Case No: B4/2015/1151

Neutral Citation Number: [2015] EWCA Civ 1305
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
MR RECORDER DIGNEY
FD14P00296

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before :

LADY JUSTICE BLACK
LORD JUSTICE VOS
and
MR JUSTICE BODEY

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RE C (INTERNAL RELOCATION)

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- -

Mr Charles Hale QC (instructed by **Penningtons Manches LLP**) for the **Appellant**
Miss Deborah Eaton QC & Mr Stephen Jarmain (instructed by **Stewarts Law LLP**) for the **Respondent**
Mr Damian Garrido QC & Dr Rob George (instructed by **Dawson Cornwell)** on behalf of the **Intervener, the International Centre for Family Law, Policy and Practice**

Hearing date: 28th October 2015

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Judgment

Lady Justice Black:

1. This is an appeal against orders made on 23 March 2015 by Mr Recorder Digney in relation to C, who was born in October 2005 and is 10 years old. C's mother wished to move from London to Cumbria, taking C with her, and the appellant, C's father, who has always had a considerable involvement in her life, wished the present London based arrangements for C to continue along much the same lines. The Recorder permitted the mother to move with C from 1 September 2015 and ordered that C would attend a particular school in Cumbria from the start of the new school term. He made a child arrangements order with regard to the division of C's time between her parents. She was to live with her father on alternate weekends, alternating between Cumbria and London. If the father was able to travel to Cumbria during the week, C was to be in his care overnight for up to two nights a week. There was provision for daily contact on other days by telephone, Skype or Facetime. Holidays were to be divided equally between the parents. The father contends that, for a variety of reasons, the Recorder was wrong to sanction the mother's proposals.

Brief history

2. The parents have not been married. Their relationship lasted between 2004 and 2007. Both of them work. The father is considerably better off than the mother, who earns about £40,000 per annum. In addition to providing other support for C, the father purchased a flat in London near to his house at a cost of £1 million where the mother and C live rent-free. The current arrangement is that the mother has to vacate the flat when C reaches her 18th birthday. Proceedings under Schedule 1 of the Children Act 1989 are on foot.

3. C spends two nights a week and every other weekend with the father, returning to the mother on Sunday evenings. She attends a fee-paying London day school. Initially, she was looked after by nannies whilst the parents were at work. For some time now, however, she has been spending the time after school at the home of Mrs N, the wife of a local vicar, until one or the other parent collects her.

4. Applications were made by both parents in early 2014 with regard to C's care which led, ultimately, to the hearing before the Recorder. The father's application was made before the advent of child arrangements orders so was for a shared residence order reflecting the present arrangements for C, with an extension of his weekend time to Monday mornings. The mother applied for a specific issue order permitting her to move with C to Cumbria where C would start at a new day school.

The evidence before the Recorder and his conclusions

5. The Recorder had evidence from both parents, written and oral. In addition, CAFCASS provided a report, and the CAFCASS officer gave oral evidence. This was an important component of the material before the Recorder and, quite early on in his judgment, he quoted extensively from the passage in the CAFCASS report where the officer set out her professional judgment on the case, although ultimately going on to disagree with her recommendation.

6. The CAFCASS officer considered that the competing options were "very finely balanced" and that "either situation would bring benefits and losses for C". Her

conclusion was that a move was not in C's best interests, despite the fact that C had told her that she was keen to move to Cumbria and was confident that she would be able to maintain a strong relationship with the father if she did so. The officer considered that C's relationship with the father was "a crucial one". She commented that C has an established routine in London and that her relationship with the father is integral to that and has been since birth, the arrangements for them to spend time together being intrinsic to it. The officer thought that, at 8 years old (as she then was), C may not have an entirely realistic view about the significant change that a move would bring and about the fact that she would be spending a lot less time with the father. She was concerned that the move "may be emotionally damaging for C as she will not be able to enjoy the type of relationship with the father that she has had for all of her life".

7. As for the rest of the material available to the Recorder, the following resumé, taken largely from his judgment and incorporating his findings on certain salient matters, should be sufficient to set the scene for the points which arose in the appeal.

8. The Recorder accepted that the mother's application was genuine and not motivated by a desire to exclude the father, and that it was well researched and realistic. The mother originally comes from the North Lancashire coast. Her family still live there and she would be about an hour's drive away from them if she moved to Cumbria. Indeed, she sees living in Cumbria as returning home. She could work at her employment more easily there, and she and C enjoy country pursuits and the life in Cumbria would be a "typical rural life".

9. Issues about accommodation were a part of the mother's motivation. The flat in which she and C live in London is a basement flat with a small garden. It was said to be dark and to have considerable damp problems. The Recorder said that the mother was given no choice as to where to live as the father wanted C to live close to him and he criticised the father for this on the basis that a nicer property could have been purchased for C and the mother had he been prepared to put to one side his insistence that they live so close. The mother felt the need to safeguard her situation once C reaches 18 by getting on the property ladder, perfectly rationally the Recorder found, although this was not her main motivation for moving.

10. C attends a London day school and the father thought it would be detrimental for her to change schools during her primary education from a school where she is happy and settled. The Recorder did not take the same view of matters. Although he was sure that it provided "a perfectly proper education in the technical sense of that phrase", he thought that the London school was not the sort of school to which the mother would expect to send a child, the other children coming from wealthier backgrounds. He did not accept the father's criticism of the school that the mother had identified in Cumbria. He was sure that it too was capable of providing a perfectly proper education and that there would be the advantage that the mother would feel much more at home as a parent there than she does in London. He concluded that "the whole schooling experience will be far more satisfactory in Cumbria" than in London.

11. The Recorder accepted that if she was forced to stay in London, the mother would feel deeply unhappy and he found that her feelings were likely to have a serious and very harmful impact on C. C and the mother have already spent happy times in Cumbria

with friends of the mother. The Recorder considered that, contrary to the father's fears, the risks of C and the mother not being happy living there are not great.

12. The father had put forward a proposal designed to enable the mother to buy a property in Cumbria which she could use for holidays, whilst continuing to live with C in London. The Recorder found this proposal to be "speculative only" at the moment and he had grave doubts that it would work financially because the mother was unlikely to be able to afford somewhere to live in London as well as keeping up the house in Cumbria. The Recorder also found that it had the added disadvantage that it would leave the father in control of the situation. Although the parents had, as far as possible, avoided criticising each other, the mother had made what the Recorder described as a "passing criticism" of the father that he was controlling. She had described feeling "caged" in her dependence on him and the Recorder found some substance in what she said, describing her feeling that she was "caged" as "not irrational". The Recorder did not think it in C's best interests that the mother should have such feelings and, in any event, he did not see the father's suggestion as a realistic way of saving the status quo.

13. The Recorder accepted that the father's opposition to the move was motivated by genuine concern for C's future well-being and that he would be upset if the move took place, although he did not think that that upset would impinge upon C. The move would mean that the father would not see C during the week in term time except on rare occasions. The father's view was that the result of it would be a weakening of his relationship with his daughter but the Recorder did not agree. He considered that the relationship between C and the father was very good and sufficiently well established to continue essentially as it is now, even if there were to be a change in the quantum of contact. He also thought that there would be changes to arrangements, even if there were no move, because, as children get older, having two homes becomes less practical. Furthermore, in his assessment, the relationship between the parents would inevitably deteriorate if the mother was unable to move and she would find it much more difficult to make the current arrangements work.

14. The father thought that a move would also bring other losses for C which would be detrimental to her. He thought she would see less of her cousins and other significant people in the London area, but the Recorder thought that the change would be quantitative not qualitative and that relationships could be kept up at weekends. The father was also concerned that the loss of C's present after-school care would be to her detriment. However, the Recorder did not see the current care arrangements as totally positive for reasons that I shall explain in the next paragraph. He also thought that carers do from time to time disappear from a child's life and children are resilient to these and other changes and take such matters in their stride.

15. The mother had voiced doubts about the mid-week stays with the father. She argued that it must cause confusion for C to spend time with three carers (at Mrs N's house, at the father's house, and at the flat). There was a period when C was often late for school. This happened with both parents but more often when she had spent the night before with the mother. The Recorder took it as evidence that the arrangements were less than totally satisfactory. The mother said that she wanted C to have more consistency in her life and a more stable environment and the Recorder accepted that she was entitled to see the current existence as "inconsistent with all the moving

round". In Cumbria, C would also spend time with other carers but that would be in the mother's house and she would live in one home rather than three.

16. The Recorder set some store by C's wishes about the move. This was an important reason for his differing from the CAFCASS officer. C's expressed view was that she was keen to move. Although the CAFCASS officer did not think that she would fully appreciate the realities of this, the Recorder disagreed. He accepted her wish to move as clear and properly reasoned. He pointed out that C has travelled often to Cumbria and must realise that the distance between there and London will have an impact on her relationship with the father. Indeed, although the Recorder did not mention this, it is clear she *did* realise this because she told the CAFCASS officer that she would miss Dad a lot. She talked to the CAFCASS officer about having contact at weekends. She said she would spend time with him "*most* weekends" (my emphasis). It was clear from this that she knew she would no longer be seeing the father during the week. It was suggested that it indicated that she did not realise the reality of fortnightly weekend contact but the Recorder thought that "most" was simply a loose use of language.

17. The Recorder did not think that the move would be emotionally damaging to C. His view was that, in fact, she would be upset if she were *not* allowed to move and that "there will be more (negative) weight here than any harm caused by her father's lack of propinquity, given that she will be seeing her father regularly". Remaining in London was, in the Recorder's judgment, "much less conducive to C's well-being than is the move to Cumbria". It is clear from the summary that the Recorder gave of his conclusions at paragraph 45 that, in addition to C's own wishes, a significant component in this conclusion was that the mother would "find it very difficult to be happy and content and therefore a satisfactory mother if she is not allowed to relocate as she wishes".

The law

18. The father's appeal generated a consideration of the proper principles to be applied in internal relocation cases, that is to say cases where the proposed move is within the United Kingdom. Interestingly, there was a large measure of agreement between the parties as to what those principles should be, all parties submitting that there should be no difference in principle between internal relocation cases and cases of relocation outside the United Kingdom. Whether that position accords with the present state of the law is a question that will have to be considered.

19. Internal relocation cases and external (or international) relocation cases have historically been kept separate, the courts appearing to approach them differently. At first glance, this may not seem surprising given the provisions of section 13 of the Children Act 1989[1] (hereafter "the Act"). Where a child arrangements order is in

[1] As material, and as amended by the Children and Families Act 2014, section 13 provides:

(1) Where a child arrangements order to which subsection (4) applies is in force with respect to a child, no person may –
(a) cause the child to be known by a new surname; or
(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.
(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by a person named in the child arrangements order as a person with whom the child is to live.
(3) In making a child arrangements order to which subsection (4) applies, the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

force dealing with what would formerly have been called residence or contact, section 13 provides that no person may remove the child from the UK (other than for short periods) without either the written consent of every person who has parental responsibility or the leave of the court. There is no equivalent provision regulating moves within the UK; the freedom of a parent to move with the child will only be constrained if an order is made under section 8 of the Act, usually in these circumstances a prohibited steps order or a specific issue order. When one looks below the surface, however, the separate treatment of the two types of relocation begins to appear more questionable.

20. The first point to make is that section 13 is not a universal component in external relocation cases. It is the existence of a child arrangements order that brings into play the prohibition against external relocation in section 13. However, parents do not always need a child arrangements order to regulate their care of the child and courts are directed by section 1(5) of the Act not to make an order unless doing so would be better for the child than making no order at all. It follows that there are, in theory, two types of removal from the UK: those where there is a child arrangements order and removal is restricted by section 13, and those where there is no child arrangements order and so no automatic restriction. In the latter case, the move will be regulated, if at all, by means of an order under section 8. I am not sure whether any of the external relocation cases acknowledge this dichotomy. If they do, the acknowledgment has no practical implications because all external relocation cases are approached in exactly the same way. This appears to suggest that the outcome does not depend in any way upon section 13.

21. The approach taken to the applicability of the welfare checklist (section 1(3) of the Act) in external relocation cases demonstrates, I think, how things have not been allowed to depend upon any technicalities with regard to section 13. The welfare principle in section 1(1) of the Act[2] applies no matter whether the court is deciding the case under section 8 or section 13 because, under section 13, the court is undoubtedly determining a question with respect to the upbringing of the child. However, if a decision is taken under section 13 (I say "if" because I do not propose, for present purposes, to indulge in any debate as to whether decisions about relocation are ever taken under section 13 or whether they are all, in fact, an exercise of the court's section 8 powers), section 1(3) does not apply because, on that analysis, the court is not considering whether to make, vary or discharge a section 8 order. The welfare checklist is not therefore imported into the decision-making process by statute. However, the courts have nonetheless treated it as if it were, expecting that it will be used (see most recently *Re F (A Child)(International Relocation Cases)* [2015] EWCA Civ 882, hereafter *Re F* [2015], per Ryder LJ at paragraph 3). This is sensible and unsurprising because the welfare checklist is a useful *aide memoire* and because

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(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 –

(a) with whom the child concerned is to live, and

(b) when the child is to live with any person.

[2] Section 1(1) provides:

When a court determines any question with respect to –

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

any other approach would lead to an artificial situation in which the outcome of a case might depend upon the precise form of the application made initiating it, whether for leave under section 13 or for a section 8 order.

22. If section 13 is not the justification for the separate treatment of internal and external relocation cases, perhaps it is to do with the different implications of a move within the UK and a move outside the UK? Thorpe LJ considered the matter in *Re H (Children)(Residence Order)* [2001] EWCA Civ 1338 [2001] 2 FLR 1277 where he said:

> "What then is the rationalisation for freer movement of the primary carer within the United Kingdom? It seems to me to be obvious. Within the same sovereignty there will be the same system of laws, with the same rights of the citizen, rights for instance to education, health care and statutory benefits. Equally, it can be said that within Europe, whilst perhaps the burden on the applicant may be greater, it is equally mitigated by the fact that within the Community there is the same fundamental approach to social issues and a real endeavour to achieve harmonisation, obviously in social policy but also in family justice. If, moving to the third alternative, the application is for relocation outside the European region, the necessary adjustment may be rationalized on the basis that the social and other circumstances involved in relocation may require much greater adjustment for the children; alternatively, that the obstacles to contact may be enhanced. However, attempts to rationalize gradation of the hurdles that the applicant must clear are always liable to be tested by specific example, as this case suggests. What is the rationalisation for a different test to be applied to an application to relocate to Belfast, as opposed to, say, an application to relocate from Gloucester to Dublin? All that the court can do is to remember that in each and every case the decision must rest on the paramount principle of child welfare."

23. It is apparent from this passage that although he postulated possible arguments for a different approach to internal and external relocation cases, Thorpe LJ did not find a particularly satisfactory foundation for it. Even the rationale which he did offer is not completely convincing. For instance, he referred to the same sovereignty within the United Kingdom meaning the same system of laws, but the United Kingdom does not have only one system of laws. Furthermore, he divided up his consideration into *three* categories, United Kingdom, the European Union and the rest of the globe, but there are only *two* categories of relocation, within the United Kingdom and outside it.

24. I have not been any more able than was Thorpe LJ to identify a convincing explanation for the position that has been adopted, whereby the freedom of a parent to move appears to have been accorded greater weight in internal relocation cases than in external relocation cases. It might be argued that there is greater ease of enforcement of, say, an order providing for the child to spend time with the other parent after relocation if the move is within the UK than if it is not. However, I do not find this argument compelling in the light of the enforcement provisions of Brussels

IIA and the 1996 Hague Convention. Enforceability of such an order may be a relevant factor in the decision whether to permit relocation outside the jurisdiction, but I am not convinced that it justifies a separate regime for internal and external relocation cases. It is equally difficult to justify a separate regime on the basis of the distances involved in the two types of relocation. Thorpe LJ demonstrated this with his example of the different treatment of Dublin and Belfast. *Re F (Internal Relocation)* [2010] EWCA Civ 1428 [2011] 1 FLR 1382 (hereafter "the Orkney case") is another example. It concerned a move from the north east of England to one of the Orkney Islands and amply demonstrates that relocation within the UK can create just as much, if not more, of a geographical and logistical barrier between the child and his or her other parent as relocation abroad.

25. I am at a loss to identify any other obvious justification for keeping internal and external relocation cases in separate compartments. In the Orkney case, Wilson LJ (as he then was), sitting in a constitution of the Court of Appeal of which I was also a member, expressed discomfort about the state of the law on internal relocation as it had been represented, in that case, to the Recorder and in the Court of Appeal. Had he not felt bound by authority he would have suggested that it had taken a wrong turning. Now, with the benefit of full submissions examining the existing law (including comprehensive submissions from the intervenor, ICFLPP), in the light of the reappraisal of the law in relation to external relocation cases in *K v K (Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793 [2012] 2 FLR 880 and *Re F (Relocation)* [2012] EWCA Civ 1364 [2013] 1 FLR 645, and in the light of the changes in the law made by the Children and Families Act 2014 including the addition of section 1(2A) to the Children Act 1989, I think the time has come to go back to the beginning to see how the present compartmentalised approach has come about, what principles really do apply in internal relocation cases, and what, if any, adjustments are desirable/permissible within the bounds of precedent.

26. It may be convenient to start with a recapitulation (not intended in any way as a modification) of the effect of *K v K* and *Re F (Relocation)* [2012] (supra) as these authorities contain the modern law on external relocation. The only principle to be applied when determining an application to remove a child permanently from the United Kingdom is that the welfare of the child is paramount. Guidance from the Court of Appeal as to factors to be weighed in the search for what is in the best interests of the child, such as that in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052, is valuable in so far as it helps judges to identify factors which are likely to be of importance but it is not to be applied rigidly. *Re F* [2015] (supra) is quite a recent Court of Appeal authority adding to the jurisprudence on external relocation. It is clear to me from what Ryder LJ said in that case that he did not intend to alter what had been established in *K v K* and *Re F (Relocation)*, see particularly paragraphs 19, 20 and 24 of his judgment. *Re F* [2015] is a helpful reminder that the welfare checklist will be relevant in all external relocation cases and I will return to the case later when I come to consider proportionality.

27. Sometimes the question of where a parent is to live is subsumed in the debate over which parent the child is to live with, the proposals of each of the parents as to where they would be based being a very material factor in determining the dispute (see, for example, what Butler-Sloss LJ, as she then was, said about this in *Re E (Residence: Imposition of Conditions)* [1997] EWCA Civ 3084 at paragraph 21, [1997] 2 FLR 638

at 641-642). Leaving to one side this sort of case, the question of domestic relocation (sometimes involving a move within England and Wales and sometimes within the United Kingdom) has arisen in two contexts. One approach has been to regulate where a parent is going to live by means of a condition imposed on a residence order pursuant to section 11(7) of the Act[3]. That route was considered, for example, in *Re E* (supra). The other approach has been to determine the issue in the context of a section 8 application. An example of that is the Orkney case in which the mother had made an application for a specific issue order permitting her to move.

28. In *Re L (Shared Residence Order)* [2009] EWCA Civ 20 [2009] 1 FLR 1157, Wall LJ reviewed the authorities on internal relocation as part of his consideration of whether a different approach was required where there was a shared residence order. He went back to *Re E* (supra) which he saw as the leading case on internal relocation. Our attention has not been invited to anything of relevance pre-dating *Re E* so I too propose to start there and then to examine the authorities in roughly chronological order, although I will then have to come back to them to consider what is to be made of them overall.

29. The issue in *Re E* was whether a condition requiring a mother to live at a particular place should have been imposed on the residence order granted to her. The Court of Appeal set aside the condition. Butler-Sloss LJ said (paragraph 18) that in her view "a restriction upon the right of the carer of the child to choose where to live sits uneasily with the general understanding of what is meant by residence order" and (paragraph 20) that where the court intends to make a residence order in favour of a parent who is entirely suitable, a condition of residence is an unwarranted imposition upon the right of the parent to choose where he/she will live within the United Kingdom. Her preferred approach was to look at the issue of where the child will live as one of the relevant factors in the context of cross-applications for residence and not as a separate issue. But, in paragraph 20, she allowed for the possibility of a condition as follows:

> "There may be exceptional cases, for instance, where the court, in the private law context, has concerns about the ability of the parent to be granted a residence order to be a satisfactory carer but there is no better solution than to place the child with that parent. The court might consider it necessary to keep some control over the parent by way of conditions which include a condition of residence. Again, in public law cases involving local authorities, where a residence order may be made by the

[3] As amended by Children and Families Act 2014, section 11(7) provides:
(7) A section 8 order may –
(a) contain directions about how it is to be carried into effect;
(b) impose conditions which must be complied with by any person –
(i) who is named in the order as a person with whom the child concerned is to live, spend time or otherwise have contact;
(ii) who is a parent of the child;
(iii) who is not a parent of his but who has parental responsibility for him; or
(iv) with whom the child is living,
and to whom the conditions are expressed to apply;
(c) be made to have effect for a specified period, or contain provisions which are to have effect for a specified period;
(d) make such incidental, supplemental or consequential provision as the court thinks fit.

> court in preference to a care order, section 11(7) conditions might be applied in somewhat different circumstances"

30. As in a number of the authorities, the court had a comment to make on the interplay between the principles relating to internal and external relocation. Butler-Sloss LJ said (paragraph 23) that in her view the principles set out in the authorities relating to leave to remove a child permanently from the jurisdiction had no application to conditions proposed pursuant to section 11(7).

31. *Re S (a child)(residence order: condition)* [2001] EWCA Civ 847 concerned a child with Down's Syndrome. The mother, who had cared for the child throughout her life, began a new relationship and planned to relocate to Cornwall with her new partner and the child. That would have reduced the father's contact and he opposed the plan as not in the child's interests, although he was not seeking a residence order himself. The judge made a residence order in favour of the mother with a condition that the child continue to reside in a particular London borough. On the mother's appeal, Thorpe LJ inferred from the absence of an equivalent to section 13(1)(b) in relation to relocation within the UK that "within the UK the court will not ordinarily seek to dictate the primary carer's place of residence" (paragraph 15 ibid). He saw two good reasons why it was important not to impose restrictions on the freedom of the child's primary carer to choose their preferred way of family life and their preferred place of residence, describing them as follows:

> "The first is that often the notion of such restrictions are [sic] simply contrary to good sense and, secondly, because the imposition of restrictions is likely to have an adverse effect on the welfare of the children indirectly through the emotional and psychological disturbance caused to the primary carer by denial of the freedom to exercise reasonable choice."

32. Thorpe LJ went on to address what Butler-Sloss LJ had said, in the passage from paragraph 20 of *Re E*, which I have quoted above, about exceptional cases. He said of it:

> "[24] I am in no doubt that, in defining the possibility of exception, Butler-Sloss LJ was guarding against the danger of never saying never in family law litigation. The whole tenor of her judgment is plain to me, in that she was giving the clearest guide to courts of trial that, whereas it was not safe to say never in cases in which the imposition of such a condition would be justified, it would be *highly exceptional* and probably restricted to a case, as yet unforeseen and may be difficult to foresee, in which the ability of the primary carer to perform to a satisfactory level required the buttress of a section 11(7) order." [my emphasis]

33. Clarke LJ (as he then was) said that a condition should only be imposed "in genuinely exceptional cases" (paragraph 35). He said in paragraph 37 that in his view, "no case will be an exceptional case unless the absence of such a condition would be incompatible with the welfare of the child".

34. In terms of the distinction between internal and external relocation cases, Thorpe LJ referred to *Payne v Payne* and, differing slightly from what Butler-Sloss LJ had said in *Re E*, said (paragraph 17) that it seemed to him to be necessary to have "some consistency" between that line of authority and cases where the judge was considering imposing a condition pursuant to section 11(7), although (paragraph 18) he thought that the tests applied to section 13 cases "must inevitably be more stringent than the tests applied to the primary carer seeking a purely local relocation". Clarke LJ broadly agreed with this.

35. The case (*Re S*) was remitted for a further hearing because, in addition to failing to look at the matter in the round and to take account of the impact on the mother's feelings (and, through her, the impact on the child) of preventing her from pursuing her plan, the judge had mistakenly striven for some sort of ideal over and above the rival proposals of the available carers for the child, to be achieved by the imposition of a condition as to place of residence. Thorpe LJ thought that that approach could lead to "quite unsustainable restrictions on ordinary adult liberties".

36. At the further hearing in the county court, the same condition as to the mother's residence was imposed and the mother appealed again, to a differently constituted court, the decision being reported as *Re S (a child)(residence order: condition)(No 2)* [2002] EWCA Civ 1795 [2003] 1 FCR 138. The appeal did not succeed this time.

37. Dame Elizabeth Butler-Sloss, by now the President of the Family Division, said at paragraph 14 that her judgment in *Re E*:

> "appears to have been read in later cases as creating, in effect, a total bar on the imposition of conditions unless there are doubts about the suitability of the primary carer or for some other reason it is necessary to keep some control on the resident parent."

38. This was not what she had intended as she explained in paragraph 17 where she said:

> "the general principle is clear that a suitable parent entrusted with the primary care of a child by way of a residence order should be able to choose where he/she will live and with whom. It will be most unusual for a court to interfere with that general right of the primary carer. There will however be exceptional circumstances in which conditions will have, in order to protect the best interests of the child, to be imposed albeit those conditions will interfere with the general right to choose where to live within the United Kingdom. I did not intend in my judgment in *re E* to exclude the possibility that an exceptional case might arise in which a parent against whom there is no complaint might nonetheless have to face some restriction of movement. Section 11(7) provides a safety net to allow for the exercise of discretion under the provisions of section 1 where the paramountcy of the welfare of the child exceptionally requires the court to impose restrictions upon the primary carer which otherwise would be unacceptable."

39. At paragraph 23, she said that "[a]n exceptional case means truly exceptional and there will be few of them". Laws LJ stressed, however, that the categories of what was exceptional were not closed (paragraph 37).

40. Between the two trips of *Re S* to the Court of Appeal, there had been *Re H (Children)(Residence Order: Condition)* [2001] EWCA Civ 1338 [2001] 2 FLR 1277. The children there were in the care of the father who wished to return to Northern Ireland from where both parents came. He was prohibited from doing so. On appeal, Thorpe LJ drew upon *Re S* [2001] for the proper approach to the case, which, as can be seen from paragraph 20, he took to mean that a primary carer had freer movement within the United Kingdom than when seeking to move outside it, although he said in paragraph 19:

> "In making its decision the court must always apply the welfare test as paramount, whether the relocation is internal or external."

and at the end of paragraph 20 said:

> "All that the court can do is to remember that in each and every case the decision must rest on the paramount principle of child welfare."

41. *E v E (Shared Residence: Financial Relief: Yardstick of Equality)* [2006] EWCA Civ 843, [2006] 2 FLR 1228, involved a proposal by a mother with a shared residence order to move with the children from Bognor Regis to Bexhill-on-Sea. The Court of Appeal found that the judge had accepted the mother's proposal to move without any proper analysis of its consequences for the children and failed to decide, as he should have done, what was in the children's best interests. The case is interesting for the analogy drawn by the Court of Appeal with the *Payne v Payne* line of authorities, notwithstanding that this was a domestic relocation case, and for its clear focus on the best interests of the children as the determining factor. Wall LJ said (at paragraph 32):

> "The function of the court is to decide whether or not the relocation is in the best interests of the children. In that context, the judge's duty is to subject the mother's relocation proposals to rigorous scrutiny, and (assuming the mother to be acting bona fide) to balance their benefits for the children, and the effect on the mother of refusing her application, against the effect on the children of the disruption of their relationship with their father. The fact that the mother does not need the formal leave of the court to move to Bexhill is beside the point. If it was doubtful as to whether it was in the interests of the children to move to Bexhill, the court would need to consider whether it would be preferable to attach a condition to any continued residence order, shared or otherwise, in favour of the mother that they should continue to reside with her in Bognor or indeed to invest their sole residence in the father."

42. The next case chronologically is *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055 [2008] 1 FLR 613. There, the mother was prevented by a prohibited steps order

from transferring the child's residence to Northern Ireland. The Recorder had been referred to the other Northern Irish case, *Re H* [2001] (supra). In the Court of Appeal (in *Re B*), Thorpe LJ said that he did not think, on reflection, that his judgment in *Re H* had sufficiently reflected that the imposition of a condition on a residence order restricting the primary carer's right to choose his or her place of residence is a "truly exceptional order" and regretted that the Recorder had not had his attention directed to *Re E*. He endorsed (paragraph 9) the following treatment of the topic in a book by Professor Lowe as to which he said:

> "[Professor Lowe], at page 90, considers movement of children within the United Kingdom, and reviewing the cases, concludes that a primary carer faced with an application for a prohibited steps order or the imposition of conditions on a residence order, will not, save in an exceptional case, be restrained by the court, because for the court so to do would be an unsustainable restriction on adult liberties and would be likely to have an adverse effect on the welfare of the child by denying the primary carer reasonable freedom of choice. Professor Lowe takes that proposition from the decision in Re: E and in paragraph 6.4 he states:
>
> > "The correct approach, therefore, is to look at the issue of where the children will live as one of the relevant factors in the context of the cross-applications for residence, and not as a separate issue divorced from the question of residence. If the case is finely balanced between the respective advantages and disadvantages of the parents, the proposals put forward by each parent will assume considerable importance. If one parent's plan is to remove the children against their wishes to a part of the country less suitable for them, it is an important factor to be taken into account by the court and might persuade the court in some cases to make a residence order in favour of the other parent."
>
> He then considers what might constitute an exceptional case and in particular refers to the decision of this court in *Re: S (A Child) (Residence Order Condition*) [2001] 3 FCR 154."

43. That brings me to *Re L* (supra), the case in which Wall LJ reviewed the authorities on internal relocation. The mother was seeking to move from London to Somerset. The judge had distinguished earlier authorities on the basis that he was dealing with a shared residence order and the Court of Appeal held that this was an error because it was wrong in principle to apply different criteria to the question of internal relocation simply because there was a shared residence order.

44. Having reviewed the authorities, Wall LJ endorsed passages from *Re E* and *Re B* (supra) which referred to the imposition of a condition on a residence order being exceptional or truly exceptional and which included the endorsement of the passage from Professor Lowe's book which I have set out above. Having rejected the idea that

different principles should apply to a question of internal relocation simply because there is a shared residence order, Wall LJ said (paragraph 36):

> "In each case what the court has to do is to examine the underlying factual matrix, and to decide in all the circumstances of the case whether or not it is in the child's interest to relocate with the parent who wishes to move."

45. Later he said (paragraph 51):

> "For the reasons which I have given in paragraph 36 above, the correct approach, in my view, is not to distinguish the case but to look at the underlying factual substratum in welfare terms, bearing in mind the tension which may well exist between the freedom to relocate which any parent must enjoy against the welfare of the child which may militate against relocation. In my judgment it is this balance which is critical…."

46. I come thus to *Re F*, the Orkney case (supra). The application before the court was the mother's application for a specific issue order determining whether she might take the children to reside with her in the Orkneys. Wilson LJ referred, at paragraph 24, to the early statement, in *Re E*, that the principles on leave to remove permanently from the jurisdiction have no application to conditions proposed pursuant to section 11(7). Was it, he asked, so obvious that there should be a complete dichotomy between the principles applicable to the two types of determination? He remarked that in the first *Re S* decision (supra), Thorpe LJ and Clarke LJ had both observed that it was desirable to have some consistency between the two sets of principles. He quoted from paragraph 20 of Thorpe LJ's judgment in *Re H* which I have cited above and suggested that what Thorpe LJ said showed that he found it difficult to rationalise the application of a different test depending on whether the application was to relocate to Belfast or to Dublin. He went on (paragraph 24):

> "I do not mean to suggest, particularly in the light of the current controversy surrounding the aptness of the principles which have been developed in this court in relation to the determination of applications in respect of external relocation, that, as they stand, they should -- or can -- be applied to cases of internal relocation. Nevertheless, even if, for example, the effect upon the aspiring parent, and thus indirectly upon the child, of a refusal of permission to remove was one day to be considered to have been afforded too great an emphasis in our principles governing external relocation, I would expect our principles governing internal relocation to allow at any rate for some weight to be attributed to that factor. Indeed in that regard I note that in *Re L* above Wall LJ, at [56], expressly accepted that the effect on the aspiring parent of the refusal of permission to effect an internal relocation would be likely to be relevant."

47. At paragraph 25, Wilson LJ turned to what he described as the "early insinuation into the principles governing internal relocation of a test of exceptionality". It is worth quoting what he said on the subject in full:

> "The development of the case law in this regard offers an interesting insight into the way in which law is made, perhaps not always satisfactorily. No one could quarrel with a proposition that it would rarely be in the interests of a child for the residential parent to be prevented from moving home with the child within the UK. The way in which, in *Re E* above, Butler-Sloss LJ chose to express that proposition was to turn it round and to say, at 642D, that "there may be exceptional cases" which justified refusal. Thus were the seeds of a new test sown. In the first of the decisions in *Re S* above, Thorpe LJ, at [24], described the cases in which refusal would be legitimate as "highly exceptional" and Clarke LJ, at [35], described them as "genuinely exceptional". By the time of this court's second decision in relation to S, namely *Re S (a child) (residence order: condition) (No 2)* [2002] EWCA Civ 1795, [2003] 1 FCR 138, exceptionality had become part of "the principle". For Butler-Sloss LJ, at [9][ii], referred to: "…the principle enunciated in *Re E*…that the court ought not in other than exceptional circumstances to impose a condition on a residence order to a primary carer who is providing entirely appropriate care for the child".
>
> 26. In two entirely different contexts I have previously had occasion to refer to the danger that a decision-maker's attempt to explain his decision in terms which include reference to exceptionality gives rise to the subsequent elevation of a concept of exceptionality as the governing criterion: see *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946, at [19], and *Haringey Independent Appeal Panel v R (M)* [2010] EWCA Civ 1103, at [29]. It is too late for it to be permissible for this court to rule that, in internal relocation cases, the analysis of the child's welfare, informed by consideration of the matters specified in section 1(3) of the Act, should not be conducted through the prism of whether the circumstances are exceptional. The recorder thus rightly asked himself whether the circumstances were exceptional; his answer was that they were; and the main thrust of the appeal is that he was plainly wrong so to have concluded. But, for the reasons given, I believe that, had I not felt bound by authority, I might have wished to suggest that a test of exceptionality was an impermissible gloss on the enquiry mandated by section 1(1) and (3) of the Act."

48. The Court of Appeal was once again occupied with the subject of internal relocation in *Re S (a child)(residence order: internal relocation)* [2012] EWCA Civ 1031 [2012] 3 FCR 153. In that case, the mother wished to move with the child from London to

Norwich whereas the father sought a shared residence order with an equal division of the child's time. The judge made a residence order in favour of the mother, providing for generous contact for the father but permitting the mother to move as she wished. The judge's decision was not a pure consideration of whether relocation should be permitted because she was determining that issue in the context of the father's rival application for a shared residence order. Her approach was to determine the case "on the straightforward basis of the paramountcy of the welfare test", see paragraph 64 of the judgment of Sir Mark Potter on appeal. She did not proceed on the basis that the mother should only be prevented from relocating in exceptional circumstances. Accordingly, she took an approach that was as favourable as it could be to the father. He lost because the facts as found by the judge led her to the view, supported on appeal, that the child's best interests would be served by the orders sought by the mother. In the circumstances, this was not the case in which to have a debate about the proper approach to domestic relocation cases in the aftermath of *K v K*, see paragraph 82 of the Court of Appeal decision.

49. The final case at which I need to look is *Re M (a child)* [2014] EWCA Civ 1755. The judge at first instance had ordered that the child be returned from Newcastle where he was living with the mother to live with his father in London. The mother argued on appeal that this had been done in the expectation that she would move to London and that it was, in reality, an impermissible condition on the joint shared care arrangements. McFarlane LJ looked at the authorities on internal relocation up to and including the second *Re S*, which was in 2002, (but not including Re H [2001]). From these, he said (paragraph 31) that it was plain to him that "it remains an exception for the court to consider imposing a condition as part of a section 8 order on parents as to where they live within the United Kingdom and, in particular, within England and Wales". He said (paragraphs 51 and 60) that an order that required the mother to move from Newcastle, went beyond what the law can require, save in exceptional circumstances, which did not exist in that case. That, together with considerable other criticisms of the judge's judgment, led to the order being overturned. Judging by the limited number of authorities referred to in McFarlane LJ's judgment, it seems that there was no particular argument in front of the Court of Appeal on this occasion about the proper approach to internal relocation cases and as to whether it needed to be reviewed in the light of developments in the law. It also seems likely that the citation of authority was far from complete. In the circumstances, the decision does not, in my view, add significantly to the jurisprudence.

50. It is now necessary to consider how the law stands in the light of the authorities I have just set out. A helpful place to start is with Wilson LJ's observations in the Orkney case about the "insinuation into the principles governing internal relocation of a test of exceptionality". His analysis of how "exceptionality" had started to be seen as a principle is compelling. However, I am not persuaded that it ever did become a principle, as such. The situation seems to me to have been very like that which developed in relation to external relocation, with the guidance provided in *Payne v Payne* being taken to be binding legal principle when, in fact, as *K v K* identified, the only authentic principle running through the entire line of external relocation cases was that the welfare of the child was the court's paramount consideration. When one goes back over the authorities on internal relocation, I think it is clear that the same has happened there.

51. There is no doubt that it is the welfare principle in section 1(1) of the Act which dictates the result in internal relocation cases, just as it is now acknowledged that it does in external relocation cases. It is difficult to see any room in the statutory scheme for the outcome to be dictated by other, different, principles. And when one goes back over the internal relocation cases, it is clear that one of the main influences behind the exceptionality "test" was always the welfare of the child. The protection of the freedom of the adults to choose where they would live within the United Kingdom was, of course, another significant influence, but the "exceptional cases" where that would be restricted were those where the welfare of the child required it.

52. In *Re E*, it was contemplated that the welfare of the child might require the adult's freedom to be restricted because of concerns about the competence of the parent. In *Re S* [2001], Thorpe LJ explained the reluctance to place restrictions on the freedom of the child's primary carer to choose where to live in welfare terms, remarking that such restrictions were likely to have an adverse effect on the children indirectly through the impact on the primary carer, but he also subscribed to the notion that restriction might be necessary where the ability of the primary carer to give satisfactory care to the child was in doubt. Clarke LJ expressed himself very clearly in welfare terms in that case, when he said that "no case will be an exceptional case unless the absence of such a condition would be incompatible with the welfare of the child", which could be loosely recast, I suppose, as "unless the welfare of the child requires the parent to be constrained to live in a particular place". It was in much the same terms that Dame Elizabeth Butler-Sloss P expressed herself in *Re S (No 2)* when she said that her earlier judgment had been read too narrowly and that there would be "exceptional circumstances in which conditions will have, in order to protect the best interests of the child, to be imposed" even where there was no complaint against the parent whose movement would be restricted. As she said, "[s]ection 11(7) provides a safety net to allow for the exercise of discretion under the provisions of section 1 where the paramountcy of the welfare of the child exceptionally requires" restrictions on the primary carer. In *Re H* [2001], Thorpe LJ said that in making its decision, the court "must always apply the welfare test as paramount, whether the relocation is internal or external", albeit that he later wished, in *Re B*, to emphasise that a restriction was "truly exceptional". In *E v E (Shared Residence: Financial Relief: Yardstick of Equality)*, Wall LJ said that the function of the court was "to decide whether or not the relocation is in the best interests of the children". In *Re L*, where he carried out his review of the authorities, although endorsing passages from them which referred to conditions being exceptional, he said that in each case what the court had to do was to examine the underlying factual matrix and decide in all the circumstances whether it was in the child's interest to relocate, bearing in mind the tension that may well exist between the parent's freedom to relocate and the welfare of the child which may militate against it.

53. Given the central thread of welfare that runs through all these authorities, and with the reasoning in *K v K* very much in mind, I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases. It is no doubt the case, as a matter of fact, that courts will be resistant to preventing a parent from exercising his or her choice as to where to live in the United Kingdom unless the child's welfare requires it, but that is not because of a rule that such a move can only be prevented in exceptional cases. It is because the welfare analysis leads to that conclusion. One can see from the authorities, and indeed from this case, that the

courts are much pre-occupied in relocation cases, whether internal or external, with the practicalities of the child spending time with the other parent or, putting it another way, with seeing if there is a way in which the move can be made to work, thus looking after the interests not only of the child but also of both of his or her parents. Only where it cannot, and the child's welfare requires that the move is prevented, does that happen.

54. Once welfare has been identified as the governing principle in internal relocation cases, there is no reason to differentiate between those cases and external relocation cases. In my view, the approach set out in *K v K, Re F (Relocation)* [2012] and *Re F* [2015] should apply equally to internal relocation cases. Clearly, however, the outcome of that approach will depend entirely on the facts of the individual case. At one end of the spectrum, it is not to be expected, for instance, that the court will be likely to impose restrictions on a parent who wishes to move to the next village, or even the next town or some distance across the county, and a parent seeking such a restriction may well get short shrift. At the other end of the spectrum, cases in which a parent wishes to relocate across the world, for example returning to their original home and to their family in Australia or New Zealand, are some of the hardest cases which the courts have to try and require great sensitivity and the utmost care.

55. Before I leave the law, I want to venture a few words on the subject of proportionality. Ryder LJ raised this issue at paragraph 31 of *Re F* [2015] as follows:

> "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)"

56. Ryder LJ went on to say, at paragraph 32, 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."

57. The present appeal has caused me to consider how a proportionality evaluation would actually work in the context of a relocation case. We are now entirely familiar with the role of proportionality in relation to public law children proceedings, see particularly *In the matter of Re B (Care Order: Proportionality: Criterion for Review)* [2013] UKSC 33, [2013] 2 FLR 1075. Its impact is upon whether the court sanctions an interference in family life by the state in the guise of the local authority. Interference will not be permitted if it would violate the rights of the child or parents to respect for their family life under Article 8 of the ECHR. Proportionality also has a well established role in contact disputes where, as can be seen notably in *Re A (Intractable Contact Dispute: Human Rights Violations)* [2013] EWCA Civ 1104, [2014] 1 FLR 1185 the court can have an obligation to ensure that appropriate steps are taken to enable the family tie between parent and child to be maintained. It is not difficult to see how Article 8 influences the outcome in that situation – the court has to strive harder.

58. However, the situation in a relocation case is more problematic. Often, whichever way the decision goes, there will be an interference with the Article 8 rights of a parent. If the father is allowed to take the child to live at the other end of the country, there may be interference with the mother's Article 8 right. If, on the contrary, he is refused permission to move, there may be interference with his Article 8 right. Both parents may be disinclined to back off and middle courses are not often easy to find in these problematic cases. As Ryder LJ implies, the problems may be worse in the international context – Australia is more difficult than another town in the United Kingdom – but even moves within the United Kingdom can be seriously disruptive of established arrangements. Left with a significant interference with Article 8 rights whichever way one turns, what can the court do? What should it do?

59. *Nazarenko v Russia (Application No 39438/13)* [2015] 2 FLR 728 was put before us as a recent example of the approach of the ECtHR to balancing the rights of parents and children. At paragraph 63, the Court put it this way:

> "Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, primary importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII, and *Płaza v. Poland*, no. 18830/07, § 71, 25 January 2011)."

60. Nobody has suggested that section 1 of the Act (the welfare principle and the welfare checklist) is incompatible with the Strasbourg jurisprudence and, when one looks at the way in which relocation cases are approached in the courts of England and Wales, it seems to me it is an approach which is broadly in line with what is expected by the ECtHR. The interests of the parents are not ignored but, if it is not possible to accommodate everyone's wishes, the best interests of the child dictate the outcome.

61. Mr Hale QC, for the father, originally suggested in argument that first the court has to carry out its comprehensive analysis of the welfare considerations and reach a conclusion, then that conclusion must be subjected to a cross-check by considering whether such interference with the Article 8 rights of the parties as it involves is proportionate. I have struggled with how that could be made to work in practical, real life, terms. If the cross-check produced the same result as the welfare analysis, it would be unproblematic but not very useful except as reassurance. If it produced a different result, that result could only have an impact on the outcome of the case if the provisions of section 1 of the Act were to be ignored. I am afraid that there also seems to me to be a real danger of the parties and the court getting so tangled up in the strands of the two separate exercises that they lose sight of what really matters for the child. All in all, therefore, in my view, matters should be approached as an analysis of the best interests of the child, whether the relocation is internal or external. Given the potential for the impact of the decision on the parents to affect the child as well, this necessarily involves a careful examination of the parents' wishes and their interests.

The judge's approach to the law here

62. One of the grounds of appeal was that the Recorder erred in his overall approach to the case, wrongly placing significant reliance on the guidance in *Payne v Payne* (supra) and treating the mother as the child's primary carer. I do not accept this criticism as valid. The Recorder's approach to his decision seems to me to have been in line with the law. He did not focus solely on *Payne* as the judge did in *Re F* [2015], nor did he concentrate only upon the "discipline" there set out. Certainly he referred to the factors identified in *Payne*, but that is perfectly permissible where a judge finds it of assistance as part of his marshalling and/or analysis of the evidence before determining what the child's best interests require, see *K v K, Re F (Relocation)*, and *Re F* [2015]. He also paid careful attention to the welfare checklist which he thought provided significant assistance, particularly as this was a finely balanced case. In the light of all the material assembled, he took his decision on the basis of what C's best interests demanded, as is quite clear from the judgment read as a whole, and explicit in the final sentence of paragraph 45 of it. I will deal with the question of whether the Recorder treated the mother as the primary carer in the next section.

The other grounds of appeal

63. The father's argument was that, in conjunction with wrongly treating the mother as C's primary carer, the Recorder elevated her likely reaction to the refusal of her application beyond other relevant factors, also failing to have proper regard to the crucial role that the father has in C's life.

64. I do not consider that the Recorder treated the mother as C's "primary carer" or elevated her in any way to a privileged position when it came to considering what was appropriate for C. Nor do I consider that he ignored the importance of C's relationship with the father. The judgment, read as a whole, concentrates not upon labels but upon the practical day to day arrangements for C. The Recorder expressly recognised (paragraph 10 of the judgment) the need to look at "the reality of the situation and the precise factual basis rather than wondering what the correct title is". His approach, as can be seen encapsulated in paragraph 12, was to search for what was in C's best interests in the light of the welfare checklist, including looking at the impact of the proposals on *both* parents. Paragraph 12 reads:

> "It follows that I have to decide what the outcome is in C's best interests in the light of the checklist as a whole, but the impact of the move, or the impact of retaining the status quo, on both parents is a very important factor."

65. The Recorder did look at features mentioned in Thorpe LJ's guidance in *Payne* but only as part of his overall evaluation of the case, looking at the reasons behind each parent's point of view. He did not only consider the impact upon the mother (and thereby C) if she was not permitted to move, but also considered how the father might feel in either of the two possible scenarios. This appears, for example, from paragraph 30 where he recognised that the father would be upset by the change but did not consider that his feelings would impinge on C, and from paragraph 45 where he returned to his assessment of the likely impact on both parents.

66. As for the father's relationship with C, the importance of that was fully recognised by the Recorder. It features at intervals throughout the judgment. At paragraph 18, dealing with the CAFCASS officer's evidence, the Recorder identified two points (actually two sides of one coin) in favour of keeping the status quo. One was that the relationship with the father was highly beneficial in that it was as much of a full-time relationship as there can be where parents are separated, which was very much in C's interests. The other was that, in the view of the CAFCASS officer, removal from the father would have an emotionally damaging effect on C. Although the Recorder differed from the CAFCASS officer in respect of likely harm, he did not disregard the importance of the relationship with the father. At paragraph 20, for instance, he expressly recognised it, albeit that he then went on to consider, as he was entitled to do, what he thought to be negative aspects of the current arrangement. In paragraph 25, he accepted that C's relationship with the father was "more than satisfactory", describing it as "very good", but explaining that rather than this leading to an embargo on the mother's move, he thought it was sufficiently well established to withstand a change in the quantum of contact without deleterious effect. He returned to this again in paragraph 41.

67. The father criticised the Recorder's treatment of his proposal with regard to the purchase of property in Cumbria. Mr Hale's submission was that the father's offer went beyond anything that could be achieved by the mother in Schedule 1 proceedings and could not properly be described by the Recorder as "speculative". He argued that the Recorder confused the father's financial proposals and failed to take account of the mother's evidence that she planned to buy the property she had chosen in Cumbria whatever the outcome of her application, and that her parents had undertaken to make up the shortfall if absolutely necessary.

68. The father's proposals are to be found in a letter of 26 January 2015 from his solicitors to the mother. It is important to look at the detail of them as there were considerable strings attached. The offer involved the father assisting in the purchase of the Cumbrian property by providing the mother with 40% of the price, the value of that to be left by the mother on trust for C on her death. In relation to the mother's London living arrangements, the father proposed that he would rent out the existing flat and "you will then be able to apply the net rental income received … to rent alternative accommodation for you and C, again of your own choosing but in reasonably close proximity to your current home". This arrangement was offered on

the basis that it would be in settlement of all property based claims under Schedule 1 of the Children Act.

69. It will be immediately appreciated that the offer in relation to the mother's London living arrangements was highly unlikely to be an improvement on her present position. It required her to stay reasonably proximate to the current flat and she would have to find something at a rent significantly less than the rental value of the flat because she would have at her disposal only the rent on that flat *less tax*. She would have to keep up her share of what it cost to live in London, in whatever accommodation she obtained, plus defraying the cost of the Cumbrian property including a mortgage. Furthermore, the offer did not deal with the period after C reached 18, and the price of acceptance was relinquishing property based Schedule 1 claims. All in all, the Recorder was entitled not to see this as a realistic way of saving the status quo.

70. The Recorder was also said to have departed from the recommendations of the CAFCASS officer without cogent reasons so to do and without giving sufficient weight to what she had said. Furthermore, Mr Hale submitted that it was incumbent on the Recorder expressly to invite the officer's comment on his reservations about her analysis before he could depart from it. The Recorder was particularly criticised for his comment, à propos of his disagreement with the CAFCASS officer, that "[t]he arguments relate to the future and views as to the future are usually a matter of judgment", which he said meant that he should "give great weight to the views of [the officer], but in the last resort I have to reach my own conclusions".

71. I am not at all persuaded by the suggestion that the Recorder had to put his own thoughts to the CAFCASS officer before he could deploy them as part of his evaluation of the case. For a start, in this case, as in many cases, it would have been impractical for him to have done so. The CAFCASS officer gave her evidence at the start of the case, at which stage, whilst he may have had some provisional thoughts, the Recorder had still not heard oral evidence from the parents and could hardly be expected to have had his ideas formulated to the extent that he could seek the officer's views about them. Indeed, had he done so, he might have been open to a rather different criticism, namely that he had prejudged the case. It can sometimes be helpful for a judge to discuss with a CAFCASS officer or other expert some of the factors upon which he may put weight, particularly if they are not otherwise covered in the evidence, but it all depends on the circumstances and it is very far from being a rule that this has to happen.

72. I am not persuaded either that the judge failed to give cogent reasons for disagreeing with the officer or erred in his approach to her evidence in any other way. Mr Hale is, of course, right that it was a central part of the officer's task to assess the future risk of the options available for C. She brought to that task her particular expertise. But the judge was not *bound* to accept what she said, as the authorities clearly establish. He had his own role in the proceedings and he was right that it was ultimately for him to determine what risks there were, just as it was for him to consider all the other elements of the welfare checklist and to determine, based on all the evidence that he received, what was in C's best interests. The CAFCASS officer adjudged the matter to be very finely balanced. She thought from her investigations that the balance tipped one way and the Recorder, having heard all the evidence, thought it tipped the other. It can be seen from the judgment that he had a number of reasons for reaching that

view and it does not seem to me that these have been significantly undermined on appeal. I will not deal with every last point that was raised in this respect but will pick out some of the more prominent ones.

73. The Recorder did not entirely agree with the officer's view about how realistic C was in her view of the future. For the reasons he set out in paragraph 30, and which I find cogent, he thought she did realise what the future held. He thought that C would be upset by not being able to move as she wishes; this was not much of a step from the CAFCASS officer's view that it would be "disappointing" for C. Looking at the case as a whole, and taking into account the strength of C's relationship with the father, which he thought would withstand the distance, the Recorder concluded that the harm that the upset of not being able to move would cause would be more than the harm flowing from the father's lack of propinquity. That is just the sort of balance that a judge hearing a case such as this has to strike and I am not persuaded that the Recorder erred in either the factors that he put into the balance or the weight that he gave to them.

74. Mr Hale put some weight on the way in which the Recorder dealt with the schooling issue. He suggested that there was no evidence on which the Recorder could reach the conclusions that he did about the sort of pupils at each school. This is to ignore the mother's evidence. She said in her statement, for example, that there was a distinct lack of social mix in the area and at the school and that C was "surrounded by staggering privilege", and that her (C's) friends were "international" with no permanent roots here and tended to move on. She also observed that the school was not geared to working mothers and she thought only one mother had a full time job. The CAFCASS officer said in evidence that C told her that she finds an all-girl school a bit much (although the officer had not got the impression she was unhappy in her life in London).

75. Mr Hale also criticised the Recorder's approach to the London flat and criticised him for accepting that the father exercised control and put his own interests before C's. At the heart of this criticism was the assertion that the mother chose the flat herself, the father having made proper provision for the housing and maintenance of his daughter and provided for her emotionally as well. I do not consider that the Recorder has been demonstrated to have erred in his finding about control. The Recorder's particular concern was with the father's stipulation that C and the mother should live near him, which had limited the choice of properties for the mother because of the cost, and it is notable that there is a similar stipulation as to area in the offer that the father made in January 2015. In addition, the CAFCASS officer's assessment at least lent support to the proposition that the mother found the father controlling.

76. It was also argued that the Recorder was wrong to conclude that there were negative aspects to the current weekday regime. On the contrary, the father argued, C was doing well at school. In so far as the Recorder took C's lateness at school as evidence of a problem with the midweek arrangements, he misunderstood the import of this, it was said, because in fact it justified an extension of the father's weekends so that C went to school from his house on Mondays, which is when most of the lateness occurred. Once again, the Recorder was taken to task for not having accepted the view of the CAFCASS officer who was "not convinced by [the mother's] assertion that the current arrangement for C to spend time with her father during the week is not beneficial to C" (paragraph 37 of the CAFCASS report).

77. Mr Hale criticised the Recorder for proceeding on his own personal views rather than on the evidence when he spoke about two homes becoming less practical for children as they get older and joint parenting only working where both parents are positive. Anyway, he submitted, the Recorder was wrong to think that these parents would not cooperate if permission to relocate were to be refused.

78. None of these criticisms about the Recorder's assessment of the midweek regime and the likely situation if the mother were not to be able to move survive a careful look at the evidence available to the Recorder and a reading of the judgment as a whole. The lateness at school point was not a big one in the overall reasoning for the Recorder's decision. He was entitled to make of it what he did, in my view. There *was* evidence to support his views about the practicality of two homes. The mother's evidence was that there was difficulty. There was also material evidence from the CAFCASS officer. At the end of her oral evidence, as can be seen from the transcript, the Recorder asked her about the mother's view that as C got older, the split week became more difficult. The officer's response was that it "does get harder … to manage", though she thought it could work "if both parents are willing to make it work". Almost the final words spoken by the officer, in answer this time to Mr Hale, were, "I think the judge makes a very good point as well, that all of it gets harder as the child reaches adolescence and they get their own views about what they want to do, but, if it has been established, I think that it can be of benefit to the child". As to cooperation if permission were to be refused, it was a matter for the Recorder, having seen the parents give evidence, to assess the likely impact on the mother of a refusal to let her move and the effect, in turn, upon the arrangements between the parents; there is no reason for this court to interfere with his conclusions about that. He thought the mother would be loyal to any order he made but her relationship with the father would be less positive if there was no move and she may find it more difficult to make the effort involved in making the current arrangements work.

79. Mr Hale argued that the Recorder failed to have regard to the impact on C of two changes of school in two years at a critical point in her school career and involving also a move from a single sex school to a co-educational school. However, the CAFCASS officer did not appear to be concerned about this, explaining in her oral evidence that her primary concern was around the impact upon C of the change in her relationship with the father. Schooling was part of the Recorder's analysis but only part and I do not think that he can be said to have made any significant error in his approach to it.

80. In short, despite Mr Hale's rigorous scrutiny of the Recorder's judgment, I am not persuaded that it has been demonstrated that it is flawed in any material way, whether in relation to his application of the law or his treatment of the facts. I would therefore dismiss the appeal.

Lord Justice Vos:

81. I agree entirely with Black LJ's careful and compelling analysis, and I too would dismiss this appeal for the reasons she has given.

82. I add a few words in an attempt to summarise the position that has now been reached. As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the

child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

83. One of the most difficult aspects of this case has been to establish in the light of previous authority what use, if any, should be made in the process we have just described of the 4 "disciplines" identified by Thorpe LJ at paragraph 40 of his judgment in *Payne v. Payne* ([2001] EWCA Civ 166, [2001] 1 FLR 1052) (the "*Payne* factors"). In my judgment, one of the valid concerns about the *Payne* factors is that they do not adequately reflect the gender-neutral approach to these problems that the court will now adopt in every case. Whilst the *Payne* factors may still be of some utility in some cases, they are no part of the applicable test or the applicable principles. In some circumstances, the judge may find them useful. In others, the judge may not. If the judge finds them a useful guide to some of the factors that he should consider, he will be doing so only as part of the multi-factorial balancing exercise that is required.

84. Another difficult aspect of the case concerned the way in which the parents' rights under article 8 of the ECHR should be factored in to this exercise. In my judgment, parents who are staying behind will always be able, in some measure, to pray in aid their article 8 rights necessitating a consideration of the proportionality of any proposed interference with those rights. That consideration should be an essential part of the balancing exercise itself and should not be undertaken separately so as to disrupt a joined up decision-making process.

Mr Justice Bodey:

85. I agree that this appeal should be dismissed for the reasons given by Lady Justice Black. Following comprehensive review of the authorities as set out in her judgment, the proper approach to the whole issue of relocation may be stated in summary as follows:

a) There is no difference in basic approach as between external relocation and internal relocation. The decision in either type of case hinges ultimately on the welfare of the child.

b) The wishes, feelings and interests of the parents and the likely impact of the decision on each of them are of great importance, but in the context of evaluating and determining the welfare of the child.

c) In either type of relocation case, external or internal, a Judge is likely to find helpful some or all of the considerations referred to in *Payne v Payne* [2001] 1 FLR 1052; but not as a prescriptive blueprint; rather and merely as a checklist of the sort of factors which will or may need to be weighed in the balance when determining which decision would better serve the welfare of the child.