Journal of Family Law and Practice

Volume 1, Number 1 • May 2010

The Journal of the Centre for
Family Law and Practice
London Metropolitan University

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Volume 1, Number 1 • April 2010

CONTENTS

STUDENT SECTION

LONDON METROPOLITAN UNIVERSITY
CENTRE FOR FAMILY LAW AND PRACTICE
ON LINE JOURNAL

Congratulations to the Centre for Family Law and Practice, and to its co-Directors, Marilyn Freeman and Frances Burton, on the launch of this impressive new Journal. They could hardly have done better than to entice Lord Justice Thorpe, from the world of the courts, and Professor Nigel Lowe, from the world of academia, to contribute two such interesting articles on important topics. The collaboration between law and practice has got off to a flying start, and so has the international element, which no family lawyer can afford to ignore these days.

Family cases have occupied a good deal of the time of the United Kingdom's new Supreme Court since it opened its doors on 1 October 2009. On the international front, we have considered "opting in" to the jurisdiction of the UK courts under article 12 of the Brussels II revised Regulation; financial relief after foreign divorce; and the effect of a pre-nuptial agreement between a French husband and a German wife living here. On the domestic front, we have reinforced the paramountcy of the child's welfare in private law disputes, grappled with the conundrum of the unknown perpetrator in child abuse cases, and reformulated the approach to children giving evidence in cases about their future.

This last was a "first" for the Supreme Court in another way: the Court of Appeal handed down its reserved judgment on 9 February 2010; the Supreme Court gave permission to appeal on 18 February; the hearing took place on 1 and 2 March; and a fully reasoned written judgment was delivered on 3 March. This would have been very difficult to achieve in the House of Lords but was much easier in the Supreme Court. So at least we are better equipped to take seriously the "general principle" that delay is detrimental to the welfare of the child. This Journal will, of course, provide ample opportunity for reflection on whether we, and others in the family justice system, have got things right.

With all good wishes to the Centre and the Journal and everyone who is working so hard for their success,

Brenda Hale

Justice of the Supreme Court of the United Kingdom
Parliament Square
London SW1P 3BD

Welcome to Volume 1 Issue 1 of the Centre's new online journal.

This is the inaugural issue of our new Journal, which is available to read, download and/or print out from the online version, which will remain located on the Centre's website on the freely accessible journal pages.

Future issues of the journal will be relocated into a protected area linked to the Centre's membership scheme which was launched at the 2010 Conference, 30 June to 2 July 2010. Issues 2 and 3 of Volume 1, which will feature articles based on the conference papers in Relocation (issue 2) and International Child Abduction (issue 3) will be available on line by the end of 2010. The smaller number of papers on Forced Marriage will be adapted for issue 4, the first issue of 2011, to be expected in March 2011.

We have found setting up the Centre an exciting experience: we set out to bring together the perspectives of both academe and practice – that is practitioners in all sections of the profession, including the judiciary as well as the referral Bar and their instructing lawyers - and have been astonished at the response from the specialist experts, researchers and practitioners from around the world who have registered to attend our inaugural 2010 conference in the three linked Child Law topics of International Child Abduction, Forced Marriage and Relocation. We hope that our January 2012 conference, which will take the same specialist approach to Property, Finance and Relationships within both national and international perspectives on Family Law, will generate as much interest. We are sure that creating such opportunities to gather together the available corpus of international work on specialist topics in this way is highly beneficial as it promotes such a practical sharing of experiences and creative ideas as is difficult to achieve without a periodic focus on the issues which assail multiple jurisdictions as Family Law develops at the rattling pace which has occurred in the past few years.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

Re I
The Perfect Storm"

Dr Marilyn Freeman*

The author is grateful to the Pro Bono Legal team who represented reunite and The Centre for Family Law and Practice in the Supreme Court in Re I for their assistance in the preparation of this article, namely counsel: Henry Setright QC and Teertha Gupta of 4 Paper Buildings and their instructing solicitor: Anne-Marie Hutchinson OBE of Dawson Cornwell.

Where a child who was once habitually resident in this jurisdiction no longer is so, judicial decisions over his or her welfare may not usually be continued to be exercised by the courts of this, his or her former habitual residence.[1] In cases of lawful relocation from this jurisdiction, where international contact causes such notable difficulties for the families involved[2] , in cases of forced marriage where children are taken on pretext from this jurisdiction by their parents to another country where the intention is to force them to enter into a marriage, in cases where spouses habitually resident in this jurisdiction are abandoned in a foreign jurisdiction and separated from their children who are retained in this jurisdiction, in cases of international child abduction where the 1980 Hague Convention does not apply, the possibility of continuing control by the courts of this country would be an important development in the armoury of child protection.. It would seem, however, that the possibility of the courts playing a continuing role after removal has been closed in all but the most limited of cases[3], within Europe at least, by the coming into effect of the Brussels 11 Revised Regulation (B11R) on 1st March 2005. The reason for this may be found in Article 8 B11R, which sets out the general jurisdiction:

> "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

This provision is subject, however, to Article 9[3] in relation to the short period of continuing jurisdiction for the former State of habitual residence in cases of lawful removal of a child; Article10 in relation to jurisdiction in cases of child abduction where the courts of the Member State of the child's habitual residence will retain jurisdiction unless and until certain specific conditions

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* Professor of Family Law at London Metropolitan University, Co-Director of the Centre for Family Law and Practice.

[1] Article 8 Council Regulation (EC) 2201/2003 of 27November 2003 otherwise known as 'Brussels II Revised' or 'BIIR' concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, usually referred to as Brussels 11 Revised (hereafter Brussels 11R) states that the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. However, Article 9 provides for the limited continuing jurisdiction of the child's former habitual residence. This is where a child moves lawfully from one Member State to another and acquires a new habitual residence there. The courts of the Member State of the child's former habitual residence, by way of exception to Article 8, retain jurisdiction for a period of 3 months for the purpose of modifying a judgment on access rights issued in that Member State before the child moved where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence. This does not apply if the holder of access rights has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.This does not, however, provide for enforcement of the said access order. For a critique on the effectiveness of these provisions, see further (Marilyn)Freeman, Relocation; The rReunite Research, July 2009, at p28 www.reunite.org (hereafter Relocation)

[2] See Freeman, Relocation supra at 14 et seq

[3] See fn 1 supra

[4] See fn 1 supra

[5] See The Family Law Act 1986 as amended by B11R, S2 states:

apply; and Article 12 which deals with prorogation (reserving/retaining) of jurisdiction. Article 12 provides two powers of prorogation of jurisdiction in matters of parental responsibility: one in matrimonial proceedings, the other in non matrimonial proceedings. The provisions governing matrimonial proceedings are in Articles 12.1) and 12.2, and non matrimonial proceedings are in Articles 12.3 and 12.4. Article 12.3 allows for a prorogation of jurisdiction in respect of children who are not habitually resident in the Member State in which the proceedings are brought, provided certain criteria are satisfied, including that the prorogation is in the best interests of the child. Article 12.4 deems this to be the case in specific circumstances.

This was the accepted position in a European case, so that, in a case in which B11R applies, it governs the situation[5] and, other than in the limited circumstances already described, it will be the courts of the child's habitual residence which will have jurisdiction in matters concerning the child's welfare.

However, as stated, this is subject to the provisions on prorogation in Article 12. As this provision is central to the developments which this critique will go on to address, it is set out in full at this stage:

> "Article 12
> 1. The Courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:
> (a) at least one of the spouses has parental responsibility in relation to the child;
> and
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised and is in the superior interests of the child.
> 2. The Jurisdiction conferred in paragraph 1 shall cease as soon as:
> (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
> (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a) a judgment in these proceedings has become final;
> (c) the proceedings referred to in (a) and (b) have come to an end for another reason.
> 3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:
> (a) the child has a substantial connection with that member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State
> and
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.
> 4. Where the child has his or her habitual residence in the territory of a third state which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children,

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"A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless (a) it has jurisdiction under the Council Regulation or (b) the Council Regulation does not apply but –
(i) the question of making the order arises in or in connection
with matrimonial proceedings or civil partnership proceedings
and the condition in section 2A is satisfied, or(ii) the condition in section 3 of this Act is satisfied."
A Section 1(1) (a) order includes a Section 8 Children Act 1989 order, i.e. one that relates to residence, contact, prohibited steps or specific issues concerned with the child. Section 2A relates to continuing matrimonial proceedings between the parties. Section 3 provides for jurisdiction on the basis of the child's habitual residence or physical presence on the date of the application or order

[6] [2009] UKSC 10 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0075_Judgment.pdf

jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third state in question."

Before the instant case came before the courts, the precise scope of Article 12 had not been tested, in particular the meaning of Article 12.4 which, along with the remainder of B11R as noted subsequently by Lord Justice Thorpe (see below), was generally thought to have effect purely as within the States bound by the EU Regulation. What was needed was a case which would give the Supreme Court the opportunity to consider the relevant provisions of B11R in circumstances which would provide the scope for a determination on the issues of continuing jurisdiction[6] and the reach of the provisions. This unique combination of elements came in the form of re I, heard by the Supreme Court on 12th and 13th October 2009, in which Baroness Hale gave the lead judgment on 1st December 2009. It was, indeed, the "perfect storm".

The facts of this case were , in essence, that a couple, who were both British citizens, met and married in Pakistan in 1999. When she became pregnant, the wife returned to England, where she had been born, and sponsored the father's application to join her. The child, Q, was born in England on 27th July 2000. Approximately 18 months later, Q was subject to care proceedings in relation to injuries he had sustained. The father was initially held by the Court to have inflicted the injuries but was subsequently exonerated when the judge found that it was, in fact, the mother who had been responsible. The consultant psychiatrist instructed to prepare two reports for the court recommended that Q should live either with his father, or his paternal family in Pakistan. A residence order was made in favour of the father on 22nd May 2003, with a 12 months supervision order to the local authority and supervised contact to the mother. There was also a contact agreement between the local authority and the father which stated that the local authority would assist in facilitating any move to Pakistan by the father with Q. The mother did not accept the findings against her against which she unsuccessfully appealed. The father then sought leave to remove Q to Pakistan, which was opposed by the mother, but which resulted in leave being granted on 16th September 2004 by Mr. Justice Hedley, subject to an undertaking given by the father to return Q to this jurisdiction when ordered to do so. The father was represented by counsel at that hearing. A contact order was made which provided for supervised visiting contact and weekly telephone contact.

The father moved to Pakistan with Q in December 2004, after which the father returned to England. Q remained in Pakistan with the paternal family. Contact with the mother took place by agreement between the parties and began with weekly telephone contact. The mother visited and stayed with the paternal family in Pakistan in July/August 2005 and March/April 2006, and in summer 2006 Q came to England for 4 weeks, having daily contact with the mother. In summer 2007 Q came to England with the paternal grandmother for a 9 -week visit, staying initially with the mother but, following a quarrel, moved to spend the remainder of the time with the father.

The mother, acting in person, made an application to the English courts in October 2007. Both parties attended the first directions hearing on 5th November 2007 at which they appeared in person. At the adjourned conciliation hearing on 12th December 2007 both parties again appeared in person. This resulted in an agreement for weekly telephone contact with Q when he was in Pakistan, and daily telephone contact when he was in England, as well as defined direct contact arrangements for when Q was in this country. The telephone contact took place but the mother wanted to progress to unsupervised contact and, possibly, to a change of residence and therefore launched another application on 15th April 2008 seeking to "vary and enforce" the contact order. Directions were made which transferred the applications to the High Court, requiring each party to make a statement in relation to issues of jurisdiction and contact. The father did not make such a statement, but the mother made a statement which stated that Q was habitually resident in both countries (i.e. England and Pakistan) and that his centre of interest is in the UK where his parents are and where his father has residency and is habitually resident .[7]

The case came before Mr. Justice Hedley on 17th June 2008 with the parties acting in person. The court held

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[7] Judgment of HHJ Barnett (hereafter B) unreported, see below, adopted and set out in the judgment of Lord Justice Thorpe in the Court of Appeal decision in this case, see fn 12 below. B, Paragraph 15

[8] B, Paragraph 16

that Q was entirely lawfully in Pakistan but that the English court had jurisdiction to hear the case because both parties:

> "..[H]ave not only submitted to the jurisdiction but have actually invoked it on a number of occasions, and so the question of jurisdiction of itself does not present a problem in this case, though the question of enforcement of orders might" .[8]

Q was joined as a party to the proceedings pursuant to rule 9.5 of the FPR 1991 and CAFCASS was invited to appoint a guardian. The father was ordered to bring the child to England in June and July 2009, the child was to have reasonable contact with the mother, and the mother could visit the child in Pakistan. She did do so during 2008 but not afterwards. The CAFCASS guardian expressed a provisional view in January 2009 that the child should visit England every other year, with the mother visiting Pakistan on the alternate years.

The matter returned to the High Court on 2nd March 2009, with both parties being legally represented. The father's counsel filed a position statement which accepted that the English court had retained jurisdiction. However, the father's personal circumstances had changed so that he did not wish to bring the child back to England in 2009 and wanted to set aside Mr. Justice Hedley's order that required him to do so. A directions hearing took place on 12th March 2009 before Mrs. Justice Black who was "..[C]oncerned and exercised by the question of jurisdiction" . [9]

The matter was then heard by His Honour Judge Kevin Barnett sitting as a deputy High Court Judge on 5th and 6th May 2009. He stated that the background circumstances which gave rise to the applications before him were unusual, if not extraordinary.[10] The mother argued that the court had jurisdiction, her counsel relying on the habitual residence of both parents within the jurisdiction of England and Wales, the history of the litigation and the nationality of the child. The father and the guardian ad litem argued that there was no jurisdiction. HHJ Barnett concluded that Q was neither habitually resident nor present in the jurisdiction on any of the relevant dates, nor were there any extant contact orders which might be varied under the exception provided by S1(1) Family Law Act 1986 [11]. He stated that the case was not one where the Council Regulation (meaning B11 R) applies.[12] He also stated that, if the court did have jurisdiction, he would not have granted a stay on the ground of *forum non conveniens*.[13] It was also the view of the CAFCASS guardian that the most appropriate forum to determine these issues was in the English courts as both parents were resident in this jurisdiction. HHJ Barnett also found that the contact order of 16th September 2004 did not purport to define or regulate contact once Q had relocated to Pakistan; it was designed to regulate contact up until Q left the country.[14]

The mother appealed to the Court of Appeal [15] where leading counsel[16] advanced her argument that jurisdiction did exist in the English court, based on an issue which was not heard in the lower court, which was that B11R has effect not only within Europe, but also globally, through the application in Article 12.4 to "a third State". Article 61, the only other place in B11R which speaks of a "third State",[17] was also said to be supportive of this interpretation.[18] The Court of Appeal addressed

[9] B, Paragraph 19

[10] B, Paragraph 4

[11] Family Law Act 1986 1 Orders to which Part I applies:

(1)Subject to the following provisions of this section, in this Part a "Part I order" (get rid of this blue) means—

(a)a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order]

[12] Per Thorpe LJ, Paragraph 8 Court of Appeal judgement, [2009] EWCA Civ 965 (hereafter Thorpe).

[13] Thorpe, Paragraph 9

[14] B, Paragraph 11

[15] 21st July 2009

[16] Mr. Jonathan Baker Q.C., now Mr. Justice Baker

[17] See Article 12, set out supra

[18] Article 61

As concerns the relation with the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement, and cooperation in respect of parental responsibility and measures for the protection of children, this regulation shall apply;

(a) Where the child concerned has his or her habitual residence on the territory of a Member State .....

(b) As concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of

the points of law relating to whether the rules as to jurisdiction in Articles 8 – 14 of B11R take precedence over domestic rules; whether the phrase "third State" in Article 12.4 of B11R means "non-Member State" so that the power of prorogation of jurisdiction in Article 12 extends to children who are habitually resident outside the EU; the proper interpretation of the criteria for prorogation of jurisdiction under Article 12.3 B11R; and whether the doctrine of *forum non conveniens can* be invoked in cases under Section 2 of Chapter 11 of B11R, having regard to section 5 of the Family Law Act 1986 which sets out the power of the court to refuse an application or to stay proceedings, and inter alia the decision of the European Court of Justice in Owusu v Jackson [2005] QB 801.[19] It was submitted for the mother that the jurisdictional provisions of B11R in matters of parental responsibility have replaced and subsumed the domestic rules for all civil matters relating to parental responsibility save for those matters expressly excluded by the Regulation itself in Article 1.3.

Lord Justice Thorpe [20] described the "..[U]niversal acceptance amongst international family lawyers in this jurisdiction that the Regulation Brussels 11 Revised is a regulation that has effect only within the Member States of Europe"[21] and offered his acceptance of that view when he stated that "..[e]very instinct suggests to me that the Regulation is intended simply for the solution of jurisdictional and other problems within the European Union to ensure a common judicial area within which decisions of competent courts are recognised and enforced under a common set of rules. It would be surprising indeed if this laudable aim had any impact at all on relationships between Member States and non-Member States through the wider world. It would be in my judgment to ignore the aims and objectives of the Regulation to afford it the construction that Mr. Baker urges". [22]

However, Lord Justice Thorpe did not wish to reject the arguments on the basis alone and stated that there were three fences which the mother had to negotiate to arrive at the desired "winning post". The first was to establish that relationships between this jurisdiction and Pakistan are covered by the Regulation; the second was that the jurisdiction of the courts has been accepted, expressly or otherwise, in an unequivocal manner by all of the parties to the proceedings at the time the court is seised; and the third was that the exercise of jurisdiction by the courts is in the best interests of the child.[23]

Having provided his view on whether the Regulation extended to relationships with non-Member States, Lord Justice Thorpe LJ considered the second of the three fences and expressed himself as "quite unpersuaded" that anything the father had done within this jurisdiction amounts to unequivocal acceptance,[24] and further that unequivocal acceptance of prorogation by all parties to the proceedings had not been demonstrated as required as the guardian ad litem had not been party to such acceptance, having joined at a relatively late stage. Lord Justice Thorpe also stated in relation to the third of the three fences, that is in relation to best interests, that decisions about Q's welfare were better dealt with by the courts of Pakistan, where he has been for more than half of his life. [25]

For all the reasons set out above, Thorpe LJ held that the appeal failed, stating:

> "[w]e can hardly expect the judges of Pakistan to honour the [Pakistan] Protocol beyond the immediate territory of abduction if we lay exorbitant claims to jurisdiction in relation to children who are essentially Pakistani". [26]
>
> He concluded by endorsing the decision that His Honour Judge Barnett had reached

another Member State, even if the child concerned has his or her habitual residence on the territory of a third state which is a contracting party to the said Convention"

[19] The case concerned the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, art 2. The Court held that since article 2 of the Convention was mandatory and the Convention contained no express exception relating to forum non conveniens, it was not open to a court of a contracting state to decline jurisdiction conferred on it by article 2 on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other contracting state was in issue or the proceedings had no connecting factor with any other contracting state.

[20] Lord Justice Thorpe gave the lead judgment in the Court of Appeal. The other two judges were Scott Baker and Sullivan LJJ.

[21] Thorpe LJ, paragraph 11

[22] Thorpe, Paragraph 17

[23] Thorpe, Paragraphs 18 and 19

[24] ThorpeLJ, Paragraph 26

[25] Thorpe, Paragraph 31

[26] Thorpe, Paragraph 34

[27] ThorpeLJ, Paragraph 35

regarding jurisdiction by saying:

> "[i] would have been dismayed had it been necessary to set aside his very sensible conclusion". [27]

The case was then appealed by the mother to the Supreme Court,[28] the first Family Law case to be heard there,[29] and the first occasion on which the highest Court in the land has had an opportunity to consider the Brussels 11 Revised Regulation.[30]

Permission was sought by **reunite** [31] and The Centre for Family Law and Practice[32] to intervene in the appeal. The reason for the intervention was that the issues in the case were deemed to be of such importance to other cases in the field of international child law where similar difficulties arise, namely: cases involving abduction, forced marriage (i.e. parents relocating their children abroad against the latter's consent), spouses being stranded abroad in non-Hague countries, and relocation of children when one parent moves outside of the jurisdiction. Additionally, one of the authors of this article, as who is Head of the **reunite** Research Unit[33] and co-director of The Centre for Family Law and Practice , recently completed a research project, funded by the Foreign and Commonwealth Office, into the operation of the UK-Pakistan Protocol, which was a factor mentioned at paragraph 34 of Lord Justice Thorpe's judgement in the Court of Appeal, and a research project, funded by The Ministry of Justice, into the issues surrounding relocation.[34] The possible impact of this decision was therefore of great concern to the potential interveners, and those families with whom they are involved, as it would resolve fundamental questions of wide-ranging importance relating to the jurisdictional basis of proceedings concerning children who are physically outside the United Kingdom. Those individuals who are living in, or may move to live abroad to, a country which is outside Europe and/or is not a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction may well wish to seek the protection of the Courts of England and Wales.

Permission to intervene was granted on 6th October 2009. The interveners, who took a neutral position relating to the outcome of the case, were represented by Henry Setright QC and Teertha Gupta of 4 Paper Buildings, instructed by Anne-Marie Hutchinson OBE of Dawson Cornwell, solicitors, who is also the Cchair of reunite Reunite. The legal team provided its services on a pro bono basis. The Supreme Court heard the case on 12th and 13th October 2009, with judgment handed down on the morning of 1st December 2009.

Baroness Hale of Richmond set the scene when she commented:

> "[o]ne can only feel sympathy for the Court of Appeal, confronted as they were with a novel and at first blush surprising argument". [35]

The first issue for the Supreme Court was whether the parties "right of prorogation" to "opt in" to the jurisdiction of a European Union country which would not otherwise have jurisdiction to determine a child's future, contained in art 12 of B11R, could apply to a child who was habitually resident outside the European Union. If the answer to this question was positive, the second issue was whether the criteria in art 12.3 were made out.

The interveners' case was that on any of the various possible constructions of habitual residence, Q had not been habitually resident in the UK since his removal to Pakistan in 2004, notwithstanding the continuing court proceedings in this jurisdiction and the factual acceptance by the courts of the child's habitual residence in this country. The interveners also argued that the child was not capable of having dual habitual residence, nor did he have habitual residence in this jurisdiction through the habitual residence of his parents in England and Wales. As the proceedings could not have been based, in

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[28] The Supreme Court granted the appellant permission to appeal against the order of the Court of Appeal (Civil Division) on 28th September 2009

[29] [2009] UKSC 10, [2009] All ER (D) 12 (Dec)

[30] See Press Release of Dawson Cornwell 1.12.09 http://www.dawsoncornwell.co.uk/documents/Re%20I%20press%20release%20-%2001%2012%2009.pdf (what on earth sort of link is this?)

[31] The International Child Abduction Centre, the leading UK charity specialising in international parental child abduction.

[32] The Centre for Family Law and Practice at, London Metropolitan University, was established in January 2009 to address the interface between academe and practice in the broad area of Family Law and associated topic areas.

[33] Dr. Marilyn Freeman (is this footnote really needed in that there is now only one author since the counsel and solicitor backed out of writing it?!)

[34] Both reports may be viewed on reunite's website www.reunite.org

[35] Per Baroness Hale of RIchmond, [2009] UKSC 10 at Para 12. The other judges in the Supreme Court were Lord Hope, Lord Collins, Lord Kerr and, Lord Clarke.

[36] As amended following implementation of B11R

the view of the interveners, on the child's English habitual residence, other jurisdictional bases for the proceedings had to be explored by way of a process of elimination.

The court considered sS2 Family Law Act 1986 :[36]

> "(1) A court in England and Wales shall not make a section 1(1)(a)
> order with respect to a child unless –
> (a) it has jurisdiction under the Council Regulation, or
> (b) the Council Regulation does not apply but –
> (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings
> and the condition in section 2A is satisfied, or
> (ii) the condition in section 3 of this Act is satisfied.

Baroness Hale noted that, if B11R applies, it governs the situation. Only if it does not apply at all will the residual rules in the 1986 Act come into play.[37] So, the question was, does the Regulation govern the situation?

The First Issue

The court then continued by considering whether article 12[38] could apply at all where the child is lawfully resident outside the EU. Baroness Hale answered this unequivocally by saying that, in her view, it can.[39] She stated that there is nothing within either articles 12.1 or 12.3 to limit jurisdiction to those children who are resident within the EU. She stated that this view of the matter is confirmed, if the third-State" which is referred to in article 12.4 and article 61 means a "non-Member State.[40] Baroness Hale states that both these articles look at the relationship between B11R and the 1996 Hague Convention. If the child is habitually resident in "a third State" which is a party to the 1996 Convention, the Regulation applies to the recognition and enforcement in one Member State of a judgment given in another Member State. If the child is habitually resident in "a third State" which is not (original emphasis) a party to the Convention, article 12.4 lays down a presumption that it will be in the interests of the child for the EU State to assume jurisdiction if the parties have agreed to accept it. All of this makes sense if the "third State" lies outside the EU but would add nothing if it lies within it.[41]

In essence, the Aappellant mother argued that, from the earliest days of EC law, the phrase "third State" has been used to mean non Member State and the interveners referred the Supreme Court to other sources emanating from the EU which define the term to mean a State outside the EU: The Community Research and Development Information Service (CORDIS), which uses the term "Third State" to mean a state that is neither a Member State nor an Associated State.

Baroness Hale stated:

> "[t]his merely reinforces the conclusion arrived at on ordinary principles of construction that article 12 can apply to children who are habitually resident outside the EU". [42]

The Second Issue

The court went on to consider the second issue, i.e. whether the criteria in Article 12.3 are made out, it being regarded as a necessary step to jurisdiction being established under Article 12.4.

Paragraph (a) of article 12.3 was held to be satisfied as both parents were habitually resident in the United Kingdom at the time the proceedings began, and the child was also a British national.

The more complicated issues arose under paragraph (b) of article 12.3 under which, firstly, the jurisdiction of the courts must be accepted expressly or otherwise in an unequivocal manner by all the parties to the proceeding at the time the court is seised, and secondly must be in the best interests of the child:

> ***(i)At the time the court is seised*** – the court considered whether this refers to a moment in time or, as held by the Court of Appeal, to any time while the proceedings are continuing, concluding from a consideration of Article 16 that the time of seisin is fixed when the document initiating the proceedings is lodged with the court or, if it has to be served before lodging, is received by the authority responsible for service. Baroness Hale stated her view [43] that the court became seised of this matter on 31st October 2007 when the mother brought

[37] Baroness Hale paragraph 15
[38] See supra
[39] Per Baroness Hale Paragraph 17
[40] Per Baroness Hale, paragraph 18
[41] Per Baroness Hale, paragraph 19
[42] Per Baroness Hale, paragraphs 19, 20
[43] Baroness Hale, paragraph 25

proceedings for contact with Q, this had not been done in the earlier order in 2004.

Baroness Hale then went on to consider what the words in paragraph (b) in fact describe. She asked:

> "[d]o they, as had been assumed by all before the hearing in this Court, describe the time at which the parties have accepted jurisdiction? Or do they, as proposed by Mr. Setright QC on behalf of the interveners describe the parties whose acceptance is required? In other words, does Aarticle 12.3(b) mean "the jurisdiction of the courts was accepted when the proceedings began by all those who were then parties"? Or does it mean "the jurisdiction of the courts has been accepted at any time after the proceedings have begun by all those who were parties when they began"? [44]

Baroness Hale found much to be said for this latter argument. After considering the German, French, Italian and Spanish texts, she focused on the tense used in the English text, stating that, although it might be unwise to place too much reliance on the precise tense chosen, the phrase "has been accepted" is more consistent with the possibility of later acceptance of jurisdiction, and that it would have been more natural to use the words "was accepted" if it had been intended to limit acceptance to the exact time of seisin.[45]

> ***(ii) Acceptance*** - Baroness Hale held that the court did not need to resolve this question (i.e. the meaning of the phrase "at the time the court is seised") in this particular case because there was unequivocal acceptance of the jurisdiction both before and after the proceedings were begun which reflects the mother appellant's argument that Lord Justice Thorpe was wrong when he stated that the father had not done anything within this jurisdiction amounting to unequivocal acceptance[46] as the father could not have done more to indicate an unequivocal acceptance of jurisdiction as required by article 12.3.

Baroness Hale stated that, whichever is the correct interpretation, the acceptance in question must be that of the individuals who are the parties to the proceedings at the time when the court is seised. Parties who are joined later (eg the child) cannot come along and upset the agreement which the original parties have made.[47] This issue was the subject of comment by the other judges and the diversity of views indicates that the interpretation is not *acte clair*[48] and if a case arises where the issue has to be decided it may have to be the subject of a reference to the European Court of Justice under articles 68 and 234 of the EC Treaty.[49]

> ***(iii) In the best interests of the child*** – this will depend upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor.[50] Baroness Hale stated that the presumption in Aarticle 12.4, although expressed as a "deeming" provision, and not irrebuttable, "makes sense". She explained that: "[i]f a child is habitually resident in a country outside the EU which, like Pakistan, is not a party to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, then even if the EU country in question is a party to that Convention, there would be no provision for recognition and enforcement of one another's orders. If, therefore, the parties have accepted the jurisdiction of an EU State, it makes sense for that State to determine the issue. The difficulty or otherwise of holding the proceedings in the third State in question are

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[44] Baroness Hale, paragraph 26

[45] Baroness Hale, paragraph 27

[46] Thorpe LJ para 26

[47] Baroness Hale, paragraph 32

[48] See Bulmer v Bollinger [1974] 2 All ER 1226 at 1234/5 where Lord Denning laid down guidelines for discretionary referrals to the European Court of Justice. Article 234 references should be made only if a ruling by the European Court is necessary to enable the English court to give judgment in the case. .. there is no need to refer a point which is reasonably clear and free from doubt; this is known as the 'acte clair' doctrine.

[49] Baroness Hale at paragraphs [23-32], Lord Collins at [51-64], Lord Kerr at [66-74], Lord Clarke at [75-92].

[50] Baroness Hale paragraph 36

[51] Baroness Hale paragraph 37

obviously relevant. It is not suggested that it would be impossible to hold these proceedings in Pakistan, but while neither party has had difficulty with the proceedings here, the mother would certainly face difficulties litigating in Pakistan".[51] In this case, the guardian ad litem took the view that it would be better for the case to be heard in the courts of this jurisdiction because the risks of contact between the child and mother in this country could be better assessed here.

The court went on to consider the UK - Pakistan Protocol which had been of concern to Lord Justice Thorpe in the Court of Appeal because of the effect that the acceptance of jurisdiction by an English court would have in respect of a child who was habitually resident in Pakistan. It was orally submitted by Mr. Setright QC on behalf of the interveners that Article 12 does not undermine the UK - Pakistan Protocol but, rather, works harmoniously with it. The courts in Pakistan might welcome the fact that the courts in England had investigated the situation here and put in place safeguards which would enable the child to visit his mother and other members of his family in this country in safety, and the Protocol would operate to secure his prompt return to Pakistan after any such visit.[52] In any event, Baroness Hale states that the proper interpretation of B11R cannot be affected by the terms of a private agreement between the judiciaries of one Member State and a non-Member State.[53] Baroness Hale therefore allowed the appeal, declaring that the courts of England and Wales have jurisdiction in this case.[54]

Impact of the Supreme Court decision

The decision in Re: I gives – without any suggested revision of the Family Law Act and without a reference to the ECJ - a fascinating new interpretation of the potential 'long reach' of the English jurisdiction. Any assessment of the full impact of this decision by the Supreme Court will need time. What is clear is that all family lawyers who specialise in the area of international child movement must now be alert to the concept that parents can potentially nominate an EU jurisdiction to deal with future issues concerning their child even if the court sanctions a permanent relocation of that child to another EU country - or to a non-EU country. Only time – and litigated cases or their absence - will establish whether this interpretation will result in significant numbers of parties proroguing jurisdiction to the courts of England and Wales or whether it will simply be of academic interest.

Substantial time in the oral arguments and in the judgment was taken up in discussing what could be termed as the entry provisions under Article 12(3) of Brussels II Revised. Henry Setright Q,C. and Teertha Gupta advanced in oral submissions an entirely novel construction that appeared to find favour with four out of five Justices with Lord Clarke dissenting. The significance of the point being that it would allow a certain and finite evaluation as to whether a case met one of the entry provisions. This had the added advantage of being internally consistent with the thrust and provisions of the revised Regulation. However the Justices of the Supreme Court would have been conscious that by adopting this construction formally it would have required a re-evaluation of Owusu and this would have resulted in the possibility of a referral to the ECJ for a consideration of the point.[55] Therefore although expressing clear views on the point (the Aappellant also adopting the submissions of Henry Setright QC and Teertha Gupta) the Supreme Court chose not to rule on it, save for Lord Kerr, who endorsed it in the following terms:[56]

> "Although I am reasonably firm in my opinion that the proper construction of these provisions is as Mr Setright submitted it should be, I agree with Lady Hale and Lord Collins that it is not necessary for a final view on the question to be reached in the present case. This is so because it is clear that the father had unequivocally accepted the jurisdiction of the court when, in 2007, it was indisputably seised of the proceedings.As has been pointed out, moreover, his subsequent attitude to the proceedings evinced unambiguous acceptance of the court's jurisdiction."

[52] Baroness Hale Paragraph 43

[53] Baroness Hale Paragraph 44

[54] The 4 other judges agreed that the appeal should be allowed and that a declaration should be made that the Courts of England and Wales have jurisdiction in this case, but Lord Clarke differed on the true construction of article 12.3(b) B11R.

[55] See (Lady Hale at paragraph 40)
[23]-[32]; Lord Collins at [51]-[64]; Lord Kerr at [66]-[74]; Lord Clarke at [75]-[92])

[56] See paragraph 74

The Jurisdictional Rules under the 1996 Hague Convention on the Protection of Children

Professor Nigel Lowe*

I Introduction

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention'), has been something of a sleeping giant. It first came into force in January 2002 when the third ratification, that of Slovakia, came into effect (Monaco and the Czech Republic having previously ratified). As of 1 January 2010, there are 17 Contracting States, Croatia being the latest State to ratify (Switzerland having ratified in July 2009). Australia is alone among common law jurisdictions in ratifying (in August 2003). Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia and Slovenia are the only current EU Member States that have either ratified or acceded to the Convention. But all this is about to be transformed, for the rest of the EU Member States (though Malta has yet to sign) including, of course, the United Kingdom [1], are required simultaneously to deposit their instruments of ratification and accession by 5 June 2010 [2] which means that on 5 September when these instruments take effect, there will be at least 36 Contracting States. But in addition New Zealand is currently working to ratify the Convention sometime in late 2010, while both Canada and the USA are also actively considering ratification.

The plan to implement the 1996 Convention in England and Wales and Northern Ireland (Scotland is devising its own process) is to do so not by primary legislation but by using secondary legislation under the European Communities Act 1972, s 2 (2), which in fact authorises amendments to primary legislation. Although this route has hitherto been used to implement EU Regulations [3] and indeed was designed for this purpose, the view has been taken that since individual Member States have no competence to ratify or accede to the 1996 Convention and that EU wide ratification/accession has been orchestrated under the EU aegis, it is appropriate to use the 1972 Act to implement this Hague instrument [4].

These developments now give some urgency for considering some of the more challenging implications of the 1996 Convention and, after giving a brief overview, the focus of this article is on the Convention's jurisdictional rules.

II What the Convention is Trying to Do

1. The objectives

The objectives are set out by Article 1, namely:

(a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of child;

(b) to determine which law is to be applied by such authorities in exercising their jurisdiction;

(c) to determine the law applicable to parental responsibility;

(d) to provide for the recognition and enforcement of such measures of protection in all Contracting states;

(e) to establish such co-operation between authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

In broad terms, the 1996 Convention aims to provide a global system for improving the protection of children in international situations. To this end it provides for a common set of jurisdictional rules and for the

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[1] The UK signed the Convention in April 2003.

[2] See Council Decision of 5 June 2008 (2009/431/EC) OJ L 151/6.

[3] See, for example, the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulation 2005 (SI 2005/265), which implemented Council Regulation (EC) No 2201/2003 of 27 November 2003 ('the revised Brussels II Regulation').

[4] See the European Communities (Definition of Treaties)(1996 Hague Convention on Protection of Children etc) Order 2010.

consequential recognition and enforcement within Contracting States of measures directed to the protection of children's person and property and to establish the necessary co-operation between the authorities of Contracting States in order to achieve this basic purpose.

2. The Scope of the Convention

(i) The Meaning of "Child"

Under Article 2, the Convention applies to "children from the moment of their birth until they reach the age of 18 years", which means that it clearly[5] does not apply to unborn children but, unlike the 1980 Hague Abduction Convention which only applies to children under the age of 16, it does apply to children under the age of 18 (though in doing so it does not thereby determine the age of majority)[6].

(ii) The Meaning of "Protection"

In general terms "protection" refers to both private and public law measures taken by judicial or administrative bodies to safeguard children. The types of matters covered by the Convention are set out by Article 3, namely, the attribution, exercise, termination and delegation of parental responsibility; rights of custody and access; guardianship; curatorship and analogous institutions; the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; placing a child in foster or institutional care or the provision of care by *Kafala* or an analogous institution, public authority supervision of the care of a child by any person having charge of the child; and finally the administration, conservation or disposal of the child's property.

Article 3 does not provide a complete definition but only an illustrative list. As the Lagarde Report comments[7], since 'the measures vary with each legal system, the enumeration given in this article could only be given in terms of examples.' In contrast, Article 4 provides an exhaustive list of what the 1996 Convention does not cover, namely: establishing or contesting a parent-child relationship, adoption, names, emancipation, maintenance obligations, trusts or succession; social security, general public measures on health or education, measures taken as a result of penal offences committed by children; and the right of asylum and immigration decisions[8]. This is not quite as simple as it looks. For example, in the English context while all section 8 orders under the Children Act 1989 fall within the ambit of Article 3, specific issue and prohibited steps orders fall outside the scope of the 1996 Convention if they are orders in respect of children's names by reason of Article 4. Article 4 is also thought to exclude contact orders made under s 26 of the Adoption and Children Act 2002. There may be doubts, too, as to whether education supervision orders made under s 35 of the 1989 Act fall within the scope of the 1996 Convention.

One further complication is that under Article 55 Contracting States may reserve (a) jurisdiction to its own authorities to take measures directed to protect a child's property[9] situated on its territory and (b) the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by its authorities in relation to that property[10].

3. Jurisdiction, Recognition and Enforcement

The Convention provides a common set of jurisdictional rules with consequential provisions for the recognition and enforcement of orders. In this respect the format is similar to the Revised Brussels II Regulation

[5] For a possible argument that the Hague Abduction Convention could in certain circumstances apply to unborn children see *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388.

[6] See the Explanatory Report on the 1996 Convention by Paul Lagarde in Proceedings of the Eighteenth Session, Tome 11, Permanent Bureau (1998), 16 ('the Lagarde Report'). Emancipation is expressly excluded from the Convention by Article 4d. The Lagarde Report is indispensable reading to gain an understanding of the 1996 Convention. It may compared with the Pérez-Vera Explanatory Report on the 1980 Convention.

[7] *Op cit* at para 18. See also Silberman "The 1996 Hague Convention on the Protection of Children: Should the United States Join?" (2000) 34 *Family Law Quarterly* 239, at 245.

[8] The rationale for these exclusions are that they are matters already covered by other Conventions (e.g. adoption, maintenance obligations, succession and trusts) or they are not really to do with the child's protection (e.g. establishment of the parent-child relationship, names and emancipation) or because they are public law matters over which States would not give up control (e.g. education, health, immigration and measures taken following the commission of penal offences by the child).

[9] The reservation can be restricted just to certain types of property: Article 55(2).

[10] Although this power was inserted upon the UK's initiative it is not now expected that it will exercise the reservation.

('BIIR'), which is hardly surprising since the latter was drafted with the former in mind, though it should be noted that the Regulation takes precedence over the Convention[11].

Jurisdiction will discussed shortly, suffice to say here that the primary rule of jurisdiction is that of the child's habitual residence. So far as recognition and enforcement is concerned, the basic scheme is as follows.

(i) Recognition and Enforcement - the basic scheme

Under Article 23(1) measures taken by the authorities of one Contracting State must be recognised by operation of law in all other Contracting States. Limited exceptions to this basic obligation are provided for by Article 23(2).

Under Article 26(1) measures entitled to recognition taken in one Contracting State *and enforceable there* must, on the request by an interested party, be declared enforceable or registered for enforcement in another Contracting State. By Article 28(3) such a request can only be refused on one of the grounds on which recognition may be refused. Under Article 26(2) Contracting States are obliged to apply 'a simple and rapid' procedure for enforcement and, under Article 27, are forbidden to review the merits of the measure taken. Once declared enforceable or registered for enforcement, the measure can be enforced as if it had been made by the second State. According to Article 28 enforcement takes place "in accordance with the law of the requested State to the extent provided by such law, *taking into consideration the best interests of the child.*" This reference to the child's best interests could significantly dilute the powers of enforcement and contrasts with the English position in which it has been held[12] that when imposing sanctions for non compliance with child orders the child's welfare is not the paramount consideration.

(ii) Refusing recognition or enforcement

Article 23(2) provides limited exceptions to the enjoinder both to recognise and enforce measures taken by other Contracting States, namely:

(a) jurisdiction was not based on a Convention ground;

(b) except in cases of emergency, the child was not given the opportunity to be heard in violation of fundamental principles of procedure of the requested State;

(c) a person claiming parental responsibility had not been given the opportunity to be heard;

(d) recognition would be "manifestly contrary to public policy of the requested State, taking into account the best interests of the child";

(e) the measure is incompatible with a later measure taken by an authority in the child's habitual residence, and

(f) Article 33 had not been complied with.

Before examining these grounds it may be observed

1. Since it is the clear expectation under Articles 23(1) and 26(1) that measures be recognised and enforced, the grounds for refusal under Article 23(2) should be regarded as exceptional. Presumably, as with establishing the exceptions under Articles 12 and 13 of the 1980 Hague Abduction Convention, the burden of proof lies on the person seeking to invoke them.
2. In deciding whether or not to refuse recognition or enforcement, authorities are bound by findings of fact on which the authority of the State where the measures were taken based its jurisdiction (see Article 25) and are forbidden by Article 27 to review the merits of the measure taken;
3. Article 23(2) sets out the only grounds on which refusal may be based.
4. As the Lagarde Report puts it, the establishment of an Article 23(2) ground "authorises the refusal of recognition, but does not impose it.[13]"
5. Fears about non recognition can be allayed by obtaining what in effect is an advanced ruling by the requested State under Article 24, namely, whether or not it will recognise the measure taken in another Contracting State[14].

Notwithstanding that the implication of points 1 to 4 above is that Article 23(2) should be restrictively

[11] See BIIR, Article 61.

[12] *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533, CA.

[13] *Ibid* at para 121. A similar stance is taken in the 1980 Hague Abduction Convention but the 1996 Convention has no equivalent provision to Article 18 of the former Convention.

[14] Applications may be made by any interested party but it is for each Contracting State to provide a procedure for dealing with such requests.

interpreted, two provisions Article 23(2)(b) and (d) stand out as giving a potentially wide latitude for refusal.

Article 23(2)(b) provides that, emergencies apart, recognition or enforcement can be refused if the measure was taken "without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the *requested* State." This provision was inspired by Article 12(2) of the UN Convention on the Rights of the Child[15] . Although the Lagarde Report comments[16] the Article "does not imply that the child ought to be heard in every case" it gives the requested State some latitude for refusal. Given the difference of view and practice in this regard among different States, there must be some concern that this difference of view could lead to non-recognition under Article 23(2)(b), though it has to be said that the virtually identical provision, Article 23 (b) of BIIR[17] has not caused any reported difficulties.

Article 23(2)(d) provides that recognition may be refused upon the basis that it "is manifestly contrary to public policy of the requested State, taking into account the best interests of the child."

Although the prohibition against going back on findings of fact and of reviewing the merits of the original decision militates against a simple application of the welfare test, there is an obvious danger that the court could rely on fresh evidence and then essentially apply a welfare test on a forward looking basis. Could it be doubted, for example, that if a court has refused an application for the child's return under the 1980 Hague Abduction Convention on the basis of an Article 13(b) defence founded on the left behind parent's violence that that will not then be taken into account in applying Article 23(2)(d) in deciding whether to recognise a pre-existing custody order? Nevertheless the indicators are that it should be narrowly interpreted. Article 23 (2) (d) is identical in terms to Article 23 (a) of BIIR, which in turn replaced Article 15 (2)(a) of the original Brussels II Regulation[18]. In interpreting the latter Holman J remarked[19] 'To say something is contrary to public policy is a high hurdle, to which the Article adds the word "manifestly"'. The jurisprudence of the meaning of 'manifestly', at any rate in the context of interpreting Article 10(1)(a) and (b) of the European Convention on the Recognition and Enforcement of Custody Orders 1980, which allows a refusal to recognise and register an order, is that it places a heavy onus on those seeking to establish the defence[20].

4. Cooperation

As with other Conventions the crucial vehicle for co-operation is the Central Authority which under Article 29 all Contracting States are obliged to create. Pursuant to Article 29(2), which permits States having autonomous territorial units to have more than one Central Authority, it is understood that in addition to having separate Authorities for England, Northern Ireland and Scotland as under both BIIR and the 1980 Hague Abduction Convention, there will be a separate Authority for Wales. Central Authorities have a general mission of co-operation and information. Under Article 30 they must co-operate with one another to achieve the purposes of the Convention and to this end take appropriate steps to provide information as to the laws of, and services available, in their States relating to the protection of children. Under Article 31 Central Authorities must either themselves or through public authorities or other bodies take all reasonable steps to (a) facilitate communication between authorities where this is needed under Articles 8 and 9 (the *forum non conveniens* provisions, discussed below); (b) facilitate by mediation, conciliation or similar means, agreed solutions for the protection of children and (c) provide assistance in discovering the whereabouts of the child.

Under Article 32 the Central Authority of the place where the child is habitually resident *and* present may, at the request of another Central Authority (or competent authority) with which the child has a substantial connection, provide a report on the situation of the child and/or request the competent authority of its State to consider the need to take measures to protect the child. This provision could be useful in the context of

[15] See the Lagarde Report at para 123.

[16] *Ibid* at para 123.

[17] This Regulation applies to proceedings between Member States of the European Union and, inter alia, affects the operation of the 1980 Convention.

[18] Council Regulation (EC) No 1347/2000 of 29 May 2000.

[19] *Re S (Brussels II: Recognition: Best Interests of Child)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571.

[20] See e.g. *Re G (A Minor)(Child Abduction: Enforcement)* [1990] 2 FLR 325, 331 per Booth J, *Re A (Foreign Access Order: Enforcement)* [1996] 1 FLR 561 at 564 per Leggatt LJ and in *Ireland, RJ v MR* [1994] 1 IR 271 at 289, per Finlay CJ.

child abduction where the court after ordering the child's return might wish to ensure that the child will be protected in the foreign state upon his or her return[21]. This protection is further augmented by Article 36 which provides that if the child is exposed to serious danger, the competent authorities of the State where measures for protection for that child have been taken, must, if they are informed that the child's residence has changed to, or that the child is present in another State, inform the authorities of that other State about the dangers involved and the measures taken, unless this would place the child or a member of its family in serious danger[22]. Furthermore, Article 33 obliges authorities contemplating the placement of a child in foster or institutional care, or *Kafala* or an analogous institution in another Contracting State, to consult with the Central Authority or other competent authority of the latter state. Failure to comply with this obligation entitles the other State to refuse to recognise the placement under Article 23(2)(f).

A particularly useful provision is Article 35 which aims to safeguard rights of access to a child in another Contracting State. Article 35(1) provides:

> "The competent authorities of a Contracting State may request the authorities of another contracting State to assist in the implementation of measures of protection taken under this Convention, especially in securing the effective exercise of rights of access as well as of the right to maintain direct contacts on a regular basis."

Article 35(2) permits a parent seeking to obtain or maintain access but who is living in one Contracting State while the child is habitually resident in another Contracting State, to request the competent authorities of the State in which the child is residing to "gather information or evidence and may make a finding on the suitability of that parent to exercise access and on the conditions under which access is to be exercised." This information is then admissible evidence in proceedings in the child's habitual residence and indeed, under Article 35(3), the court may adjourn proceedings pending the outcome of such a request.

5. Applicable Law [23]

1. The general position

One of the unusual features of the 1996 Convention is its applicable law provisions contained in Chapter III[24]. The general rule under Article 15(1) is that when exercising their jurisdiction the authorities of the Contracting State apply their own internal law (the *lex fori)*. As the Lagarde Report[25] puts it, the principal justification for this stance is that it "facilitates the task of the authority which has taken jurisdiction since it will thus apply the law which it knows best." But an important supporting argument is that, given the jurisdictional rules, the authority in question will generally be the closest to the child and being the most appropriate forum it is right that it should apply its own law. Nevertheless, as Nygh points out,[26] "jurisdiction can be taken on the basis of the child's presence and to take account of this Article 15(2) provides that insofar as the protection of the child's person or property requires, the authority assuming jurisdiction may "exceptionally apply or take into consideration the law of another State (which does *not* have to be a Contracting State) with which the situation has a substantial connection".

Article 15(3) deals with the situation where the child's habitual residence changes. Although under Article 14 measures taken by the authorities of the State of the child's former habitual residence remain in effect, by Article 15(3) the conditions by which those measures operate is governed by the law of the new habitual residence. The Lagarde Report[27] instances the example of a guardian who, by the law of the State of original habitual residence needs court permission to take certain actions. If, however, the law of the State of the new habitual residence does not impose such a requirement, Article 15(3) operates to allow that guardian to act alone.

One overall rider to all the applicable law provisions is Article 22 which provides that the application of the law of habitual residence may only be refused if its

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[21] See Nygh, *op cit*, at 356.

[22] See Article 37.

[23] For a detailed discussion, see N Lowe 'The Applicable Law Provisions of the 1996 Hague Convention on the Protection of Children and the Impact of the Convention on International Child Abduction' [2010] IFL – forthcoming.

[24] Hague Conventions normally only govern rules of jurisdiction and consequential rules of recognition and enforcement.

[25] At para 86.

[26] P Nygh "The New Hague Child Protection Convention" (1997) 11 *Int Jo of Law, Policy and the Family* 344.

[27] *Ibid* at para 91.

application would be manifestly contrary to the public policy of the forum taking into account the best interests of the child[28].

2. The position with regard to parental responsibility

Articles 16 – 18 provide specific rules dealing with parental responsibility. Reflecting the normal rule, Articles 16(1) and (2) respectively provide that the attribution or extinguishment of parental responsibility[29] is governed by the law of the child's habitual residence (*whether or not that is the law of a non-Contracting State*). On the other hand, the effect of a change of the child's habitual residence on the *attribution* (but note *not* extinction – see below) of parental responsibility is governed by Article 16(3) and (4). These provisions respectively provide that the parental responsibility which exists under the law of the State of the child's habitual residence will continue to exist notwithstanding a change of that residence to another State. BUT where the law of the State of the child's new habitual residence automatically confers parental responsibility on a person who does not already have it, it is the latter law that will prevail. In other words, while a change of habitual residence cannot extinguish parental responsibility, it can confer it, which effectively means that the 1996 Convention gives a preference for a substantive rule imposing parental responsibility whenever possible.

This position, however, is tempered first by Article 17 which provides that the *exercise* of parental responsibility is governed by the law of the State of the child's habitual residence including, where that habitual residence changes, the law of the State of that new residence. Secondly, by Article 18 which provides that the authorities of the State of the current habitual residence of the child, can subsequently terminate or modify parental responsibility. Thirdly, by Article 22 which provides a general release from applying these provisions where to do so would be manifestly contrary to public policy taking into account the child's best interests. There is in addition the power under Article 55(1)(b) for a Contracting State to make a reservation of the right not to recognise any parental responsibility or measure insofar as it is incompatible with any measure taken by its authorities in relation to the child's property situated on its territory. Finally, under Article 19(1), as one commentator has put it[30], third parties are 'entitled to assume that the rules of their own system apply to entitlement to act on the child's legal representative unless they know or ought to know that the rules of another system are applicable under the convention'. But note might also be taken of the Lagarde Report's comment[31] that while this Article extends protection whatever the nature of the transaction it might reasonably be supposed that 'the diligence required on the part of the third party in order to benefit from Article 19 ought to be in proportion to the importance of the transaction'.

Articles 16-18 represent a compromise between two opposing views, namely, based upon the idea of mutability, that for each change of habitual residence there should be a corresponding change in the applicable law on the attribution or extinction of parental responsibility which has the advantage of simplicity and consistency with Article 15, as against the desire to preserve continuity of protection which has the advantage of maintaining family stability and avoids the need to take fresh steps to preserve parental responsibility in the new jurisdiction.

III The Jurisdictional Rules

1. Primary jurisdiction based on child's habitual residence

In common with other modern child conventions, Article 5 vests primary jurisdiction in the authorities of the Contracting State in which the child is habitually resident.

"Habitual residence" is not defined but no doubt cognizance will be taken of the jurisprudence both under the 1980 Hague Abduction Convention and BIIR and in particular the ECJ decision, *Re A (Area of Freedom, Security and Justice)*[32], which held that habitual residence 'corresponds to the place which reflects some degree of

[28] This provision corresponds to Article 20 of the 1980 Convention (which permits refusal to return upon the basis that it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms) but which the United Kingdom has not implemented. A reservation on Article 22 is not permitted by the 1996 Convention (Article 60(1)) but then neither was an Article 20 reservation provided for by the 1980 Convention.

[29] Defined by Article 1(2) as "including parental authority or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or property of the child."

[30] Clive 'The New Hague Convention on Children' (1998) 3 *Juridical Review* 169 at 182.

[31] *Ibid* at para 113.

[32] Case C – 523/07, [2009] 2 FLR 1.

integration by the child in a social and family environment'. This test has been said[33] to be 'broadly in akin to the authorities' in England and Wales. In short, it has not undermined the established jurisprudence on the meaning of habitual residence under the 1980 Hague Abduction Convention.

Supplementing this primary rule is a number of subsidiary rules.

2. Jurisdiction based on presence

By Article 6 jurisdiction can be based on the child's presence in the case of

> (a) refugee children and those who "due to disturbances occurring in their country, are internationally displaced", and
>
> (b) children whose habitual residence cannot be established.

3. Powers conferred by Articles 11 and 12

By Article 11 power (it is perhaps a moot point as to whether it confers *jurisdiction*) to take measures *having extra territorial effect* can, in cases of urgency, be taken upon the basis of either the child's presence or that of his property, though any measures taken will lapse as soon as a Contracting State otherwise with jurisdiction[34] under the Convention takes its own protective measures.

In non urgent situations jurisdiction to take measures 'of a provisional character' can be based on the presence of the child or his property under Article 12, but such measures only have effect within the territory making the order and lapse once a Contracting State otherwise with jurisdiction takes protective measures.

The power to act under either Article 11 or 12 can be based upon the child's presence or that of his or her property[35]. According to the Lagarde Report[36], jurisdiction taken on the property basis does not prevent measures being taken to protect the child, since it is possible

> 'to conceive that the urgency requires the sale in one country of the property of the child in order to furnish him or her in the country where he or she is present, the resources which are immediately necessary.'

The interplay between Articles 11 and 12 repay careful study and will no doubt be the source of developing jurisprudence.

There are four key differences. First, orders made under Article 11 have extra-territorial as well as domestic effect. Article 12 orders only have domestic effect. Secondly, unlike Article 11, Article 12 cannot be relied upon in cases of wrongful removal – see Article 7 (3). Thirdly, unlike Article 11, Article 12 orders cannot be incompatible with measures already taken by an authority of competent jurisdiction. Fourthly, measures can only be taken under Article 11 in cases of urgency whereas Article 12 permits measures "of a provisional character" to be taken at large save to the extent of being incompatible with existing measures.

While it is easy to appreciate the need for Article 11, which, its extra-territorial effect apart, is a fairly standard provision which essentially replaces Article 9(1) of the 1961 Hague Protection Convention and is akin to BIIR Article 20[37], Article 12 is more unusual. It was inserted following an initiative by the United Kingdom and is designed to permit provisional and territorially limited measures to protect children on a temporary visit to a foreign jurisdiction as, for example, a holiday, an educational exchange visit or even an access visit, in cases where, strictly, there is no urgency. The example given in the Lagarde Report[38] is where a family receiving the child is overburdened such that it may be desirable to place the child with another family or in a shelter under the supervision of a local social authority.

So far as Article 11 is concerned, a key question is what amounts to 'a case of urgency'. 'Urgency' is not defined in the Convention (neither was it under the 1961 Convention). The Lagarde Report instances[39] a child's need for urgent medical treatment or the need for the rapid sale of perishable goods belonging to the child but it clearly covers more ground than that. But by way of analogy with the application of Article 20 of BIIR particularly in the light of the ECJ's ruling in *Re A (Area of Freedom, Security and Justice)*[40], it seems clear that (a) measures taken under Article 11 must truly be urgent -

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[33] Per Thorpe LJ in *Re S (a child)* [2009] EWCA Civ 1021 at [8].
[34] As Nygh, *op cit* n 26, points out, the other State need not be the State of the child's habitual residence since jurisdiction can be properly taken upon another basis, for example, nationality.
[35] It may even be possible to do so where the property rights are in dispute, see the Lagarde Report, *op cit* at para 70.
[36] Above at para 69.
[37] Ironically, there is a reference, Case 256/09 (*Parrueker*) pending before the ECJ, in which the prime question referred is whether orders made under Article 20 have extra territorial effect.
[38] *Op cit* n 6 at para 74.
[39] At para 68.
[40] Case C- 523/07, [2009] 2 FLR 1.

the Article should not be used simply as a means of seizing jurisdiction, and (b) such measures can only be temporary so, for example, while an interim care order might be possible it would not be possible to make a final care order[41].

Another issue of some practical importance is the scope of the orders that can be made under Article 11 and in particular whether they have to relate *directly* to the child. The Convention provides no definition of 'protective measures'. Indeed according to the Lagarde Report[42] this was a deliberate omission. The Report itself describes such measures as a 'functional concept, the urgency dictating in each situation.' While clearly there have to some limits on the type of measures that can be taken, for example they must surely be broadly confined to protecting the child, that still begs the question whether they have directly to do so. This is an issue of some moment in the context of international child abduction where the 'abduction court' might wish to put in place a raft of protective measures to ensure the child's safety on being returned to his or her home jurisdiction. Measures could include directing the left-behind parent to provide accommodation and financial support for the abducting parent (usually, the mother) and the child upon their return and perhaps also to prevent the applicant harassing or molesting the defendant parent, It would be unfortunate if Article 11 were to be interpreted so as to exclude the power to make orders relating to the parent in that context. Incidentally, this discussion begs the question of whether Article 11 extends to urgent measures being taken *specifically* to take effect in another jurisdiction, as hitherto has assumed to be the case[43]. Overall, it is urged that courts take a purposive approach when interpreting Article 11 so as to empower the making of the raft of measures just referred to.

4. Surrendering jurisdiction

By Article 8 the authority having jurisdiction may decide that an authority in another *Contracting State* (i.e. proceedings *cannot* be transferred to a non Contracting State) is better placed to determine the best interests of the child. In such cases the original authority may either request that other authority (either directly or with the assistance of its Central Authority) to assume jurisdiction or suspend consideration of the case and invite the parties to submit the request to the other authority. Before a decision is made, as Article 8(3) states, the "authorities concerned may proceed to an exchange of views." By Article 8(2), the authorities to which jurisdiction may be transferred are those of a Contracting State of which the child is a national; in which the child's property is situated; whose authorities are seized of matrimonial proceedings; or with which the child has a substantial connection.

Under Article 8 the initiative for transferring jurisdiction lies with the authority of the child's habitual residence, but Article 9 provides exactly the same scheme so as to allow the other authority to take the initiative to displace the jurisdiction based on the child's habitual residence but it can only take jurisdiction if the authority of the child's habitual residence agrees (Article 9(3)).

5. Jurisdiction of Authority seised with Matrimonial Proceedings

By Article 10(1) authorities seized of matrimonial proceedings (i.e. divorce, legal separation annulment) may take measures to protect children, if their domestic law so permits, providing that at the time of the commencement of proceedings

(a) one of the child's parents is habitually resident in that State *and* one of them (but not necessarily the parent just referred to) has parental responsibility *and*

(b) the parents and anyone else with parental responsibility agree to such jurisdiction being so exercised and that it is in the child's best interests to do so. However, jurisdiction to take protective measures ceases as soon as the decision allowing or refusing the application for divorce etc has become final or when the proceedings have come to an end for another reason (Article 10(2)).

6. The position where the child's habitual residence changes

Prima facie, as Article 5(2) provides, where the child's habitual residence changes to another Contracting State

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[41] *Cf Re S (Care: Jurisdiction)* [2008] EWHC 3013 (Fam), [2009] 2 FLR 574.

[42] *Op cit* at para 70.

[43] See eg Nygh, *op cit* n 26, at 351.

it is the authorities of the latter State that have pre-eminent jurisdiction. However, this is subject to two important provisos, namely

(a) Article 7 which prevents a child's habitual residence being regarded as having been changed in cases of wrongful removal or retention (discussed below) unless either there has been acquiescence or the child has resided in the new Contracting State for at least one year after those having rights of custody have or should have had knowledge of the child's whereabouts and "no request for return lodged within that period is still pending and the child is settled in his or her new environment" and

(b) Article 13, which provides that authorities of a Contracting State must abstain from exercising jurisdiction (other than emergency or temporary jurisdiction under Articles 11 or 12) if at the time of the commencement of proceedings, corresponding measures have been requested from the authorities of another Contracting State having due jurisdiction according to Articles 5 to 10, and those proceedings are still pending[44]. The only exception to this embargo (see Article 13(2)), which is aimed at removing conflicts where there are concurrent proceedings, is where the authority first seized declines jurisdiction.

By preventing jurisdiction being acquired ipso facto by a wrongful removal or retention (unless acquiesced in or 12 months has elapsed and no request for return is outstanding and the child is settled in his or her new environment), Article 7[45] is designed to deny the court of the requested state having refused a return application under the 1980 Hague Abduction Convention then having primary jurisdiction to make a custody order. This is reinforced by Article 13 which preserves the jurisdiction of the court in which custody proceedings are pending. One result of these provisions [46] is that if there is a pre-existing custody order made in the requesting State, then, following the refusal under the 1980 Convention, there is nothing to prevent an application being made under the 1996 Convention for its recognition and enforcement.

Interestingly, although BIIR also aims to prevent the 'abduction court' taking jurisdiction ipso facto upon a refusal to make a return order under the 1980 Convention, its strategy is quite different. In common with Article 7 of the 1996 Convention, Article 10 of BIIR prevents jurisdiction being acquired simply following a wrongful removal or retention but rather than having an equivalent to Article 13 of the 1996 Convention, Article 11 (6) - (8) of BIIR provide an elaborate scheme following a refusal. In such cases the 'abduction court' must notify the child's 'home authority' of their decision to refuse a return and that authority in turn must notify the parties that they may bring an on-merits application to determine the child's future upbringing. If, following that hearing the home authority considers the child should be returned, the abduction court has no choice but to comply. [47]

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[44] This embargo applies equally to jurisdictions assuming jurisdiction under Articles 6-10.

[45] Which was inspired by the American delegation, see Nygh, *op cit* n 26, at 348.

[46] For a fuller discussion of the possible impact of the 1996 Convention on international child abduction, see Lowe *op cit* n 23.

[47] See, for example, *Re Rinau, Case C-195/08 PPU*, [2008] 2 FLR 1495, ECJ and *Re A; HA v MB (Brussels II Revised: Article 11 (7)Application)* [2007] EWHC 2016 (Fam), [2008] 1 FLR 289.

Relocation: A Children's Rights Perspective

Dr. Ursula Kilkelly*

Introduction

Relocation - the decision to allow one parent to move permanently to another jurisdiction with the children of the relationship - is a subject fraught with difficulty. For those who have contested divorce proceedings, including residence and contact matters, an application to relocate may re-open old wounds, requiring a fresh consideration of issues that were highly contentious the first time.[1] In these circumstances, parents who were unable to agree on where the child should live, and what contact the non-resident parent should have post-divorce, will be unlikely to find it easy to reach agreement on the arguably bigger question of relocation. From a neutral position, however, such proceedings may 'pit a custodial parent's reasonable wish to better her circumstances by moving against a noncustodial parent's reasonable desire to maintain the frequent contact with his minor child that is a normal and perhaps essential element of any parental relationship.' [2]

Here, neither parent is being unreasonable and both are motivated by justifiable and genuinely child-focused reasons, as much as by their own desires. This is the nub of the relocation dilemma, especially where both parents are fully involved in their children's lives and are competent carers.[3] But in many cases there is conflict and an unresolvable dilemma. The mother (it is frequently the mother) feels she is being forced to live in one country against her will, and the father believes his relationship with his child(ren) will be threatened if not destroyed if she leaves. The application to remove the children to another jurisdiction is often accompanied by factors associated with (just) one parent's happiness and lifestyle, such as a new partner, a move closer to friends or a return home to extended family and other supports. In such cases, it is perhaps easy to say that the welfare of the mother, as the child's primary carer, is inextricably linked to that of her children.[4] The benefits that the move might bring - greater stability or emotional and financial security perhaps - easily outweigh the risk to the father's relationship with his children, especially given that modern technology makes travel and communication easy and cheap. Some have criticised this approach which appears based on generalisations about what is best for children, or indeed assumptions that was is best for mother is best for the child, and alternative approaches have been proposed.[5] These approaches have significant merit, but this paper proposes a third alternative, one that recognises that at the heart of the dilemma of relocation is an individual whose independent rights and interests also deserve protection. Focus on children in relocation is not a new concept admittedly – there is widespread consensus on the need to adopt an approach that is child-centred and focused[6] - but there has been little consideration to date of how to secure children's rights in relocation. Accordingly, this paper aims to consider the implications for children's rights of the relocation question, to

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[1] These issues are very contentious in themselves. See Gilmore, 'Disputing Contact; challenging some assumptions' [2008] 20(3) CFLQ 285.

[2] Braver, Ellman and Fabricius, 'Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations' (2003) *Journal of Family Psychology Vol 17*(2) 206-219, at p 206.

[3] For an overview of the issues see Freeman, *Relocation. The reunite Research*. Funded by the Ministry of Justice. July 2009, available at www.reunite.org (11 January 2010).

[4] *Payne v Payne* [2001] 1 WLR 1826; [2001] EWCA 166. For a recent Irish case loosely based on these principles (although informed by the Irish constitutional position) see *B v O'R* [2009] IEHC 247.

[5] See Hayes, M. 'Relocation Cases: is the Court of Appeal applying the correct principles? [2006] 18(3) CFLQ 351 and Herring and Taylor, 'Relocating Relocation' [2006] CFLQ 18(4) 517.

[6] Herring and Taylor usefully summary the evidence in their article 'Relocating Relocation' [2006] CFLQ 18(4) 517. see Freeman, *Relocation. The reunite Research*. Funded by the Ministry of Justice. July 2009, available at www.reunite.org (11 January 2010).See also Kelly and Lamb, 'Developmental issues in Relocation Cases involving Young Children: When, whether and how? 17(2) *Journal of Family Psychology* (2003) 193-205.

examine the children's rights standards that must be part of the decision-making process, and to identify the elements of the process that are necessary to make relocation and relocation decision-making more children's rights compliant.

Children's Rights: the International Standards

Now twenty years old, the United Nation Convention on the Rights of the Child (UNCRC) is the definitive international instrument in the area of children's rights and is the most highly ratified instrument in international law.[7] The Convention is legally binding on states parties, and also enjoys a moral status generated by the extraordinary consensus that surrounded its drafting, adoption and coming into force.[8] Apart from its widespread, almost universal application, the great strength of the Convention is its comprehensive nature.[9] Although some of its standards have been criticised for being vague, weak or contradictory,[10] Fortin rightly notes that 'for all its faults, the Convention remains a remarkable document, which provides a comprehensive set of standards against which ratifying states may measure the extent to which they fulfil children's rights.'[11]

According to the Committee on the Rights of the Child, the Convention has four general principles.[12] These are contained in article 2, which provides for the right of every child to enjoy his/her Convention rights without discrimination of any kind; article 3 which requires that the best interests of the child are a primary consideration in all actions taken concerning children; article 6 which recognises the right of the child to life, survival and development, and article 12 which provides that the state shall assure to every child capable of forming a view the right to express that view freely in all matters concerning him/her and to have it given due weight in accordance with the child's age and maturity. These four Articles are significant, not just as important, individual provisions, but as guiding principles that should inform how the Convention as a whole is to be implemented. In this way, respecting children's interests, their development, their views and their right to equal treatment are key Convention goals, which every state party is required to implement under Article 4.

The Best Interests of the Child

Although there is no hierarchy among the general principles, it is clear that both Article 3 and Article 12 are critical to decisions made about children's residence. Fortin's view is that Article 3 is the most important Convention provision insofar as it underpins all the others.[13] However, Article 3, which gives the status of international law to the best interests principle, has been criticised for watering down the requirement often applied in domestic law that the child's best interests are 'paramount'.[14] While this is explained by the fact that the scope of Article 3 is very broad and intended to apply in all areas including those in which there may be other legitimate considerations, like the public interest, a more serious, but less cited criticism of Article 3(1) is that it is not in fact a right at all. It is noticeable, for example, that Article 3 is one of very few Convention provisions not to use rights language and despite the Committee's attempts to reinterpret the standard, it has a paternalistic feel that harkens back to an approach

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[7] GA res 44/25, annex 44 UN GAOR supp (No 49) at 167, UN Doc A/44/49 (1989) entered into force on 2 September 1990. The Convention has 193 states parties. The United States and Somalia have signed but not ratified the Convention. See the Convention at www.ohchr.org (18 January 2010). On the US position see Kilbourne, The wayward Americans – why the USA has not ratified the UN Convention on the Rights of the Child' 10 CFLQ (1998), 243-256.

[8] See Van Bueren, *International Law on the Rights of the Child*, Martinus Nijhoff, 1998, at pp 13-16. For full detail of the drafting process see Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoire*s, Martinus Nijhof, 1992.

[9] Fortin, *Children's Rights and the Developing Law*, 3rd Ed Cambridge University Press, 2009, at p 45. See also Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice,* Tottel Publishing, 2008, at p 26.

[10] Kilkelly and Lundy, 'Children's Rights in Action: using the Convention on the Rights of the Child as an auditing Tool' (2006) 18(3) CFLQ 331-350.

[11] Fortin, supra, at p 45.

[12] Committee on the Rights of the Child, *General Guidelines regarding the Form and Content of Initial Reports to be submitted by States Parties under article 44, paragraph 1(a), of the Convention.* UN Doc CRC/C/5, 30 October 1991, para 13, available at www.ohchr.org (18 January 2010).

[13] Fortin, *Children's Rights and the Developing Law*, p 40.

[14] See for example, s 1 of the Children Act 1989 of England and Wales and section 3 of the (Irish) Child Care Act 1991. See also Fortin, ibid.

whereby adults decided unilaterally what was best for children or alternatively dressed their interests up as the child's.[15] Henaghan considers that the principle has yet 'to find a life of its own based on genuine concern for children's wellbeing'[16] and the vague nature of the provision, which can mean all things to all people, could be said to undermine the Convention's contribution to the rights-approach to children's issues.[17] This is considered further below.

The criticism that Article 3(1) has attracted perhaps explains why the terms of Article 3(2) are sometimes ignored. Yet, this provision imposes a relatively onerous duty on states to ensure that children receive 'such protection and care as is necessary for his or her well-being', taking parents' duties and rights into account. Like Article 18, this provision recognises the primacy of parental responsibility for children's needs, but makes it clear that there is nonetheless a strong, residual duty on the state to 'take all appropriate legislative and administrative measures' to ensure children's care and protection. This duty, if taken seriously, could be used to ensure that families work out better solutions for their children where relocation is anticipated.

The Child's Right to be Heard

Notwithstanding the importance of Article 3, it is Article 12 of the CRC that the Committee on the Rights of the Child has described as the fundamental principle of the Convention and indeed of children's rights generally.[18] Article 12 imposes a duty on states to assure to the child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. The provision, which is considered to have empowering qualities is important in its own right – in ensuring children are heard as part of decision-making about them – and in the interpretation of other rights, including Article 3. In that sense, it can be seen to have a transforming effect on the treatment of children, both in substance and by improving their experience of the process. In particular, requiring that children's voices are heard aims to raise the profile of children and their views, and ensure that they are treated with respect. The provision is unique insofar as it has both substantive and procedural effect, and it is important both taken alone, and as an enabler designed to facilitate the exercise by children and young people of their rights in other areas. The key to Article 12 is that it has two distinct but related parts: paragraph 1 places the general duty on the state to ensure that children have the right to express their views, and puts in place a dual test (in the form of age and maturity) with regard to giving effect to those views. Article 12(2) supplements the first paragraph by recognising that in order to ensure children are heard they must be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative. Even though this particular requirement must bow to the procedures of domestic law, the provision is crucial nonetheless in laying down a benchmark on the child's right to participate in decision-making processes that concern him/her. [19]

Various justifications are put forward for enabling that children are heard in decisions made about them.[20] The relevance of children's experiences and views, the

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[15] Bainham, 'The Privatisation of the Public interest in Children' (1990) 53(2) MLR 206.

[16] Henaghan and Atkin, *Family Law Policy in New Zealand*, 3rd Ed, Wellington, Lexis Nexis, 2007, p 302.

[17] See A Azer, 'Modalities of the best Interests Principle in Education' (1994) 8 *International Journal of Law and the Family* 227-258; Herring, 'The Human Rights Act and the welfare principle in family law – conflicting or complementary? (1999) 11(3) CFLQ 223-235 and Kilkelly and Lundy, 'Children's Rights in Action: using the Convention on the Rights of the Child as an auditing Tool' (2006) 18(3) CFLQ 331-350.

[18] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010), para 2.

[19] There is now considerable literature available from a range of disciplines on the child's right to be heard. See *inter alia* Sinclair, R. (2004) 'Participation in Practice: Making it Meaningful, Effective and Sustainable', *Children and Society* 18: 106-118 and Lundy, L, '"Voice" is not enough: the implications of Article 12 of the United Nations Convention on the Rights of the Child for Education' forthcoming *British Educational Research Journal* (2007).

[20] There is now extensive literature on the promotion of children's participation generally. See, for example, Lansdown, Promoting Children's Participation in Democratic Decision-Making (UNICEF Innocenti Research Centre, 2001); Sinclair, 'Participation in Practice: Making it Meaningful, Effective and Sustainable' 18(2) *Children and Society* (2004) 106–118;Thomas, 'Towards a Theory of Children's Participation' 15 *International Journal of Children's Rights* (2007) 199-218 and Lundy, "'Voice' is not enough; conceptualising Article 12 of the Convention on the Rights of the Child" 33(6) *British Educational Research Journal* (December 2007) 927 – 942.

importance of ensuring inclusive decision-making and the need to teach children about the values of democracy and citizenship are all arguments in favour of listening to children.[21] In family decision-making, ensuring children have a say can secure their protection as well as their participation rights[22] but more importantly perhaps, taking the views of children into account in decisions made about them is good not just because of the added value it gives to the outcome, but because of the importance of process.[23] As Henaghan explains in the context of judicial family law decision-making, 'the reason for obtaining the child's views …is to listen to the child, to show respect to the person whom the decision is about'.[24] A similar point is made by Smart, Neale and Wade who argue that 'children's viewpoints need to be included if family policy is to proceed from an ethical stance'.[25] More importantly, we know from the extensive array of studies that it is important to children themselves that they have their say in family law decision-making and in other areas of their lives.[26] Far from 'wanting their way', children want a say in the decision-making process because it is important to them, because they do not want to be marginalised from decisions that affect them, and because they believe that it contributes not just to better decisions but to more workable arrangements about their care.[27]

As noted, the scope of Article 12 is broad insofar as it recognises the right of the child to be heard in 'all matters affecting the child'.[28] Given that 'matters affecting the child' are decided in families every day, the Committee on the Rights of the Child has highlighted the importance of promoting the provision in the private family setting.[29] At the same time, it is the state's duty to facilitate children's participation in decision-making and in this regard, the Committee has recommended that states encourage parents and guardians, through legislation and policy, to listen to children and give due weight to their views in matters that concern them.[30] States are also required to take steps to inform and support parents to ensure that parenting respects the child's right to be treated with respect, for their views to be heard and their evolving capacity support.[31] Article 12 thus has clear implications that go beyond how the state carries out its own functions in relation to children's decision-making. In addition to requiring that state authorities hear the views of children, the state is also required to ensure that parents do so and to support them (under Article 18) to this end. Research has identified that parents' understandable desire to protect their children from conflict and from the risks associated

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[21] See also the argument that children's involvement in decision-making in the area of healthcare has significant therapeutic benefits in Kilkelly and Donnelly, *The Child's Right to be heard in the Healthcare setting: Perspectives of Children, Parents and Health Professionals* (Office of the Minister for Children, 2006), p 8.

[22] Röbäck and Höjer, 'Constructing Children's Views in the Enforcement of Contact Orders' 17(4) *International Journal of Children's Rights* (2009) 663-680.

[23] See generally See Freeman, M. Relocation. *The reunite Research*. Funded by the Ministry of Justice. July 2009, available at www.reunite.org (11 January 2010).

[24] Henaghan and Atkin, *Family Law Policy in New Zealand*, 3rd Ed, Wellington, Lexis Nexis, 2007, p 323.

[25] Smart, Neale and Wade, *The changing experience of childhood: Families and Divorce* (Oxford, Polity Press, 2001), at p 156.

[26] See Kilkelly, Kilpatrick, Lundy, Moore and Scraton, *Children's Rights in Northern Ireland* (NICCY, 2005) which found the right to have a say the most important right to children in Northern Ireland. In relation to family law, see for example, Smart and Neale, 'It's my life too – children's perspectives on post-divorce parenting' Family Law (2000) 163-169; Gollop, Smith and Taylor, 'Children's involvement in custody and access arrangements after parental separation' 12 CFLQ (2000) 383-399; Bretherton 'Because it's me the decisions are about' – children's experiences of private law proceedings' 32 *Family Law* (2002) 450-457 and Parkinson, Cashmore and Single, 'Parents' and children's' views on talking to judges in parenting disputes in Australia' 21 *International Journal of Law, Policy and the Family* (2007) 84-107.

[27] See Cashmore and Parkinson, *Children's and Parents' perceptions of Children's participation in Decision-making after Parental separation and Divorce*. The University of Sydney Law School Legal Studies Research Paper 08/48 May 2008 available at http://ssrn.com, at p 9.

[28] Article 12(1).

[29] Committee on the Rights of the Child, *The Right of the Child to be Heard,* General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010), para 90. The Committee has highlighted that such an approach to parenting serves to promote individual development and enhance family relations. Ibid.

[30] Ibid, para 92.

[31] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010), paras 90-94.

with involvement in the decision-making process is a considerable obstacle to children's participation.[32] Clearly, more needs to be done to promote more widespread awareness of the importance of listening to children and it is important that courts deciding relocation cases consider the extent to which children's views have already been taken into account in the decisions made by the parties themselves.

Article 12 does not afford a higher status to listening to children depending on the seriousness of the decisions being taken – children's views are to be heard 'in all matters[33] - and nor does it differentiate between children of different ages. The only condition in Article 12(1) is that the child be 'capable of forming his/her views'. The Committee has rejected that this requires that only children who have achieved a certain level of competence or capacity must be heard. Instead, it has highlighted that children of all ages and capacities can express their views, perspectives and experiences and that there are a range of methods and methodologies that can ensure that these are fed into the relevant decision-making process.[34] In this regard, Article 12 places the onus to listen to the child firmly on the adults concerned, rather than the child. Moreover, the child also 'has the right not to exercise this right' meaning that expressing views is a choice for the child, not an obligation.[35] This is entirely consistent with research that shows that children desire participation in decision-making that falls short of taking responsibility for these decisions.[36]

Thus, what is crucial – for children themselves and under the Convention - is that the filter of age and maturity applies only to the weight to be attached to the child's views, and not the hearing of those views in the first instance. In this regard, the Committee on the Rights of the Child has rejected that children without capacity have no right to be taken seriously,[37] stressing that compliance with Article 12 involves separate elements of first, hearing the child and second, taking what has been heard into account in line with the child's age and maturity.[38] Again, this has clear implications for decision-makers, including parents, in relation to relocation and means that children's involvement in such decisions cannot be limited to those deemed old and/or mature enough for this purpose.

In order to implement the right in Article 12(1) to ensure that children's views are heard, Article 12(2) provides that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. According to the Committee on the Rights of the Child, this includes judicial proceedings governing matters of residence and contact following separation or divorce and may also include alternative measures like mediation and arbitration.[39] How best to implement Article 12(2) – whether to provide separation representation for children or to have the judge hear them directly – continues to be the subject of considerable debate. The conventional wisdom is that indirect methods of informing the court of children's

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[32] See Tomanovic, 'Negotiating children's participation and autonomy within Families' 11 *International Journal of Children's Rights* (2003) 51-71. See also Kilkelly and Donnelly, *The Child's Right to be heard in the Healthcare setting: Perspectives of Children, Parents and Health Professionals* (Office of the Minister for Children, 2006).This was identified by children, parents themselves and health professionals in this study.

[33] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010), paras 26-27.

[34] *Ibid*, paras 20-21.

[35] Committee on the Rights of the Child, *The Right of the Child to be Heard,* General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010),at para 16.

[36] See, for example, Smart and Neale, 'It's my life too – children's perspectives on post-divorce parenting' Family Law (2000) 163-169; Gollop, smith and Taylor, 'Children's involvement in custody and access arrangements after parental separation' 12 CFLQ (2000) 383-399; Bretherton 'Because it's me the decisions are about' – children's experiences of private law proceedings' 32 *Family Law* (2002) 450-457 and Parkinson, Cashmore and Single, 'Parents' and children's' views on talking to judges in parenting disputes in Australia' 21 *International Journal of Law, Policy and the Family* (2007) 84-107.

[37] Archard, Children's Rights and Childhood (Routledge, 1993) and Federle, 'Rights Flow Downhill', 2 International Journal of Children's Rights (1994) 343–368.

[38] Committee on the Rights of the Child, *Implementing Child Rights in Early Childhood*, General Comment No 7 (2005). Un Doc CRC/C/GC/7/Rev.1 20 September 2006 available at www.ohchr.org (18 January 2010), at para 14.

[39] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010), para 32.

views are 'greatly superior to the judge interviewing children directly'.[40] Not only are professionals regarded as better able to interview children, they are also seen as better qualified to interpret children's views in light of all the circumstances.[41] In some jurisdictions, however, the private judicial interview has become more acceptable in the absence of other mechanisms for hearing the views of the child. But, as Clissmann and Hutchinson argue in the Irish context, it is 'profoundly unclear where the judicial discretion to hear the views of an infant in this way is derived from' and concerns abound about this apparent breach of the 'hearsay rule'.[42] However, those opposed to judicial interviews on these and other grounds are being challenged by increasing discussion in a range of jurisdictions of the potential benefits of undertaking such interviews as part of the overall decision-making process. Empirical research with children and young people, has found that children favour speaking directly to the judge because they want their views heard by the ultimate decision-maker.[43] Admittedly direct involvement of the child in this way can be threatening to the parent who fears the child will express a preference for the other parent either genuinely or under duress. And it may have risks for the child too. But, recent criticism by the Office for Standards in Education, Children's Services and Skills of the reports prepared by the Children and Family Court Advisory and Support Service (CAFCASS) in relocation cases – in particular, in relation to the lack of focus on the wishes and feelings of the children - suggests that both models can be flawed.[44] Regrettably, Article 12 does not assist here although the guidance of the Committee on the Rights of the Child is that legislation on separation and divorce must include the right of the child to be heard by decision-makers and in mediation processes, preferring an case-by-case approach a to what age this is required.[45] Clearly, from the Convention's perspective, the requirement is that children's views are heard; it is less relevant how that happens.

The Family

In addition to the rights that must inform the decision-making process, the Convention also includes several substantive provisions that set out the rights of children relevant to divorce and relocation situations. The Convention and indeed children's rights sometimes suffer from the misconception that they are anti-family, and that children's rights per se involve the zero sum game of taking rights from adults. In fact, the importance of the family to the child is emphasized throughout the Convention. The Preamble recognises the family as the fundamental unit of society and stresses that children need to grow up in a safe family environment. In the Convention, several provisions reflect the importance of the family to children and emphasise the important role that parents play in guiding and influencing their children in the exercise of their rights. Frequent references are made to parents, legal guardians and extended family and community members with a role in the child's life and the rights of parents are also given express recognition in a number of important provisions. The state's duty to support families is set out in Article 18 of the Convention which requires states to use their 'best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child'. The provision also notes that parents have the primary responsibility for the upbringing and development of the child and specifies that the 'best interests of the child will be their basic concern'. Article 18(2) provides that for the purpose of guaranteeing Convention rights, states shall render 'appropriate assistance' to parents 'in the performance of their child-rearing responsibilities' and shall ensure 'the development of institutions, facilities and services for the care of children'. This clearly worded provision contains two principles – the first is an acceptance of the concept that parents will and must act in their child's best interests. The second is the acknowledgment that this is something for which they are entitled to state support, including through the development of relevant state services.

The relationship between children, parents and the

[40] Cashmore and Parkinson, above at 49.

[41] This view appears to be one shared by the European Court of Human Rights. See *Sommerfeld v Germany* [GC] (2004) 38 EHRR 35 and *Sahin v Germany* [GC] (2004) 36 EHRR 565.

[42] Clissmann and Hutchinson (II), above, at 5.

[43] Cashmore and Parkinson, above, at 51. See also Crichton, 'Listening to Children' October [2006] Fam Law 849-854 where a District Judge expresses the same impression of personal experience.

[44] See details in Freeman, M. Relocation. *The reunite Research*. Funded by the Ministry of Justice. July 2009, available at www.reunite.org (11 January 2010), at pp 18-20.

[45] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010),para 52.

State with regard to respect for the child's rights is dealt with in Article 5. This provides that states will respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to the child in the exercise of his/her rights in a manner consistent with the child's evolving capacities. This provision neatly demonstrates the gradual nature in which the parents' direct role in the protection of children's rights transfers to children as they acquire the maturity to undertake this role for themselves.[46] According to the Committee, 'respecting young children's evolving capacities is crucial for the realisation of their rights' and while, under Article 5, parents (and others) have 'responsibility to continually adjust the levels of support and guidance they offer to a child', these adjustments 'take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests.'[47] The evolving capacities doctrine should thus be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression and which have traditionally been justified by pointing to children's relative immaturity'.[48]

Several Convention provisions specify the rights of the child with respect to the family and chief among these are Article 7, which recognises the child's right to know and be cared for by his/her parents and Article 8, which obliges states to respect the child's right to preserve his or her identity, including nationality, name and family relations without lawful interference. In the context of parental separation, Article 9 is hugely significant in the context of decisions as to residence and contact, including relocation. Article 9 (1) requires states 'to ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child'. One of the specific examples provided here is where parents are living separately and a decision must be made as to the child's place of residence. The requirement that such matters be informed by what is in the best interests of the child and that they be determined by the 'competent authorities subject to judicial review' clearly affirms the importance of ensuring that a competent body take such decisions in an independent manner. The importance of process is equally important here and this is recognised by Article 9(2) which requires that in any such proceedings, 'all interested parties' must have the opportunity to 'participate in the proceedings and make their views known'. Although this makes clear that the child's parents must be entitled to be heard and to participate in the decision-making process,[49] from the child's perspective it is important that Article 9 reaffirms the child's right to be heard in this specific context also. This is critical to ensuring that such decisions are made in a rights-compliant manner as discussed further below.

As to how the merits of the separation of children from parents should be determined, Article 9(3) requires states to 'respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'. This clearly states the default position as one of direct and regular contact, with the exception being where this is not in the child's best interests. Despite its references to the child's best interests, the Convention regrettably provides no guidance as to how the concept might be defined and applied either in specific contexts or generally. Particular criticism has been made of the best interests principle's use in the family law context where claims of unfettered discretion and the absence of transparency abound.[50] It is said too that the principle lacks transparency insofar as it is not clear what precise factors have informed the decision-making process.[51]

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[46] However, see the criticism of McGoldrick, 'The United Nations Convention on the Rights of the Child' 5 *International Journal of Law and the Family* (1991) 132-169, at pp 138-139.

[47] Committee on the Rights of the Child, *Implementing Child Rights in Early Childhood*, General Comment No 7 (2005). Un Doc CRC/C/GC/7/Rev.1 20 September 2006 available at www.ohchr.org (18 January 2010), at para 17.

[48] *Ibid*.

[49] Similar principles have been developed by the European Court of Human Rights with respect to the rights of parents under article 8 of the ECHR. See Kilkelly, 'Article 8 – The Right to Respect for Private, Family Law, Home and Correspondence' in Harris, O'Boyle, Bates and Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd Ed, Oxford University Press, 2009), at pp. 416-418.

[50] This now a strong body of literature criticising the best interests or welfare principle on these bases. See the discussion above and also in particular, Eekelaar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' 8(1) *International Journal of Law, Policy and the Family* (1994) 42-61. For a useful summary, see Fortin, *Children's Rights and the Developing Law*, 3rd Ed, pp 22-26.

The Payne discipline illustrates this point in relocation cases: while it purports to be focused on the welfare of the child, 'the reasoning is actually structured so as to protect the interests of the relevant adult, notably the resident parent[52]. In this regard, Hayes has questioned the relationship between this approach and the paramountcy principle and advocated for a return to more direct assessment of the welfare principle.[53] Moreover, the New Zealand courts have rejected it as inconsistent with the child-centred approach required by New Zealand law.[54] More specifically they have rejected the emphasis attached to the mother's likely reaction to a negative decision to her request to relocate limiting it to cases where there is independent evidence of psychological harm. As George notes, however, cases with such evidence are likely to be sufficiently serious to raise questions about her capacity as a care giver, ruling out that such a reaction would in fact benefit the parent seeking to relocate.[55]

It can also be said that an approach focused on the child's welfare of best interests is in fact anathema to a rights-based approach which is in contrast based on the principles of transparency, reasoned justification, and proportionality.[56] However, the Committee on the Rights of the Child has responded to these claims of paternalism by attempting to re-shape the best interests principle in the children's rights context with specific reference to the child's right to be heard, set out in Article 12. In particular, in 2009, the Committee formulated the best interests principle as a procedural right that 'obliges States Parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration'.[57] According to the Committee, the Convention requires states to assure that those responsible for taking actions in the best interests of the child also fulfil a mandatory duty to hear the child, as stipulated in Article 12.[58] Even for younger children, the Committee has asserted that determining the best interests of the child must take into account the child's views and evolving capacities.[59] Furthermore, it has recommended states parties to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child's interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences.[60] The Committee has rejected the notion that Articles 3 and 12 conflict, finding instead that the provisions are complementary.[61]

Resolving Rights Conflicts

So, this analysis of the Convention on the Rights of the Child makes clear that applications for relocation have considerable implications for children's rights both in terms of their substantive rights and their procedural rights, notably to have their views taken into account in such decisions. Many Convention rights will be invoked in relocation cases including the child's right to contact with both parents following separation and the right to know and be cared for by his/her parents. Both would appear to support refusal of relocation application where that would risk disruption to the child's relationship with the non-resident parent. But are there children's rights that would support a relocation decision? Clearly, family rights are also relevant here – the child's relationship with the resident-carer may demand it – and the question of child protection, under Article 19 of the Convention, may

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[51] Eekelaar, 'Beyond the Welfare Principle' [2002] CFLQ 237; Kilkelly and Lundy, supra.

[52] See the criticism in Herring and Taylor, supra, p 4.

[53] Hayes, supra.

[54] *D v S* [2002] NZFLR 116. See the more recent case of B v B (Relocation) [2008] NZFLR 1083 and for a comprehensive analysis of New Zealand law in this are see Henaghan, 'Going, Going … Gone – to relocate or not to relocate, that is the Question' *Family Law,* New Zealand Law Society, 18 September 2009, 295-326.

[55] George, 'Are we there yet? An analysis of relocation judgments in light of changes to the Family Law Act' (2008) AJFL 259 cited in Henaghan, ibid.

[56] See Fortin, *Children's Rights and the Developing Law*, 3rd Ed, at pp. 22-29 and Kilkelly, *Children's Rights in Ireland; Law, Policy and Practice* (Tottel Publishing, 2008), pp 10-12. See also Herring and Taylor, supra, at pp.

[57] Committee on the Rights of the Child, *The Right of the Child to be Heard*, General Comment No 12 (2009) UN Doc CRC/C/GC/12, 20 July 2009, www.ohchr.org (18 January 2010),at para 70.

[58] *Ibid*.

[59] Committee on the Rights of the Child, *Implementing Child Rights in Early Childhood,* General Comment No 7 (2005). Un Doc CRC/C/GC/7/Rev.1 20 September 2006 available at www.ohchr.org (18 January 2010), at para 13.

[60] *Ibid*, at para 14.

[61] Accordindg to the Committee, there can be no correct application of Article 3 if the components of Article 12 are not respected. *Ibid*, at para 74.

arise, for example, where the parent reacts very badly to the court's refusal of her application. However, where continuing with the current position is seen to offer the child the best chance for a relationship with both parents, then this outcome, ie a refusal of the application to relocate, would appear to offer the best chance for protection of the child's rights too. But is the matter that simple? What if a clearly better quality of life awaits the child in his/her new location? Could persuasive arguments be made based on the child's right to education (Art 28), the right to rest, play and leisure (Art 30) and the right to health care (Art 24)? And what scale of improvement in the protection of these rights would be required before an interference with the child's family rights (with the non-resident parent) could be justified? Does the principle of proportionality – such as it applies under Article 8 ECHR for example – offer any solution here? And what about the rights of other parties, notably the parents here? Do they not also have important, if not equally valid, rights claims in this context?[62]

It is widely recognised that there is no easy answer to any of these questions. In many cases, it will simply be impossible to ensure that all a child's rights are equally protected and a balance will frequently have to be struck between the child's individual rights and those of other parties. The Convention contains no explicit guidance as to how this balance can be achieved but its provisions do highlight important elements of process that must be followed if decision-making is to be rights-compliant. In cases where allowing relocation will undermine the child's right to contact with the non-resident parent, it is useful to return to the terms of Article 9 to see whether such an interference is permissible. This provision, it is remembered, is not phrased in absolute terms – limits are permitted where the child's best interests requires – and it also comes with that all important procedural component which requires the views of all parties to be heard.[63] On this basis, a case can be made that as long as a decision gives consideration to the substantive rights of the child, as the central party to the dispute, and also takes into account the child's views, in line with article 12, then both process and outcome will be rights-compliant. And where the conflict between the child's substantive rights – or indeed between the rights of the child and those of the other parties – cannot be resolved, then it is submitted the child's involvement in the decision-making process directly or indirectly becomes the final frontier. Only respect for the child's procedural rights will thus ensure a process that is rights-compliant. The evidence is that some involvement in the process, an acknowledgement that this affects them too and respect for their views on what should happen are principally (although not always only) what children themselves desire.

The European Dimension

Of course the requirement for a rights-compliant decision and process is not confined to the Convention on the Rights of the Child. Other instruments, notably the ECHR which is part of domestic law in many countries, and now the EU charter of Fundamental Rights, which came into force as part of the Lisbon Treaty on 1 December 1999, make provision for the rights of the child. Article 24 of the Charter reiterates many of the CRC's principles in this area including children's right to care and protection for their well-being, the right to express views freely and have them taken into consideration in matters that concern them, the requirement to ensure that the best interests of the child are a primary consideration in all actions relating to children[64] and finally, most specifically, Article 24 recognises the right of the child to maintain on a regular basis a personal relationship with both parents, unless that is contrary to his/her interests. Although the likely impact of the Charter is as yet unclear, the fact that its provisions are so clearly in line with the CRC, to which all EU states are a party, is an important message for those seeking to promote children's rights in the area of family law. [65]

More directly relevant, however, is the European Convention on Human Rights and in this regard, Herring and Taylor rightly invoke the ECHR as the basis for an

[62] Herring and Taylor, 'Relocating Relocation' [2006] CFLQ 18(4) 517.

[63] This provision is similar therefore to article 8 ECHR even if the latter provision has only been applied in cases with adult, rather than child applicants. See Kilkelly, 'Article 8 – The Right to Respect for Private, Family Law, Home and Correspondence' in Harris, O'Boyle, Bates and Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, 2nd Ed (Oxford University Press, 2009), at p 394.

[64] In this regard, McGlynn has expressed concern about the choice of 'primary' over paramountcy' in Article 24 although the effect of this remains to be seen. See McGlynn, *Families and the European Union. Law, Politics and Pluralism*, (Cambridge University Press, 2006) pp 70-71.

[65] See also McGlynn, 'Rights for Children? The potential Impact of the European Union Charter of Fundamental Rights' 8 *European Public Law* (2002) 387-400.

alternative approach to relocation cases than is currently followed by the English courts.[66] In particular, they advocate an approach based on the rights of the parties which, they submit, is in line with the seriousness of the interests affected by the relocation and required by the Human Rights Act 1998 (HRA).[67] The proposed approach identifies the rights of the parties, notably under Article 8 of the ECHR which requires respect for family life, considers the justifications for interfering with the right and then in the 'ultimate balancing exercise' weighs up the interference with each right against the other in order to find a solution that 'minimises the interference with both rights'.[68] Their analysis neatly identifies the interests of the adult parties involved in the relocation decision by focusing on the rights of the parties to protection for their personal autonomy and their capacity to make decisions consistent with their vision of the 'good life'. The reasoning falls short, however, with respect to their view of what rights and interests of the child are affected by the decision to relocate.[69] In particular, the authors support their approach by arguing inter alia that it is not in a child's interests to grow up in a family in which a parents' interests count for nothing, that children should learn respect for each other's rights and be able to negotiate and learn 'to be effective members of families or communities, asserting their rights where appropriate, but sacrificing them where necessary'.[70] All this may be true, at some level, but what of the child's independent rights? Are these not also worthy of protection and inclusion in an ECHR analysis? The picture remains incomplete according to this analysis, which notwithstanding its merit does little to change the basic deference shown to the rights of parents.

An alternative approach based on the ECHR is possible however. Although the ECHR is not replete with references to children's rights, the case law of the European Court of Human Rights (ECtHR) is confirmation, were it needed, that children can invoke ECHR provisions.[71] Extensive case law on Article 3 (protection from harm), Article 5 (right to liberty), Article 6 (fair trial) and Article 2 of Protocol 1 (education) demonstrates the relevance and importance of the ECHR to children in substantive terms and as a remedy of last resort.[72] Admittedly, there have been few applications taken by children alone asserting their right to respect for family life under Article 8, but the cases taken by their parents clearly have direct relevance to them. In addition to the extensive alternative care jurisprudence, the European Court has considered numerous private family law matters under Article 8. Cases of particular relevance to the relocation dilemma include those concerned with restoring a parent's right to contact following child abduction[73] and here it is clear that positive obligations to respect family life can have real and practical consequences for how matters are handled by the national authorities. Those involved in relocation cases at all stages – including those who advise parents, mediate between them and aim to avoid a court-imposed solution - would do well to reflect on this.

Also relevant are those cases detailing the extent to which children should be heard in order to ensure that the body determining the parent's right to contact has sufficient material to reach a reasoned decision in the particular case.[74] As with the New Zealand courts, the emphasis is on transparent decision-making informed by evidence rather than prediction.[75] The focus in ECtHR jurisprudence on the procedural as opposed to the

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[66] Herring and Taylor, 'Relocating Relocation' [2006] CFLQ 18(4) 517.

[67] *Ibid*, at p 5.

[68] Herring and Taylor, supra, p 9.

[69] The authors focus here not on a child's rights under the CRC but on a view of children's rights which emphasises bringing children to the 'threshold of adulthood with maximum opportunities to form and pursue life goals reflecting an autonomous choice as closely as possible'. Herring and Taylor, *ibid*, p 20, citing Eekelaar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' (1994) IJFPF 42.

[70] Herring and Taylor, supra, p 11.

[71] See generally, Kilkelly *The Child and the ECHR*, (Ashgate, 1999).

[72] See Kilkelly, *ibid*, and Fortin, 'Rights Brought Home for Children' (1999) 62 MLR 350.

[73] See *Glaser v United Kingdom* (2001) 33 *EHRR 1; Ignacollo-Zenide v Romania,* 25 January 2000; *Monory v Hungary v Romania*, 4 May 2005; *Bianchi v Switzerland*, 22 June 2006 and *Iosub Caras v Romania*, 27 July 2006.

[74] See *Sahin v Germany* [GC] 36 EHRR 765 and *Sommerfeld v Germany* [GC] (2004) 38 EHRR 35, See also *C v Finland*, 9 May 2006.

substantive rights of the parties suggests that an ECHR compliant approach should involve paying due attention to the decision-making process in addition to engaging in a more transparent weighing up of the competing interests of the parties. As such, a rights-approach need not result in a different outcome but it should produce a much improved process, with all the benefits that such ownership involves especially for children. In this way at least, the ECHR test can be said to have much in common with the children's rights approach.

Conclusion

There is clear disquiet with the manner in which relocation cases are being decided in England and Wales and several approaches have been proposed as alternatives to the prevailing presumption that appears incapable of distinguishing between the interests of the applicant and his/her children. Hayes has criticised the English courts' approach for failing to apply the principle that demands that the child's interests be paramount, whereas Herring and Taylor suggest that a focus on the child's welfare is not enough to ensure compliance with the ECHR. Both claims are legitimate, but as is evident from this paper, there is another flaw that is revealed when the courts' approach is viewed through the lens of children's rights. In particular, it appears that linking the welfare of the relocating parent to that of the child deprives the child of an independent voice in the decision-making process, both substantively in terms of giving due weight to the child's substantive rights, and procedurally by ensuring that the child's involvement, directly or indirectly, in the decision-making process. In contrast, this paper has tried to advocate for an approach to relocation cases that takes the rights of children seriously. It highlights the need to ensure such decisions take into account the evidence in support of the child's rights on both sides of the argument – allowing the court to then weigh up these rights against each other - while also, more importantly perhaps, stressing the crucial nature of ensuring that children's views, however they are ascertained, are taken into account in the process.

Apart from the guidance that they offer the judicial decision-making process, children's rights standards also explain the broader obligations that the state's administrative, executive and parliamentary bodies must fulfil if children's rights are to be respected. Laws that give express protection to the rights set out in the Convention – notably the child's right to contact and the right to involvement in decisions made that affect him/her – can improve the quality of child-focused decision-making in such cases. Both Australia and New Zealand, it is suggested, stand out as positive examples of this approach. Similarly, taking seriously the duty to respect the rights of children to family life under the CRC and under the ECHR would see greater effort expended on encouraging parents to negotiate better solutions for children.

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[75] For example, on the importance of evidence on the psychological needs of the child for contact with the non-custodial parent see *R v P*, family Court, Dunedin, FAM 2005-012-000233, 23 February 2006, and in relation to the impact of a rejection of a relocation application see *B v B* (Relocation) [2008] NZFLR 1083, both cited and discussed in Henaghan, above.

Relocation – The Search for Common Principles.

The Rt. Hon. Lord Justice Thorpe*

The Problem

The frequency and intensity of parental disputes over relocation are a relatively modern phenomenon. They are a by-product of communication and travel technology exemplified by the wide-bodied jet and the worldwide web. National frontiers are lowering as we create a global world. As we survey the future we can see that this a continuing process. The next generation of jets will double capacity.

In our region the steady and continuing expansion of the European Union enlarges the choice of countries to which every EU citizen has the right of entry and residence.

Add to all that the separation factor. In many of our jurisdictions relationships are easily formed and children follow. But the relationships are as easily unformed and the family fractured. In such a painful process one of the parents may well at some level need to distance himself or herself physically as well as emotionally from the other. Dissention results and the contested relocation case is born. Judges in several jurisdictions have said that these are some of the most difficult cases that a trial judge has to decide.

Furthermore the relocation case is but an aspect of the international movement of children. There is the lawless movement or abduction. Then there is the judicially sanctioned movement following a successful application to relocate. From the standpoint of the determined parent there is thus a choice of routes. Nothing more directly engages International Family Law than the cross-border movement of children. International Family Law has developed a common standard to prevent or deter the wrongful removal of children, thanks to the creation and rapid development of the 1980 Hague Convention. The Convention enshrines the principles to be applied internationally to ensure the swift return of abducted children.

The question that this article poses is whether common principles can be agreed internationally for the determination of applications brought by the parent who has chosen to seek judicial permission rather than to remove wrongfully. Again, viewed from the perspective of the unsettled parent, an informed choice between the lawful and the wrongful in part depends upon knowing what test the judge will apply to the application for permission and accepting that test as reasonable.

With that introduction I turn to consider in some detail the origin and development of the test applied in our jurisdiction and its principled foundation.

The English Approach

The Court of Appeal in London established its principles comparatively early in the course of the social developments referred to above. It was on the 24th day of July 1970 that the court delivered judgment in the case of *Poel v. Poel* (1970) 1WLR 1469. It was dealt with in the day: only 1 unreported case was cited in argument and none in the three extempore judgments. The three judges concurred that the mother's application to relocate to New Zealand had to be governed by the paramount factor of child welfare. However the court concluded that the welfare of the children was most likely to be achieved by recognising and supporting the function of the primary carer. This concept was expressed by Sachs LJ in the following passage: -

> "When a marriage breaks up, a situation normally arises when a child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as my lord has pointed out, produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the

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child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

The subsequent development of this approach was strongly stated in judgments of Ormrod LJ in cases such as *A v. A* (1979) 1FLR 380, the unreported 1981 case of *Moody v. Field* and the later case of *Chamberlain v. De La Mare* [1983] 4FLR 434. The last case is important because Balcombe J at first instance had refused the mother's application, doubting whether prior decisions of the Court of Appeal had sufficiently regarded the statutory requirement to give paramount consideration to the welfare of the child. The mother's appeal was allowed. Ormrod LJ emphasised that the court in Poel had not weighed the interests of the adults against the interests of the children but had rather weighed the effect on the children of imposing unreasonable restraints on the adults. Ormrod LJ explained the principle in characteristically unlegalistic English:-

> "The reason why the court should not interfere with the reasonable decision of the custodial parent, assuming, as this case does, that the custodial parent is still going to be responsible for the children is, as I have said, the almost inevitable bitterness which such an interference by the court is likely to produce. Consequently, in ordinary sensible human terms the court should not do something which is, prima facie, unreasonable unless there is some compelling reason to the contrary. That I believe to be the correct approach."

These forthright judgments provided a clear standard against which practitioners could measure prospects of success in individual cases and which trial judges could apply to the mounting stream of contested applications. Many of their decisions were challenged in the Court of Appeal on the facts or on the weighing of the discretionary balance but the underlying principle was unchangingly upheld. After thirty years of precedent it is easy to see that relocation applications have been consistently granted by the London Court of Appeal upon the application of the following two propositions:

> (a) the welfare of the child is the paramount consideration; and
>
> (b) refusing the primary carers reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children.

Or course in the majority of cases the diminution in contact to the other parent has been equally recognised as detrimental but then outweighed in the discretionary balancing exercise.

In so stating the proposition, note that I have given the primary carer the female sex. That is, of course, because in the overwhelming majority of cases considered by the Court of Appeal, the primary carer has been the mother. This factor requires further consideration but clearly the propositions apply equally to cases in which the primary carer is the father.

A landmark event in the law of England and Wales was the commencement of the Human Rights Act 1998 importing into our domestic law the European Convention of Human Rights. Most relevant to family proceedings is Article 8, establishing the right to family life. Inevitable then was the submission that the developed principles determining relocation applications were inconsistent with the ECHR and particularly the Article 8 right of the left behind parent to family life. That challenge came to the Court of Appeal in the case of *Payne v. Payne* [2001] Fam 473. The submission failed. In my judgment I noted that decisions of the Strasbourg Court inevitably recognised the paramountcy of the welfare of the child in any situation in which the rights of individual family members conflicted. By way of instance in *L v. Finland* (application number 25651/94), the court stressed that "the consideration of what is in the best interests of the child is of crucial importance."

I also pointed out that Article 2 of Protocol 4 (a protocol not yet ratified by the United Kingdom) provides the European citizen with "the right to liberty of movement and freedom to choose his residence". Thus Protocol 4 is a useful reminder that it is not one but everyone in a family who enjoys rights. The function of the court is not only to uphold the rights of the individual but to balance the rights of the individuals when they conflict. A cornerstone objective of the European Union is also to ensure the European Citizen's right to movement within the Union.

The judgments in *Payne v. Payne* consider specifically two categories of case in which the court has recognised that the proposed relocation is consistent with the welfare of the child. The first category is the repatriating mother whose only attachment to England came with the marriage and went with its breakdown. The second category is the mother who has married again to a man whose roots or whose employment incline him to some

other jurisdiction.

Later it was suggested that a third category was emerging, which was labelled the life-style choice category. Typically the applicant mother, with the right to reside in any EU jurisdiction, asserted that she and her child would greatly benefit from living out a Spanish/French/Italian/Greek idyll (the chosen locations are invariably Mediterranean and usually not far distant from the sea). It was then submitted that the principle in *Payne v. Payne* had no application to these cases, which were portrayed as whimsical or even capricious choices. That argument was rejected in the case of *B (Children)* (2004) EWCA Civ 956. In my judgment I emphasised the importance of applying the same principle in all relocation decisions and of avoiding invitations to categorise. Clearly in a life-style choice case the applicant faces a harder task in satisfying the judge that the refusal of her application would profoundly destabilise her emotionally and psychologically.

The Welfare Test in Relocation Cases and its Foundation

Let us now consider the elasticity of the welfare test in the context of relocation cases. Almost without exception the applicant is the mother and the primary carer of the child. The respondent father may oppose the application by criticising her proposals as unrealistic, or urging the educational and cultural deficit of the proposed move or, most usually, emphasising the diminution in frequency and overall quantity of his contact were the move sanctioned. In the paradigm case the court weighs the impact on the mother of refusal against the diminution in the father's contact. This balance is struck in the context of the welfare of the child. Thus the harmful impact on the mother is taken to be harmful to the child: the diminution in contact is a deprivation of the child's right to relationship with his father. In recent years father's rights groups have singled out this principle for particular criticism, contending that it is matricentric and discriminatory. Given that the principle is not derived from expert evidence nor from any research studies the challenge cannot be lightly dismissed.

The emergence of the principle needs to be seen in the context of social tides that were moving some forty years ago. The judgments reflect the law as it then was. Parents contended for custody, care and control and access orders expressive more of parental power than responsibility. The parent who held the custody had a consequential right to decide major issues concerning the upbringing of the child including the country of habitual residence. In an age of sharing of responsibility and even residence perhaps the Poel edifice wobbles.

Furthermore the U.N.C.R.C had not been conceived when Poel was decided. In recent years its Articles are much more influential in any discretionary welfare judgment. Weight must surely be given to Art. 9(3):-

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest."

Equally pertinent are the provisions of Article 12(2):-

"for this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings effecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

That sub-paragraph is of course an appendage to Article 12(1) assuring the right of the reasonably mature child to express views in all matters affecting welfare.

The passage of the Human Rights Act 1998 has impacted strongly on the way in which family cases are both argued and decided. We are rightly required to be vigilant to uphold the individual's Article 8 rights to family life. It is however important that we do not loose sight of the responsibilities and duties that attend the exercise of rights. The mother who bears the responsibilities that flow from the grant of a residence order acquires a broad discretion as to how she discharges those responsibilities, always subject to the overriding power of the court whose supervisory role is there to be invoked by the other parent. Moreover the court recognises that the primary carer's discretion extends to choosing the location of the children's home within the jurisdiction, even if that choice precludes weekly contact or terminates an already established pattern of weekly contact. It is only in the most exceptional cases that the court will intervene to prevent the primary carer's proposed relocation within the jurisdiction: see in *Re E (Imposition of conditions)* (1997) 2FLR 638.

Furthermore whilst the court's jurisdiction is limited to England and Wales Section 13 of the Children Act 1989 provides:

(1) Where a residence order is in force with respect to a child, no person may -

(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 the person in whose favour the residence order is made.

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

Therefore a proposed move to Northern Ireland does not require an application under Section 13 whilst a proposed move to the Irish Republic does. How then do we develop a different principle for the determination of relocation applications that just exceed the borders of the United Kingdom? Differences that might be thought relevant are all of degree and not of kind. As such they contribute to the exercise of the discretion in individual cases. They do not require the development of a different principle.

Finally any re-evaluation of the established principle must be in the context of the court's powers, duly recognising their limitations. For the court's power to prohibit adult freedom in order to promote the interests of the child is a limited power. In the field of relocation the court may only prohibit the primary carer from a move that is incompatible with the welfare of the children. Even in that instance it is only the exit of the child that the court can prohibit. (However in reality a mother does not, save in the rarest instances, abandon her child and go alone. This reality is often exploited by the respondent to the relocation application who will seek to say: well if you are resigned to remaining, the prospect cannot be that distressing. Judges are not generally impressed by that tactic.)

Equally the court does not possess a power to require the other parent to relocate in order to ensure the best possible outcome for the child. There are cases, albeit rare, in which the court concludes that the reduction in contact, the basis of the respondent's opposition, would be overcome were he to join the move. An example of such a case in our court is *Re: S* [2005] 1FCR 471.

In such cases the court has not the power to order the result that would best serve the interests of the child. The court's powers in relation to the parents are only derived from the residence order, the contact order and the responsibilities that they impose. Powers deriving from the contact order are restrictive powers. The court cannot order a reluctant parent to spend time with a child or a committed parent to move in order to make weekly contact possible.

On that analysis the court's power to restrict the mother's right to choose the location of the family home is derived from the residence order and the responsibilities that it imposes. Any interference with that right would be unprincipled unless the welfare of the child plainly required it.

Other Jurisdictions

The principle applied in England and Wales I believe to be well founded and consistent with our statutory law. However it is clearly not universally or perhaps even generally shared by other jurisdictions. The challenge for the international community is to develop a principle of general application. In an ever shrinking world uniformity of approach would help parents to take responsible decisions and would reduce the scope for subterfuge and strategic manoeuvring. Indeed in a real sense uniformity of approach would support the efficacy of the 1980 Hague Convention and reduce the frequency of wrongful removals and retentions.

Whether or not there is sufficient International consensus in this most difficult area is a question that has come to the fore last year and this.

The following factors can be clearly identified:-

(i) There is no common approach, even within the jurisdictions of the common law. In the United States case law shows wide internal divergence. In the field of family law California is a highly influential jurisdiction. Even within that state the leading cases demonstrate swing from permissive to restrictive approaches and also how much individual decisions have been influenced by social science research literature. In Canada, Australia and New Zealand the emphasis has been on balancing factors that directly bear on child welfare, rejecting the heavy emphasis that this jurisdiction has placed on the impact of refusal upon the primary carer.

(ii) The recognition of a divergence of approach is nothing new. At the International Judicial Conference for judges of the six leading common law jurisdictions in Washington in 2000 the following resolution was passed:

"(9) Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated

in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention."

(iii) The endeavour to elevate the debate above the domestic into the realm of international family justice was almost inevitable. All the jurisdictions of the common law world share the same problem and recognise the benefits of a uniform solution. The United Kingdom endeavoured to initiate a debate at the 5th Special Commission at The Hague in 2006. Unfortunately time and procedure did not favour the attempt. In this year and last we see a strong momentum. At the Cumberland Lodge Conference for judges of the commonwealth and common law jurisdictions more time was devoted to this debate than to any other. Groundwork was done in preparation for the Washington Conference in March 2010 (convened by the Hague Conference and the International Centre for Missing and Exploited Children) when judges and experts from around the world will meet to discuss over the course of three days the single topic of relocation. Finally we have the opportunity at the Centre for Family Law and Practice Conference at London Metropolitan University at the end of June to progress the debate.

(iv) There is every reason to favour a common standard adopted internationally. This could be achieved by a Convention or a Protocol made available for ratification among the member states to the Hague Abduction Convention. A relocation application is the means to a lawful removal. The Hague Convention is there to reverse an unlawful removal. States operating the Convention should support the creation of a parallel instrument standardising the factors to be taken into account in granting or refusing an application for lawful removal. I shall be disappointed if our efforts over the coming months achieve no progress towards an objective that is clearly achievable.

Forced Marriage

Hanisha Patel and Anita Guha*

Introduction

1. This article aims to set out the background to the Forced Marriage (Civil Protection) Act 2007; the context in which forced marriage arises; the relevant case law in England and Wales; and points of note for practitioners and lawyers working in the field of child (or adult) protection. The authors are both practising barristers with considerable experience in the field, and are members of the Child and Family Law team at 7 Bedford Row.

2. The Forced Marriage (Civil Protection) Act 2007 (which came into force on 25th November 2008) provides a statutory definition of forced marriage as one in which a person ('A") is forced into a marriage, if another person ("B") forces A to enter into the marriage without A's free and full consent.[1] For the purposes of the Act, it does not matter whether B's conduct forcing A into the marriage is directed against A, B or another person .[2]

Cultural Background

3. At the outset, it is imperative to distinguish the concept of a 'forced' marriage from one that is 'arranged'. Arranged marriages require the full consent of the parties involved. Forced marriages absent this vital requirement from either or both of the parties to the 'marriage'. Arranged marriages are an accepted cultural practice and are not to be criticised.

4. The sad reality in cases involving forced marriage is that generally speaking the Respondents to these applications are close family members. As Mr Justice Munby stated in *NS v MI* [2006] EWHC 1646 (Fam)[3] , "the law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives".

5. Parents often believe that they know what is best for their child. The promise of a marriage may even have been made prior to the victim being born. The central argument put forward by parents who force their children into marriage is that children should respect and obey their elders, and must not embarrass or bring shame to the family by frustrating decisions that have been made on their behalf.

6. The pressure brought to bear by parents upon children to enter into a marriage of their choosing is likely to have been constant throughout the child's upbringing. Many victims will not have the ability to question their family's views or decisions, and some will be unaware that they have the right to refuse to enter into a marriage. In situations where informal agreements are made between families about prospective marriages of the children of the respective families, family pressure is likely to be all the more intense to ensure that the agreement is honoured and that the marriage is entered into, regardless of the wishes and feelings of the child concerned.

7. Parents who force marriage upon their children frequently justify such behaviour by stating that they are conforming to cultural and religious norms. It should be highlighted, however, that every major faith condemns forced marriages. There are various other reasons given for forcing a marriage, and these are set out within Multi-Agency Practice Guidelines Handling Cases of Forced Marriage, June 2009 .[4]

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[1] Section 63A (4) Family Law Act 1996

[2] Section 63A (5) Family Law Act 1996

[3] Para 8

[4] Controlling unwanted behaviour and sexuality; preventing unsuitable relationships; protecting family "honour"; responding to peer group or family pressure; attempting to strengthen family links; achieving financial gain; ensuring land, property and wealth remain within the family; protecting perceived cultural ideals; protecting perceived religious ideals which are misguided; ensuring care for a child or adult with special needs, assisting claims for UK residence and citizenship and long-standing family commitments (Multi-Agency Practice Guidelines Handling Cases of Forced Marriage June 2009)

"Honour"

8. The issues relating to forced marriage are often closely intertwined with those relating to 'honour crime' – the 'honour'of the family is usually the key motivator behind a marriage taking place in the first instance. The term 'honour crime' encompasses various crimes that are committed with the aim of punishing the victim for acts which are perceived to be contrary to the traditional and expected mode of behaviour, and that have brought shame to the family and/or community. The use of the word 'honour' in this context has provoked much criticism from commentators. Wall J made the following observations in *Re B-M (Care Orders)* [2009] EWCA Civ 205:

> " My second point is that the time has surely come to re-think the phrase 'honour killings'. It is one thing to mock the concept of honour – as, for example, Shakespeare does through Falstaff in I Henry IV Act V, Scene i. It is quite another matter to distort the word 'honour' to describe what is, in reality, sordid criminal behaviour. …..these things have nothing to do with any concept of honour known to English law. They are, I repeat, acts of simply sordid, criminal behaviour and a refusal to acknowledge them as such. We should, accordingly, identify them as criminal acts and as nothing else….. The message from this case, which must be sent out load and clear, is that this court applies a tolerant and human rights based rule of law: one which, under the Act of 1989 regards parents as equals and the welfare of the child as paramount. That is the law of England, and that is the law which applies in this case. Arson, domestic violence and potential revenge likely to result in abduction or death are criminal acts which will be treated as such."

Statistics

9. The Forced Marriage Unit was set up in 2005. It is a subdivision of the Foreign and Commonwealth Office and provides information, advice and overseas and consular assistance to victims abroad. In 2008, the Unit received 1618 reports of possible forced marriage – 15% of those were from male victims and 39% of those involved minors. Of all the reports, 57% involve Pakistan, 13% involve Bangladesh, 7% involve India and the remaining 23% are from the UK, Afghanistan, Europe, Turkey, Africa and the Middle East. Thus, it is evident that almost a quarter of all reports involve communities outside of the Indian subcontinent, suggesting that this is a worldwide problem not isolated within any particular community.

Practical Guidance

10. Warning signs for those working with children and young people that have been identified in the Multi-Agency Practice Guidelines for Handling Cases of Forced Marriage in June 2009 include absences from school, decline in behaviour, parental refusal for the child to attend extra curricular activities, prevention from seeking further education, leaving work accompanied, attendance at the doctor's accompanied, self-harm, depression, female genital mutilation, siblings forced to marry, unreasonable restrictions such as house arrest or other financial restrictions.

11. It is vital to obtain as much information about the victim and the circumstances as possible – those at the frontline should be fully aware that for the victim to come forward is usually their last and final cry for help. The stark reality that practitioners should note is that there is often only one chance to get it right. Helpful practice guidance has been issued regarding what information should be gathered at first instance. [5]

[5] Details of the person making the report, their contact details, and their relationship with the individual under threat; details of the person under threat (including the date of report, their name, nationality, age, date and place of birth, passport details, school details, employment details, details of the allegation, name and address of parents and national insurance/driving licence number); a list should be obtained from the person under threat of all those friends and family who can be trusted and their contact details which may also include a code word to ensure that you are speaking to the right person; a way of contacting them discretely in the future; any background information; details about any threats or abuse; a recent photograph and any other identifying documents; the nature and level of risk to the safety of the person – is she pregnant? do they have a secret boyfriend or girlfriend? (Multi-Agency Practice Guidelines Handling Cases of Forced Marriage June 2009)

12. Needless to say, practitioners will have to act very quickly in cases where the individual is going overseas immediately and the practice guidelines also address what additional information should be obtained where possible. [6]

13. If no direct instructions can be obtained from the victim, it may be necessary for a litigation friend to be appointed who can instigate court proceedings on behalf of the Applicant. In appropriate circumstances, a solicitor may act as the litigation friend.

14. For practitioners to have gathered as much information in advance will place them at a significant advantage. Many forced marriage victims are removed from the jurisdiction and taken on a 'holiday' abroad to a remote village, not having been able to alert anybody of their predicament in advance. For that reason, it is of great assistance to the consular assistance services in the UK for practitioners to be able to obtain the necessary Court orders and provide them with as much information as possible to assist them in locating the whereabouts of the victim.

15. Legal representatives should consider seeking court orders that direct family members or associates to attend court to provide information regarding the victim's whereabouts. If they are unwilling to do so voluntarily, they will be subjected to uncomfortable cross examination under the scrutiny of the court about what information they are aware of or have access to. Orders will have more teeth if penal notices are attached to them as this will enable contempt proceedings to be pursued if there is evidence that the order has been breached. The Court has power to sentence contemnors to a term of imprisonment or to pay a fine, or to seize any assets that are owned by them in England and Wales. Sequestration proceedings can be an effective method of coercing recalcitrant parties to co operate with the court process.

16. Practitioners should think as laterally as they can to obtain information. If all the potential Respondents to the application are abroad, try and find a family member, even distant, who is in the UK and will be able to relay the terms of the Order to the family members abroad. Practitioners may also need to apply for seizure of passports and travel documents and should bear in mind that the victims may be of dual nationality and all passports and travel documents should be seized. Mobile phone companies may also be able to assist with enquiries in relation to telephone records and text messaging.

17. Even if the victim's whereabouts are known, further difficulties are frequently encountered in ensuring that the victim is spoken to in circumstances where there are no risks that the victim is being subjected to undue influence by family members. Victims may be terrified of the repercussions of speaking out and are sometimes threatened that they or a loved one will be harmed if they do so. The precautionary step that is normally taken with the assistance of the Foreign & Commonwelath Office ("FCO") is that the Order should specify that the victim should be taken to the nearest office of the British High Commission or consular body where a representative from the FCO can interview the victim alone to appraise the situation and assess whether the victim requires intervention to take them to a place of safety.

18. Insurmountable difficulties arise when the victim resolutely maintains during the interview that she is not being abused or subjected to any pressure from her family regarding marriage but the FCO believe otherwise. The FCO will not have the authority to take any action without any court order if the victim states that nothing untoward is happening. In such circumstances, the FCO will normally require the family to make the victim available to be spoken to them on subsequent dates so that they can monitor the situation and satisfy themselves as far as they are able that the victim is not at the risk of harm. The mandate of the FCO to act is naturally weaker in cases where the victim is over the age of 18 years old.

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[6] A photocopy of their passport for retention; any address where they may be staying overseas; date of the proposed wedding (if known); potential spouse's name (if known); addresses of the extended family in the UK and overseas; details of any travel plans and people likely to accompany them; a safe means by which contact may be made with the person e.g. a mobile phone; an estimated return date; and a written statement by the person explaining that they want the police, adult or children's social care, a teacher or a third party to act on their behalf if they do not return by a certain date (Multi-Agency Statutory Guidance Handling Cases of Forced Marriage June 2009)

Legal Context

19. The Act is wide-ranging and deals with most of the practical hurdles that practitioners are likely to face in their daily court practice. Forced Marriage Protection Orders can be made in advance to prevent a forced marriage from taking place or can be made to provide a remedy to a victim where a forced marriage has already taken place. The court has to have regard to all the circumstances including the need to secure the health, safety and well-being of the person to be protected.[7] Further, in ascertaining that person's well-being, the court must, in particular, have such regard to the person's wishes and feelings (so far as they are reasonably ascertainable) as the court considers appropriate in the light of the person's age and understanding.[8] It should also be noted that by "force", the Act includes coercion by threats or other psychological means – thus a mother threatening to commit suicide or financial pressure exerted upon a victim to ascertain his or her consent is also within the remit of the Act.

20. The content of the Forced Marriage Protection Order is also far-reaching and can contain any such prohibitions, restrictions, requirements or such other terms as the court considers appropriate[9] and thus it is clear that the courts are willing to consider broad requests for applications in order to get the necessary information that may be needed as a matter of urgency in these cases. The loosely defined wording is likely to lend itself to fruitful litigation and testing of the limits of how far the Court will be prepared to extend its jurisdiction in forced marriage cases.

Applications and the court process

21. Forced marriage cases are commenced with an originating summons and an affidavit in support. The forms for practitioners to complete are available on the court service website[10] and can be downloaded free of charge. Applications can be made by the person who is to be protected by the order, or by 'a relevant third party' or by any other person with the leave of the court. It is important to note that the only body entitled to apply without leave as ' a relevant third party' is a local authority (see paragraph 36 below).

22. Prior to the enactment of the 2007 Act, applications for protective orders were sought in wardship proceedings and/or under the inherent jurisdiction in the High Court. 15 designated county courts are now able to deal with applications for forced marriage protection orders. Consideration is being given to expanding the list of designated courts. In some cases, it is necessary for applications to be issued under both regimes in the High Court, particularly where the victim is abroad and assistance from foreign authorities and embassies is required to trace, safeguard and/or repatriate the victim.

23. Practitioners should be aware that some of the information that they are provided with may be extremely sensitive and may potentially put their victim at even greater risk of harm. For example, having a boyfriend, being secretly married to someone else, wearing make-up, being pregnant. To deal with such situations, practitioners should draft two versions of the supporting affidavit – one with all the relevant information and another to be served on family members. A separate order for restricted disclosure will then need to be applied for in court.

24. When drafting court orders, particular care should be taken to cover a ceremony of marriage or bethrothal. In some communities, once an agreement to marry has been pronounced, a broken agreement has the same stigma attached to it as a broken marriage. Non molestation paragraphs in the Order provide an extra safety mechanism for the victim and should be drafted carefully so as to afford maximum protection.

25. The first hearing is usually done on an ex-parte basis so that the Respondents to these applications are not alerted in advance. Should the family become aware that an application to the court may be made, they may take steps to speed up the marriage or indeed remove the victim from the jurisdiction. In deciding whether to grant an ex parte order, the court must have regard to all the circumstances including any risk of significant harm to the person to be protected or another person if the order is not made immediately; whether it is likely that an

[7] Section 63A (2) Family Law Act 1996
[8] Section 63A (3) Family Law Act 1996
[9] Section 63B (1) Family Law Act 1996
[10] www.courtservice.gov.uk

applicant will be deterred or prevented from pursuing an application if an order is not made immediately; and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service; and whether the delay involved in effecting substituted service will cause serious prejudice.[11]

26. Following this initial hearing, the court will list the matter for an inter partes hearing to give the Respondents to the application the opportunity to be heard. This opportunity must be as soon as just and convenient; and at a hearing of which notice has been given to all the parties.[12]

27. The Court may add a power of arrest where violence is threatened or used or where there is a risk of significant harm, either to the intended victim or to someone else in connection with the intended marriage and the court considers that there will be inadequate protection without it. The Court is able to accept undertakings as an alternative to making an Order unless the criteria for attaching a power of arrest are met.[13] The provisions governing the procedures for the arrest and remand of a person pursuant to power of arrest or warrant are analogous to those within the domestic violence legislation.

28. Breach of an order made under the Act is not a criminal offence, but the respondent may be arrested if the police believe there is reasonable cause to suspect there is a breach of the order. Breach is dealt with as contempt of court and the courts will have the full range of sanctions available to them, including imprisonment.

29. In most cases, the Courts will look beyond the parameters of the application for a protection order and whether the criteria are satisfied, and will investigate what arrangements have been made or will be made to safeguard the victim and whether it is safe for them to return to his/her family. If the victim is a child, this will invariably lead to Social Services involvement, if they are not involved already, and the Local Authority will have to consider whether it is appropriate to issue care proceedings. Other options include the Local Authority seeking leave from the Court to invoke the inherent jurisction and/or to issue wardship proceedings, or seeking leave to apply for a prohibited steps order prohibiting the parents from taking steps to remove the child from the jurisdiction. There are obvious practical advantages to the Local Authority being the Applicant given that it may be that there will need to be a social work assessment of the family situation to investigate the wider ramifications of how and why the problems arose within the family whether or not care proceedings are subsequently issued.

30. Respondents to these proceedings can be expected to be unfamiliar and bewildered by the court process initiated by their relative, in which they may be subject to draconian orders such as having their passports seized and injunctive orders being made against them. Furthermore, it is frequently the case that Respondents are provided with scant information regarding why the case has been brought to court. Restrictions upon the rights of a person to freedom of movement must be proportionate and stand up to close scrutiny. For example, there will be little justification for imposing any prohibitions upon a Respondent's ability to travel out of the jurisdiction if the victim is in a place of safety in the U.K. and there is no appreciable risk that they will be abducted.

31. As discussed above, it is routine for Applicants to obtain non disclosure orders on an ex parte basis authorising them to withhold certain evidence from the Respondents. Forced marriage cases depart from the normal guidance in child protection cases where it is expected that information should be shared with family members and that they should be consulted and informed about any decisions being taken by the authorities regarding the child. The clear guidance in forced marriage cases is that family members should not be approached, and information should not be divulged without the express consent of the victim as this may heighten the risk of harm to the victim. The danger to the victim will diminish but may not be completely removed once they are taken to a place of safety which is why in some cases orders are sought on behalf of the Applicants

[11] Section 63D Family Law Act 1996
[12] Section 63D(4) Family Law Act 1996
[13] Section 63E(4) Family Law Act 1996

that certain information never be disclosed. Issues of disclosure are highly sensitive and require careful handling by practitioners and the court to ensure that a fair balance is struck between safeguarding the victim and ensuring that the Respondent's rights to a fair hearing are respected.

32. Careful consideration should also be given to seeking reporting restrictions of the court proceedings, if any accredited media representatives attend the hearing. This issue may be particularly controversial in some close knit communities where the identity of the parties may be more easily revealed by a description of the outline facts even if the names are anonymised. In such cases, there will be a more compelling argument that the court should exercise greater vigilance in circumscribing the details that may be reported by journalists given that the consequences of any inadvertent errors will be irreparable once the information is released into the public domain.

33. Practitioners representing Respondents have to adopt a tactical approach in assessing whether it is in their client's interests to agree to giving undertakings, or to forced marriage protection orders being made on a without prejudice basis, with no findings having been made by the Court that the allegations made by the Plaintiff are true, and thus guarding their clients against the risks of any negative findings being made, as opposed to pursuing a fact finding hearing where the Plaintiff must prove the truth of the allegations relied upon on the balance of probabilities.

Impact of the legislation

34. November 2009, the Ministry of Justice published a report entitled 'One Year On: the initial impact of the Forced Marriage (Civil Protection) Act 2007 in its first year of operation'. The report states that during the first year of the Act's operation, a total of 83 applications were issued for protective orders in England and Wales. This in itself indicates that the introduction of the Act has been successful given that the predicted number of applications for this period was 50. The feedback collated from the judges and practitioners was that the procedure under the Act was straightforward, quick and efficient.

35. The findings regarding the geographical distribution of the orders revealed that two thirds of the orders were made in 3 of the 15 designated courts. No orders at all were made in 5 of the designated courts. This would suggest significant regional variation in the level of awareness and approach taken by the relevant agencies.

36. Parliament introduced the provision specifying a local authority as a relevant third party on 1 November 2009, obviating the need for a local authority to seek leave to issue an application, following public consultation upon the issue.[14] The aim of this provision was to remove hurdles to local authorities issuing applications, but may have also been intended to encourage Local Authorities to be more proactive in taking action. The view expressed by the Ministry of Justice [15] was that some Local Authorites were seen as acting slowly in becoming involved in forced marriage cases in comparison to the police who are reported to have reacted positively to the Act and to be 'active players' in bringing cases forward and utilising the legal framework as a means of emergency and preventative intervention.

37. The report suggests that there are longer term issues for local authorities and that 'the Act does not sit well with social services working methods', referring in particular to the fact that there is a poor understanding of the interrelation between Forced Marriage Protection Orders and child protection procedures, and that different statutory criteria are applicable.

38. The Government are intending to undertake further research into the impact of the 'relevant third party' provision and are considering extending the provision to the the police, and voluntary sector agencies such as Independent Domestic Violence Advisers. The Government plans to review both these proposals in Easter 2010.

Case Law

39. The reported case law in this field has focussed on issues relating to jurisdiction and the ambit of the powers

[14] Family Law Act 1996 (Forced Marriage)(Relevant Third Party) Order 2009/2023
[15] Ministry of Justice 'One Year On' November 2009 Report

that the court has to grant relief in such cases. In the landmark cases of *Re SK (Proposed Plaintiff) (An Adult By Way of Her Litigation Friend)* [2004] EWHC 3202 (Fam) and *Re SA (Vulnerable Adult With Capacity: Marriage)* [2005] EWHC 2942 (Fam), it was held that the inherent jurisdiction of the High Court could be invoked to protect an adult in an appropriate case, where the complaint was that the adult was being coerced into entering a marriage against his/her will. Singer J held in Re SK that the inherent jurisiction, in a similar manner to wardship was a "sufficiently flexible remedy to evolve in accordance with social needs and social values. If an adult is deprived of the capacity to make relevant decisions, then, if there is disagreement about what should be done in his or her best interests, or if there is a serious issue as to the propriety of what is proposed, recourse can be had to the court for declaratory relief."

40. The case of *Re B; Rb v FM and MA (Forced Marriage: Wardship: Jurisdiction)* [2008] EWHC 1436 (Fam) exemplifies the inventive and pragmatic approach that the Courts are often willing to adopt in these cases to provide the maximum protection to vulnerable victims. The facts of the case were that the 15 year old girl was a Pakistani national, and was born and raised in Pakistan. She had never set foot in the U.K, and her only connection to the U.K. was that she had dual nationality and was also a British citizen through her father who had a British passport. The case was brought to Court after the girl contacted the British High Commission in Islamabad and asked them to rescue her from a forced marriage which was being arranged by her mother ,and that arrangements be made for her to go to live with her half brother in Scotland. Hogg J held that "While the court accepted that it should be extremely circumspect in assuming any jurisdiction founded on nationality alone in relation to children physically present in some other jurisidiction, in these dire and exceptional circumstances the tentacles of the court could stretch towards Pakistan to rescue a girl who was and always had been a British child and was seeking British help. It would not have been right to ignore her pleas."

41. The Courts can also intervene in forced marriage cases to grant a decree of nullity where a marriage has already taken place if the following test is satisfied. "The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual" (*Hirani v Hirani* (1983) 4 FLR 232).

42. More recently in the case of *B and I* (23 November 2009 unreported), Baron J held that the Court had power to grant a declaration pursuant to the inherent jurisdiction that there had never been a marriage capable of recognition in England and Wales. A declaration was being sought in this manner as the 3 year time limit for an application for a decree of nullity had lapsed. It was noted in the judgment that the inherent jurisdiction could be used as a flexible tool to provide a remedy where there is none provided by legislation.

Raising awareness

43. Increasingly, in the authors' view, training seems to be provided throughout the country to legal practitioners, the police and social workers. It appears however that further training is still required, as one of the reasons the police are perceived to be more proactive in utilising the Act is that local authorities are less aware of the potential benefits of the Act.[16] Training also needs to be provided in schools – to the potential victims themselves. Unfortunately, many of these young victims are removed from schooling and taken abroad for marriage and are not aware of the help that is available to them. Teachers need to be fully trained in this area so that they are able to take action should any concerns develop.

44. The question of whether victims of forced marriage are fully informed of their rights and the protective remedies that are available to them was again raised in the report by the Ministry of Justice.[17] Recommendations were made that public awareness of the messages and principles enshrined in the Act needs to be promoted,

[16] Ministry of Justice 'One Year On' November 2009 Report

particularly within the Black, Asian and ethnic minority communities. It is further reported that a more effective strategy is required to deliver the message to 'closed communities' that the practice of forced marriage is unacceptable. There have been calls for community and religious leaders to assume greater responsibiliy in this process. A higher level of media attention is also widely seen as a measure which would promote public awareness of the issues.

45. A concern frequently raised by those working in the field is that people may be apprehensive of taking preventative or protective action in forced marriage cases, due to fears of stigmatising or offending minority communities. The Government is endeavouring to tackle this sensitive issue by engaging local communities in co-ordinating a joint response to forced marriage, in liaison with the Forced Marriage Unit.

Funding Issues

46. Legal aid is available to both Applicants and Respondents in forced marriage cases and is assessed in accordance with the usual means and merits tested criteria. Priority is afforded to Applicants for funding given that the objective of the Orders are to protect the applicants from harm, and income and capital waivers may be applied. The criteria regarding Respondents are more stringent. The same criteria governing applications for non molestation orders apply, meaning that many Respondents in forced marraige cases will be denied public funding. Feedback provided by judges[18] highlighted the need for Respondents to have access to public funding to ensure a level playing field. Further the judiciary warned of the dangers of victims and/or vulnerable witnesses being exposed to further trauma by being cross examined by Respondents acting in person. Public funding is available irrespective of the Applicant's immigration status, and for overseas victims as there is no requirement that the Applicant must be British, or living in England and Wales. Importantly, public funding is also available to Applicants to issue nullity proceedings.

Conclusion

47. The impact of forced marriage cannot be underestimated. The effects upon the victims will be devastating, and can change their lives forever. Victims may find themselves ostracised by their families and communities, uprooted from their home environment, isolated, and living in fear of being traced, harassed or abused by family and/or community. Victims who make the difficult decision not to return home will have to overcome traumatic experiences and rebuild their lives with no family support network. This all serves as a reminder of why the work undertaken in this area must continue to be afforded a high priority. Effective action must be taken to tackle the root cause of the problem, in addition to providing the maximum protection and support for victims.

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[17] Ministry of Justice 'One Year On' November 2009 Report

[18] Ministry of Justice 'One Year On' November 2009 Report

'What's in a name?' A Discussion of Shared Residence Orders and the Changes in their Application

Olivia Harris*

"What's in a name? That which we call a rose
By any other name would smell as sweet."
Romeo and Juliet, Act II, scene II

Both residence and shared residence were concepts introduced by the Children Act of 1989.[1] At the time of that Act coming into force, the government considered that shared residence orders would be rare. There was scepticism about their widespread need in family law and a recognition of the implicitly loaded nature of the words themselves:

> '…it is not expected that (they) would become a common form of order, partly because most children will still need the stability of a single home, and partly because in the cases where shared care is appropriate there is less likely to be a need for the court to make any order at all'.[2]

Similarly, the Law Commission's Report on Guardianship and Custody acknowledged even earlier, that:

> '(Shared residence) arrangements will rarely be practicable, let alone for the children's benefit'

In recent years, however, there has been an increase in the willingness of judges to make shared residence orders. When analysing the reasoning behind these decisions, it is sometimes difficult to disentangle the benefit to children of such orders from that of their parents. This is despite the interests of the child continuing to be the court's paramount consideration.[3]

Unlike Juliet's rose, in *Romeo and Juliet*, it is perhaps the 'name' of a shared residence order which smells sweet in today's courtroom rather than the reality, which those orders are supposed to reflect. Perhaps more of a psychological crutch for disenfranchised parents, without concrete theory in place to regulate the development of shared residence orders, their substance is at risk of getting lost in this soggy, anthropomorphic terminology. Their use in placating parents' interests in an ever widening variety of situations helps to detach the name from the meaning, leaving shared residence orders vulnerable to an uncertain legal future.

In order to understand the current position on shared residence orders, it is helpful to track judicial thinking on this subject since their first application.

Early case law

Section 11(4) of the Children Act makes clear provision for shared residence:

> 'Where a residence order is made in favour of two or more persons who do not themselves all live together, the order may specify the periods during which the child is to live in the different households concerned.'

However, much of the early case law on shared

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[1] These concepts replaced the previous custody orders. In *Dipper v Dipper* [1981] Fam 31 Ormrod LJ commented that 'It used to be considered that the parent having custody had the right to control the children's education – and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day to day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong'

[2] Children Act 1989 Guidance and Regulations, Vol. 1, Court Orders. Paragraph 2.2(8)

[3] Children Act 1989 s.1

residence orders was openly hostile towards their implementation. Although *J v J (A minor) (joint care and control)* [1991] 2 FLR 385, was decided before the 1989 Act came into force it indicates the then view from the Court of Appeal towards "shared" arrangements. The court held that an order for joint care and control of a child should only be granted in very 'exceptional circumstances' and that orders of this kind were generally thought to be inappropriate. The emphasis was on the interests of the child. It was considered in this case that children need to know where they are based; care and control orders in favour of one parent, but allowing for contact with the other, are the best way of safeguarding their stability. A premium was placed on the child having 'one home'. There was a reluctance to underscore the parents' equality in the eyes of the law with shared orders when provision could very well be made for this with generous contact and parental responsibility.

This remained the approach of the court notwithstanding the change introduced by the Children Act 1989. Through the early 1990's, a number of cases approved the view in *Riley v Riley (Custody)* [1986] 150 JP 439 CA that the paramount interests of the child were that he or she should have one, settled home. Although the courts had acknowledged by this point that judges certainly had a discretion to make shared residence orders, in accordance with s.11(4) of the Act, they remained unconventional. It was thought that shared residence orders should only be contemplated in circumstances where they would confer a 'positive benefit' on the child or the children (*A v A (Children: Shared residence order)* [1994] 1 FLR 669). In A v A, Butler-Sloss LJ made very clear that 'the usual order would be a sole residence order... (and that)... shared residence... is an unusual order which should only be made in unusual circumstances.'

The tone of these judgments is cautious. Without substantial statutory or regulatory guidance, there is a danger that the words 'shared residence' imply more than they are allowed to confer. The early case law on this subject seemed anxious not to create confusion out of the situation by granting these orders too frequently. Even in the latter half of the decade, the consensus was that shared residence orders should not 'become standard', as in Re N (Section 91(14) Order) [1996] 1 FLR 356, where Hale J, as she then was, said

'...it has always been acknowledged in the Court of Appeal that orders that a child should share his time between two homes are not orders that should become standard and that in many cases the child needs the security of knowing where his home base is.'

However, by 2001, there had been a slight change in thinking.

The watershed of *D v D*

In 2001, further consideration was given to shared residence orders in the case of *D v D (Children) (Shared residence orders)* [2001] 1 F.L.R. 495. Here, the mother of three children appealed against the making of a shared residence order. The children concerned spent approximately 140 days each year with their father (which he calculated was 38 percent of their time) and the rest they spent with their mother. There were two significant points of departure in this case from the previous authorities. These were

(i) the assertion that there was no requirement either in the Children Act 1989 or in the case law that a shared residence order could only be made in exceptional circumstances (*H (A Minor) (shared residence),* Re [1994] 1 F.L.R. 717 CA (Civ Div) not followed) and

(ii) that a shared residence order could be made in situations where children are spending 'substantial amounts of time' with both parents. It was clarified that the time spent at each parent's house does not need to be mathematically equal and that such an order can be made even when one parent is openly hostile towards it.

The important shift represented by *D v D* was reiterated by Thorpe LJ in the case of *Re A (Children) (Shared Residence)* [2003] 3 FCR 656:

> "I am very doubtful as to whether the judge in the County Court has sufficiently reflected in his approach the shift of emphasis signalled by the decision of this Court in *D v D* ... Where there is a proximity of homes and a relatively fluid passage of the children between those two homes, the judicial convention that the welfare of the children demanded a choice between one parent or the other as a guardian of the residence order in order to promote the welfare of the children no longer runs as it used to run".

As long as there is a broadly equal split in the time spent at each parent's home, a shared residence order can be made. Indeed, more than being able to make shared residence orders in this context, the recent case of *Re P (Shared residence order)* [2006] 2 FLR 347 CA

suggests there should almost be a presumption of shared residence where, on the ground, the child spends almost half of their time with each parent:[4]

> '(the making of a shared residence order does) not automatically follow because children divide their time between their parents in proportions approaching equality. However, where that does happen...it seems to me...that good reasons are required if a shared residence order is not to be made.' (per Wall LJ at paragraph 22)

Interestingly in this case the court emphasised that the principle established in *Dipper v Dipper* [1981] Fam 31 in regard to custody applied similarly under the 1989 Act to residence namely that

> 'it was not the case that a residence order gave one parent the authority to make the 'final decision' on issues. Day-to-day decisions had to be taken by the parent with whom the child was residing for the time being; important decisions should be taken jointly. As both parents had parental responsibility, both were in any event equal in the eyes of the law and had equal duties and responsibilities as parents' (see paras [22] and [24]).

That 'substantial amounts of time' (outlined in *D v D*) is a malleable concept was confirmed last year in *Re M (Residence Order)* [2008] 1 FLR 1087 CA. Here the judge made a shared residence order when the children spent roughly 64% of their time with their father and 36% with their mother.

Even aside from the issue of division of time, *D v D* signalled a new prominence for shared residence orders and willingness on the part of judges to grant them in a wider range of situations. In *Re F (shared residence order)* [2003] 2 FLR 397, for instance, one of the points of appeal after a shared residence order had been granted by the trial judge, was that such orders could not be approved in situations in which the parents are proposing to live in different jurisdictions. On this point both Wilson J as he then was and Thorpe LJ dismissed the appeal. They held that there was no reason not to grant a shared residence order just because the children may have to move between jurisdictions when staying with each parent. Also in this case Wilson J raised an interesting point about the 'label' of a shared residence order. He placed less emphasis on the order reflecting the exactly equal division of time between parents on the ground; 'any lingering idea that a shared residence order is apt only where, for example, the children will be alternating between the two homes evenly, say week by week or fortnight by fortnight, is erroneous' and more emphasis on the idea of a shared residence order conferring 'equal status' to each parent. He also said that;

> 'to make a shared residence order to reflect the arrangements here chosen by the judge is to choose one label rather than another. Her chosen arrangements for the division of the girls' time could also have been reflected in orders for sole residence to the mother and for generous defined contact with the father. But labels can be very important.'

The 'label' of a shared residence order was considered to be vital for the children. It was used in part to avoid confusion for the children and also to affirm the notion that the parents in *Re F* were of equal importance. However, the extent to which a shared residence order is in the best interests of the children and the extent to which it is for the benefit of the parents is sometimes more difficult to disentangle.

An analysis of the recent authorities on shared residence orders was undertaken by Wall LJ in *A v A (shared residence* [2004] 1 FLR 1195. In long and embittered proceedings, the father applied for a shared residence order as he complained that the mother made unilateral decisions about the children's health and education and was deliberately excluding him from their lives. The mother, in retort, informed the father that one of the children was frightened of him and also made allegations that he had sexually abused that child. It seems that the case was laced with acrimony between the parents at almost every level. As a result, it was held that a shared residence order best reflected the fact that the parents were 'equal in the eyes of the law' and had 'equal duties and responsibilities towards the children'. It was thought that a sole residence order in the father's favour would likely be misinterpreted as granting the father control over the situation rather than pushing the parents towards co-operation. As Wall LJ said,

> 'control is not what this family needs. What it

[4] Judith Rowe QC - Private Law Update FLBA Lecture, October 2009

needs is co-operation. By making a shared residence order the court is making that point.'

Whilst it cannot be ignored that by the start of this trial the children were spending almost exactly half of their time with each parent, the emphasis on using shared residence orders to ease parental tension was stated more strongly here than in the previous case law. Indeed, the words of Wall LJ were repeated in *Re G (residence: same sex partner)* [2005] 2 FLR 957. The fact that the parents were caught up in acrimonious disputes did not preclude the making of a shared residence order, rather a shared residence order was considered to be essential in order to give the 'clear message' that one party was not being 'marginalised' over the other.

This perhaps echoes thinking in relation to contact as well as residence; that parents should not be made to feel sidelined by particular orders. *In D (A Child) (Intractable Contact Dispute: Publicity), Re* [2004] 1 FLR 1226, for example, Munby J as he then was was keen to impress upon the parties that the courts were neither pro-mother nor anti-father, or vice versa. It was also pointed out that the court process did not deal well with cases of parental alienation. It is sometimes thought that shared residence orders can appease the hostility between parents and prevent a future return to court *(A Father and a Mother v Their Two Children (B and C*) (2004) EWHC 142 (FAM). In this line of decisions the 'name' attached to the order made is considered to be psychologically important. It could be argued that the children, especially if they are young, are less concerned with the label attached to their pattern of residence than their parents. So, the question arises, who are shared residence orders really for? Also, what makes a shared residence order different from a residence order with provision for extensive contact?

Shared residence orders and relocation

The authorities on shared residence and relocation present similarly troubling reasoning. In relocation cases, *Payne v Payne* [2001] EWCA Civ 166 remains the dominant authority. This clarified earlier cases on the subject of relocation by saying that the reasonable proposals of a primary carer mother to relocate with the children (ether to her home country or elsewhere) should not be regarded as a presumption but should rather carry 'great weight'.

There has been much recent criticism of this decision. For one thing, its perceived balance towards relocating mothers can be said not to reflect the social shift represented by an increase in shared residence orders and more 'hands on' fathers. As Thorpe LJ surmised of the *Applicant's case in Re G (Leave to Remove)* [2007] EWCA Civ 1497, 'it was suggested that (Payne) was antiquated in that it reflected the view of a past age when joint residence orders would only be made in wholly exceptional circumstances.' This has now changed. *D v D* has confirmed the more commonplace status of shared residence orders in today's courtroom. However, shared residence orders still do not have an explicit impact on relocation cases. Continuing his judgement in *Re G*, Thorpe LJ went on to say that there has been no such 'self-evident social shift' that requires Payne v Payne to be reconsidered. He said in any case that *D v D* was decided before Payne and so has to have been in the mind of the court when that judgement was given. This is despite, as Dr Marylin Freeman David Williams have pointed out[5], *D v D* not being one of the 25 authorities referred to in Payne and that being the case which instigated the shift in attitudes towards shared residence.

Although in the early 2000s, some judges were willing to regard shared residence orders as carrying more weight in this respect, such thinking has been significantly reined in since then. In 2004, for example, Headley J went so far as saying that a shared care arrangement meant that *Re Y (leave to remove from jurisdiction)* [2004] 2 FLR 330 fell 'factually outside the ambit of well settled authorities in this area of the law'. The reasoning was geared towards the welfare of the children but ultimately, the mother's application to relocate was refused and he granted a shared residence order instead. In later cases, shared residence orders have had a far lesser impact on decision making in this area. In *CC v PC* [2006] EWHC 1794 (Fam), for instance, a joint residence order, albeit spanning more than one jurisdiction, remained appropriate even though one parent was living in the UK and the other in the USA. Relocation was allowed. Indeed, even more explicitly, in *Re L (shared residence order)* [2009] 1 FLR 1157, it was held that;

'...it is wrong in principle to apply different

[5] 'Leave to Remove: Time for a Change' – David Williams, 'Relocation – The Research' –Dr Marilyn Freeman, 4 Paper Buildings International Child Abduction Seminar for Panel Solicitors, November 2009

criteria to the question of internal relocation simply because there is a shared residence order. Plainly, the fact of such an order is an important factor in the welfare equation, but I respectfully agree with counsel that it is not, in effect, a trump card preventing relocation. 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.'[6]

So, again, we are presented with the situation of an increase shared residence orders being granted and a decrease in the weight they carry in court. One might wonder what substance these orders actually do have.

The Substance of Shared Residence Orders

In terms of the practical benefits provided by shared residence orders, in *A v A (Minors) (Shared residence order)* [1994] 1 FLR 669, 674 it was held that such an order:

1. removes any impression that one parent is good and responsible and the other is not;
2. has the benefit of being more realistic in those cases where the child is to spend considerable amounts of time with those parents;
3. brings with it certain other benefits (including the right to remove the children from accommodation provided by a local authority in the event that the child is taken into care - s.20 of the Children Act 1989). If the other parent does not have legal parental responsibility for the children, they do not have this automatic right.

The first of these is nominal. As has already been mentioned, it seems to provide psychological comfort above anything else. The second is important and is often stressed in the case law but, again, it relates to the label of a shared residence order being realistic rather than conferring practical benefit. The third is a substantial. If there was a sole residence order in place, it would not be possible to remove the child(ren) from local authority accommodation in these circumstances unless there was agreement from the parent in whose favour the residence order was made. In more recent case law other implications of shared residence orders have been tested in the courts. Most prominently, these cases relate to housing law and parental responsibility.

In terms of housing law, the most recent case involving a shared residence order is *Holmes-Moorhouse v Richard-upon-Thames LBC* [2009] 1 FLR 904 HL. Here, there was a shared residence order was in place for three children who were to split their time equally between their parents. The father, who left the mother in the family home, sought assistance in finding housing from the local authority. He said that he was a homeless person with whom dependent children 'might reasonably be expected to reside', pursuant to the Housing Act 1996 s.189(1)(b). The local authority found that he did not have a priority need for housing. The Court of Appeal held that the local authority's reviewing officer had misdirected himself in law, so the decision was quashed. In the House of Lords, its appeal was allowed. Interestingly, Lord Hoffmann said at paragraph 17 that a family court;

> 'Should not make a shared residence order unless it appears reasonably likely that both parents will have accommodation in which the children can reside. But the provision of such accommodation is outside the control of the court.'

The fact that such an order has been made does not require the housing authority to regard one of the parents as a person in need of priority accommodation for their children.

This case, although demonstrating the tensions between parents who may or may not agree a shared residence order - or have it imposed upon them - and local authorities with their legal duties to provide accommodation to persons in priority need, may be treated as suggesting that shared residence orders should not be used so frequently as a label to placate parents' interests in situations where the label is unrealistic. At once a shared residence order is heralded as more than just a 'name' and, at the same time; limits are imposed on its power. This case also raises the interesting question of wealth – and the ability of the parents each to have houses – in order for a shared residence order to be made.

Shared residence orders are having more impact on other areas of the law such as parental responsibility. In most cases, parents already have shared parental responsibility, or can apply for parental responsibility in

[6] [2009] *1 FLR* 1157 at 1170

an application separate from residence. Using shared residence as a route to parental responsibility is therefore unnecessary (per Hale *LJ in Re A (children) (shared residence)* [2001] EWCA Civ 1795). In Re G (Children) [2006] UKHL 43, however, it was held by Thorpe LJ in a case involving same-sex parents, that it was a 'significant feature' of the appellant's case that

> '(she) could only achieve parental responsibility in relation to (the children) if she succeeded in her application for a joint residence order'.

Although it was feared that shared residence orders might become a backdoor route to obtaining parental responsibility, Thorpe LJ offered reassuring comments to the effect that to use shared residence orders for this purpose would be 'quite artificial and quite unreflective of the reality.' [7]

Nonetheless, only two years later in *Re A (Shared Residence: Parental Responsibility)* [2008] EWCA Civ 867, it was held that;

> 'the making of a shared residence order was a legitimate means by which to confer parental responsibility on an individual who would not otherwise be able to apply for a free standing parental responsibility order, as in the case of someone who is not the natural parent, but a step-parent...or same sex partner'.

This presents rather a stark expansion of the principles in *Re G*. Instead of making shared residence orders more powerful to accommodate deficiencies in the existing law on parental responsibility, perhaps the law on parental responsibility should be updated. The problem with expanding the scope of shared residence orders (even when it could be argued that parental responsibility has to come with a form of residence) is that, without underlying theory, the future for shared residence orders is uncertain. It also paves the way for contradictory judgments in cases which turn on different sets of facts. Also, again, it brings into issue whether shared residence orders are made for the benefit of children or their parents.

That said, in the midst of these developments, Wilson LJ has been careful to rein in the judicial focus back to the interests of the children. In *Re K* [2008] 2 FLR 380, he reflects on the reality of a child's living situation sometimes getting mixed up with the issue of whether a shared residence order should be made. In light of this he says;

> 'in my view, the proper legal approach to the application is now clear: it is that, because a shared residence order may serve the interests of the child not only in circumstances in which the division of his time between the two homes is equal, the two aspects of the application, namely for a ruling in favour of an equal division of time and for a shared residence order do not stand or fall together. On the contrary, they have to be considered separately; and the convenient course is for the court to consider both issues together but to rule first upon the optimum division of the child's time in his interests and then, in the light of that ruling, to proceed to consider whether the favoured division should be expressed as terms of a shared residence order or of a contact order.' (para 6)

What this does is to make the children the focus of the shared residence order from beginning to end. First, what situation on the ground would be beneficial for the children and, then, what label would be beneficial for this situation as far as the children are concerned? In other cases the children's interests (which are always named as the first consideration) have nonetheless been more difficult to distinguish from issues concerning the parents – such as the psychological benefit of the orders or parental responsibility – and so this clarity should be appreciated. Even still, however, the principles that currently govern the making of shared residence orders are open to an uncertain evolution. Although the law may be clear in the higher courts on the facts of the cases that reach their attention, there is a danger that the underlying uncertainty trickles down to leave shared residence orders a seemingly vacuous concept, with great flexibility in the way they can be applied. So much of family law is yet to be underpinned by concrete theory and, as some of the more unwieldy case law has shown, this is just one of the areas in which such a development might be welcome.

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[7] *Child and Family Law Quarterly* 'Principle or pragmatism? Lesbian parenting, shared residence and parental responsibility after *Re G*' March 2006, [2006] *CFLQ* 125

Contact Orders
The Child's Untold Story

Simon Silver*

The Children and Adoption Act 2006 was introduced following pressure from groups such as Fathers for Justice. One of the many publicity stunts their members engaged in was to dress as Batman and Robin, spending three days on the roof of the Royal Courts of Justice in order to highlight their perceived injustice of the family law system.

Members of the judiciary have openly stated their understanding of the anger felt by fathers,[1] which can be seen by the judgment of Munby J (as he then was) where he stated that the father had every right to feel let down by the system.[2] However, we have also seen the emergence of mothers' groups who argue that too much weight has been given to fathers. They believe that the law still fails to consider the mother because the law requires mothers to force their children to see their father despite the fact that the children are kicking and screaming that they do not wish to go. They argue that if they do not force their child to go then they face losing the child despite the father's potentially unreasonable behaviour.[3]

We have witnessed a monumental change in the law since the mid-nineteenth century when fathers under common law had absolute rights over legitimate children,[4] but the question remains as to whether the law has continually moved in a direction which benefits the child.

Most legal practitioners and academics will be aware of the history of contact orders, but this article, which incorporates the perspective of a child referred to as F to protect his anonymity, compares the law at the time of the Children Act 1989 and the current law which has changed with the introduction of the Children and Adoption Act 2006. F's case is a clear example of the effects of decisions in these matters, has concentrated on F's story.

The case of F is illustrative of the problems which arise from inhibiting contact with a father due to difficulties in enforcing contact orders and the frequently resulting parental alienation. F is now an adult and his history is interesting because of his unusually detailed analysis of the impact of his family's breakdown on his subsequent life.

After F's parents divorced he became the subject of a legal battle for contact in the early 1990s. From a young age F refused to see his father as he felt this might reduce the hostility in the house and bring about peace in what he describes as an emotionally charged household. F states that he was effectively brainwashed into believing his father was an uncaring and unkind father which resulted in F not seeing his father again until adulthood.

As a consequence of not seeing his father, once F became a teenager he reportedly suffered from many of the emotional problems highlighted by Jenkins (an assistant professor at the Institute of Child Study, University of Toronto)[5], such as a heightened sense of aggression, anxiety and a poor relationship with his mother. F's personal perspective has contributed to this research by offering commentary on his previous reading and the ideas put forward in this paper. This input was used to examine whether the law has moved in the right direction or whether more still needs to be done to protect the children at the heart of these battles over contact.

The results of a brief questionnaire completed by practising solicitors and barristers[6] are also examined to establish whether legal practitioners believe that the outcomes of the first six months of the Children and

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4 *Re D (a child) (intractable contact dispute: publicity)* [2004] EWHC 727

2 *Ibid* at para 2; see also para 11

3 Aitkenhead, Decca, 'The sins of the fathers' *The Guardian*, 8 May 2006 – found on the website www.mothers-for-justice.net

4 Re *Agar-Ellis v Lascelles* (1883) 24 Ch D 317

5 Jenkins, Jennifer M, 'Inter-parental conflict and children's emotions: The development of an anger organisation' (2000) *Journal of Marriage and the Family* 723

6 The participants in the questionnaire and interviewees reserved their anonymity.

Adoption Act 2006 have been successful; basically, the purpose was to answer the question: does the current law work? It was also hoped that practitioners might offer insight as to the different perspectives mothers and fathers may have on contact orders.

The surveys were initially carried out by sending over 200 questionnaires to a cross section of family and child law practitioners in London, but due to a lower than expected response these were followed up with telephone interviews with a number of family and child law solicitors and barristers found by networking. The solicitors were mainly working in high street firms and the barristers working both in London and in Manchester. One solicitor offered the opportunity to interview a client who is a parent currently involved in the contact process. This parent and the children of the case are referred to as 'Case A'.

F and Parent A were represented by different solicitors; the two parties are independent and have never met.

The old legislation

In the late 1980s and early 1990s, there was some strong rhetoric from the judiciary regarding the implacable hostility of mothers. One such example is that delivered by Lady Justice Butler-Sloss in *Re H (A Minor) (Contact)*: '[i]t is important that there should not be ... "a selfish parents' charter".[7] Her point here was that if a parent does not want a child to see the other parent, they cause so much commotion that this results in the court preventing access. If it is right for the child to see the father, then that order is there to be obeyed.[8] However, in spite of the rhetoric, this has not always been the reality, as may be seen in cases such as *Re J (A Minor) (Contact)*[9] where the court felt it was best for the child to cease contact with the father due to the mother's implacable hostility. It seems that this was not an exceptional case as many decisions made by judges on these matters have followed a similar path.[10]

Cases such as this have given rise to the establishment of 'Fathers 4 Justice' and similar fathers' rights groups. In one case, Fathers 4 Justice published the home addresses of ten judges, including that of the deputy head of family justice.[11] Whilst most would agree that such action is extreme, we must ask why these groups are going to such lengths to ensure that their voices are heard?

One barrister interviewed stated that he could understand why Fathers 4 Justice had been established; the system in place could be regarded as extremely pro mother, regardless of whether the father is regarded as a good parent, and in the past there have been failures by the courts to prevent implacably hostile parents achieving their aims. Another barrister said that in his experience historically, unless a mother was a prostitute, she would be given residency of the child. This appears to be endemic throughout the family court system and this view simply echoes those of judges such as Munby J who when discussing the frustration of a father over contact, said: "Responsible voices are raised in condemnation of our system. We need to take note. We need to act. And we need to act now".[12]

F feels that the problems he suffered stem from the damage caused in part by judges who, at the time, clearly believed that they were acting in his best interests and those of other children affected by such decisions. All practitioners interviewed have acknowledged that F's case is not unique and this view is supported by cases such as *Re H (Children) (Contact Order) (No. 2)*.[13] Furthermore, case law[14] together with the statement of a London based solicitor show that despite continuous decisions from the Court of Appeal that fathers should have contact, the lower courts at least are still ignoring these instructions to ensure contact with fathers in cases of implacable hostility. In one case where residency was transferred to the father in order to ensure that contact was maintained, Ward LJ stated that this course of action was often threatened but was rarely implemented.[15]

As stated by Wall J, there is no one-size-fits-all

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[7] [1994] 2 FLR 776

[8] *Ibid*, 782

[9] [1994] 1 FLR 729

[10] *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1; See also *Re J (A Minor) (Contact)* [1994] 1 FLR 729;

[11] Walsh, Elizabeth, 'Newsline: Fathers4Justice 'Judgebuster' Campaign' [2007] Fam Law 976; See also Morgan, Charlie, 'Judge targeted as fathers start new campaign' 5th January 2007 – available at http://www.thisiswiltshire.co.uk/news/1105030.0/

[12] *Ibid* fn 1, paragraph 4

[13] [2001] 3 FCR 385

[14] *Re S (Minor: Access)*[1990] 2 FLR 166; See also *Re W (A Minor) (Contact)* [1994] 2 FLR 441

solution.[16] However, research by Jenkins[17] supports the idea that unless there are genuine reasons to prevent contact, its refusal is a form of emotional abuse by the custodial parent and should be treated as such. This abuse does not merely lie in the lack of contact, the resultant negative impressions can seriously affect the child's psychological and emotional health. Once contact has ceased, F recalls that the mere mention of the non-resident parent's name caused further conflict and, worse still, these negative feelings can create greater conflict within the household.

The number of contact applications increased by 2% in 2005-2006 and 3% in 2006-2007, meaning that the task of ensuring contact is increasing in importance. Making sure that contact takes place has historically been difficult, but making it work successfully is even harder. [18]

The Issues

During an interview, the Case A parent said that the effects of contentious contact orders differed based on the characteristics of the child and that this was demonstrated in their family with one child suffering emotionally and the other seeming to be emotionally stable. From Case A and Child F we can see that the true impact that family distress has on the individual may not be revealed until they are old enough to articulate their feelings adequately — and in some cases, may never be disclosed.

With this in mind, it can be seen from cases such as *A v A (Shared Residence and Contact)* that given the right opportunities an independent party is often able to assess the true nature of the hostilities.[19] In *A v A* the child refused contact with the father. However, following the judge's insistence for contact to be resumed, the children had an immediately strong attachment and a loving relationship with the father.[20] It is often the case, as F's story demonstrates, that children would rather cut out contact with a parent if it results in a reduction of domestic hostilities.[21]

Furthermore, what is said will often depend on the parent's gender. The study conducted by Felicity Kaganas and Shelley Day Sclater[22] indicates that parents will interpret what is best for the children based on their own criteria, which may be gender-biased. As an example one mother stated that:

> "We [mothers] shouldn't have to ... prove why we think contact is not suitable. It should be the other way around. The husband should have to say why they can have contact when they've never cared for the child, never washed them, dressed them, sung to them, or been with them, or taken them to the child minder ..." [23]

F believes that (as was the situation in his case) that parents normally want to be successful in their parenting roles, but often only see things from their own perspective and thus fail to examine the broader picture which should encompass their children's short and long-term emotional health and wellbeing. This view appears to be supported by the research conducted by Kaganas and Day Sclater.[24] However, it begs the question of whether the new sanctions will help to resolve this problem.

The New Legislation

The new legislation brings with it sanctions which include giving judges the ability to impose a financial compensation order on a breaching party for travel costs or lost holidays where the financial position of the party makes this a practical option. The court may also force a non-compliant parent to undertake unpaid community work for up to 200 hours. But in the past when the courts

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[15] In the Matter of *C (a Child)* [2007] EWCA Civ 866, para 3 though this is a case before the implementation of the 2007 Act.
[16] *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024, para 7
[17] *Ibid* fn 5
[18] In *Re G (Children) (Residence: Same-sex Partner)* [2006] UKHL 43 at para 41 per Baroness Hale
[19] [2004] EWHC 142
[20] *Ibid*, paragraph 23
[21] Hunt et al, *Perspective of Children and Parents on the Family Court Welfare Service "Families in Conflict"* (Policy Press, 2001) as quoted in Adams, Steve, 'In Practice: Parents' rights v children's needs in private cases' [2007] Fam Law 257 - 261, 260
[22] Kaganas, Felicity and Shelley Day Sclater, 'Contact disputes: Narrative constructions of 'Good' parents' (2004) 12 *Feminist Legal Studies* 1 -27
[23] *Ibid*, pg 16
[24] *Ibid*, pg 23

have discussed the old law they have said that they 'regard the conventional methods of enforcing court orders as a last resort: fining the primary carer will only mean that she has even less to spend upon the children; sending her to prison will deprive them of their primary carer and give them reason to resent the other parent who invited this'. [25]

We must question, therefore, whether the new sanctions will have the same impact as the former ones but in a different way. A solicitor replying to the questionnaire argued that this is not the case, on the grounds that the old 'sanctions were in [their] view limited and not ... particularly imaginative or practical'. However, some solicitors felt that the new sanctions seem: 'Far more, on the face of it, appropriate and well considered'. Whilst these new sanctions give the courts what they wanted (that is, far more flexibility [26]) the views of these practitioners are not in line with those of various academics. Freeman has argued that an enforcement order allowing the court to force a non-compliant parent to undertake unpaid community work for up to 200 hours is not for the child's benefit because the parent would have to carry out the work at the weekend. [27] Additionally, Bracewell J has stated that prison:

> 'May well not achieve the object of reinstating contact; the child may blame the parent who applied to commit the carer to prison; the child's life may be disrupted if there is no-one capable of or willing to care for the child when the parent is in prison; it cannot be anything other than emotionally damaging for a child to be suddenly removed into foster care by social service from a parent, usually a mother, who in all respects except contact is a good parent' [729]

It must be asked how a child would view a mother's absence during the day or during the day and night. One argument is that the repercussions from the resident parent will be the same and they may simply use it as a weapon against the non-resident parent.

Freeman also argues that whilst it is also possible to order compensation for financial losses incurred for travel costs or lost holidays, the court must take into account the parties' financial positions and, therefore, it is said that this will rarely be ordered because it is not an efficient use of the courts resources.[29] The other factor which must be considered is that if the resident parent has sufficient resources to pay a financial penalty they are unlikely to be encouraged to allow contact by the threat of having a fine imposed and if they are unable to pay the penalty, this sanction does not apply.

The senior judiciary asked for more flexibility,[30] but they, along with parents, also acknowledged the need to reduce the time these cases take. For a child, the time frame for matters such as this can be crucial; a period of a year will seem far longer to a child than to an adult; hence when cases such as Case A take a year for the fact-finding hearing, this has a potentially detrimental effect on the parent-child relationship.

As it is likely that situations such as these will increase, it is crucial that the courts are able to hear these cases in a far quicker timescale than they do currently. In order to achieve this they require the support of Cafcass, which is struggling to cope owing to a shortage of funds; it is here that the Children and Adoption Act 2006 has failed to have any impact. With one in six private law cases unallocated to a specified member of staff in Cafcass, reducing the time frames will be a tall order[31], regardless of the will of the judiciary[32] and government reports.[33]

Despite the attempts which have been made to reduce the time taken for cases to be resolved, there are still long delays in the system,[34] and only two years ago, the acting head of Cafcass said that cases are in and out of court for up to seven years; it has been said that 'what happens in the future often depends upon the father's persistence'.[35] In F's case, he has reported that his father went to the 'brink of his emotional capacity'. We

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[25] *Ibid* fn 6, paragraph 41
[26] Green paper: Parental Separation: Children's Needs and Parents' Responsibilities, July 2004, cm6273 Para 85
[27] Freeman, Michael, *Understanding Family Law*, Sweet & Maxwell, 2007, 238
[28] *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215, paragraph 10
[29] *Ibid* fn 27, 239
[30] Ibid fn 26
[31] *Hansard* 2nd Reading, 2nd March 2006: Column 464 as per Mr Jackson
[32] See per Munby J 'delay is the scourge of the family system' in *Re S (a child) (contact)* [2004] EWCA Civ 18, para 46
[33] Great Britain. Advisory Board on Family Law. Children Act Sub-Committee, Making Contact Work, 2002, Lord Chancellor's Advisory Board on Family Law, para 10.37
[34] BBC Breakfast Show 16 November 2009 – Interview with Sandra Davies from Mischon de Reya and Anthony Douglas from CAFCASS on 16 November 2009

therefore need to ask what we could do to resolve such situations sooner.

Possible Resolutions to the Problem

It has been argued by some members of the judiciary that the courts may not always be the most appropriate environment for these disputes to take place.[36] It could, therefore, be argued that Cafcass should have the capability to implement the suggestions made by solicitors in response to the survey and the former acting head of Cafcass [37] that parents should be educated as to why their actions are harmful to the child. A similar scheme has been trialled on a voluntary basis in Scotland.[38] The programme comprised of a series of one-off meetings designed to inform parents what children feel during a divorce and or separation and how to cope with their situation. Although this was regarded as a limited success there have been others who have said this did not change the behaviour of the parents[39] and it is suggested that the reason is because the views are often so ingrained that resident parents cannot see the harm they are causing even when it has been pointed out to them.[40] Additionally, parents often felt that it was the other parent that had to change and not them.[41]

During an interview on the BBC Breakfast show[42] Sandra Davies from Mischon de Reya and Anthony Douglas from Cafcass stated that mediation is rarely used and parents simply do not understand the harm they are causing. Furthermore, they felt that parents needed to be taught how to co-parent rather than simply to assert control over the other, and to ensure that the children are actively involved in the process. Research has, however, indicated that parents want to be seen as good parents.[43]

A solicitor responding to the survey referred to a change of residency as draconian. However, Wall J said that, if the mother has no idea that she has done anything wrong, until she recognises her error she will never have a meaningful relationship with her children.[44] It appears that punishment of the resident parent only makes the situation at home worse for the child. It therefore, seems reasonable to argue that education is the way forward. If after having the consequences of their actions explained resident parents are still unable to accept the other parents' rights to contact with their offspring, and there is no justifiable reason for refusal, there should be either joint residency or transfer of residency.

The idea of a transfer of residency was addressed as long ago as 1978 in the case of *V-P v V-P (Access to Child)*[45] but it has been suggested that whilst a transfer of residency does sometimes take place now, the practicalities have in the past been so difficult that it was not easy to achieve. [46]

The number of reported cases enforcing the changes to the Children and Adoption Act 2006 appear to be minimal at this point. However the case of *In the matter of R (A Child)* [47] does support the idea of a transfer of residency because it was said to be in the child's best interests. This would support the idea that the Children and Adoption Act 2006 may have had a positive impact.

Research has shown that one of the worst fears resident parents have is that someone will take their children away. [48] As seen above, with cases such as *Re S (Minors: Access)*,[49] courts were often reluctant to make an order for contact because of the mother's implacable hostility. Furthermore, the practical difficulties in

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[35] King, Michael and Judith Trowell, *Children's welfare and the law; The limits of legal intervention*, SAGE publications, 1993, 58

[36] 'Newsline - Making Contact' [2003] *Fam Law* 218 (6)

[37] Adams, Steve, 'In Practice: Parents rights v children's needs in private cases' [2007] Fam Law 257, 258

[38] The Scottish Executive Central Research Unit 2000, An evaluation of the parent information programme, 2000

[39] Mayes, G.M., Wilson. G.B., MacDonald, R.A. & Gillies, J.B., "Evaluation of an Information Programme for Divorced or Separated Parents", Child and *Family Law Quarterly* 15 (2003), 85–105, pg 99

[40] *Ibid* fn 23, pg 24; See also 'Newsline - Making Contact' [2003] Fam Law 218 (6), as per Wall J and also *Re S (Uncooperative Mother)* [2004] EWCA Civ 597, paras 16, 19-20 for a practical example of this point.

[41] *Ibid* fn 40

[42] *Ibid* fn 35

[43] *Ibid* fn 40

[44] *Ibid* fn 16, paragraph 157

[45] (1978) 1 FLR 336

[46] Black, Jill, Jane Bridge and Tina Bond, *A practical approach to Family Law*, 7th Ed Oxford University Press, 2004, 474;An example of this can be seen by the case of *In the Matter of A (Children)* [2009] EWCA Civ 1141; See also *In the Matter of C (a Child)* [2007] EWCA Civ 866, para 3 where Ward LJ states that a change of residency, although often threatened, is very rarely implemented.

[47]

changing residency make the resident parent more intransigent in the knowledge that often the only action the judge will take is one such as an enforcement notice, which will simply turn the child further against the non-resident parent. However, in a society where equality exists between the genders, we must accept that mothers and fathers are equally capable of raising children and must, therefore, think carefully about transferring residency where no other course of action would work.

In the light of the early cases under the Children and Adoption Act 2006 [50] it seems the courts may now be looking at a change of residency as a method of ensuring that the child's long term interests are the paramount consideration.

Wilson LJ has said that a warning must be given to the resident parent,[51] but the writer would argue that the time from warning to transfer should be the minimum period necessary to give the primary carer a chance to change. This proposal is supported by F's personal experience (and he says it is the view of others he has met) which suggests that resident parents will try to use their time with the child to ensure that they view the idea of moving residence negatively.

There will be cases where a change of residence is not possible, perhaps due to the non-resident parent's working hours. In these cases, the option of a shared residency order should be considered. Sir Mark Potter has said that that the making of a shared residence order is no longer as unusual as it once was.[52] But even more importantly, it is said to be 'psychologically beneficial to the parents in emphasising the equality of their position and responsibility'. [53] As shown above, [54] some resident parents do not see the benefit of having the non-resident parent in the child's life. Shared residence, if it continues to be used by the courts, could change the mindset of the resident parent, whilst also ensuring that the non-resident parent is able to continue with existing employment without drastic steps being required to accommodate a change of residence.

Conclusion

Taking into account the well documented risk of the harm which is inflicted on children if deprived of contact with their fathers, [55] the courts have a duty of care to ensure that where it is possible the children are given the opportunity to spend time with the non-resident parent (who is normally the father). Likewise, in a society of equal rights it is not unreasonable to think of the father as being the resident parent and we have seen that where both parents wish to have contact, ensuring that contact happens will often result in a more stable emotional environment for the child.

The law has certainly moved a long way since the days when fathers were automatically given custody and it is important to ensure that we do not move in the opposite direction. We saw a period of time during the 1980s and 1990s where contact was often refused because of a mother's implacable hostility. However, the long term effects on the child are often unnecessarily severe in these cases.

Groups such as Fathers 4 Justice have undertaken persistent and public campaigns for reasons that one barrister described as "being understandable". This is a highly emotive area of the law, but also an area where there appear to be few acceptable sanctions for breaches of a court order. Many solicitors have said that sanctions were never enforced and we have seen cases where good fathers have been unable to see their children because the mother does not want contact to take place.

At a time when the number of contested contact orders is rising,[56] if an initiative to educate parents were to fail it would be important for the courts to continue considering a change of residence in order to make sure that the child can have contact with both parents. If resident parents are still failing to ensure that their children have access to the other parent, they are failing to do the best job for their children. As it seems that resident parents often fear their children being taken away from them, it is vital that we use the one tool at

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[48] Trinder, Liz et al, Making contract happen or making contact work? University of East Anglia, DCA Research Series 3/06

[49] *Ibid* fn 14

[50] *In the Matter of R (A Child)* [2009]EWCA Civ 1316

[51] *In the Matter of A (a child)* [2007] EWCA Civ 899, paragraph 3

[52] *In the matter of Re A (A Child: Joint Residence/Parental Responsibility)* [2008] EWCA Civ 867, paragraph 66

[53] *Ibid*

[54] *Ibid* fn 23

[55] *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830, 834

[56] *Ibid* fn 30

our disposal to guarantee that children are genuinely given the right to see both parents.

This parental behaviour is arguably a form of child abuse and it is suggested that if the parents were aware of the damage they were causing, and they were shown that this behaviour is not that of a 'good parent', they may be willing to allow contact to take place.

Furthermore, we must consider that if a child was being abused we would criticise the court for failing to take the child away from the source of the abuse. F believes that this behaviour is a form of abuse and if we accept this then considering a transfer of residency where the resident parent is intransigent in preventing contact may be the practical way forward. In contrast with the early cases it appears that the law may now be effective to ensure that an implacably hostile parent cannot prevent contact. If enforcement continues in this direction it would appear that the new legislation will have had the desired effect in making sure that parents have equal rights of contact with their children.

This article has not considered domestic violence and the ideas expressed here may not be appropriate in that case. Such recommendations are probably only appropriate for cases where the sole problem is the implacable hostility of the resident parent.

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