept Miss Isaacs' submission that this court should look to the substance rather than the form of that analysis in the manner accepted by this court in *M v GP and AK and Suffolk County Council* [2014] EWCA Civ 942 at [19] to [20].

34. For the avoidance of doubt the most recent amendments to the CA 1989 were not in force when the decision in these proceedings fell to be concluded. Articles 3 and 4 of the Children and Families Act 2014 (Commencement No 5 and Transitional Provision) Order 2014, SI 2014/2749 together provide that the new provisions in section 1 CA 1989 only applied to proceedings not disposed of before 22 October 2014. The relevant substantive provisions are, however, important to section 8 applications in the future. Section 1(2A) and 1(2B) CA 1989 as inserted by the Children and Families Act 2014 are as follows:

> "A court, in the circumstances mentioned in subsection (4)(a) ... is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare...
>
> "In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time"

35. These provisions like section 1(3) are not directly applicable to section 13 CA 1989 applications but I have no doubt that they will in future heighten the court's scrutiny of the arrangements that are proposed by **each** parent.

The decision under appeal:

36. As I have already indicated, I consider that the judge has regrettably fallen into the error of conducting an analysis which was almost entirely based upon the four point

Payne discipline. Under the heading 'The Law' at paragraph [49] of her judgment Judge Waddicor says:

> "[49]. Both counsel have addressed me helpfully and succinctly on the law. I have been referred to the cases of *Payne -v- Payne* and the more recent authorities of *Re TC, K -v- K* and *Re F and H*. The application for removal from the jurisdiction and the contact application are determined by the child's welfare which is always paramount. Although *Payne -v- Payne* suggested that great weight should be given to the wishes of the primary carer, particularly if he or she was returning to their native country, that is not a principle – it is merely guidance which the Court may or not follow. The approach of the court has to be:
>
> - Is the application a genuine one or is it motivated – as is suggested in this case – by a desire to exclude the father from L's life?
> - Is the proposal practical both financially and in terms of educational and health provision for the child?
> - What would be the impact on the mother if her application were refused?
> - What would be the impact on the father and the child's relationship with the father if the application were granted?
> - Is the father's opposition motivated by concern for the child or is it driven by an ulterior motive as is suggested here by a wish to control the mother and ultimately L?

37. In so far as the judge states that 'the approach of the court *has* to be' (emphasis added) one to which the four point discipline applies, she attaches too great an importance to the same. That this is so is demonstrated by the five paragraphs that then follow in which, as Mr Setright has demonstrated, each of the four specific factors is taken in turn. The judge then takes account of L's wishes and feelings. She records that the child wished to go to Germany and expressed herself in a manner which seemed to the judge to be entirely genuine. The judge, however, discounts the child's wishes (at least to an extent) on the basis that inevitably, albeit inadvertently, L will have been influenced by her mother's views. After one further paragraph in which the judge acknowledges that L may blame the father if leave is refused but, conversely, that their relationship may improve if leave is granted, the judge announces her decision.

38. The judge's analysis, I am afraid, is so taken up with discussion of the four point 'discipline' that there is no clear identification of any overall welfare analysis. In particular at no stage does the judge take account of any erosion in the quality of the relationship between father and daughter if L were to move to live in Germany. High on the list of important questions should have been an evaluation of the harm, on the one hand, to L of leave being refused as against, on the other, the harm that would result from separation from her father should she move.

39. The context is important and is submitted by father to be as follows:

    a) L's mother has fought against any increase or development in contact and has been found by the judge to be controlling of it such that it is a reasonable implication that she would not seek to preserve any meaningful relationship between L and her father;

b) L's mother does not wish her father to be involved in her education;
c) L's mother seeks to deny the existence or benefit of L's Jewish heritage;
d) L's mother wrongly abrogates responsibility to L about important questions such as what L should call her father, whether she should see her father and whether she should speak positively about her father;
e) L's mother failed to disclose her intention to relocate until a time of her own choosing and for a reason which indicates that it was an inappropriate reaction to the financial remedy order rather than a decision genuinely motivated by L's welfare.

40. Whether the father's submissions carry any weight in a proper welfare analysis is yet to be decided. It is submitted that the judge was wrong to reverse the strategy of the court to proactively support the relationship between L and her father embarked upon by the District Judge and Judge Probyn. Likewise, that may or may not be the case. The analysis undertaken by the judge is so focused upon the *Payne* discipline that is not possible to say what a broader and proper analysis might have revealed. I have previously described my conclusion as being hesitant. That is only because of the child's wishes and feelings. I am of the view that greater emphasis needs to be placed on the child's participation in the re-hearing that this court anticipates.

41. I regret to have to conclude that the judge's reliance upon the *Payne* discipline rather than a welfare analysis has led the judge into error. That is an error of substance not just form. The dominance of the analysis of the *Payne* factors is such that important evidence, findings of fact and value judgments about risk have not been analysed or given the consideration they deserve. This was a case about the risk of loss of an important relationship and the risk of harm that might entail. That demanded closer analysis on the facts. In any event there was no proportionality cross check and that is necessary in an international relocation case of this kind.

42. I would allow the appeal, set aside the relocation and child arrangement orders and direct a re-hearing before a judge other than Judge Waddicor. From the perspective of judicial continuity and given that her orders were never appealed, that could be Judge Probyn. For the avoidance of doubt, in the interim the child arrangement orders put into place by Judge Probyn remain in force.

Lord Justice Christopher Clarke:

43. I agree. Reduced to the barest essentials the guiding principles and precepts are as follows. The welfare of the child is the paramount consideration. That is the only true principle. In deciding, in a case such as this, where a child should be located it is necessary for the court to consider the proposals both of the father and of the mother in the light of , inter alia, the welfare check list (whether because it is compulsorily applicable or because it is a useful guide) and having regard to the interests of the parties, and most important of all, of the child. Such consideration needs to be directed at each of the proposals taken as a whole. The court also needs to compare the rival proposals against each other since a proposal, or a feature of a proposal, which may seem inappropriate, looked at on its own, may take on a different complexion when weighed against the alternative; and *vice versa.*

44. For the reasons given by my Lord, in the present case the judge's reliance on the *Payne v Payne* criteria led her away from carrying out the necessary overall welfare analysis that was needed.

Lord Justice McFarlane:

45. I agree that the appeal must be allowed for the reasons given by Ryder LJ. In the light of the emphasis that is given in this case to the word 'holistic', I would add the following general observations.

46. The word 'holistic' now appears regularly in judgments handed down at all levels of the Family Court. This burgeoning usage may arise from my own deployment of the word in a judgment in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965; [2014] 1 FLR 670 where, at paragraph 50, I described the judicial task in evaluating the welfare determination at the conclusion of public law children proceedings as requiring:

    i. 'a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.'

47. Having heard argument in this and other cases, I apprehend that there is a danger that this adjective, and its purpose within my judgment in *Re G*, may become elevated into a free-standing term of art in a way which is entirely at odds with my original meaning.

48. In the judgment in *Re G* my purpose in using the word 'holistic' was simply to adopt a single word designed to encapsulate what seasoned Family Lawyers would call 'the old-fashioned welfare balancing exercise', in which each and every relevant factor relating to a child's welfare is weighed, one against the other, to determine which of a range of options best meets the requirement to afford paramount consideration to the welfare of the child. The overall balancing exercise is 'holistic' in that it requires the court to look at the factors relating to a child's welfare *as a whole*; as opposed to a 'linear' approach which only considers individual components in isolation.

49. Reference to 'a global, holistic evaluation' in *Re G* was absolutely not intended to introduce a new approach into the law. On the contrary, such an evaluation was put forward as the accepted conventional approach to conducting a welfare analysis, as opposed to a new and unacceptable approach of 'linear' evaluation which was seen to have been gaining ground.

50. In the context that I have described, it is clear that a 'global, holistic evaluation' is no more than shorthand for the overall, comprehensive analysis of a child's welfare seen as a whole, having regard in particular to the circumstances set out in the relevant welfare checklist [CA 1989, s 1(3) or Adoption and Children Act 2002, s 1(4)]. Such an analysis is required, by CA 1989, s 1(1) and/or ACA 2002, s 1(2) when a court determines *any* question with respect to a child's upbringing. In some cases, for example where the issue is whether the location for a 'handover' under a Child Arrangements Order under CA 1989, s 8 is to take place at MacDonalds or Starbucks, the evaluation will be short and very straight forward. In other cases, for example a case of international relocation, the factors that must be given due consideration and appropriate weight on either side of the scales of the welfare balance may be such as to require an analysis of some sophistication and complexity. However, whatever the issue before the court, the task is the same; the court must weigh up all of the relevant factors, look at the case as a whole, and determine the course that best meets the need to afford paramount consideration to the child's

welfare. That is what, and that is all, that I intended to convey by the short phrase 'global, holistic evaluation'.

51. It follows from the explanation that I have given that I would entirely agree with Ryder LJ at paragraph 30 of his judgment when he describes the benefit of this evaluation in an international relocation case. The application of an holistic approach to relocation cases is not in some way to be seen as a new development. For the reasons I have given, it is not. It is, in fact, 'as old as the hills'. The consistent theme through all the authorities for over 40 years is that the child's welfare is the paramount consideration. In order to afford paramount consideration, the court has always sought to balance the relevant factors one against another with the aim of forming a conclusion as to the child's welfare as a whole, or, to use the 'h' word, holistically.

52. Finally I wish to add one further observation relating to paragraph 29 of Ryder LJ's judgment where my Lord suggests that it may be helpful for judges facing the task of analysing competing welfare issues to gain assistance by the use of a 'balance sheet'. Whilst I entirely agree that some form of balance sheet may be of assistance to judges, its use should be no more than an aide memoire of the key factors and how they match up against each other. If a balance sheet is used it should be a route to judgment and not a substitution for the judgment itself. A key step in any welfare evaluation is the attribution of weight, or lack of it, to each of the relevant considerations; one danger that may arise from setting out all the relevant factors in tabular format, is that the attribution of weight may be lost, with all elements of the table having equal value as in a map without contours.