Journal of Family Law and Practice

Volume 4, Number 2 • Summer 2013

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

Journal of Family Law and Practice
Volume 4, Number 2 • Summer 2013

CONTENTS

Introduction from the Editor 3

Family Arbitration

Sir Peter Singer
Family Arbitration: The Philosopher's Stone 5

David Hodson
The important role of Lord Justice Thorpe in its development 10

Financial Provision

Professor Elizabeth Cooke and Victoria Stephens
The Law Commission's project: Matrimonial Property,
Needs and Agreements 12

Relocation

Professor Mark Henaghan
Creating a Discipline in Relocation 18

Professor Linda Silberman
Hague Convention on Child Abduction and Unilateral Relocation 26

Professor Marilyn Freeman and Associate Professor Nicola Taylor
The Reign of Payne II 31

Stephen Cullen and Kelly Powers
The 1980 Hague Convention and Immigration
The Case of Mr and Mrs B 44

Shared Parenting

Professor Rollie Thompson
The Contribution of Spousal Support Guidelines to
Equality in Parenting 47

A Life in the Day of Lord Justice Thorpe

Professor Peter de Cruz
Millionaires, Mothers and Children 58

Guidelines for Submission of Articles 62

Editor's Message

Our second issue of 2013 continues to look forward to the Centre's 2nd International Conference in July 2013, but in this instance in relation to the special celebration, to which this issue is devoted, of the long standing contribution to Family Justice of Lord Justice Thorpe, both as a Judge of the High Court and Court of Appeal and, since 2005, as Head of International Family Justice and as convenor of the specialist international Relocation group which he has led with the significant effect which is recorded in the contributions of those who have written on that topic in this issue: and further as a major supporter of the Centre for Family Law and Practice since its foundation in 2009, and of our online journal, Family Law and Practice, to which he was an early contributor at the time of our 1st International Conference in 2010.

When we planned this issue to focus on Lord Justice Thorpe's most significant contributions to Family Justice over the past few years we identified, in addition to Relocation, his work in the areas of Shared Parenting and Financial Provision (remembering not only some of his key decisions, which indicated cutting edge forward thinking in this respect, but also his leadership of the Ancillary Relief Group, which looked early at possible legislative reforms). However, since these never materialised, so that progress was left to judicial decisions, our reminiscences were once again brought back to some of those decisions which were again led by Lord Justice Thorpe, such as the end of the "sterile argument" he identified about the respective weights in financial provision terms of the contributions of husband and wife in the "stellar contribution" cases such as *Lambert v Lambert*, and his innovative procedural approach to pre-nuptial agreements as in *Crossley v Crossley*. We then remembered that it was he who was responsible for proactive encouragement of Family Arbitration, the significant new ADR tool in Financial Provision cases, in which we were not surprised to find he has already taken the training to become (and qualified as) one of the early group of Family Arbitrators, a role in which rumour has it he means to practise exclusively on retirement from the Bench. The Institute of Family Arbitrators (IFLA) could not have a better indication of support from such a notorious innovator for its own innovative scheme.

Thus the themes of this issue of the journal were easily set. Sir Peter Singer, who has already written on Family Arbitration in earlier issues, has contributed a more personal account of Lord Justice Thorpe's "Philosopher's Stone" style involvement in the development of IFLA and of the potential for use of the IFLA Scheme for obtaining a Family Arbitration Award which can become a binding resolution of a variety of family financial and property disputes, in accordance with the overriding discretion of the Family Division of the High Court which is able to approve such agreements, subject to natural justice and other safeguards. Sir Peter will be the Arbitrator in the Conference's mock IFLA Family Arbitration hearing session. David Hodson, who was part of the working group which realised the IFLA Scheme, has more particularly recorded Lord Justice Thorpe's early reasoned encouragement of the project: David will also participate in the Conference's mock hearing.

Professor Elizabeth Cooke and Victoria Stephens, from the Law Commission, have updated us on the Law Commission's present work on Financial Provision, with particular reference to marital agreements, needs and matrimonial property, to the jurisprudence of all of which Lord Justice Thorpe has contributed at various times.

Professor Rollie Thompson, from Canada, has written on the important financial contribution to Shared Parenting of the innovative Canadian Spousal Support scheme which shares with Lord Justice Thorpe a reliance on the utility of guidelines.

The Relocation section is, as perhaps one would expect, the largest, with an article from Professor Mark Heneghan from New Zealand, which includes an account of the work of the main members of Lord Justice Thorpe's Relocation Group who will appear in a discussion session at the Conference of 3-5 July 2013: Professor Linda Silberman, from the USA, has written on the European Court of Human Rights' impact on unilateral relocation and Professor Marilyn Freeman and Professor Nicola Taylor, respectively from the UK and New Zealand perspectives, contribute an update on Lord Justice Thorpe's long standing involvement with Payne v Payne on which they and he have been writing, and thinking, in this journal and at our Conferences since 2010. Finally, from the USA, by way of Scotland and the Hague, Stephen Cullen and Kelly Powers contribute a practitioners'

thoughtful note on another unexpected impact on Relocation and Abduction: the potential, and most recently in their own experience, immigration consequences.

Finally, Professor Peter de Cruz, who jointly chairs the Editorial Board of Family Law and Practice, has reflected on the broad scope of Lord Justice Thorpe's daily work in the Court of Appeal and extra-judicially, highlighting his recent spirited attempt to stop wealthy husbands making off down an "open road" and in a "fast car" with the family assets by placing them into limited companies. While his fellow Chancery and Commercial Lords Justices were of course properly protective of these companies' separate legal identity from that of the husband, it does seem entirely in accordance with Lord Justice Thorpe's long standing search for fairness in such cases that he has just been supported by the Supreme Court's finding that such assets can be conserved for the family by invoking, in an appropriate factual scenario, the law of trusts.

Normally this journal only appears on line, but unusually for this special occasion of Lord Justice Thorpe's retirement after such a productive career in Family Justice, we have also printed a single copy for him as a souvenir of our gratitude for his support of the Centre since its foundation.   We hope that his retirement will also provide him with ample time, not only for his work as a Family Arbitrator, but also for us to benefit from his wise counsel and involvement in our projects.

Frances Burton

Editor, *Family Law and Practice*

This issue may be cited as (2013) 4 FLP 2, ISSN 2052-6598
online at www.londonmet.ac.uk/flp

Editorial Board of the journal *Family Law and Practice*

Professor Peter de Cruz
Professor Julian Farrand
(Joint Chairmen)

The Hon Mr Justice Jonathan Baker
Stephen Gilmore, Kings College, London
Anne-Marie Hutchinson OBE, Dawson Cornwell, Solicitors
Clare Renton, 29 Bedford Row Chambers
Julia Thackray, Penningtons, Solicitors

Ex Officio: The Co-Directors of the Centre for Family Law and Practice
Frances Burton (Editor)
Marilyn Freeman (Professor of Family Law)

Family Arbitration: The Philosopher's Stone

Sir Peter Singer*

Arbitration is an alchemy (an art, not a science) which enables overburdened barristers and QCs and stressed solicitors alike to resolve that eternal internal dispute: how to be in two places at once. It matters not whether the two places are Court 32 and Court 50 at the RCJ, or First Avenue House and (for the moment at least) Wells Street.

Philosophically this stubborn stone has been cracked by a simple expedient. IFLA[1] arbitrators must site their process and their award in London or elsewhere in England and Wales; but can sight their customers and those customers' lawyers wherever. For instance, I can cite my own experience earlier this year when from home I held a pre-arbitration pre-commitment meeting via 4-way Skype envisioning and auditioning (and being auditioned by) potential clients in London, Washington DC and New York State. It was such a success, communicatively speaking and for them, that (still sadly pre-commitment) they promptly settled! Thus at a stroke out of sight out of mind and out of the window flew a projected flight to do the business in Washington. Still, it may yet prove to be a loss leader, you just never know.

This particular Philosopher's Stone can turn all manner of matter to gold, and by no means just for the lawyers (within which description I include the arbitrator, as all IFLA arbitrators are experienced family finance practitioners drawn from across the profession). As multi-faceted as the Star of India, this gem of a process possesses, as Cleopatra's charms, infinite variety and can most satisfy while never cloying. Of arbitration's flexibility, more below.

But what is the connection between all that and Lord Justice Thorpe, whose retirement this Festschrift is to commemorate and to whom this trifle of a contribution is dedicated?

Well, simply that Mathew (if I may) has been in the van of arbitration's development as an art form for a number of years now. Come to think of it, he and I as his pupil (his first ever but he survived that and had others subsequently) were often in his, a green Mini one, dropping in on horologists, furniture restorers and Sotheby's sales en route to and from courts and conferences. At all these events and on all these occasions he deployed both his discernment, his evaluative eye and aesthetic appraisal, and his negotiating skills in the hunt, whether for elegant antiques or satisfactory dispute outcomes.

Indeed, talking of hunts, an early sign that he might hold me in some esteem was my selection as (very junior) counsel of his choice to represent him as (happily for me) successful county court plaintiff in a claim for irreparable damage wrought on a pair of custom-built hunting britches by his local dry cleaner.

In later years as the judgments rolled mellifluously from his lips, first at first instance and then appellately, I came to relish his use of words and his sometimes almost epistolatory style. Less relished (once I grew to man's estate and started delivering judgments of my own) and less welcome were some reversals I suffered and from a few of which I still smart. Perhaps uppermost in my mind rankles his determination that a well-founded claim of settlement under article 12 of the Hague Abduction Convention, conjoined with more than a year's delay between unlawful removal or retention and commencement of proceedings, merely opened the door to the exercise of a discretion whether to order return forthwith or not; rather than the view (which in this company I can say I still prefer) that it is more consistent with the aims, objectives and indeed the language of the convention to regard such a case, if established, as taking the application in question

*Sir Peter Singer was formerly a Judge of the Family Division of the High Court, and is now a Family Dispute Resolution Facilitator and Arbitrator, MCIArb, 1 Hare Court, Temple, London EC4Y 7BE. One of a team jointly voted Innovative Lawyer of the Year, Jordan's Family Law Awards 2012.

[1] Institute of Family Law Arbitrators. The Scheme operated by IFLA is the product of a pan-professional grouping of the Chartered Institute of Arbitrators, the Family Law Bar Association and Resolution (formerly the Solicitors Family Law Association). Under the Scheme Rules, experienced and accredited practitioners trained as arbitrators resolve post-breakdown financial disputes by an Award at which they arrive in accordance with and by the application of the domestic family law of England and Wales.

beyond the bounds of the Convention's application. See *Cannon v Cannon*.[2]

So, how did Thorpe LJ help to move the concept of arbitration from a gleam in the mind's eye of an inspirational few to a dispute resolution process lauded for its potential by Ryder J (as he then was) in *Judicial proposals for the modernisation of family justice* (July 2012) who at paragraph 62 wrote:

> 'The [Money and Property working group of the Family Justice Council] will also be asked to make recommendations about rule and practice direction changes to facilitate the determination of cases out of court; for example, where the parties have agreed to an arbitration conducted in accordance with the principles of English law by an accredited family arbitrator, including interim directions and whether special arrangements should be made for the expedition of the approval of consent orders to reflect arbitrated decisions.

More recently, in May 2013, an impressive combination of the Judicial College, together with the Civil Justice Council and the Civil Mediation Council issued *The Jackson ADR Handbook* which under the heading 'Key Recent Developments' specifically refers to IFLA 'providing a scheme under which family law disputes can be decided through a decision-making process that is within the control of the parties.' The editorial Advisory Board is heavy-weight and is headed by no lesser luminaries than Lords Neuberger and Clarke. This recognition in such a prestigious publication adds to the growing evidence that family law arbitration has the confidence and support of many at the pinnacle of their profession and of the judicial hierarchy.

Also worth noting in passing is the fact that the IFLA Scheme is now free of the threat of strangulation so soon after birth which lay lurking in a provision originally contained within (but now excised from) Baroness Cox's Private Members Arbitration and Mediation Services (Equality) Bill which aimed to insert a new section 80A into the Arbitration Act 1996 that would have embargoed arbitration of family law matters.

Now that such portents of high-level acceptance are multiplying one can, I hope and believe, discern the prospect of exponential growth in the use of arbitration and in the benefits which for many disputants it can bring.

Lord Justice Thorpe played, as I say, an important part in this process from the off. In 2008 he penned an article *Statutory Arbitration In Ancillary Relief*.[3] He summed up thus the advantages he perceived arbitration might bring to beleaguered ex-spouses and to ex-civil partners alike:

> [Family arbitration] could ensure for the parties privacy and confidentiality, allow them to select the decision maker, offer them some choice of the adjudication process and avoid the risk of lengthy delays in litigation. … Some of the other perceived primary advantages of family arbitration are the selection of decision maker especially according to the issues of the case, the direct and continuous involvement of decision maker, flexibility and individual choice of adjudication process and disclosure obligations, privacy and confidentiality, avoidance of court delays and standardisation of forms and procedure, use for discrete issues of case, speed and saving of court resources. Almost the only disadvantage is the private cost of the arbitrator, although this may be outweighed by the many advantages.

Then in *Lykiardopulo v Lykiardopulo*[4] at paragraph [69] he observed:

> … I see no public policy objection to parties opting for an arbitrator or what is now known as "private judging". *Resolution* have presented a strong case for the introduction of binding arbitration in ancillary relief. The abstraction of cases from the family justice system, whether for alternative dispute resolution, collaborative practice or non-binding arbitration is generally to be welcomed.

He was therefore at both those times, in a benighted pre-IFLA Scheme era, of the view that 'the

[2] [2004] EWCA Civ 1330, [2005] 1 FLR 169.
[3] [2008] Fam Law 26.
[4] [2010] EWCA Civ 1315, [2011] 1 FLR 1427.

advantages of arbitration can only be assured if arbitration rests on a statutory foundation that prevents a party rejecting the arbitrator's award', a seemingly uncompromising conclusion from which as a post-retirement IFLA approved arbitrator-in-waiting I hope he may have moved.

Certainly one can still ally oneself with his 2008 pronouncement that 'to extend the Arbitration Acts to reach all financial issues created by the breakdown on relationships is surely safe territory.' To take possible future developments first, maybe an opportunity to secure that extra security may be opened if legislative activity creates terra firma for the Law Commission's anticipated recommendation later this year that a special status of "Q-nups" (qualifying nuptial agreements) should be extended in certain defined circumstances to pre- and post-marital agreements which regulate in advance the financial fall-out from separation or divorce. Why not, one might ask, apply the same advantages of in effect guaranteed acceptability and thus enforceability by the courts to arbitral awards resulting from the parties' informed decision to be bound by that award? Is there any defensible logical distinction between an agreement in advance to be bound to a pre-defined outcome (as in a Q-nup) and an agreement in advance to be bound by the outcome of a chosen process option (arbitration)?

But in the here and now (putting aside the beguiling but maybe illusory mirage that a Law Commission report on a family law topic might find legislative support) is it really accurate still to regard arbitration as "non-binding" in the family financial domain? In every other area of law the Arbitration Act, with its very limited (and in practice usually unsuccessful) grounds of challenge, does its best to make awards stick, as a matter of principled response to the parties' agreement to arbitrate. That Act contains no limitation which would of itself remove from its ambit family financial disputes in general, or post-divorce ones in particular. So should it be different if on the wreck of a marriage the disputed claims cover the full range of financial remedies arbitrated under the IFLA Scheme, rather than on the foundering of a ship a marine salvage claim conducted in accordance with the Lloyd's Standard Salvage and Arbitration Clauses?

Well, 'yes and no' is I believe the only fair answer at present.

An arbitral award is not binding on the court, certainly: such is the effect of section 25 of the Matrimonial Causes Act, as faithfully reflected and provided for in the IFLA Scheme Rules at articles 13.3 and 13.4 of the 2012 (2nd edition). Please note in particular article 13.3(b).

. 13.3 Once an award has been made, it will be final and binding on the parties, subject to the following:

. (a) any challenge to the award by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;

. (b) insofar as the subject matter of the award requires it to be embodied in a court order (see Art.13.4), any changes which the court making that order may require;

. (c) insofar as the award provides for continuing payments to be made by one party to another, or to a child or children, a subsequent award or court order reviewing and varying or revoking the provision for continuing payments, and which supersedes an existing award.

. 13.4 If and so far as the subject matter of the award makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the award or the relevant part of the award and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the award, whether on primary application or on transfer from another division of the court.

The family court's overriding oversight is similarly recognised in the Form ARB1 (2012 edition) which would-be arbitrees complete and sign and, in doing so, by which they confirm their acceptance of its paragraph 6. The provisions of paragraphs 6.4(b) and 6.5 precisely mirror articles 13.3(b) and 13.4 of the Rules, above. Furthermore paragraph 6.5 concludes

with this additional caveat coupled with commitment:

> We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made.

But 'yes', the award is as binding as it can be when two adults fully advised (one would hope and expect) agree, as between themselves, to be bound by their selected arbitrator's award at the end of a process which, in large measure, they own and can fashion to their mutual satisfaction. It may be single issue, paper only, or on submissions, or after evidence and submissions … a CPR-style approach or one which (with or without adaptation) follows the pathway for financial remedy disputes flagged up by the FPR … limited issues or the full-fig and full-dress Monty of a leave-no-stone-unturned battle. Whichever way: flexibility and adaptability of process are cornerstone features of arbitration's winning appeal.

Which leads to the questions (i) what happens if a court invited to make an order to reflect an award should feel disposed to impose a different outcome; and (ii) how should a judge approach a case where one disaffected party reneges on his or her agreement to be bound by the award.

When the time comes for a court to rule (one hopes authoritatively) on such questions it will be to dicta of Thorpe LJ that those who support arbitration will be drawn. A striking and (dare I say it) attractive and now classic metaphor is there to be followed, that of the ''magnetic factor'' to which he first pointed in *Crossley v Crossley*[5] at [15]. That case concerned an application to show cause why the terms agreed in a pre-nup should not, without full enquiry, in the circumstances of that case be conclusive of the outcome of the recalcitrant wife's application for more generous relief. Her appeal seeking detailed disclosure was denied and, without more ado and by way of summary disposal she was held to the terms of the pre-nup.

Notably, moreover, in the course of judgment Thorpe LJ opined at para [17]:

> It does seem to me that the role of contractual dealing, the opportunity for the autonomy of the parties, is becoming increasingly important.

So how should the family judge, be (s)he district Judge or High Court judge in the newly-branded unified family court which is to come, react to a request for a consent order? Surely in a consistent manner, one would suppose, irrespective of whether consent was reached by negotiation mediation or arbitration.

In articles I penned to be found in *Family Law*[6] I ventured to sketch out what I believe to be a principled route and a reaction to the dilemma which section 25 of the Matrimonial Causes Act poses: how to reconcile the conundrum and to square the circle of the binding nature of the award on the parties as between themselves, and the court's duty (in modern circumstances perhaps still sometimes over-avuncular even if not quite so paternalistic as before) to consider the section 25 factors and ''all the circumstances'', and then to decide what is just, fair and reasonable.

"Just", "fair" and "reasonable"

One can, in passing, have some harmless fun with that formulation, a gentle tease rather than a condemnation, although the question to my mind still has significance.

Long, long ago, years before *White*[7] became right, in *Page v Page*[8] Bush J had, at first instance, concluded that it would be "unjust" to give the wife less than half. But the three judges of the Court of Appeal thought one third was more correct, because that produced a solution which was "fair, just and reasonable".

Is a decision which is "fair, just and reasonable" better than one which is just "just"? Presumably so. Also, it should follow, a "fair, just and reasonable" conclusion must be better than ones which are "fair and just, but not reasonable" - or "unfair, but just and reasonable" - or even "fair and reasonable, but

[5] [2007] EWCA Civ 1491, [2008] 1 FLR 1467.

[6] [2012] Fam Law 1353 and [2012] Fam Law 1496.

[7] [2000]UKHL 54, [2001] 1AC 596.

[8] Reported only in the Court of Appeal at [1981] 2 FLR 198.

unjust."

It really does not take very long to detect that stirring into the mix the supposed "added values" of fairness and reasonableness contributes nothing to the conceptual purity of the abstraction we call Justice, nor to an objective evaluation of the intellectual integrity of a decision. The extra words are in truth only the formula with which is cloaked the appellate determination to overrule. Indeed the trinity of virtual synonyms attracts a dubious ambivalence when paired off. Is there not a hint of something less than the ideal we strive for in the combinations "*just* fair", or "*fairly* reasonable", or "*reasonably* just"? "That sounds fair enough," do I hear you agree? Just so, very reasonable.

So, to be overruled on appeal, Bush J's decision must have been "plainly wrong" in terms of *G v G*,[9] and thus outside the permissibly generous *Bellenden v Satterthwaite*[10] ambit of reasonable judicial disagreement. It is worth remembering after all that the difference between a half and a third is never more nor less than a sixth.

To return to arbitration: I suggest that the path to salvation is not strewn with many stones. It passes by (though in no sense should it by-pass) wise and sometimes witty observations by such as Ward LJ (as he then was) in *Harris v Manahan*[11] and Munby P (as he now is) in *X v X (Y and Z intervening)*[12] and *L v L*[13] where can be found chronicled the quest for that fabled beast, the forensic ferret. Here is guidance given to courts faced with an application for a consent order, which may perhaps fairly be summed up as 'do not strive too officiously to interfere.'

The judicial instinct will I hope respond in the same way when faced with a 'bad loser', a party who is disenchanted with the award and seeks to avoid its consequences. Such recusants should, and I trust will, be very clearly given the message that the burden is firmly theirs to show cause why an order should not be made to reflect the award. As Eleanor King J put it in *S v S (Ancillary Relief)*[14] 'this is one of the category of cases identified by Thorpe LJ in *Crossley v Crossley* where there is a factor of such magnetic importance that it must necessarily dominate the discretionary process.'

An emerging flavour has been added to the palette on offer for the lollipop we (whether hatted as judge, arbitrator or family practitioner negotiating with opposite number) need to suck to help see a palatable result. It is party autonomy, Thorpe LJ's other *Crossley* contribution as noted in passing above. There has been growing recognition and acceptance that the customers sometimes do know best what they want, and that if they can agree to their own solution their decisions relating to what are after all their affairs should not lightly be disregarded. Markers along this route are the passages in *Radmacher (Formerly Granatino) v Granatino*; and the judgment of Charles J in *V v V (Prenuptial Agreement)*.

Now however the end of the march is in sight. The journey can and should start and end with the lode-stone of the award, pointing the way like a Pole Star illuminates the path, helping the court navigate through the gates to that same robust outcome which Lord Justice Thorpe, himself no mean philosopher, conjured up in *Crossley*.

Thorpe LJ registered his reaction to what he clearly saw as the wife's unreasonableness in these trenchant terms:

> If ever there is to be a paradigm case in which the court will look to the *prenuptial agreement* as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case.

If one re-reads that dictum with '*arbitration* agreement' in place of '*prenuptial* agreement'… it is easy to see just one example of how Lord Justice Thorpe's contributions to the development of family law will carry continuing influence.

9 [1985] 2 All ER 225.
10 [1948] 1 All ER 343.
11 [1997] 1 FLR 205 at 213.
12 [2002] 1 FLR 508 especially at [103].
13 [2006] EWHC 956 (Fam), [2008] 1 FLR 26 at [68] to [73].
14 [2008] EWHC 2038 (Fam), [2009] 1 FLR 254 at [88].
15 [2010] UKSC 42, [2010] 2 FLR 1900, especially at [75] and [78].
16 [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315, at para [36].

Family Arbitration: The important role of Lord Justice Thorpe in its development

David Hodson*

Great Innovations do not just happen, however creative and spontaneous they seem. They need great ideas, then great encouragement and wise advice and then great organisation. In this special issue of *Family Law and Practice* which focuses on Lord Justice Thorpe's retirement and on some key aspects of his special contribution to Family Justice, none is more recent and topical than that to the realisation of Family Arbitration.

Family Arbitration has quickly taken its place as a key opportunity in our family justice system for resolving cases outside a final court hearing. England has launched a sophisticated scheme[1] with over 150 very experienced family lawyers already trained as arbitrators. It has had international endorsement[2]. It has had judicial case law support[3]. It is timely as even more vital with the present deterioration of the family justice system as a whole.

But it had slow beginnings and development. Along the way we needed encouragement and wise counsel and we found it in Lord Justice Thorpe.

In 2006, the idea of family arbitration had been in existence for about five years but it needed stronger growth. Andrew Greensmith, then chair of SFLA, now resolution, set up a committee, which I chaired, into the more directive forms of dispute resolution. Amongst these was arbitration. I had already worked closely with the Chartered Institute of Arbitrators who were very supportive. We had a framework of rules devised. But we needed to break into the legal establishment and receive help to promote further and know the best directions to go.

In the late 90s and early part of the past decade, Lord Justice Thorpe had been a keen promoter of the multi-disciplinary approach in family law, with several highly successful conferences in Darlington. He had encouraged the use of mediation in the Court of Appeal. We decided to approach him. Our letter of invitation was very cautious, perhaps even defensive. After all, arbitration does take work from the judiciary! His response was warm, hugely supportive and enthusiastic. It was agreed we would meet to talk about it over a dinner in a restaurant in Notting Hill in January 2007. Four of us went along; Andrew Greensmith, Sarah Lloyd, Suzanne Kingston and myself.

At first it was just information giving. How does it (or could it) work, how does it fit in with the court system in family law, what are the benefits and disadvantages and who will be the arbitrators and much more. The real "nitty gritty" basic questions, practical and legal, and asked by him in a spirit of keenness to understand. We explained

* Partner, Solicitor, Arbitrator and Mediator, The International Family Law Group LLP, Hudson House, 8 Tavistock Street, Covent Garden, London. WC2E 7PP, England Tel: + 44 (0)20 3178 5668 Mobile: +44 (0) 7973 890 648. www.iflg.com, dh@davidhodson.com.

1 On 26 March 2012.

2 Resolution 13 of the 6th Family Law World Congress, http://www.lawrights.asn.au/o,ages/stories/world%20congress%202013%20resolutions.pdf.

3 *AI v MT* www.bailii.org/ew/cases/EWHC/2013/100.html.

how it had developed abroad in family law discretionary jurisdictions and how our model was based on Australia and Canada. But gradually and progressively he responded with his own thoughts and ideas and possible future directions, pitfalls to avoid, where it might be unsuccessful, the cases where it would be most important, areas to go slowly and areas to go faster, whom to approach for other judicial support and how it could best work short of Parliamentary legislation. The growth of family arbitration came of an age with the sharp forensic analysis of our plans and hopes and the wise practical counsel of the way forward. We came away buzzing with increased enthusiasm and new ideas.

Lord Justice Thorpe agreed to write an article for Jordans' *Family Law journal*[4] to explain the idea and benefits. There had been previous articles which had garnered discussion but now the profession sat up and took serious notice. A working party was set up by the research committee of academics, practitioners and judges of City University's Centre for Child and Family Law Reform (CCFLR), incorporating the Chartered Institute and the pan-professional practitioner representatives of Resolution and the Family Law Bar Association (and initially the Law Society) and other interested persons including myself.

There is now the Institute of Family Arbitration (IFLA) whose board[5] is chaired by Lord Falconer of Thoroton, with an Advisory Council chaired by HH Judge Donald Cryan, Chairman of the CCFLR and of the Advisory Council of City University's Law School. We found it easier to talk to the Ministry of Justice, the Family Justice Council, the judiciary and others. It was a very important article. We were very grateful.

After still more extended and detailed organisational work (the idea with the encouragement always needs the hard graft), the scheme was very successfully launched and Family Arbitration "under the Rules of the IFLA Scheme" immediately began to make its contribution to the current Alternative Dispute Resolution initiative in Family Justice.

There are many to whom credit must be given for the arbitration scheme in its present existence. But we are so grateful to Lord Justice Thorpe for his pivotal role at a key stage for his encouragement, wise counsel and judicious support. It is notable that Sir Mathew, together with other distinguished retired or soon to be retired members of the Court of Appeal and higher judiciary, is himself amongst the 150 trained Arbitrators and an immediate bonus of his retirement, which this issue of Family Law and Practice honours, is that he will be available to give the scheme further support by acting as a Family Arbitrator himself.

[4] [2008] FM Law 26.
[5] IFLA Ltd.

The Law Commission's project: Matrimonial Property, Needs and Agreements

Elizabeth Cooke* and Victoria Stephens*

We begin with some observations about the Law Commission for England and Wales, and on the process of law reform. Many common law jurisdictions have law reform commissions, all with more or less different constitutions, which in turn have an impact on the work that each commission can do and on its success in making law reform happen.

The Law Commission for England and Wales was created by the Law Commissions Act 1965.[1] Section 3 provides that:

> It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law … .

The Commission is not a part of government, although it is resourced by Parliament. The intention was that it would have an independent status, as well as time, resources and intellectual freedom; and while government was not to be bound by the Commission's recommendations, the expectation of that era was that they would be swiftly implemented, being born of legal wisdom on issues where party politics was irrelevant.

Over time, things have changed. The Commission's recommendations are not always implemented. And whilst we do not take on issues of purely political policy, many of our projects have been controversial and have had a political dimension: for example, cohabitation, homicide, divorce, hate crime, rented homes and the sale of goods.

Each project that the Commission takes on involves an initial process of research and consultation. A consultation paper is published setting out in detail the existing law and its defects, giving the arguments for and against possible solutions and inviting comments. Consultation responses are then analysed and followed by a final report outlining recommendations for reform, along with a draft Bill.

It is then for the government to choose whether to accept our recommendations and, where these are for legislative reform, to introduce them in the form of a government Bill (normally following the draft Bill published with the report). Occasionally Law Commission bills are adopted by private members who have been successful in the ballot for private members' bills; for example, the Estates of Deceased Persons Forfeiture of Law and Succession Act 2011 which was introduced by Greg Knight MP, gave effect, with modifications, to the recommendations set out in the Law Commission's 2005 report *The Forfeiture Rule and the Law of Succession*.[2]

---

* Law Commissioner for England and Wales and ** Research Assistant, Law Commission for England and Wales. This article is derived from a paper given at the Parentage, Equality and Gender conference of the Centre for Family Law and Practice in July 2013.

[1] The Scottish Law Commission was created by the same statute (hence the plural, "Law Commissions Act"); the Law Commission for Northern Ireland was established in 2007 under the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).

[2] The Forfeiture Rule and the Law of Succession (2005) Law Com No 295.

Over the years, and after the first decade or two of enthusiasm, the rate of implementation of Law Commission recommendations has fallen. Two steps have been taken to address this. One is the Protocol signed in 2010[3] regulating the relationship between Government and the Commission. It requires that, before the Commission takes on a project, there must be a Government department expressing a serious intention to carry forward law reform in that area. The corollary of that is that a project will not be taken on unless a department has that intention; to that extent the Protocol represents a sacrifice in independence, although it is important to note that from its inception the Law Commission has had to submit its programmes of work to the Lord Chancellor for approval and so to that extent it has never had an entirely free hand in deciding what to take on.

The other step is the introduction of the Special Public Bill Procedure, which enables uncontroversial Law Commission bills to be introduced in the House of Lords, with the second reading taking place not on the floor of the House but in a Committee Room. This is in no sense a fast track, and the bills taken through so far have been subjected to intense scrutiny, but it means that precious time on the floor of the House is not taken up and so in effect makes more room in Parliament for the Commission's work.[4]

The new House of Lords procedure is only for "uncontroversial" bills, and the boundaries of that term have not yet been fully explored. But family law projects can rarely if ever be among them. I am here talking about the Commission's current family law project; it is certain that if our recommendations (not yet made public) are to be implemented, that can only be done by the government making time for a programme bill. We have to be very realistic, therefore, about what can achieved; law reform, as well as politics, is about the art of the possible.

The Law Commission's project on Matrimonial Property, Needs and Agreements

The project now entitled *Matrimonial Property, Needs and Agreements* began in 2009 as a project restricted to marital property agreements – by which we mean agreements between spouses or prospective spouses that seek to determine in advance the financial consequences of divorce or of the dissolution of civil partnership. In the course of our work it became apparent that there was a case for extending our remit, and the government agreed that extension. In what follows I explain something of the background to our law relating to financial orders on the ending of marriage and civil partnership,[5] and then discuss the eventual three legal ingredients in the project. We shall be publishing a report in the autumn of 2013; our final recommendations of course have to remain unpublished until then although, as will be seen, we have chosen to put some of our conclusions into the public domain at an early stage.

The legal background

England and Wales does not have a community of property regime. On divorce or dissolution in England and Wales the courts have a very broad discretion to redistribute the parties' property and income. The Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 list orders that the court can make (identical in the two statutes), including orders for periodical payments, lump sum orders, pension sharing orders and orders for the transfer or settling of property.[6]

Property is divided according to a number of factors which include, but are not limited to, the needs and responsibilities of the parties, their income, earning capacity and all their resources, with first consideration being given to the needs of the parties'

[3] Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission, available at lawcommission.justice.gov.uk/publications/940.htm.

[4] Four bills have been passed under this procedure so far: Perpetuities and Accumulations Act 2009; Third Parties (Rights Against Insurers) Act 2010; Consumer Insurance (Disclosure and Representations) Act 2012; and Trusts (Capital and Income) Act 2013.

[5] The legal position for both is identical.

[6] Matrimonial Causes Act 1973, s 23; and Civil Partnership Act 2004, sch 5, parts 1 to 4A. For full details of the available orders see M Everall, P Waller, N Dyer and R Bailey-Harris (eds), *Rayden and Jackson on Divorce and Family Matters* 18th ed (Lexis Nexis, 2005), ch 16.

children while they are minors.[7] The relevant provisions of the 1973 Act and of the 2004 Act are sections 25(1) to (4) and schedule 5, part 5, paragraph 20, respectively.

This is a wide discretion, and the statutes merely state the relevant factors to be considered by the court in making an order without giving the objective the court is to aim for in exercising its discretion. However, following the House of Lords' decision in *White v White*[8] the courts have developed a principle of sharing. Generally, provided that the parties' financial needs are met, their assets are shared.[9] But this is a matter of discretion, not a rule; it cannot be regarded as a regime. Moreover, the concept of "financial needs" – nowhere defined in case law or in statute – is so broad that in most cases there is no room for the sharing principle. Instead, all the parties' resources for the present and the foreseeable future are devoted to ensuring that each has an income, a home, and the resources required for the care of their children if any. Sometimes open-ended orders for periodical payments are made, on the basis that one of the parties will never be able to support himself or herself; in other cases it is envisaged that spousal support will come to an end once the children leave home or after a shorter period where the parties do not have caring responsibilities. But orders are in any event focused on making ends meet.

In a minority of cases the picture is different. Where the assets available exceed the needs of the two parties, the court's approach is to assess the needs of the financially weaker party and to check that they will be met by a half-share of the assets. If that is the case then the parties' assets will be shared, in principle equally.

We have to say "in principle" because, within the court's discretion, there may be exceptions. To a limited extent, a more-than-equal share may exceptionally be awarded to a party who played a special part in the generation of wealth – but this approach is not widespread.[10] More importantly, the courts have become increasingly willing to follow the terms of marital property agreements; and they are likely to except from the sharing principle property acquired by one party alone before the marriage or civil partnership, or at any point by gift or inheritance.

Marital Property Agreements

It was against this background that the Law Commission began its project in 2009 by asking to what extent couples should be able to "contract out" of the above law relating to financial provision on divorce in the form of a pre-nuptial or post-nuptial agreement.

The law relating to pre-nuptial agreements, post-nuptial agreements and "separation agreements" (made at the point when the relationship ends) is uncertain. Agreements of this sort have been regarded by the courts as contrary to public policy and (contractually) void. The terms of the agreement might influence the court's discretionary allocation of property; and we can trace a development over the past two decades, during which the courts have moved from extreme scepticism[11] to a position where the terms of an agreement may well be respected. Significantly, in *Crossley v Crossley*[12] the pre-nuptial agreement was described by Thorpe LJ as "a factor of magnetic importance"[13] and in *MacLeod v MacLeod*[14] the Privy Council held that post-nuptial agreements were no longer contrary to public policy.

These cases drew a great deal of media interest, but none more so than the landmark decision of the Supreme Court in *Radmacher v Granatino*[15] in 2010. The significance of *Radmacher v Granatino* was such that the Law Commission delayed the publication of its Consultation Paper in anticipation of the decision so as to be able to properly consider its implications on the current law.

[7] Matrimonial Causes Act 1973, s 25 and Civil Partnership Act 2004, sch 5, para 21.
[8] [2000] UKHL 54, [2001] 1 AC 596.
[9] *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.
[10] *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.
[11] See Thorpe LJ in *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, at [66].
[12] [2007] EWCA Civ 1491, [2008] 1 FLR 1467.
[13] [2007] EWCA Civ 1491, [2008] 1 FLR 1467 at [15].
[14] [2008] UKPC 64, [2010] 1 AC 298.
[15] [2010] UKSC 42, [2010] 2 FLR 1900.

The case involved a pre-nuptial agreement made between Katrin Radmacher, a German heiress, and Nicholas Granatino, a French investment banker. The agreement was made in Germany where such arrangements are not uncommon and where there is no doubt about their enforceability; throughout continental Europe, couples are free to choose their marital regime and to determine in advance what is and is not part of the community of property. The agreement provided that none of Ms Radmacher's family wealth would be shared with Mr Granatino. The German notary who drafted the agreement warned the couple that there was doubt as to its status in, in particular, English law.

The marriage took place and later broke down. Ms Radmacher applied for divorce in England. Mr Granatino applied for financial provision, despite the agreement that he would not do so, to buy himself a home in London and a property in Germany, where the children could stay with him. He did not apply for a share in Ms Radmacher's wealth beyond that.

The case went to the Supreme Court where the majority held that the public policy rule that makes void a contract providing for future divorce "is obsolete and should be swept away".[16] That statement is *obiter*; it is likely to be respected but it is unclear to what extent it formally changes the law. In any event, it cannot change the fact that even where such an agreement is a valid contract, it cannot oust the statutory discretion of the court to make financial orders on divorce and dissolution. Without statutory reform, that cannot be achieved. But the majority made the following statement of principle:

> A court when considering the grant of ancillary relief is not obliged to give effect to nuptial agreements – whether they are ante-nuptial or port-nuptial. The parties cannot, by agreement, oust the jurisdiction of the court. The court must, however, give appropriate weight to the agreement. … A prior agreement between the parties is only one of the matters to which the court will have regard. …

The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.[17]

This gave a clear signal that, despite their lack of contractual enforceability, the courts would hold parties to their marital agreement if it was freely entered into and would be fair to do so.[18] The courts have gone as far as it is possible for them to go towards a principle of enforceability for marital agreements; any further step would require statutory reform.[19]

Following this decision, in 2011 the Law Commission published its Consultation Paper[20] which asked whether the statement of principle in *Radmacher v Granatino* should remain the law – so that the enforceability of marital agreements remained a matter for the discretion of the court - or whether legislative reform should make such agreements contractually binding and able to oust the discretion of the court. We took the provisional view that there should be such reform, and that a new form of marital agreement might be created – the "qualifying nuptial agreement" – which would oust the jurisdiction of the court provided certain safeguards were met. The safeguards discussed included regulating the formation of the agreement, the necessity for legal advice, and disclosure of the parties' financial circumstances. We asked consultees to what extent such agreements should be binding in

[16] [2010] UKSC 42 at [52].

[17] [2010] UKSC 42, [2010] 2 FLR 1900, at [2] – [3] and [75].

[18] See the following later cases citing that principle: *GS v L (Financial Remedies: Pre-Acquired Assets)* [2011] EWHC 1759 (Fam), [2013] 1 FLR 300; *V v V* [2011] EWHC 3230 (Fam), [2012] 1 FLR 1315; *Kremen v Agrest (No 11) (Financial Remedies: Non-disclosure: Post-nuptial Agreement)* [2012] EWHC 45 (Fam), [2012] 2 FCR 472; and *B v S (Financial Remedy: Matrimonial Property Regime)* [2012] EWHC 265 (Fam), [2012] 2 FLR 502.

[19] Lady Hale in a dissenting judgment expressed the view that the majority in the Supreme Court had gone too far. She felt that reform of the law might better be left to Parliament, advised by the Law Commission and was concerned that the test formulated by the majority came close to introducing a presumption in favour of upholding the agreement, which would be an "impermissible gloss" on the wide discretion given to the courts under section 25 of the Matrimonial Causes Act 1973 to reallocate the couple's property on a claim for ancillary relief, [2010] UKSC 42 at [138].

[20] Marital Property Agreements (2011) Law Com CP No 198.

the face of the parties' financial needs and changed circumstances; we stressed that such agreements could never enable the parties to contract out of their responsibilities for their children, nor be used to leave either party dependent upon state support. The consultation responses we received supportive of such agreements and accompanying safeguards.

We concluded that a vital safeguard would be to provide that qualifying nuptial agreements should not be able to be used to contract out of ether spouse's responsibility for meeting the other's financial needs. We have already said publicly that we will so recommend. The effect of that proviso will be ensure that the new form of contractual agreement will not cause hardship, and will not leave parties in a position where changed circumstances, unforeseen and unprovided for in the agreement, leave them in difficulties.

The extended project: matrimonial property, needs and agreements

In the summer of 2011, while we were analysing consultation responses, the interim recommendations of the Norgrove Report urged the government to review the whole of the law relating to financial orders.[21] In the light of that, and of a number of our findings from consultation responses, it was agreed that our project would be extended to cover two further areas.

One was the law relating to financial needs. Could it be clarified, not only with a view to illustrating the extent to which qualifying nuptial agreements could not be used but also to assist the vast majority of divorcing couples for whom the provision of financial needs is really the only issue in their financial arrangements?

The other was the law relating to non-matrimonial property – that property whose source indicates that it should not normally be shared. The concept was introduced in the House of Lords' decision in *White v White*,[22] where Mrs White received less than a half share of the family wealth because of an initial contribution by her husband's family. The concept is, however, completely normal and familiar in community of property jurisdictions, where either the default regime (as in France) excludes such property from sharing, or the couple can readily make an agreement to exclude it (as did Ms Radmacher and Mr Granatino). The Law Commission's extended project aimed to establish what is to be regarded as non-matrimonial property, and to explore the options for statutory reform so as to make the operation of the concept rather less discretionary and therefore more predictable.

Accordingly, a Supplementary Consultation Paper was published in 2012 seeking feedback on the meaning of needs and non-matrimonial property and discussing the possibilities for statutory and non-statutory reform. Our Report explaining the findings from this consultation, and also setting out in detail our recommendations for qualifying nuptial agreements, along with a draft bill, is due to be published in the autumn of 2013.

Reflections

It is perhaps unsatisfactory that this presentation has to stop here. Our findings on needs and on non-matrimonial property are not yet in the public domain and cannot be discussed further at this point. Instead of pursuing that road, I offer some final reflections prompted by the title to the Centre's 2013 conference, limited to the context of marital property agreements.

First, parentage. How can children be safeguarded in the context of pre- and post-nuptial agreements, in which almost of necessity children have no voice, even if their existence and needs are contemplated? The Law Commission has made clear its position that it should not be possible for anyone to contract out of their responsibilities to their children. The exclusion of "financial needs" from the scope of qualifying nuptial agreements safeguards not only the parties' own requirements but also their needs as parents: for accommodation in particular, but also for childcare costs insofar as these can be shared. Because the courts' jurisdiction to make orders in respect of

[21] Family Justice Review Panel, Family Justice Review: Interim Report (March 2011), available at http://www.justice.gov.uk/publications/policy/moj/2011/family-justice-review.

[22] [2001] 1 AC 596, [2000] 2 FLR 981.

financial needs will not be ousted, the provisions of section 25 will remain in full force so far as such orders are concerned: "first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen".[23]

Second, equality. The law of financial orders in England and Wales came very late to equality; until the decision in *White v White*, the couple's wealth was not shared on divorce, beyond what was required to make generous provision for needs; and while this made no difference in the majority of cases where needs far exceeds the couple's post-divorce property and income resources, it meant that some staggeringly unequal results were generated in the very high-net-worth cases.[24] It is extremely unfair that the introduction of the sharing principle seems to have led some writers in the tabloid press to describe London as the "divorce capital of the world", when in fact the London courts have caught up so late with a principle that has been axiomatic throughout Europe for so many decades.

Third, gender. It was the gendered aspect of the pre-*White* decisions that eventually prompted, perhaps forced, a change. The unequal division of those 1980s and 1990s decisions almost invariably meant that rich men did far better on divorce than did their wives, since almost invariably they were the ones who generated the family wealth and in whose name it stood.[25] But gender disparity persists in society. Should the law in England and Wales – in contrast to that in all the countries we have studied[26] - insist on an equal division in all cases, regardless of agreement to the contrary by the parties, so as to prevent exploitation of women as, typically, the financially weaker party in the marriage?

There are many reasons why gender equality should not lead us to that level of maternalism in legal policy. For one thing, the gender roles are by no means so stereotyped as they were. In *Radmacher*, the financial strength lay with the wife. For another, the law today must cater for same-sex couples – civil partners now, same-sex married couples once reform has been effected – where such considerations are irrelevant. Moreover, inequality will arguably be perpetuated if the law continues to treat women as needing special protection. A growing theme in family law is autonomy and the importance of choice; it is not apparent that women are any less able than men to make adult choices, provided that – as we insist in the context of qualifying nuptial agreements – all parties have sufficient advice and information.

What has concerned us in the formation of policy regarding qualifying nuptial agreements has been the vulnerability of parties who bear a more-than-equal share of the couple's joint responsibilities during marriage or civil partnership, or after divorce or dissolution. Typically that will be the case where the couple have children, but there will be other cases where decisions made by the couple about their lifestyle or division of labour have a disproportionate effect upon one of them. For those individuals, male or female, we make our proviso, that these new agreements cannot be used to contract out of making provision for financial needs. Partnership – whether marriage or civil partnership – is a risky business. It changes people, economically as well as emotionally. The law's provision for financial needs after divorce and dissolution is a form of risk management; it is a way of sharing responsibility and re-allocating disadvantage. The level at which it is made remains contentious, and the Law Commission's recommendations will be designed to make this a less controversial area. But perhaps the most useful contribution that our project can make towards gender equality is to insist that while couples may contract out of sharing they cannot contract out of their responsibility for financial needs.

---

[23] Matrimonial Causes Act 1973, s 25(1).

[24] For example: *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45; *Conran v Conran* [1997] 2 FLR 615; and *A v A (Financial Provision)* [1998] 3 FCR 421.

[25] See Mr Justice Peter Singer's lecture to the Family Law Bar Association in 1992: P Singer, "Sexual discrimination in ancillary relief" (2001) 31 Family Law 115.

[26] See Marital Property Agreements (2011) Law Com No 198, Part 4.

Creating A Discipline in Relocation Cases: Lord Justice Thorpe's Contribution to Relocation Law

Mark Henaghan*

I. Introduction

Lord Justice Thorpe has made an immense contribution to relocation law during his career. His landmark decision in *Payne v Payne*[1] is frequently cited and substantially quoted from in a wealth of relocation decisions around the world. This article will illustrate the indeterminate nature of family law and relocation cases and use the 'discipline' created by Thorpe LJ in *Payne v Payne* as the starting point for an examination of the importance of certainty and guidance in deciding relocation cases. The article will conclude with an analysis of potential guidelines, presumptions or rules that could guide relocation decisions in the future.

II. The Indeterminate Nature of Family Law and Relocation

Child custody adjudication is extremely indeterminate.[2] Robert Mnookin explains that when trying to decide which parent a child should live with upon separation, firstly "the judge would require information about how each parent had behaved in the past, how this behavior had affected the child, and the child's present condition".[3] The judge would then "need to predict the future behavior and circumstances of each parent if the child were to remain with that parent and to gauge the effects of this behavior and these circumstances on the child".[4] The judge would also have to consider possible interdependence issues such as how the parties will interact with each other following the decision, because essentially "custody disputes involve *relationships* between people".[5] As Mnookin rightly points out, all of these aspects of adjudication are "problematic",[6] because deciding "what is best for a child poses a question no less ultimate than the purposes and values of life itself"[7].

Some judges take their consideration of what is in the best interests of the child too far. For example, in *Re G (Children) (Education: Religious Upbringing)*[8] Munby LJ does not limit himself merely to the current welfare of the child, but also considers what impact his decision may have on the child's future life as well. Munby LJ states that the idea of welfare:[9]

> ... extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. ... How far into the future the judge must peer – and with modern life expectancy a judge dealing with a young child today may be looking to the 22nd century – will depend upon the context and the nature of the issue.

However, it is not possible for judges, or anyone, to look into the future in this way. Judges are not soothsayers. To require this sort of future gazing would only create greater indeterminacy.

In relocation cases judges typically work through a range of specific factors and general principles and then "weigh and balance the factors" against each

* Professor and Dean of Law, Faculty of Law, University of Otago, Dunedin, New Zealand. Thank you to Ruth Ballantyne (Professional Practice Fellow, Faculty of Law, University of Otago, Dunedin, New Zealand) for her excellent research and editorial assistance.

[11] *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052.

[2] Robert Mnookin "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law and Contemporary Problems* 226.

[3] At 257.

[4] At 257.

[5] At 252.

[6] At 257.

[7] At 260.

[8] *Re G (Children) (Education: Religious Upbringing)* [2012] EWCA Civ 1233.

[9] At [26].

other to achieve what is best for the particular child.[10] Even within appeal decisions, different judges cannot always agree on how best to weigh and balance the relevant factors and principles.[11] There is general agreement as to the process to be followed, but no unanimity of the substantive values (apart from the general notion of the child's best interests) that should predominate when making decisions in relocation cases.

III. The Importance of Certainty and Guidance in Relocation Cases

One way to address the indeterminate nature of relocation decisions, and indeed family law itself, is to construct some guidelines, presumptions or rules to apply in particular cases. The first phase in this process is to discuss why it may, or may not, be a good idea to have one approach to relocation law. In *Payne v Payne* Thorpe LJ provides practical justifications for following a 'discipline' when deciding relocation cases. Thorpe LJ states:[12]

> The opportunity for practitioners to give clear and confident advice as to outcome helps to limit the volume of contested litigation. Of the cases that do proceed to a hearing, clear guidance from this court simplifies the task of the trial judge and helps to limit the volume of appeals.

Giving legal counsel the ability to provide more definite advice to their clients about the likely outcome of relocation litigation will undoubtedly reduce the emotional and financial costs experienced by some clients. Clear guidelines will prevent some cases with a slim chance of success being brought before a court in the first place. As Cass Sunstein observes, rules are often a "summary of wise decisions", and they "save a great deal of effort, time, and expense."[13] Having standardised judicial relocation case procedures will create greater consistency so the outcome of litigation will not depend solely on the exercise of a particular judge's discretion, but rather on what evidence can be produced to satisfy the elements required by the particular guidelines, presumptions or rules guiding the decision-making process. This is what Thorpe LJ's 'discipline' from *Payne v Payne* was specifically designed to do; reduce litigation and restore predictability.

IV The Limitation of Rules

Introducing specific guidelines, presumptions or rules for judges to follow is not without its problems. There is a risk that such rules will not be flexible enough to meet individual situations. Robert George alludes to this when he discusses the danger of "imposing a homogeneity of outcomes in an area with a heterogeneity of facts and circumstances."[14] No set of rules will ever be perfect. As John Smillie said, rules:[15]

> … are potentially both under-inclusive and over-inclusive in relation to the background justifications or purposes which underlie and inform them. Cases will arise in which a rule covers a situation and dictates a result which is not indicated by direct application of the justification perceived to underlie the rule.

However, the limitations of potential guidelines, presumptions or rules do not mean that we should

[10] *Stadniczenko v Stadniczenko* [1995] NZFLR 493 at 500. See also *Kacem v Bashir* [2010] NZSC 112, [2010] NZFLR 884 for the New Zealand position; *Tropea v Tropea* 665 NE 2d 145 (1996) (Courts of Appeals) for the position in New York, United States; and *Gordon v Goertz* [1996] 2 SCR 27 for the position in Canada. See generally Linda Elrod "A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases" (2006) 3 *Journal of Child Custody* 29.

[11] For examples of higher courts weighing factors differently from lower courts see generally *Gordon v Goertz* [1996] 2 SCR 27; *AMS v AIF* and *AIF and AMS* [1999] HCA 26, (1999) 199 CLR 160; *Kacem v Bashir* [2010] NZSC 112, [2010] NZFLR 884; *D v S* [2002] NZFLR 116; and *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052.

[12] *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 at [27]. Many final appeal courts around the world (including final appeal courts in New Zealand, Australia, Canada, New York, and California) have heard relocation cases. However, none of these courts have come up with a comprehensive set of rules to assist in resolving relocation cases. Both the Supreme Court of the United Kingdom and the Supreme Court of the United States are yet to determine a relocation case. Thorpe LJ's 'discipline' in *Payne v Payne* (an English and Wales Court of Appeal decision) generates the most comprehensive judicial guidance as to how best to dispose of relocation cases.

[13] Cass Sunstein "Problems with Rules" (1995) 83 *California Law Review* 953 at 969.

[14] Robert George *Relocation Disputes: Law and Practice in England and New Zealand* (Hart Publishing, Oxford, 2013) at 155 (forthcoming).

[15] John Smillie "Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand" (1996) *New Zealand Law Review* 254 at 257.

forgo rules all together. The indeterminacy created by the current subjective open-ended approach is untenable and should not continue unchecked. Whilst the open-ended approach appears, in theory, to be able to meet every individual factual situation, in practice, it means that judges can consider the case precisely as they like. This inhibits lawyers from being able to advise their clients in advance what is likely to be considered significant. This considerably increases the amount and cost of litigation and creates a high degree of uncertainty; none of which is in the best interests of any child.

V Reducing Judicial Discretion

Much of the unpredictability found in relocation cases is connected to the inherently wide discretion judges currently have when deciding such cases. By their very nature, relocation cases provide many (often conflicting) issues that have to be judicially weighed and considered. The more issues that arise in a particular case, the more discretion judges have. Different judges rightly place weight on different aspects of the case and of the evidence before them. However, this means that results can become completely unpredictable. In some cases the outcome comes down to who the particular judge is on the day. As John Eekelaar has said:[16]

> [T]he heavily subjective nature of the power granted to the judge means that, so long as he does not claim to be applying it as a conclusive rule of law, a judge can consider almost any factor which could possibly have a bearing on a child's welfare and assign to it whatever weight he or she chooses.

Such an open-ended approach is not helpful when judges are using the law to resolve profoundly difficult disputes, where the emotional stakes are high.

Any introduction of legal guidelines, presumptions or rules for judges to apply in relocation cases will undoubtedly reduce judicial discretion. As John Smillie said:[17]

> Rules operate to limit the discretion of judges in two ways. First, they limit the number of particular facts or features of the instant case which the judge can properly take into account. Secondly, because rules represent entrenched resolutions of the conflict between competing background justifications for decisions, they deny judges direct recourse to the substantive justifications that underlie the rule and so limit the judges' capacity to reassess the merits and relative strength of those justifications as they apply to the particular facts of the case at hand.
>
> But even the most committed formalist must acknowledge that not every dispute can be resolved by mechanical application of a rule, and will concede that judges retain some legitimate capacity for choice between alternative solutions. The inherent ambiguity of language means that rules are necessarily uncertain at their margins, so that judges are frequently called upon to perform a creative interpretive role.

However, a reduction in judicial discretion is not a negative outcome *per se*. As John Eekelaar said as far back as 1984:[18]

> Family law has too long suffered from the myth that, as every case is different, their resolution must be left to the discretion of individual judges. Matters of principle are confronted at every turn. It is time we faced up to them.

While rules and clear directions do not provide the optimal outcome in all cases, leaving judges entirely to their own devices (as to what to take into account and what weight to place on particular factors) does not lead to consistently fair outcomes either. A rules-based approach will still have to

---

[16] John Eekelaar *Regulating Divorce* (Clarendon Press, Oxford, 1991) at 125.

[17] Smillie, above n 15, at 255. For an in-depth discussion of the advantages and disadvantages of decision making based on legal rules see Frederick Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, Oxford, 1991).

[18] John Eekelaar "Trust the Judges: How Far Should Family Law Go?" (1984) 47 *Modern Law Review* 593 at 597.

grapple with interpretative differences and difficulties in applying the legal guidelines, presumptions or rules. However, this approach is still more likely to produce consistent results overall.

VI Creating a 'Discipline': Choosing the Criteria

Once it is decided (like Thorpe LJ did in *Payne v Payne*) that creating some guidelines, presumptions or rules would be beneficial in terms of reducing litigation and enhancing consistency, it remains to be seen exactly which criteria should be used in the construction of these rules.

Thorpe LJ's 'discipline' from *Payne v Payne* is the fundamental starting point for the variety of guidelines, presumptions or rules that have been proposed by academics since. Thorpe LJ's 'discipline' focuses on a stereotypical factual situation where a primary caregiver mother seeks to relocate with her children against the wishes of the children's father currently exercising access or contact. As Thorpe LJ states:[19]

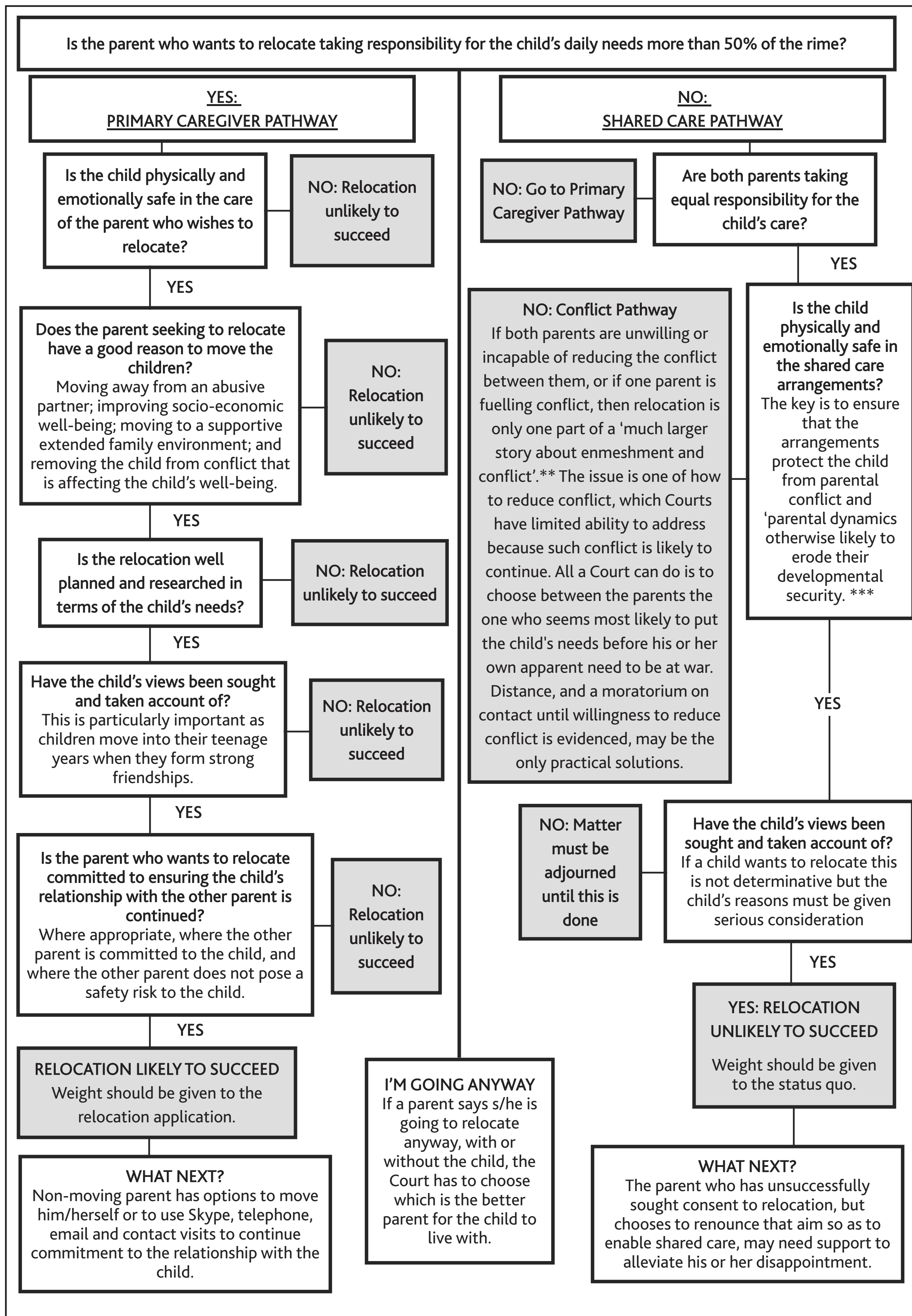
> I would suggest the following discipline as a prelude to conclusion:
>
> (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
>
> (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
>
> (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal?
>
> (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.
>
> In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.

The factors prioritised by Thorpe LJ's 'discipline' are of great importance. He rightly argues that the factors contained in his 'discipline' must then be brought in line with "an overriding review of the child's welfare as the paramount consideration."[20]

More than ten years after Thorpe LJ created his 'discipline' in *Payne v Payne*, several academics have recognised the immeasurable value of the development of some kind of guidelines, presumptions or rules for judges to follow in relocation cases. Mark Henaghan's detailed 'discipline' is based on a variety of New Zealand relocation decisions and is closely modelled on Thorpe LJ's original 'discipline'.[21] Like Thorpe LJ's 'discipline', Henaghan's 'discipline' is based on the principle that those who are fulfilling the majority of the caregiving for their children should be able to make the geographical movements best suited to their own childcare arrangements. According to Henaghan's 'discipline', relocation is much less likely to be permitted when parents are sharing the care of their children. Henaghan's proposed 'discipline' is set out below:[22]

---

19 *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 at [40] and [41].
20 At [40].
21 See Mark Henaghan "Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests: A View From the Bottom of the World" [2011] *Child and Family Law Quarterly* 226.
22 At 250.


Is the parent who wants to relocate taking responsibility for the child's daily needs more than 50% of the rime?
YES:
PRIMARY CAREGIVER PATHWAY
NO:
SHARED CARE PATHWAY
Is the child physically and emotionally safe in the care of the parent who wishes to relocate?
NO: Relocation unlikely to succeed
YES
Does the parent seeking to relocate have a good reason to move the children?
Moving away from an abusive partner; improving socio-economic well-being; moving to a supportive extended family environment; and removing the child from conflict that is affecting the child's well-being.
NO: Relocation unlikely to succeed
YES
Is the relocation well planned and researched in terms of the child's needs?
NO: Relocation unlikely to succeed
YES
Have the child's views been sought and taken account of?
This is particularly important as children move into their teenage years when they form strong friendships.
NO: Relocation unlikely to succeed
YES
Is the parent who wants to relocate committed to ensuring the child's relationship with the other parent is continued?
Where appropriate, where the other parent is committed to the child, and where the other parent does not pose a safety risk to the child.
NO: Relocation unlikely to succeed
YES
RELOCATION LIKELY TO SUCCEED
Weight should be given to the relocation application.
WHAT NEXT?
Non-moving parent has options to move him/herself or to use Skype, telephone, email and contact visits to continue commitment to the relationship with the child.
I'M GOING ANYWAY
If a parent says s/he is going to relocate anyway, with or without the child, the Court has to choose which is the better parent for the child to live with.
NO: Go to Primary Caregiver Pathway
Are both parents taking equal responsibility for the child's care?
YES
NO: Conflict Pathway
If both parents are unwilling or incapable of reducing the conflict between them, or if one parent is fuelling conflict, then relocation is only one part of a 'much larger story about enmeshment and conflict'.** The issue is one of how to reduce conflict, which Courts have limited ability to address because such conflict is likely to continue. All a Court can do is to choose between the parents the one who seems most likely to put the child's needs before his or her own apparent need to be at war. Distance, and a moratorium on contact until willingness to reduce conflict is evidenced, may be the only practical solutions.
Is the child physically and emotionally safe in the shared care arrangements?
The key is to ensure that the arrangements protect the child from parental conflict and 'parental dynamics otherwise likely to erode their developmental security. ***
YES
NO: Matter must be adjourned until this is done
Have the child's views been sought and taken account of?
If a child wants to relocate this is not determinative but the child's reasons must be given serious consideration
YES
YES: RELOCATION UNLIKELY TO SUCCEED
Weight should be given to the status quo.
WHAT NEXT?
The parent who has unsuccessfully sought consent to relocation, but chooses to renounce that aim so as to enable shared care, may need support to alleviate his or her disappointment.

Nicholas Bala and Andrea Wheeler reference both Thorpe LJ and Henaghan's 'disciplines' but take a slightly different approach themselves.[23] Instead of creating their own 'discipline' they set out the 'presumptions' about the best interests of the child that Canadian courts are currently employing in relocation cases. As Bala and Wheeler state, "[i]n setting out these presumptions, we are not proposing our views of what we think the law should be, but rather are trying more clearly to articulate what we believe Canadian courts are *doing*."[24] Bala and Wheeler's 'presumptions' are as follows:[25]

- There is a *presumption in favor of relocation* if
  - the parent opposing relocation has perpetrated acts of familial abuse;
  - the parent seeking relocation has sole custody (legal or de facto); or
  - the child wishes to move.
- There is a *presumption against relocation* if
  - the parent seeking relocation has made clearly unfounded allegations of familial abuse;
  - there is shared physical custody (each parent has child at least 40 per cent of the time); or
  - the parent seeking relocation has unilaterally moved the child; or
  - the child does not wish to move; or
  - the case is at an interim stage.

Bala and Wheeler argue that greater "awareness of these presumptions can help judges, lawyers and parents to more effectively and efficiently resolve many cases."[26] This 'presumptions' approach does provide a clear sense of direction in that the patterns of past Canadian decisions are used to suggest possible outcomes for future decisions with similar factual circumstances. This approach has striking similarities to the development of the common law. Working from such patterns is strongly encouraged, especially where they can be supported by empirical research evidence.[27]

Robert George's approach is different again, in that it identifies particular factors to be taken into account by asking judges to consider certain questions in relocation cases.[28] George's proposed questions are as follows[29]:

(1) How are the care-giving responsibilities for the child (and other family members, if relevant) currently being discharged?
(2) Why does Parent A wish to relocate, and why does Parent B oppose the relocation?
(3) Taking into account the answers to question (2), what scope is there for either parent to change their plans so that the child can remain in close proximity to both?
(4) If the options in question (3) are either impractical or undesirable (meaning that Parent A is going to relocate and Parent B is not), what would be the likely effect on the child either of relocating with Parent A, or of remaining in the current location

[23] See generally Nicholas Bala and Andrea Wheeler "Canadian Relocation Cases: Heading Towards Guidelines" [2012] *Canadian Family Law Quarterly* 271.
[24] At 316.
[25] At 317.
[26] At 316.
[27] One possible problem with establishing 'presumptions' or a 'discipline' based on how earlier relocation cases were decided is that the patterns emerging from previous cases are essentially developed from the predilections of judges in previous relocation cases. So, if judges have merely been exercising their open-ended discretion in such cases, it is difficult to be confident that the patterns emerging are necessarily the right ones. This is why it is important that any criteria to be developed into an adopted 'discipline' will need to be based on empirical research evidence.
[28] See George, above n 14, at chapter 6.
[29] At chapter 6.

with Parent B?

(5) What are the wishes and feelings of each child involved?

Most of these questions relate to the same factors both Thorpe LJ's and Henaghan's 'disciplines' raise. George's fourth question may be somewhat problematic, as it requires judges to attempt to look into the future. As New Zealand research studies illustrate, it is very difficult to predict the likely effects on different children if they stay or if they relocate with a parent.[30] Circumstances vary widely and things change dramatically in families over time. However, the questions posed by George are not designed to be exhaustive or automatically determinative. As George himself points out:[31]

> These questions are certainly not exhaustive, and the weight that would be attached to the answers would likely vary considerably from case to case. At the end of the process, the judge will be required to bring all of the answers together and make whatever decision she believes is likely to advance the child's welfare best ... The aim is to help judges to have the right information and to be asking themselves the right questions in order to exercise their judgment carefully in such a way as is most likely to be "reasonably satisfactory.[32]

All of the different approaches discussed above inevitably require interpretation at certain points. This will undoubtedly leave some room for argument between lawyers and judges, especially in cases with unusual facts. However, providing some sort of guidelines, presumptions or rules will significantly clarify the likely result for the more common factual scenarios. Though the approaches contain many differences, there is a degree of commonality in that every approach is designed to give notice in advance to relocation case participants of what types of behaviour will lead to what types of consequences. If accepted and implemented, each approach would play an important role in signaling what will happen should the matter go to court.

The key principle that unites these different 'disciplines' and approaches is that relocation decisions should be based upon some kind of visible framework. However, as yet, there is no universal agreement as to exactly what shape this framework should take and which factors should be prioritised in which order. In an attempt to alleviate this problem, Thorpe LJ is currently leading a group of international judges and academics who specialise in relocation law. This group is presently analysing different possible frameworks and criteria and ultimately hopes to develop some guidelines, presumptions or rules, which judges around the world could use in the future to assist them in deciding relocation cases.

Any framework ultimately established would need to focus on clear and detailed criteria upon which concrete evidence could accurately be gathered and which would be based primarily on what has happened so far during the child's life. Speculative considerations about the child's future should not be part of this process because it is impossible to predict what will happen in the future. The opportunity cost to the children and parents of the path not travelled is impossible to quantify. Courts are best equipped to look at past and current behaviour and base their decisions on that data, rather than merely weighing and balancing an open-ended list of non-prioritised factors.

The patterns of past and current relocation

---

[30] See Nicola Taylor, Megan Gollop and Mark Henaghan *Relocation Following Parental Separation: The Welfare and Best Interests of Children: Research Report* (The New Zealand Law Foundation, Dunedin, 2010).

[31] George, above n 14, at chapter 6.

[32] *G v G (Minors: Custody Appeal)* [1985] FLR 894 (UKHL) at 897.

decisions (in different jurisdictions where appropriate) should be analysed and combined with robust data as to long term outcomes for children. This would include an examination of the impact on children of different parenting styles, the difficulties of maintaining parental relationships while geographically separated, and the presence of inter-parental conflict, violence, mental health and substance abuse issues during childhood. This research should underpin the development of any future criteria.

VII Conclusion

Much of family law takes place in the "shadow of the law".[33] Displaying the criteria judges employ in relocation cases as a visible framework will significantly enhance certainty for judges, lawyers, parents involved in relocation disputes, and, most importantly, the respective children involved. While specific criteria may require legislative intervention to implement, it is better to move in this direction, rather than merely upholding completely discretionary assessments by judges as to what is in the best interests of individual children. Such discretionary assessments will not lead to consistent results. The inherent uncertainty contained in such assessments increases the sheer amount of relocation litigation and appeals, as well as the financial and emotional costs of that litigation for the families involved. None of these outcomes are in the best interests of children.

Thorpe LJ was the first to recognise the immeasurable value of imposing a 'discipline' into relocation law. The 'discipline' he created in *Payne v Payne* over ten years ago has had an immense national and international impact and remains the starting point for any discussion about the best way to decide relocation cases today. Any criteria ultimately developed will have its origins in Thorpe LJ's landmark 'discipline. This is a formidable judicial legacy.

[33] R Mnookin and L Kornhauser "Bargaining in the Shadow of the Law: The Case of Divorce" (1978-1979) 88 *Yale Law Journal* 950 at 997.

The Hague Convention on Child Abduction and Unilateral Relocation by Custodial Parents: Has the European Court of Human Rights Overstepped Its Bounds?

Linda J. Silberman *

I. Introduction

I am delighted to have been asked to contribute to this special issue of *Family Law and Practice*, prepared in honour of Lord Justice Mathew Thorpe. My article focuses on several recent cases in the European Court of Human Rights that highlight the interface of relocation and the 1980 Hague Convention on the Civil Aspects of International Child Abduction, a subject of particular interest both to Lord Justice Thorpe and to the Centre for Family Law and Practice.

I have been privileged to join Lord Justice Thorpe at several conferences where relocation has been a major topic of discussion and where formal resolutions on the subject have been issued. In September 2000, the Common Law Judicial Conference on International Parental Child Abduction in Washington, D.C., offered a Resolution noting the different approaches to relocation taken by various countries and stating that "[C]ourts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention." A decade later, in March 2010, at the International Judicial Conference on Cross-Border Family Relocation in Washington, D.C., that group produced a Declaration on International Family Relocation. The Declaration noted that the Abduction Convention "provides the principal remedy (the order for the return of the child) for unlawful relocations"; and it also offered a set of procedural guidelines and a list of factors relevant to decisions about international relocations. Just a few years ago, in July 2010, the London Metropolitan University Centre for Family Law and Practice held a conference in London that addressed International Child Abduction, Relocation, and Forced Marriage. Among the conclusions and resolutions adopted following that conference was one on international relocation: "We are aware that restrictions on international relocation can sometimes be a significant factor in international child abductions. We believe that international cooperation on a relocation framework, whether by international instrument or otherwise, may alleviate some harms associated with international child abductions."

The need for such international cooperation remains a high priority.

II. Restrictions on a Custodial Parent's Right to Relocate -- *Ne Exeat* Clauses

Unilateral relocations, often by custodial parents, usually mothers, are characteristic of a vast number of international abductions. States take very different approaches to relocation,[1] and relocations now occur at a frequency not contemplated by the 1980 Abduction Convention. The 1980 Abduction Convention itself takes no position on the issue of whether or not relocation should be permitted, but in deciding whether a return of the child is required, the Convention looks to the law of the habitual residence to determine whether there is a "right of custody" that has been breached.[2] The Abduction Convention obligates Contracting States to return a child who has been wrongfully removed or retained in breach of custody rights" that are defined in the

∗ Martin Lipton Professor of Law, New York University School of Law. This article is an abbreviated version of a more extensive paper prepared for the 2013 London Metropolitan University Conference on "Parentage, Equality and Gender", July 3-5, 2013. This shorter version is limited to decisions of the European Court of Human Rights that impact the 1980 Abduction Convention and does not consider decisions that may affect the Brussels II bis Regulation. The longer paper addresses those issues as well.

[1] See, e.g., Rob George, Current Developments: The international relocation debate, 34 J. Soc. Welfare & Fam. L. 141 (2012).

[2] Hague Convention on the Civil Aspects of International Child Abduction opened for signature Oct. 25, 1980, art. 3 [hereinafter Hague Abduction Convention].

Convention as "rights relating to the care of the person of the child and in particular, the right to determine the child's place of residence."[3] The nature of the rights each party has is a function of the law of the habitual residence of the child, but the definition of "custody rights" is a concept autonomous to the Convention. A restriction on relocation, which may be imposed by court order, agreement, or operation of law, affects whether a "right of custody" for Convention purposes exists. A non-custodial parent who has an explicit right to prevent relocation by the custodial parent in the absence of the non-custodial parent's consent (a *ne exeat* right) will be found to have a "right of custody" under the Convention. That view has been subscribed to by a majority of countries interpreting the term "rights of custody" within the meaning of the Convention, including the 2010 decision of the Supreme Court of the United States in *Abbott v. Abbott.*[4]

Of course, a country is free to use its own domestic law to give complete freedom to a custodial parent to relocate. In such circumstances, a parent with only access rights would not have any say in determining the child's place of residence; and without a "right to determine the child's place of residence" there would be no "right of custody" under the Convention definition and therefore no wrongful removal.[5] Thus it is left to individual countries to determine how to deal with unilateral relocations, and the Convention preserves that decision. States that impose *ne exeat* restrictions on a custodial parent should be able to rely on the Abduction Convention to effectuate a return of a child when that restriction has been violated.

III. The European Court of Human Rights Cases

Unfortunately, several recent decisions coming from the European Court of Human Rights have interfered with the choice made by individual States to prohibit unilateral relocations. These rulings exhibit a complete misunderstanding and potential undermining of the Convention.[6]

A. *Neulinger v. Switzerland*

In the first of these cases, the 2010 *Neulinger v. Switzerland* decision,[7] a custodial mother abducted the child to Switzerland in violation of a *ne exeat* order by the Israeli court. Although the mother hid the whereabouts of the child for a period of time,

---

[3] Id., art. 5.

[4] 130 S.Ct. 1983 (2010). See also *Re D* [2006] UKHL 51. That view is confirmed in The Hague Conference on Private International Law, Transfrontier Contact Concerning Children: General Principles and Guide to Good Practice, 9.3 Veto on Removal--A custody right under the 1980 Convention? (2008), which states: "The preponderance of the case law supports the view that a right of access combined with a veto on the removal of a child from the jurisdiction constitutes a custody right for the purposes of the 1980 Convention." See also The Hague Conference on Private International Law, Conclusions and Recommendations and Report of Part I of the Sixth Special Commission of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (2012) [hereinafter "Sixth Special Commission], at para. 45, approving *Abbott v. Abbott*.

Note, however, that some types of *ne exeat* rights may not qualify as "rights of custody", for example, a ne exeat restriction that confers the right of custody on the court rather than the non-custodial parent. But see *Re H* [2000] 2 AC 291 (HL) (holding that an unmarried father could assert a *ne exeat* right held by the court as "right of custody"). Also, the "potential right" to go to court to prevent relocation may not qualify as a "right of custody". See Judgment of Baroness Hale of Richmond, in *Re D* [2006] UKHL 51.

[5] See, e.g., Switzerland, Tribunal fédéral [TF][Federal Supreme Court] June 1, 2010, 136 ATFIII 353, at para. 3.3, discussed in *White v. White*, 2013 U.S.App. LEXIS 10531 (4th Cir., May 24, 2013).

[6] These developments are unfortunate, particularly in light of earlier decisions of the Court that had supported, rather than interfered with, the operation of the Abduction Convention. See Paul R. Beaumont, The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction, 335 Recueil des Cours 13-103 (2008); Linda J. Silberman, Cooperative Efforts in Private International Law on Behalf of Children: The Hague Children's Conventions, 323 Recueil des Cours 265, 381-83 (2006).

[7] App. No. 41615/07, (Eur. Ct. H.R. July 6, 2010). I have criticized *Neulinger* in other writing. See Linda J. Silberman, The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe--*Abbott, Neulinger, Zarraga*, 63 Oklahoma. L. Rev. 733 (2011) and Linda Silberman, Recent US and European decisions on the 1980 Hague Convention on Child Abduction [2012] IFL 53-55. For additional critiques of *Neulinger* and subsequent ECHR cases, see Nigel Lowe, A supra-national approach to interpreting the 1980 Hague Child Abduction Convention -- a tale of two European Courts, [2012] IFL 48-52 and [2013] IFL 169-78; Andrea Schulz, the enforcement of child return orders in Europe: where do we go from here? [2012] IFL 43-47; Lara Walker, The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights and the UN Human Rights Committee: The Danger of *Neulinger*, 6 J. Priv. Int. L. 649 (2010); Lara Walker & Paul Beaumont, Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice, 7 J. Priv. Int'l L. 231 (2011).

the father was able to file his Hague petition within a year of the wrongful removal. The Swiss Federal Court, reversing the decisions of a district and appellate cantonal court, ordered the child returned by the end of September 2007. Shortly thereafter, the abductor (and her child) brought proceedings in the European Court of Human Rights, challenging the return order as an interference with family life under Article 8 (1) of the European Convention on Human Rights. The President of the Chamber issued an interim measure that the return order not be enforced while those proceedings were pending. In January 2009, a seven-person initial Chamber decided 4-3 that there had been no violation of Article 8; the case was then taken up by the Grand Chamber, and in July, 2010, it determined that Switzerland would be in violation of Article 8 if the order of return were now enforced.

The decision of the Court of Human Rights is troubling, particularly as regards its interpretation and understanding of the Abduction Convention. The Swiss courts had considered the Article 13b defense (where return can be refused if there is a grave risk that return would expose the child to harm or otherwise create an intolerable situation)[8] and determined that the mother was able to return with the child to Israel and commence proceedings there. But the Grand Chamber determined that the situation must be assessed at the time of the enforcement of the return order – that is over two years after the return order was made and more than 4 years after the initial abduction. The Grand Chamber then determined for itself that the "settlement" of the child in the new country and the difficulties for the mother to return to Israel established that enforcement of a return order would interfere with family life. The European Court of Human Rights insisted that it had the responsibility to "ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors" as to what would be best for an abducted child in the context of an application for return. But that inquiry misconceives the role of a court hearing a petition for return, which under the Convention is to ensure the child's safety and well-being in making an order of return. The assessment of the "entire family situation" is for the courts of the habitual residence on the custody determination. The Grand Chamber's analysis also undercuts the force of Article 12 of the Abduction Convention, which provides a defence to return if the child is settled in its new environment, but only when the Hague return proceedings are commenced after one-year of the wrongful removal or retention. As noted, the Hague proceedings were instituted in Switzerland well within a year of the abduction; nonetheless the Grand Chamber applied the "well-settled" concept to the time the child had been in Switzerland since the abduction. Would-be abductors may well take heart from the message sent by Neulinger: abduct, hide, and prolong proceedings so that the child can be considered "well-settled".

B. *Raban v. Romania*

In *Raban v. Romania*,[9] the European Court of Human Rights took an approach similar to *Neulinger* in its understanding of the Convention, although this time it upheld the decision of the national court (Romania) that *refused* to return the children -- on grounds of "grave risk and ostensible consent". The left-behind father (on both his own behalf and that of the children) filed a petition with the European Court of Human Rights.[10] In determining whether the applicants' right to family life under Article 8 had been interfered with, the Court characterized its task as one of determining whether the national court had struck a fair balance between the competing interests of the child, the parents and the public order -- within the margin of appreciation afforded to States in such matters. Relying upon that "margin of appreciation", the Court of Human Rights found that the national court had sufficient evidence to conclude that the father had given his consent to the relocation and that the children were well-integrated and well taken care of by their mother. The Court emphasized that its task was not to reassess the evaluation by the domestic

[8] Hague Abduction Convention, supra note 2, art. 13b.

[9] App. No. 25437/08 (Eur. Ct. H.R. Oct. 26, 2010).

[10] In this case, the parents had been granted joint custody, and the mother unilaterally took the children to Romania.

authorities, unless there was clear evidence of arbitrariness, which it did not find in the present case.

One might ask why the same "margin of appreciation" that justified a national court refusing to return the children in *Raban* did not suffice to uphold the decision of the Swiss authorities to order the return of the child in *Neulinger*. Moreover, what is troubling about both *Neulinger* and *Raban* is the failure of the Court of Human Rights correctly to interpret and apply the provisions of the Abduction Convention. In both cases, relying upon the fact that the children were integrated into their new environment and well-cared for, the Court permitted an inquiry that the Convention authorizes only if a year has elapsed since the alleged abduction and the commencement of proceedings. In both *Neulinger* and *Raban*, the Court of Human Rights effectively expanded the "grave risk" of harm exception to include a well-settled exception that the Convention itself does not condone. Moreover, the Court of Human Rights misconceives the role of a court hearing a petition for return by not only permitting but also obligating a court in the refuge state to conduct a substantive "best interests" inquiry that under the Convention is supposed to be left to the state of habitual residence.

C. *X v. Latvia*

Although several cases post-*Neulinger* and *Raban* accepted the "margin of appreciation" deference to return orders by national courts, emphasizing that the role of the Court was not to question determinations reached by the national courts interpreting article 13b,[11] other rulings continued to second-guess national court orders of return by misinterpreting the Abduction Convention. In *X v. Latvia*[12] the European Court again found a country -- this time Latvia -- in violation of Article 8 because the Latvian courts had ordered a child returned to Australia. The chamber, in a 5-2 decision, ruled that the Latvian courts failed to make an "in-depth examination of the entire family situation", rendering the interference with family life "disproportionate". A joint dissent emphasized that it was not the role of the Court of Human Rights to take the place of the competent authorities in determining the best interests of the children, but even the dissent did not take issue with the broad substantive "best interests" inquiry that the majority indicated was appropriate.[13] The case was recently heard by the 17-member Grand Chamber of the Court, and thus the possibility remains that Grand Chamber will reverse and limit the impact of *Neulinger* by confining it to its specific facts.

D. B v. Belgium

Still another decision by a different chamber on July 10, 2012, *B v. Belgium*,[14] continues the cause for concern. As in *Neulinger*, the President of the Chamber issued an interim measure (pursuant to Rule 39) to prevent enforcement of an order of return during the course of proceedings brought before a chamber of the Court in a case where the Ghent Court of Appeal had ordered a child to be returned to the United States. Indeed, the order of return was issued at a time when the child had been in Belgium for less than a year. There had been continued litigation between the parties in the U.S. and two days after a provisional mediation agreement was reached the mother took the child to Belgium in violation of a court order.[15] An appeals court in Belgium set aside the first-instance

---

[11] See *Van den Berg and Sarri v. The Netherlands*, App. No. 7239/08 (Eur. Ct. H.R. Nov. 2, 2010); *Lipkowsky and McCormack v. Germany*, App. No. 26755/10 (Eur. Ct. H.R. Jan. 18, 2011); M.R. and *L.R. v. Estonia*, App. No. 13420/12 (Eur. Ct. H.R. May 15, 2012).

[12] App. No. 27853/09 (Eur. Ct. H.R. Dec. 13, 2011).

[13] *X v. Latvia* has other factual complexities that might be a basis for the Grand Chamber to find a violation of family life. The parents, who lived together in Australia, were not married and the father's name did not appear on the birth certificate. Only after the mother returned to Latvia with the child did the father formally establish paternity. After the return order was issued by the Latvian court, the father, after a chance encounter with the mother and child, took the child back to Australia. The Australian court gave sole custody to the father with only supervised visitation to the mother and prohibited the mother from speaking to the child in Latvian.

[14] App. No. 4320/11 (Eur. Ct. H.R. July 10, 2012).

[15] The parents were not married and the child had lived exclusively with the mother until she was four. After the father instituted custody proceedings, an agreement was reached whereby the parties were to exercise joint parental authority (the mother having custody and the father access), and that arrangement was confirmed by the local court. The court later issued an order that neither parent could remove the child from the county or the country without permission from the other parent or the judge. Litigation continued but eventually a provisional mediation agreement was reached. Two days later the mother left the United States with the child.

judgment refusing return and ordered the return of the child. The mother appealed to the Court of Cassation and requested an interim measure from the Court of Human Rights to prevent enforcement of the order of return of the child. The European court issued the measure until the close of the proceedings before the Court of Cassation.

In a divided opinion of 5-2, a majority of the chamber of the Court of Human Rights found that the order of return violated the mother and child's right to family life. It criticised the Belgian court for failing to request additional evidence and for failing to examine whether the mother had justification if she refused to return to the United States. Moreover, as it had done in *Neulinger*, the Court found that the integration of the child into her Belgian surroundings was sufficient to prevent return. The time factor was considered crucial, even though the Belgian appellate court had ordered return when the child had been in Belgium less than a year, and the child's further "integration" was the result of the interim measure ordered by the Court of Human Rights itself.

A dissent criticised the majority for substituting its views for those of the Belgian Court of Appeal, which it characterised as "based on direct examination of the facts of the case". It observed that by substituting its judgments for those of the domestic courts, the Strasbourg Court was tending through the passage of time to endorse wrongful abductions. The dissent underscored the proposition that the harm referred to in Article 13b of the Hague Convention cannot merely be a separation from the parent who wrongfully removed or retained the child. The dissent also pointed out that the case had moved through two levels of Belgian courts in fourteen months, and the interim measure ordered by the European Court was itself responsible for the further delay. The critique that the European Court's use of Rule 39's interim measure to delay returns is itself undermining the Abduction Convention is an issue that merits further attention from the Grand Chamber, but unfortunately referral of *B.v Belgium* to the Grand Chamber was rejected.[16]

IV. Conclusion

The Conclusions and Recommendations of the Hague Conference's Sixth Special Commission expressed "serious concerns" about the approach taken by the European Court of Human Rights in *Neulinger* and *Raban*.[17] The UK Supreme Court was even more explicit. In its 2012 decision in In *re S*,[18] Lord Wilson delivering the judgment of the Court wrote: "With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction . . . that neither the Hague Convention nor, surely, Article 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed, it would be entirely inappropriate."

The critics have it exactly right. The provisions of the Abduction Convention are premised on a belief that quite apart from any particular decision on custody, parental abductions are extremely harmful to children. The Convention establishes a structure to deter wrongful removals and retentions. Unless the Court of Human Rights plans to impose a custody-like merits hearing on all Hague applications, it ought to heed the margin of appreciation that it purports to grant to national courts and to recognize the parameters of the Hague Convention.

It has been the mantra to remind national courts that a Hague case is not a custody case. The custody case is for the judge at the place of habitual residence once the child has been returned. One can only hope that the Court of Human Rights will eventually get that message too.

---

[16] European Court of Human Rights, Press Release, ECHR 426 (Nov. 20, 2012).

[17] See Sixth Special Commission, Conclusions and Recommendations, *supra* note 4, at para 48.

[18] [2012] UKSC 10.

The Reign of Payne II

Marilyn Freeman* and Nicola Taylor**

Prologue

The writers' earlier article, *The Reign of Payne*, was originally published in the Autumn 2011[1] issue of the *Journal of Family Law and Practice* and has been updated in 2013, on the occasion of the retirement of The Right Honourable Lord Justice Thorpe, to honour his significant leadership in relocation law, both domestically and internationally.

Introduction

The Reign of *Payne*[2] stays mainly on the plane according to the Court of Appeal in *Re K (Children) (Removal from Jurisdiction)*[3]. How much impact this case and other recent judicial decisions, in particular *Re W (Relocation: Removal Outside Jurisdiction)*[4], will have on the family law tarmac is an issue that is attracting considerable academic and practitioner comment[5]. In this article, we focus particularly on the Court of Appeal's comment in *Re W* about the role of social science research evidence in relocation cases. Wall P cited an article by one of the present authors which had concluded that we do not currently know whether relocation is in children's best interests and agreed that there is much work to do in understanding the impact of relocation on a child and children's resilience in these circumstances. His Lordship added:

> It further occurs to me that unless and until we have the research identified by Professor Freeman, and unless and until Parliament imposes a different test to that set out in section 1(1) of the Children Act 1989 (paramountcy of welfare), relocation cases will remain fact specific, the subject of discretionary decisions, and governed by *Payne v Payne*[6].

In this article, we seek to show that while it is true there are many deficiencies in our knowledge of the impact of relocation on children, as indicated above, there are aspects of the existing research evidence that do provide some insights of particular relevance given the recent case law developments..

The *Payne* Landscape

The judicial attempts to clarify the law in *K v K* and *Re W* have emerged, at least in part, in response to recent criticism of the approach in *Payne v Payne*. The facts of the renowned *Payne* decision, which reinforced what had been set out in a series of earlier cases including *Poel v Poel*[7], will be familiar to most readers of this journal, so it will suffice to provide only the briefest of summaries. The case

---

* Professor Marilyn Freeman, Ph.D, Centre for Family Law and Practice, London Metropolitan University, England.

** Associate Professor Nicola Taylor, Ph.D, Centre for Research on Children and Families, University of Otago, New Zealand. The authors greatly appreciate the helpful comments by Stephen Gilmore on the final draft of their original article.

[1] (2011) 2 FLP 2.

[2] *Payne v Payne* [2001] EWCA Civ 166 [2001] 1 FLR 1052 (hereafter referred to as *Payne*).

[3] [2011] EWCA Civ 793 (hereafter referred to as re K).

[4] [2011] EWCA Civ 345, [2011] 2 FLR 409 (hereafter referred to as re W).

[5] See R George, 'Reviewing Relocation? *Re W (Children) (Relocation: Removal Outside Jurisdiction)* [2011] EWCA Civ 345 and *Re K (Children) (Removal from Jurisdiction)* [2011] EWCA Civ 793', (2012) 24 CFLQ 110, (hereafter referred to as Reviewing Relocation); S Gilmore, 'The Payne Saga: Precedent and Family Law Cases', September [2011] *Fam Law*, 970 (hereafter referred to as *Payne Saga*); T Scott QC, '*MK v CK*: The Retreat from *Payne*' http://documents.jdsupra.com/d1c62d88-413f-408f-872b-f67259b8a028.pdf, last visited 3rd October 2011.

[6] At para 129.

[7] [1970] 1 WLR 1469 (CA). See Rachel Taylor, 'Poels Apart: Fixed Principles and Shifting Values in Relocation Law', ch 6 in S. Gilmore, J. Herring and R. Probert (Eds) *Landmark Cases in Family Law* , Oxford, Hart, 2011.

related to a four-year-old girl whose British father had been refused a residence order when the judge made an order allowing her mother to relocate from the United Kingdom to her homeland in New Zealand. The father appealed unsuccessfully against this order. The leading judgments of the Court of Appeal were delivered by Lord Justice Thorpe and Dame Elizabeth Butler-Sloss P. Lord Justice Robert Walker agreed with both judgments. The frequently quoted sections of Lord Justice Thorpe's judgment are to be found in paragraphs 26, 40 and 41. They delineated what has become the longstanding landscape for relocation decision-making in the jurisdiction of England and Wales, and set the scene within which the recent decisions of *Re W* and *Re K* must be considered. Readers are, however, advised to remind themselves of the judgment of Dame Elizabeth Butler- Sloss[8] which has been referred to as "the best summary of the approach which judges are required to take to these difficult decisions."[9]

Concerns have been expressed by fathers' groups[10], academics, researchers, legal practitioners and members of the national and international judiciary about the guidance provided in *Payne*[11] and the apparent weighting given to what has become known as 'the distress argument' – where the primary carer mother's distress at not being permitted to relocate is considered to impact so negatively on her child(ren) that it is determinative of the issue and she will inevitably be granted permission to relocate.

Wilson LJ made an important observation in *Re H (Leave to Remove)*[12] when he stated that 'one must beware of endorsing a parody of the decision'[13] in Payne as both Thorpe LJ and Dame Elizabeth Butler Sloss emphasised the welfare of the child to be the paramount consideration in the determination of applications for permission to relocate. Nonetheless, Stephen Gilmore powerfully argues that Thorpe LJ has:

> … applied with great regularity his own discipline in hearing appeals, emphasising the welfare of the primary carer … so the parody is one that lives in practice, even though it may not represent the full picture as a matter of doctrine, and will continue in practice to dictate in its unbalanced way unless tackled.[14]

The Washington Declaration 2010

In March 2010 an International Judicial Conference on Cross-border Family Relocation was held in Washington D.C.[15] The resulting Washington Declaration on International Family Relocation[16] has been described by barrister Clare Renton as containing a set of 'agreed guidelines in respect of international family relocation including "factors relevant to decisions on international relocation."'[17] Clause 4 of the Declaration explains that the thirteen factors are for the purpose of promoting a

> more uniform approach to relocation internationally, and are intended to guide the exercise of judicial discretion in particular but not exclusively. Clause 2 states that the best interests of the child should be the paramount (primary) consideration in all applications concerning international relocation and that determinations should therefore be made 'without any presumptions for or against relocation.' The Declaration has received a mixed response.

---

8 See *Payne*, paras 85-88.

9 By Wall LJ in *Re D* [2010] EWCA Civ 50, at para 18.

10 See, for example, The Custody Minefield http://www.thecustodyminefield.com, and Relocation Campaign http://www.relocationcampaign.co.uk/index.html.

11 R George, Reviewing Relocation, fn 5 above, summarises the criticisms to which Payne has been subjected.

12 [2010] EWCA Civ 915 [2010] 2 FLR 1875.

13 At para 21.

14 *Payne Saga*, fn 4 above, p 976.

15 Organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, with the support of the US Department of State.

16 http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4240 last visited 6th October 2011; http://www.hcch.net/upload/decl_washington2010e.pdf last visited 6th October 2011(hereafter referred to as the Declaration).

17 http://www.familylawweek.co.uk/site.aspx?i=ed61748 last visited 6th October 2011.

In Re H (Leave to Remove)[18] Wilson LJ was generally positive about the Declaration and found it to be 'extremely interesting.' Subject to what he said below in paragraph 27, he stated that:

> … it may prove not only to be a valuable means of harmonising the approaches of different jurisdictions to the determination of applications for permission to relocate but ultimately also to become the foundation of some reform of our domestic law.[19]

Importantly, however, he also found that the Washington Declaration has no such effect at the moment. This led his Lordship to state that the submission by Counsel that 'today we should replace the guidance given in *Payne* with that contained in [3] and [4] of the declaration, lacked elementary legal discipline.'[20] He continued that 'the document is indeed no more than a declaration, to which our jurisdiction, through Thorpe LJ, has subscribed.'[21] Taken together, these statements appear to indicate Wilson LJ's view that, although the Declaration is not currently enforceable, it might be ultimately used as a basis for making relocation decisions in this jurisdiction subject to the necessary issue of enforceability being addressed.

Lord Justice Wilson also made 'with some hesitation' what he termed 'an aside' in paragraph 27. He queried if the present law of England and Wales does indeed place excessive weight upon the effect on the child of the negative impact upon the applicant of refusal of the application, whereas the Declaration 'as presently drawn by contrast places insufficient weight upon it.'

Mostyn J in *re AR (A Child: Relocation)* referred to Wilson LJ's comments expressed in *re H* about the possible insufficient weight placed upon the 'distress factor' in the Declaration:[22]

> I agree with this, up to a point. Certainly the factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less. The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward. [23]

Mostyn J also provided his own view of the Washington Declaration:

> The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of para 4(viii).[24]

Courts in other jurisdictions have declined to

---

[18] [2010] EWCA Civ 915 [2010] 2 FLR 1875.

[19] Ibid, at para 26.

[20] Ibid, at para 26.

[21] Ibid, at para 26.

[22] [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 at para 12.

[23] Thorpe LJ describes the limitations of the committee drafting involved in the production of the Declaration at (2010) 1 *FLP* 2 . In [2010] *IFL* 127, 'Washington Relocation Conference and *Poel v Poel*', he stated: 'Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our court has applied consistently since the decision in *Poel v Poel* [1970] 1 WLR 1469. The case for such a shift is not difficult to articulate. The principles stated in Poel were substantially founded on the concept of the custodial parent. Furthermore, there is an emerging body of significant research in various jurisdictions that must be brought into account.'

[24] At para 11.

follow *Payne* because of the emphasis placed on one, rather than all, the factors, creating a virtual presumption in favour of relocation.[25] However, some commentators have argued that imposing a 'discipline' is not necessarily detrimental in law, especially in the relocation field where greater certainty could lead to more consistent and predictable judicial decision-making. It would also signal, at an even earlier stage, how adult expectations about pursuing new cross-border relationships might come at the expense of their child(ren)'s stability and well-being and ultimately help separated parents to avoid expensive and lengthy litigation when making child care and mobility decisions. Professor Mark Henaghan emphasises that the value- driven reality of decision-making in relocation cases is:

> … not one of neutral fact finding. True neutrality will never reach a final result because all facts and principles would have to be treated equally. Decision-making requires prioritising, and giving more weight to some factors over others.[26]

He goes on to state his view that 'Thorpe LJ, in the England and Wales Court of Appeal case P*ayne v Payne*, was right to impose a "discipline" in relocation decisions to reduce litigation and restore predictability.'[27]

With this background, we now turn to examine the recent case law.

Recent Caselaw

The 2011 decisions of *Re W* and *Re K* represent what Stephen Gilmore has referred to as 'the Court of Appeal's latest forays into what might be termed the 'Payne *saga*.''[28]

We briefly recount the facts of both of these recent cases:

Re W (Relocation: Removal Outside Jurisdiction)

Re W concerned unmarried parents who had not lived together as a couple, and where the father did not have parental responsibility for the two children of the relationship, a girl aged 12 and a boy aged 8. The father had not had much contact with the children since 2009, and the mother believed that the children had suffered harm from being exposed to the father's alcoholism and possible recreational drug use, as well as his lifestyle. She alleged psychological and emotional abuse on a regular basis, witnessed by the children. The mother wanted to return home to Australia, where all her family lived, and the children were positive about the proposed move. She provided medical evidence attesting to her postnatal depression, although her primary motivation for seeking to relocate was the better life she thought she and the children would have in Perth. The Cafcass Officer filed three reports indicating that the mother should be given permission to relocate, but advocated a delay to allow the children to strengthen their relationship with their father. This was successfully achieved during the adjournment. At the final hearing the judge refused the mother's application because of his fears the children's embryonic relationship with their father would be adversely affected by the move. He accepted this would devastate the mother, but felt she 'needs to understand that the children's relationship with their father is very important.'[29]

---

[25] See, for example, *D v S* [2002] NZFLR 116 where the Court of Appeal (per Richardson P) stated at para 50: '*Payne v Payne* is not an appropriate model for New Zealand Courts. The guideline approach in *Payne v Payne*, with a clear emphasis on one only of the relevant factors to be weighed, is inconsistent with the approach required in New Zealand and not helpful as a reference point unless particular passages in the judgments are carefully identified and placed in a New Zealand context.'

[26] M Henaghan, 'Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests: A View from the Bottom of the World' [2011] *CFLQ* 226-249 at p 227.

[27] Ibid, at p 228. See also Associate Professor Lisa Young, 'Resolving Relocation Disputes: The "Interventionist" Approach in Australia' [2011] *CFLQ* 203 where she cautions, at p 207, against a reversal of the Payne approach without consideration of what she terms 'the interventionist approach' in Australia and 'where this road might ultimately lead.'

[28] *Payne Saga*, fn 5 above, p 970.

[29] The facts of the case are set out in the judgment of the President, Wall P, at para 24.

The Court of Appeal later reversed this decision:

> [It] is my clear conclusion that this [*sic*] one of those rare cases in which the judge, in the exercise of his discretion, has plainly reached the wrong conclusion, and that it is not only open to this court to interfere, but that in the best interests of the children it has a duty to do so.[30] ... When one is looking at the best interests of children, the best interests of their primary carer is a very important consideration and, I have to say, on the facts of this case, clearly outweighs the newly acquired relationship with the left behind parent.[31]

The Court took the opportunity, in light of the recent criticism of *Payne*, to clarify the status of *Payne*. Wall P dealt decisively in *Re W*[32] with the confusion created by his comments in the earlier case of *Re D (Leave to Remove: Appeal)* where he had stated:

There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.[33]

In *Re W*, Wall LJ stated that too much weight may have been given to some of his words in *Re D*[34] and he retracted his use of the word 'ignores'[35] which had been criticised by Wilson LJ.[36] in *Re H*[37] Wall P sets out clearly in *Re W* that relocation cases are governed by *Payne* which he stated 'is, of course, not only the latest leading case on "relocation" in the English jurisprudence, but also a reserved decision of this court and binding on us.'[38]

Re K

In *Re K* the father was Polish, but had lived in Canada during his childhood before moving to England in 1993. He met the mother in her country of origin, Canada, and she had been in the UK since 2003. The couple married in 2004, but separated in 2010. The care of their two daughters, aged four years and 18 months, was shared by the parents under a shared residence order made in August 2010. The children spent five nights (six days) with their father and nine nights (eight days) with their mother in every 14-day period. Both parents worked part-time so they could raise their children. The father cared for the children alone; the mother was assisted by a nanny while she worked. The mother felt unhappy and isolated in London and applied for leave to remove the children to Canada so she could gain additional support from her parents. Cafcass recommended against allowing the relocation, despite acknowledging it was a fine and difficult balance. The judge at first instance allowed the mother's application. The father appealed on three grounds - that the judge (i) had rejected the recommendations of the Cafcass officer without proper analysis or explanation; (ii) had directed herself by reference to guidance for applications by primary carers rather than guidance in applications by a parent with a shared care arrangement; and (iii) had been one-sided in referring only to the mother's case and not adequately addressing the father's.

The Court of Appeal allowed the father's appeal, holding that the only principle to come from *Payne* is that the welfare of the child is paramount; the rest is guidance to be applied or distinguished depending on the circumstances. The judge should apply the statutory checklist in section 1(3) Children Act 1989 in order to exercise his discretion. Thorpe LJ confirmed the approach set out in *Re Y*[39] that the

---

[30] Ibid, para 34.
[31] Ibid, para 95.
[32] Ibid, para 103.
[33] At para 129.
[34] [2010] EWCA Civ 50 [2010] 2 FLR 1065, at para 33.
[35] Re W, at para 128.
[36] ibid, at para 129.
[37] *Re H*, at para 23.
[38] *Re W*, at para 13.
[39] [2004] 2 FLR 330.

guidance in *Payne* is only applicable where the applicant is the primary carer. Where parents share the burden of caring for the children 'in more or less equal proportions' the approach in *Payne* at paragraph 40 should not be applied. The label 'shared residence' is not significant in itself. Black LJ reached the same conclusion as Thorpe LJ and Moore-Bick LJ, but via a different route. She said that *Re Y* is not a different line of authority from *Payne*, but 'a decision within the framework of which *Payne* is also part.'[40] She would not therefore 'put *Payne* so completely to one side.'[41]

Precedent

The issue of precedent, which is briefly addressed in *Re W*, and more substantially addressed in *Re K*, is comprehensively analysed by both Stephen Gilmore and Dr George in their respective articles. The point can be stated with unusual brevity. *Payne* remains good law and the expectation is that judges of the Court of Appeal and below must follow its guidance.[42]

The prevalence of shared care in modern post-separation parenting was raised in *Re K*, while the place of research in relocation dispute resolution was addressed in *Re W*. In what follows, we wish to argue that there are aspects of the research evidence on shared care arrangements that are relevant to relocation and have potential to affect the way *Payne* is applied in the future.

Shared Care

Several studies have included estimates of the incidence of shared residence arrangements in Australia (16%, 2009)[43], the UK (12%, 2009)[44], US (Wisconsin, 2% in 1981 to 32% in 2001)[45] and Norway (4% in 1996 to 10% in 2004)[46]. Shared care thus remains a minority post-separation care arrangement, but has increased in popularity over recent years.[47] Limitations pertaining to the research on shared care include the use of small samples, mutually agreed (rather than adjudicated) shared care arrangements, and variations in the definition of what constitutes shared care. For example, in the UK study with 559 parents (mentioned above), the children had to be spending the equivalent of at least three days and nights per week with each parent; whereas in the large-scale Australian study with 10,000 parents a wider margin of 35% to 65% of time with each parent was utilised.

Doubt has also been cast on the 'comfortable assumption' that 'shared care arrangements are only put into place when the parents are able to work harmoniously, or at least civilly, and are able to protect the children from exposure to hostility, sharp words, denigration, and the like.'[48] Reviews and critiques of the research findings have highlighted that while shared care can be beneficial for some children, others do not fare well in such an arrangement. Dr Judy Cashmore and Professor

---

[40] See the helpful summary by Andrea Watts of 1 King's Bench Walk in *Family Law Week*, http://www.familylawweek.co.uk/site.aspx?i=ed84409, last visited 6th October 2011.

[41] *Re K*, para 96.

[42] Dr George (Reviewing Relocation, fn 5 above, in the section on Precedent, Principles and Guidance) explores at length the *ratio decidendi* of Payne and the implications of Black LJ's caution against overstating the effect of the Payne guidance and Moore-Bick LJ's caution against its unduly mechanistic application.

[43] R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the Family Law Evaluation Team, 'Evaluation of the 2006 Family Law Reforms', (2009) Melbourne: Institute of Family Studies.

[44] V Peacey and J Hunt, 'I'm Not Saying It Was Easy ... Contact Problems in Separated Families' (2009) England: Ginger Bread and Nuffield Foundation.

[45] M Melli and R Brown, 'Exploring a New Family Form – The Shared Time Family' (2008) *International Journal of Law, Policy and the Family* 22, 231- 269.

[46] K Skrten and R Barlindhaug, 'The Involvement of Children in Decisions about Shared Residence' *International Journal of Law, Policy and the Family* 21, 373-385.

[47] S Gilmore, 'Shared Parenting: The Law and the Evidence (Part 2)' (2010) 20(1) Seen and Heard 21-35.

[48] J McIntosh and R Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separations' (2008) *Australian Family Lawyer* 20(1) 1.

Patrick Parkinson note that:

> There is no support in the social science literature for parenting arrangements for children under four that involve alternative substantial blocks of time. The McIntosh et al findings indicate that 2-3 year old children with conflicted parents fare less well when each parent has the care of the child overnight for at least 5 nights per fortnight. While otherwise there is no direct evidence that alternating substantial blocks of time is harmful, the preponderance of expert opinion based upon what is known about young children's attachments and sense of time, is that primary residence with one parent, regular contact with the other parent, and limited periods of separation from both parents are best for young children, and especially those under 4.[49]

Caution is therefore urged when a decision to split the child's time approximately equally between parents disregards the child's developmental needs for secure attachments, creates psychological strain on the child, and best meets the parents' rights rather than those of their child. Shared care is likely to work best when the parents live near each other, respect their ex-partner's parenting competence, and have a flexible and child-focused parenting style.[50] Several recent reviews by Stephen Gilmore,[51] Liz Trinder[52] and Belinda Fehlberg, Bruce Smyth, Mavis Maclean and Ceridwen Roberts[53] comprehensively summarise the main international research findings on how shared care impacts on children's adjustment and well-being. These reviews include recent Australian studies that have also shed greater light on shared care as a skilful undertaking involving many practical and relationship challenges, particularly when the children are infants/"pre-schoolers" or inter-parental conflict is a feature of the child's landscape.[54] This evidence base provides important guidance to both separated parents and the courts on how to translate shared care into a developmentally supportive experience for the children concerned.

It is in *Re K* that the issues of shared care and relocation collide. Whether *Payne* is applicable to cases where the care of the child(ren) has been shared between both parents is substantively discussed in the case. However, Dr George makes the insightful observation that this matter was previously decided by the Court of Appeal in the unreported 1999 decision of *Re C and M (Children)*.[55]

To update our original article, we now turn to consider two recent relocation decisions by the English courts - *Re F (A Child)*[56] and *Re TC and JC (Children: Relocation)*[57] - which have thrown further light on these issues.

Re F concerned unmarried Spanish parents who came to England with their 7-year-old son. The mother returned to Spain when the parental relationship broke down, but said that this was on the understanding that the child would join her later in Spain. The father applied for a residence order, and the mother applied for a similar order in Spain. She also applied for the return of the child under the 1980 Hague Child Abduction Convention. Holman

---

[49] J Cashmore and P Parkinson, 'Parenting Arrangements for Young Children: Messages from Research' (2011) 25 AJFL 1-22.

[50] J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, 'Post-separation Parenting Arrangements: Studies of Two Risk Groups' *Family Matters* (2011) 86, 40-48.

[51] S Gilmore, fn 47 above. See also S Gilmore, 'Contact / Shared Residence and Child Well-being: Research Evidence and Its Implications for Legal Decision-Making' (2006) 20(3) *International Journal of Law, Policy and the Family* 344–365; S Gilmore, 'Shared Parenting: The Law and the Evidence (Part I)' (2009) 19(4) Seen and Heard 19-30 for an overview of the main principles that have emerged from English case law on shared residence orders.

[52] L Trinder, 'Shared Residence: A Review of Recent Research Evidence', *Child and Family Law Quarterly* (2010) 22(40, 475-498.

[53] B Fehlberg, B Smyth, M Maclean and C Roberts, 'Caring for children after parental separation: would legislation for shared parenting time help children?' (2011) Family Policy Briefing Paper No. 7, Department of Social Policy and Intervention, University of Oxford; B Fehlberg, B Smyth, M Maclean and C Roberts, 'Legislating for Shared Time Parenting After Separation: A Research Review' (2011) *International Journal of Law, Policy and the Family*, 25(3), 318-337.

[54] McIntosh et al., fn 50 above.

[55] Reviewing Relocation, fn 5 above, at fn 92 and accompanying text.

[56] [2012] EWCA Civ 1364; see also: http://legalliberal.blogspot.co.uk/2012/10/right-thinking-wrong-result-commentary.html.

[57] [2013] EWHC 292 (Fam).

J found that the child's habitual residence was in England, and therefore dismissed the return application. The mother applied for leave to remove, with both parties seeking a shared residence order. The child lived with the father while all this was occurring. The judge stated that the decision was very finely balanced but, after considering the principles of *Payne* and *K v K*, held that the mother should be given leave to relocate. The father appealed on the basis that this was neither "a *Payne* case" in that it was not a primary carer seeking relocation since the child was living with him as the primary carer; nor was it "a *K v K* case" in that it did not involve shared residence. Munby LJ held that there was no error in law as the judge was entitled to consider the *Payne* guidelines when coming to a decision about the child's best interests. It was unnecessary and unhelpful to further categorise relocation cases into *Payne* or *K* type cases. Munby LJ stated:

> The focus from beginning to end must be on the child's best interests. The child's welfare is paramount. Every case must be determined having regard to the 'welfare checklist', though of course also having regard, where relevant and helpful, to such guidance as may have been given by this court.[58]

Re TC and JC concerned a married mother's application to relocate from England to Australia. The mother and father had met in Australia, marrying there in 2006, before moving to England in 2010 after a period living in Melbourne. The mother was Australian, and the father was British but held an Australian permanent resident visa. After the marriage ran into difficulties the mother abducted the children from England to Australia when they were 3½ and 2 years old respectively. The children were eventually returned to England under the Hague Convention, having been away for more than two years. The mother then applied for leave to remove from the jurisdiction. The parents agreed that whoever lost the application would relocate so that both parents would live in the jurisdiction in which the children were ordered to live. The CAFCASS officer could not make a clear recommendation about what should happen. Mostyn J considered the relocation case law and applicable principles, including the 2010 New Zealand Supreme Court judgment in *Kacem v Bashir*.[59] He held that the mother would be more disadvantaged by coming to live in the UK, than the father by going to live in Australia, and that the mother's distress if her application were refused would be greater than the father's disappointment of not being able to remain in the UK. The mother was therefore granted leave to remove to Australia, with shared residence ordered between the parties. Mostyn J set out what seemed to him to be the presently governing principles for a relocation application. These included that the guidance given by the Court of Appeal is not confined to classic primary carer applications and may be utilised in other kinds of relocation cases if the judge thinks it helpful and appropriate to do so[60]; and that there is no legal principle, let alone some legal or evidential presumption, in favour of an application to relocate by a primary carer. The old statements that seem to favour applications to relocate made by primary carers are no more than a reflection of the reality of the human condition and the parent-child relationship.[61] Mostyn J also addressed the issue of selflessness, which he had previously considered in *Re AR (A Child: Relocation)*[62] when he spoke of the appearance of penalising selflessness and virtue, while rewarding selfishness and uncontrolled emotions. In *Re TC and JC* he said:

> I do not resile from these views but the paradox does not make the problem any easier to solve. The impact on the mother if her realistic proposal is rejected is a fact

58 At para 61.
59 [2010] NZSC 112.
60 see iii, para 10.
61 see vi, para 10.
62 [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 (at para 12).

which has to be recognised whatever its psychological origin. I have to take the parents as I find them and if one finds himself as a result of my judgment to be a victim of his virtues then that is a cross which he will have to bear in the interests of his children.[63]

Mostyn J continued to consider international jurisprudence and stated:

I have observed before *(in Re AR (A Child: Relocation)* at para 15) that relocation has never been considered by the Supreme Court here. It has however been recently considered by the Supreme Court of New Zealand in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, [2010] NZFLR 884. In New Zealand the corresponding provisions to s1 Children Act 1989 are ss 4 and 5 Care of Children Act 2004. Although the language is different the principle of paramountcy and the statutory checklist are effectively the same. The majority judgment was by Blanchard, Tipping and McGrath JJ, and given by Tipping J. In it there are, to my mind, some highly acute observations demonstrating the fallacy of the suggestion that there is, or should be, some kind of presumption in favour of an application to relocate. They stated: "[23] At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessarily abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry. [24] Everything will depend on an individualised assessment of how the competing contentions should be resolved in the particular circumstances affecting the particular children. If, on an examination of the particular facts of a relocation case, it is found that the present arrangements for the children are settled and working well, that factor will obviously carry weight in the evaluative exercise. All other relevant matters must, of course, be taken into account and given appropriate weight in determining what serves the child's welfare and best interests, as s 4(5) puts it. The key point is that there is no statutory presumption or policy pointing one way or the other. All this seems to us to follow from ss 4 and 5 of the Act as a matter of conventional statutory interpretation." Later, at para 34, they referred to "some of the writings [which] seem to lament the unpredictability of decisions in relocation cases and also the width of the 'discretion' given to Judges in deciding such cases." This is a common theme in discussions about this subject, and for that matter, about related family law topics. But they explain, convincingly to my mind, that the function of the judge in making decisions about the future care of a child is not really "discretionary" at all, at least not in the sense of a judge making a decision from a range of legitimate solutions none of which can be said to be wrong. Rather, as they explained earlier at para 32: "But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family

[63] At para 12.

Court." So, when addressing the alleged vices of unpredictability and the width of "discretion" they stated at para 35: "These and other concerns … are inherent in the exercise in which judges administering ss 4 and 5 of the Act are involved. Lack of predictability, particularly in difficult or marginal cases, is inevitable and the so-called wide discretion given to judges is the corollary of the need for individualised attention to be given to each case. As we have seen, the court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme." Therefore, when discussing "policy", they stated at para 36: "The literature suggests that there are at least two competing schools of thought about relocation cases generally. There are those who consider relocation should generally be approved, and there are those who think that generally it should not. It is not our purpose, nor would it be appropriate, to express any preference. What is clear is that if there were to be any presumptive approach to relocation cases, it is contestable what that approach should be. This is very much a policy issue for Parliament, not judges. At the moment the New Zealand legislature has not opted for any presumptive approach. That is the way cases must be approached by the courts unless and until legislative change dictates otherwise." To my mind these observations all capture precisely my function here. They explain irrefutably to my mind why presumptions have no place in a relocation application. I therefore start with a blank sheet. There is no presumption in favour of the applicant mother. My determination will involve a factual evaluation and a value judgment. I will ask myself and answer as best I can the questions in paragraph 11(iv) above but their answers will not be determinative or even necessarily tendentious (in the true sense of that word). They will merely be aids to my determination of the ultimate single question, which is, of course: what is in the best interests of these children?[64]

Thus the law in this area continues to develop as it strives to meet the challenges that relocation disputes present.

The Role of Research Evidence

In an earlier article we reviewed the (mixed) findings from key studies pertaining to the impact of relocation in both intact and separated families.[65] It is clear that social science and socio-legal research have struggled with sampling and methodological issues in this field and with untangling the complexity of prior and current interacting factors influencing a child (and parent's) adjustment to a move, or to a proposed move being disallowed. While the courts routinely canvass a range of factors, prescribed by statute or inferred from research and case law trends, uncertainty remains about which factor(s) have the greatest explanatory power in helping to resolve relocation disputes and advance the child's welfare and best interests.

Social science can report the experiences of children and parents after separation, and measure

[64] At paras 13-18 .

[65] N Taylor and M Freeman, "International Research Evidence on Relocation: Past, Present and Future", *Family Law Quarterly* (2010) 44(3), 317-339.

how children cope. The difficulty lies in deciding which variables should be given weight in determining outcomes for each particular child. The variables range from the child's own particular internal resources, to the physical and economic surroundings they live in, through to their relationships with parents, peers and others in their life. Determining which one, or combination of these variables, leads to which outcomes is not a precise task. We simply cannot know how life would have been different if a child had, or had not, relocated with a parent.[66]

Research findings are unlikely ever to be definitive in this field, and therefore of assistance to the courts in quite the way some envisage. Methodological and ethical issues in recruiting (representative) litigating or litigated samples where relocation disputes feature, as well as the expense of tracking individuals over time, are significant hurdles in directly measuring the impact of family mobility on child (and parent) well-being – or the effect, when an application to relocate is disallowed, of having to continue living in a place where a parent, and possibly the child(ren), no longer wants to be.

However, in our view research can be both worthwhile and useful. Our own qualitative studies in England[67] and New Zealand[68] on family members' perspectives on relocation disputes, together with two similar Australian studies,[69] enabled the ascertainment of parents' (and some New Zealand children's) perceptions of the relocation issue, the dispute-resolution process, and its ongoing impact on their lives. This does have value in helping to shed light on the risk and protective factors that families, lawyers and the courts can take into account in future cases. Undoubtedly, more robust research is desperately needed but is unlikely to emerge very quickly given the impediments noted above. Meanwhile attention is turning to other avenues with the potential to provide more immediately useful guidance for parents, lawyers and the judiciary.

Existing Longitudinal Studies: Data collected within existing longitudinal studies can be used to investigate the impact of (changes in) family structure and childhood mobility on individual well-being over time.[70] While this avoids the problems and expense of recruiting new samples, since the data is already available, it does set relocation within the more general context of intact, separated and blended families rather than the court setting where the disputes we are primarily interested in are adjudicated. Nevertheless focusing on the significant difference between correlation versus causality in the existing research literature linking risk and resilience factors with relocation experiences is an important one. It may be possible to get closer to discerning the stand-out factors that courts can then more confidently apply in individual cases by examining impact and adjustment issues within an existing cohort sample where demographic, well-being and other psychological measures have been regularly administered with the same individuals (and their offspring) over several decades.

Fine Tuning Relocation Disciplines/Guidelines: Recently, legal scholars in New Zealand and Canada have suggested frameworks to guide decision-making in relocation cases before the courts. Professor Henaghan published his proposed discipline in his article in the *Child and Family Law*

[66] M Henaghan, fn 26 above, at p 235.

[67] M Freeman, 'Relocation: The reunite Research. Research Report' (2009) London: Research Unit of the Reunite International Child Abduction Centre.

[68] N Taylor, M Gollop and M Henaghan, 'Relocation Following Parental Separation: The Welfare and Best Interests of Children – Research Report' (2010) Dunedin: University of Otago Centre for Research on Children and Families and Faculty of Law.

[69] .J Behrens, B Smyth and R Kaspiew, 'Australian Family Law Court Decisions on Relocation: Dynamics in Parents' Relationships Across Time' *AJFL* (2009) 23(3), 222-246; P Parkinson, J Cashmore and J Single, 'The Need for Reality Testing in Relocation Cases' (2010) *FLQ* 44, 1.

[70] This approach is not entirely novel – see G Verropoulou, H Joshi and R Wiggins, 'Migration, Family Structure, and Children's Wellbeing: A Multilevel Analysis of the Second Generation of the 1958 Birth Cohort Study' (2002) *Children and Society*, 16, 219-231, where the researchers drew on a sample of 1,472 children whose mothers had been infants in the 1958 UK Cohort National Child Development Study. Relocation in response to family change, including parental separation and step-family formation, was not found to have a negative impact on children's wellbeing.

Quarterly in 2011.[71] It allocates the power between the parents in relation to their children on the basis of actual responsibility carried out for the child. Two pathways – 'primary caregiver' and 'shared care' lead on from the initial assessment of whether the parent who wishes to relocate is taking responsibility for the child's daily needs more than 50% of the time. Responses to key factors along each pathway determine whether the case exits at certain decision points as unlikely to succeed or flows through to a successful conclusion where weight should be given to the relocation application. Professor Henaghan concludes:

> Much of family law takes place in the shadow of the law. Putting the values up front via a visible framework, enables lawyers to advise their clients what is likely to happen, rather than guessing what will happen depending on who the judge is and how they may weigh the list of non-prioritised factors.[72]

Professor Nicholas Bala and Andrea Wheeler, in an article for submission to the *Canadian Family Law Quarterly*[73], promote the adoption of Relocation Advisory Guidelines (RAGs). Using their analysis of over 700 Canadian relocation decisions from 2001-2011 they have identified rebuttable presumptions in favour of, and against, relocation. The benefit of this approach is that different presumptions or guidelines apply in different situations, rather than having a universal presumption apply to all relocation cases regardless of their individual nuances. Such presumptions would not be determinative, but rather offer guidance and greater certainty in the relocation field.

Conclusion

Shared care and relocation are two ends of a complex spectrum of children's post-separation living arrangements. It is through this lens that we draw together the judicial and research elements woven throughout this article. *Re K* has raised the issue of how shared care intersects with relocation and the validity of the *Payne* discipline in this context. It seems to us that the international legal community is searching for clearer ways to resolve relocation disputes in an era of both increasing mobility and more diverse (and perhaps more complex) post-separation parenting arrangements as both mothers and fathers are encouraged to co-parent across separate households.

In New Zealand, for example, a non-prioritised and non-exhaustive list of factors is weighed and balanced by judges to determine whether or not a parent's application to relocate might be in the child's welfare and best interests. In England and Wales the more prescriptive approach of *Poel* and *Payne* has been applied for the past 40 years.[74]

Jurisdictions are seemingly searching for sufficient guidance within their legal approach to provide some direction, but not so much that the ability to respond to the fact sensitivity of individual cases is compromised. *Re K* illustrates this very point in seeking to tackle relocation in the context of the trend towards shared care via a more nuanced application of, or departure from, precedent (depending on whether it is the judgment of Thorpe LJ or Black LJ to which one refers). Expense and delay emerged as serious concerns for the litigating parents interviewed in the four qualitative studies referred to earlier,[75] so it behooves the legal system to provide clear signals about how relocation disputes might be resolved in the hope that parents can make decisions in the shadow of the law and avoid litigation.

Research has a significant place in assisting this process, but the complexity of post-separation family dynamics means that it is to more than one body of literature to which we must look. The

---

[71] See fn 26.

[72] Henaghan (2011), fn 26, at p 249

[73] "Canadian Relocation Cases: Heading Towards Guidelines" [2012] *Canadian Family Law Quarterly* 271.

[74] The differing ethos towards relocation in these two jurisdictions is nicely illustrated in the 44 participants' responses to the relocation case vignettes used by Dr George in his doctoral research – see chapter 4 (Practitioners' applications of English and New Zealand relocation law to hypothetical cases) in R George, 'Reassessing Relocation: A Comparative Analysis of Legal Approaches to Disputes Over Family Migration After Parental Separation in England and New Zealand' (2010) DPhil Thesis, University of Oxford.

[75] See fns 67, 68 and 69.

research evidence on shared care is already clear that this should not necessarily become a trump card[76] when it comes to relocation. Moore-Bick LJ emphasised in *Re K* that:

> … the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child.[77]

This illustrates how multiple strands of empirical research combine to provide such valuable insights for the family law tarmac.

Epilogue

Lord Justice Thorpe, who will retire in July 2013, has been a major force in English relocation law since his 2001 judgment in *Payne v Payne*. His domestic leadership in the relocation field has been complemented, since 2005, by his role as the Head of International Family Justice for England and Wales through which he has spearheaded the quest for a more consistent judicial approach towards international relocation cases, including closer international judicial co-operation in such cases. He has always acknowledged the need for a rigorous evidence-base on the impact of relocation and relocation decisions on children, and supported several research developments in this regard. Noteworthy events, combining judicial, legal and academic expertise, that Lord Justice Thorpe has either hosted, convened or contributed significantly to over the years, include:

- *The International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions*, Cumberland Lodge, Windsor, 4-8 August 2009;
- *The International Judicial Conference on Cross-Border Family Relocation* convened by the Hague Conference on Private International Law and the International Center for Missing and Exploited Children, with the support of the US Department of State. This Conference was held in Washington DC, from 23-25 March 2010, and resulted in the Washington Declaration on International Family Relocation referred to earlier in this article;
- The *International Child Abduction, Forced Marriage and Relocation Conference*, Centre for Family Law and Practice, London Metropolitan University, 30 June to 2 July 2010;
- An international (England and Wales / New Zealand) inter-disciplinary Working Group[78] that will report to a Relocation Discussion Forum at the 2nd International Family Law and Practice Conference at the Centre for Family Law and Practice, 3-5 July 2013. Under the chairmanship of Lord Justice Thorpe, this Forum will combine leading researchers, legal practitioners, dispute resolution specialists, and judges in its focus on the various international proposals which have recently emerged in the search for a way forward in relocation matters. It is envisaged that a number of recommendations and resolutions will be made that capitalise on the knowledge, expertise and collaborative spirit encouraged by Lord Justice Thorpe throughout his career.

We commend Lord Justice Thorpe's keen awareness of the potential impact of relocation on the lives of the families – and especially the children – involved in these often heart-wrenching legal proceedings, and his real willingness to steward the international community in its efforts to find better solutions to the human dilemmas that relocation disputes inevitably produce. We wish him the happiest of retirements.

---

[76] On this point see Black LJ in *Re K*, para 145, where she discusses a shared residence order in the armoury of a parent for deployment in the event of a relocation application.

[77] *Re K*, para 86.

[78] Lord Justice Thorpe convened this group, whose membership also comprises: Professor Marilyn Freeman, Professor Nigel Lowe, Dr Robert George, Mr. Justice Moylan, Timothy Scott QC, Professor Mark Henaghan and Associate Professor Nicola Taylor.

The 1980 Hague Convention and Immigration: The case of Mr and Ms B

Stephen Cullen* and Kelly Powers*

The impact of the contemporary increase in cross border movement of families underlines the importance of Lord Justice Thorpe's work towards clarification of the law in relation to parental – and dependent children's - relocation.

In particular, movement of children following parental child abduction is not always entirely straightforward. In at least one recent case what should have been an uncomplicated return to the jurisdiction of the child's habitual residence has become fraught with immigration problems and challenges, making it clear that situations can arise where the same country seeking a child's return under the 1980 Convention[1] may then refuse the child or parent entry when the child returns home and presents at border control. The United Kingdom, when acting as a requesting country, is in just such a state of confusion. There is little or no liaison between the Foreign and Commonwealth Office and the Home Office in such a context, despite the best efforts of the Official Solicitor.

The result, unless the matter is addressed, is that convention return cases will be fought on two fronts – one between the parents, and the other between agencies of the same government.

In European jurisdictions, this problem can be addressed by Article 8 of the European Convention on Human Rights[2], albeit through a process that can take years to resolve. In non-European jurisdictions, there is no mechanism to address the issue in the UK.

In consideration of the Convention's emphasis on speedy returns and the intention of the those who drafted its provision for returns to be ordered and executed quickly with minimal disruption to a child's life, there must be some paradigm to ensure that return orders can and will be executed, and that the children subject to the orders will be permitted to return to their home countries.

The case study below illustrates exactly how this scenario can occur and why it must be addressed.

Mr B v Ms B and Foreign & Commonwealth Office v. Home Office

Mr and Ms B's case started as a "traditional" abduction matter, and quickly developed into a much more complicated dispute between two branches of the same government.

Mr B and Ms B are the parents of two boys, KB and CB, now ages 12 and 14. The family are all nationals of the United States.

*Miles & Stockbridge PC, Maryland USA.

[1] The Hague Convention on the Civil Aspects of International Child Abduction 1980.

[2] European Convention on Human Rights 1980 (Art. 8 protects respect for family life, home and correspondence and prohibits "interference with the exercise of this right by a public authority except as is in accordance with law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

In July 2008, the family relocated together from the United States to the United Kingdom for Mr B's employment. Mr B was granted a work permit to enter the UK on the basis that he had been assigned to work with Shell PLC in its London office. Ms B and the two children were granted leave to remain as work permit dependents. The family's permits were valid until July 2012.

Even before relocating to the United Kingdom, Mr and Ms B had been experiencing difficulties in their marriage, which were only exacerbated by the relocation. In January 2009, Mr B initiated divorce proceedings against Ms B in London. The parties elected not to engage in Children Act litigation[3], and instead reached an agreement for the children to reside with Ms B and to have contact with Mr B. Their agreement was recorded in an order addressing various matters ancillary to the divorce. The entire family was expected to remain in the UK until at least July 2012 and they all had leave to remain until then.

During the course of their separation and divorce proceedings, Mr and Ms B each moved on to new relationships. Mr B started a relationship with an American woman, who then also relocated to the UK. Ms B started a relationship with a British man, and they eventually began living together.

In July 2010, Mr B was granted leave by the court in London to travel to the United States with the children on holiday on the condition that he return them to the United Kingdom by 18 August 2010. However, instead of taking the children on holiday to the United States, Mr B abducted them to the USA and has never returned to the UK. Mr B left London with the children in July 2010, following which Ms B had no idea where in the United States Mr B had taken the children and could not locate them until nearly four months later.

Ms B followed all of the standard procedures for seeking return of the children to the United Kingdom. She submitted an Application for Return to the Official Solicitor International Child Abduction and Contact Unit (ICACU) under the auspices of the Official Solicitor and the Foreign and Commonwealth Office. The United Kingdom government supported Ms B in her application and worked with the United States government to assist her in locating the children and seeking their return to the United Kingdom.

In February 2011, Ms B, with the assistance of the US and UK governments, located the children in Texas. She initiated return proceedings under the 1980 Convention against Mr B, which Mr B vigorously contested. Ms B and her British partner travelled together to the United States for the trial in Texas.

At the conclusion of the trial the United States federal court in Texas ordered the children returned to the United Kingdom immediately. Ms B, her British partner, and the children immediately left the United States and returned to the United Kingdom, with the court's return order in her possession.

At the time of the family's return to the United Kingdom in February 2011, a United Kingdom Government Agency, i.e. ICACU, had made a formal request for the return of the children to the United Kingdom, and it was the granting of that application by a District Judge in the United States that facilitated the family's return to the United Kingdom.

But unbeknownst to Ms B, when Mr B realized the case in the United States was not going his way, he made a request to the Home Office in the United Kingdom for his work permit in the United Kingdom be revoked.

[3] For residence or other orders under s 8 of the Children Act 1989.

So when Ms B, her British partner and the children arrived at Heathrow Terminal 4 and presented themselves at arrivals control at 6.00 am – after having travelled on a trans-Atlantic overnight flight the day after having been reunited following a four month separation – they were told they did not have leave to enter the United Kingdom and could not enter.

The two branches of the United Kingdom government involved with the family were thus at complete odds with respect to the family's future. The Foreign and Commonwealth Office actively sought the children's return to the United Kingdom under an international treaty. On the other hand, Immigration Officers at Heathrow, when told of the Hague Convention order, cancelled the family's leave to enter the UK and refused the family entry.

However Ms B was lucky – she was saved (at least temporarily) by Article 8 of the ECHR. Ms B and her British partner were (and still are) in a committed, loving and long-term relationship. They lived together in the UK with the children. Her British partner had always lived in the United Kingdom and, for his own family reasons, he could not have lived in the USA. As a matter of USA Immigration law, it was also unlikely that he would have been able to accompany Ms B if she were removed to the US. Ms B and her partner were fully self-supporting economically. There was no prospect of any recourse to public funds. Her partner was working and Ms B had savings and regular income by way of payments for the maintenance of the children. And the children were in independent schools, and the fees were paid by Ms B. They were not therefore being educated at public expense.

After an extensive interview at Heathrow, Ms B was therefore able to persuade the immigration officer to permit her and the children to enter the United Kingdom temporarily to collect their things and to appear for a voluntary removal from the United Kingdom. During her temporary leave to enter, Ms B managed to instruct solicitors file an application for a further extension to the Home Office based on under Article 8. She then submitted a further application for leave to remain for herself and the children. But her application was again refused by the Home Office.

It was not until Ms B appealed to the First Tier Tribunal nearly a year after the children were returned to the United Kingdom under the Convention and at the request of the Foreign and Commonwealth Office that she and the children were finally granted a six month temporary leave to remain.

Now nearly two and a half years after the children were returned to the United Kingdom under the Convention and at the request of the Foreign and Commonwealth Office, the family is still in immigration limbo. Their ability to remain indefinitely in the United Kingdom has still not been determined by the government, even though it was the government itself that sought the family's return.

This cannot possibly be what those who drafted the Convention envisioned.

There clearly must be some scope for an internal protocol to resolve these problems. Governments of the signatory nations to the 1980 Convention should consider implementing a system of coordination between branches of government. If one branch of the government requests that children be returned, and the children do in fact return, there must be an understanding between the two branches that the return order will indeed be executed and the children permitted to enter the requesting country without the complications which have arisen in this case.

The Contribution of Spousal Support Guidelines to Equality in Parenting

D.A. Rollie Thompson*

In Canada, the primary rationale for spousal support where there are dependent children has been compensatory, ever since the landmark 1992 judgment of the Supreme Court of Canada in *Moge v. Moge*.[1] By "compensatory", we mean compensation for the loss and economic disadvantage arising from the roles adopted during the marriage, primarily the disproportionate assumption of child care by one spouse in cases involving children. The compensatory explanation for entitlement has been widely accepted ever since, but its practical application in determining the amount and duration of support has not been easy for Canadian lawyers and courts: that is until the advent of the Spousal Support Advisory Guidelines in January 2005.[2]

At the heart of Canada's spousal support guidelines (known by their unfortunate acronym, the "SSAG") lie two formulas for amount and duration: the *without child support* formula and the *with child support* formula. The latter formula – really a family of formulas – applies where there is a child support obligation for a dependent child[3] and it is the subject of this short article. Professor Carol Rogerson and I were the co-directors of the guidelines project for the federal Department of Justice from 2001 to 2008.

The U.K. Law Commission released its Supplementary Consultation Paper on Marital Property, Needs and Agreements in September 2012.[4] It makes reference to the Canadian spousal support guidelines in the course of its discussion of the law of "needs". To a Canadian, the language of need and "needs" for spousal support in cases involving children seems odd. The emphasis upon need and non-compensatory support principles does explain why compensatory concepts disappear into the background.[5] In England, Lord Justice Thorpe has been at the centre of many debates about financial provision, about the equal weight of the homemaker's contribution and the important place of the primary carer for children. In Canada, we have different debates about spousal support in "with child" cases, debates that have been focussed and extended by the SSAG.

The *with child support* formula has made spousal support in these cases more predictable and consistent, and thus ultimately more legitimate, than in the pre-guidelines, discretionary, budget-driven world. After eight years of experience, we have found that the formula "fits" the cases quite well, so well that 85 per cent of the reported "with child" cases fall within the formulaic range for amount (and it is likely an even higher proportion of agreements). Duration is a harder question in these "with child" cases, but much of the case law falls comfortably within the ranges for duration as well.

In practice, the SSAG mean that spousal support claims are more easily made and justified in Canada, even for smaller amounts, in cases with children. For

* Schulich School of Law, Dalhousie University, Canada.

[1] [1992] 3 S.C.R. 813.

[2] The *Spousal Support Advisory Guidelines: Draft Proposal* was released in January 2005 by the federal Department of Justice, and lawyers, clients, mediators and courts then immediately started applying the SSAG. After extensive meetings and feedback, the Final Version was released in July 2008: *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice, July 2008). All future references are to the *Final Version*, which can be found online at: http://www.justice.gc.ca/eng/rp-pr/spousal-epoux/spag/index.html.

[3] In the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), a dependent child under s. 2 is called a "child of the marriage".

[4] U.K. Law Commission, *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper* (Consultation Paper 208, September 2012).

[5] As someone "from away", from one of the former colonies, I offer any advice with trepidation. Some years ago, Ira Mark Ellman offered American thoughts and advice on this subject, in "Do Americans Play Football?" (2005). 19 Int'l J.L. Pol'y & Fam. 257.

those parents with the primary care of children, whether during the marriage[6] or after separation, or both, the SSAG give practical effect to the broad compensatory principles set out in *Moge*. The result has been a better recognition of the losses and disadvantages of child-rearing for primary parents, mostly women. In turn, the improved spousal support remedy goes some distance towards greater equality in the post-separation world, to relieve "the feminisation of poverty" acknowledged by Justice L'Heureux-Dube in *Moge*: only some distance, however, as the ability to pay of the payor spouse will always be the outside limit of this private financial remedy.

1. Canadian Spousal Support Law in Context

I do not want to spend too much time explaining the larger context within which Canadian spousal support operates, but a bit of background is needed, for comparative purposes. Spousal support is a residual financial remedy, especially in cases involving children. It comes into play after the division of property and child support. In Canada, these financial steps are kept distinct and separate, unlike the needs, sharing and compensation regime in England and Wales. On the other hand, in Canada, child support is a matter for the family courts, unlike the English administrative scheme.

In a Canadian family law case, the first issue is custody or parenting. Then the matrimonial or family property is divided, with a strong presumption of equal division, reflecting the assumption that both spouses have made roughly equal contributions in the past to the accumulation of property.[7] In cases involving children, most spouses have not accumulated much in the way of property, apart from some small equity in the matrimonial home.[8] In some circumstances, it may be possible for the primary care parent to hang on to the home, but many couples are mortgaged to the hilt and thus unable to finance the home or that specific home after separation into two households. On an interim basis, the parent with interim custody or primary care will usually be given possession of the home.

Next the parties will resolve child support, determined under the Child Support Guidelines, which came into effect in 1997 with minor revisions since.[9] The Child Support Guidelines use a percentage-of-payor-income model to determine the basic or "table" amount of child support, to which special expenses may be added[10] and from which limited departures are permitted. Where the payor's income is a simple wage or salary income, child support can be readily determined, even without a division of property. In Canada, child support determination is left to the courts, as one part of their broader family law tasks. Child support is not taxable income for the recipient or deductible for the payor, unlike periodic payments of spousal support, which are deductible and includible for tax purposes.

There are also government benefits payable for children in the care of a parent: the child tax benefit (a means-tested monthly amount), the universal child care benefit (a modest flat sum for pre-school children) and the child portion of the GST credit (a low-income credit against our consumption tax). These benefits are significant at low-income levels,[11]

[6] When I use the term "marriage", it should be read to include "common-law relationship" as well. In Canada, apart from Quebec, every provincial family law makes spousal support available to common-law partners after cohabitation for 3 years or 2 years or "a relationship of some permanence" if there is a child, on the same principles as for divorcing spouses under the Divorce Act. In practice, Canadian courts do not treat common-law partners any differently for spousal support purposes, so that the SSAG are applied to them too.

[7] Between 1978 and 1986, each Canadian province passed matrimonial property legislation that applied only to legally-married spouses. There are different definitions of the "pool" of assets and differences in valuation and procedure, but all statutes start from a strong presumption of equal division. Three of the ten provinces now include common-law partners in their property division statutes, i.e. Saskatchewan, Manitoba and British Columbia. In the other jurisdictions, common-law partners are left to make property claims based upon unjust enrichment principles, recently reformulated by the Supreme Court of Canada in *Kerr v. Baranow*, [2011] 1 S.C.R. 269.

[8] And maybe pension rights, if the spouse works in the public sector or a larger private corporation.

[9] *Federal Child Support Guidelines*, SOR/97-175 as am. These Guidelines are regulations under the Divorce Act. Identical Guidelines have been adopted under provincial family laws, to apply to non-divorce child support cases, except in the province of Quebec.

[10] Under s. 7 of the Guidelines, such special expenses include child care, some health expenses, extraordinary expenses for primary or secondary education, post-secondary education expenses and extraordinary expenses for extracurricular activities.

[11] All three benefits would total about $7,500 per year for the first child and $6,300 for each subsequent child in 2013 in Ontario at the lowest income levels.

but reduce and eventually disappear at middle-income levels.

Thus, in Canada, by the time the parties or a court get to spousal support, it is the last issue to be determined, especially in cases with children. Custody arrangements have been settled, property divided, child support determined, and government child benefits assessed. Further, our family law statutes make clear that child support is to be given priority over spousal support, even if that means no ability to pay any spousal support.[12] Assuming some ability to pay, spousal support provides a more flexible financial remedy than the others, but it serves a distinct purpose.

2. The Compensatory Rationale for Entitlement

In *Moge*, the Supreme Court made clear that the primary rationale for spousal support in Canada is compensatory, especially in cases involving children. The Court emphatically rejected any general "clean break" theory, noting the impact of loss and disadvantage upon the ability to become self-sufficient after separation. The Court did acknowledge that the compensatory model was not the sole basis for support, and there could be non-compensatory reasons for support.[13]

The bare facts of *Moge* reveal a classic compensatory claim. The husband and wife had been married for 18 years and they had three children who remained in the wife's care after separation. The welder husband was the breadwinner, with the wife home and working at various part-time jobs during the marriage. After separation, the husband paid both child and spousal support for 16 years and he applied to terminate spousal support after the last child left the home. The wife continued to work part-time and intermittently at cleaning jobs. The trial court granted his motion, but the Manitoba Court of Appeal reinstated spousal support of $150 per month, on an indefinite basis. The husband's appeal to the Supreme Court of Canada was dismissed, leaving the 55-year-old Mrs. Moge still receiving modest support 19 years after separation.

In *Moge*, Justice L'Heureux-Dube drew upon lower court case law, academic writing and economic statistics to fashion a very broad view of compensatory support. *Moge* is like a three-tiered wedding cake:[14]

- the first and foundational layer is the concept of "pure compensatory loss", familiar to readers of Ira Mark Ellman and his "Theory of Alimony"[15];
- the second and smaller tier is an extension of compensatory theory" into a related concept of "economic disadvantage"; and
- a third and more dubious tier of "economic advantage or benefit", more of a restitutionary view.

(a) Pure Compensatory Loss

The first tier of *Moge* can mostly be explained by Ellman's pure theory of compensatory loss, which can only be described briefly here. Said Ellman, "loss" rather than "need" should be the foundation of any modern theory of spousal support. In his view, "need" was "invoked by courts largely as a conclusion rather than an explanation".[16]

At the end of the marriage, one spouse – usually the wife – is left with a reduction in her earning capacity compared to that which she would have had if she had not married. The post-separation reduction of earning capacity reflects that spouse's "marital investments" in child care, homemaking, moves to accommodate the other spouse's career, etc. During the marriage, these investments result in greater over-all utility for the family. If there were no alimony or spousal support, then all these losses would fall

[12] See, e.g. section 15.3 of the Divorce Act.

[13] For a good general review of the Canadian law, see Rogerson, "The Canadian Law of Spousal Support" (2005), 38 Fam.L.Q. 69.

[14] Thompson, "Ideas of Spousal Support Entitlement" in Legal Education Society of Alberta, *Family Law Refresher* (Banff, April 28-30, 2013).

[15] Ellman, "The Theory of Alimony" 77 Calif.L.Rev. 1 (1989). Ellman was also the reporter for the American Law Institute's project on family law reform, notably its proposal for "compensatory payments" to replace alimony: American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2000).

[16] Ellman, "Inventing Family Law", 32 *U.C.Davis L.Rev*. 855 (1999) at 878.

upon the one spouse, argued Ellman.

The purpose of spousal support is thus to remove financial disincentives to this optimal "marital sharing behaviour" during the marriage, by reallocating those losses after marriage breakdown. The measure of compensatory support is the amount of money required to put the recipient spouse back in the position she or he would have been, had the spouse not made the marital investments and had the spouse remained in the paid labour market in full-time employment. The "need" of the recipient is thus not the test, nor is there any simple relationship to the payor's income or the length of the marriage.

Ellman's "Theory" provided an excellent theory of entitlement, but proved difficult to apply in practice to determine amount and duration, given its demand for economic evidence and a certain amount of speculation about the likely paid labour market career of the recipient spouse.[17] In practice, a focus upon "loss" rather than "need" generates a different pattern of claims. Practical "markers" of "pure compensatory loss" or entitlement would be:

(a) a spouse stays at home full-time or part-time to care for children, while the other spouse maintains full-time employment;
(b) a spouse takes a less-demanding full-time job that permits her or him to assume greater responsibility for child care;
(c) a spouse relocates to further the career or employment of the other spouse, thereby disrupting or modifying her or his own employment;
(d) a spouse earns income in order to support the other spouse while he or she completes education, training or other qualifications to improve income.

The first two are of greatest interest here, as we are focussing upon cases involving children.

(b) Economic Disadvantage: Adjusting the Pure Theory in Canada

Ellman produced a "pure" compensatory theory. In the real world, Justice L'Heureux-Dube adjusted his theory, incorporating two sensible extensions. Our Canadian Divorce Act refers to "economic… disadvantages… arising from the marriage", as well as any "financial consequences arising from the care of any child over and above any obligation" for child support, i.e. the indirect costs of child-rearing to the parent.[18]

First, Ellman only considered marital losses incurred "during" the marriage. The wife who did not acquire marketable skills before marriage, precisely because she intended to be at home with children and to make that substantial marital investment, got left out in the cold by Ellman, although with some unease on his part. She had not "sacrificed" much by leaving the paid labour market. Moge did not separate out this group in its analysis of sacrifice, focussing instead upon the division of functions with children and the non-monetary work at home by the spouse.[19]

Second, L'Heureux-Dube J. recognised the post-separation indirect costs of child-rearing.[20] Keep in mind that Ellman left out these "losses", based upon his theoretical view that such indirect costs should be reflected in child support.[21] That academic view is not reflected in reality, not anywhere and not in Canada, and our Supreme Court properly treated this as an "economic disadvantage" that could justify a spousal support claim.

For shorter marriages, with very young children at separation, most of the compensatory "loss" described by Ellman occurs, not during the marriage, but after separation. Take my favourite example, the young mother with twins aged two, who separates

---

[17] Some career paths are easier to project than others, e.g. teachers, nurses, civil servants or university professors, given their emphasis upon education credentials and years of services. Others are much more complex and speculative.
[18] These are found in clauses (a) and (b) of section 15.2(6) of the Divorce Act, the objectives of spousal support.
[19] *Moge*, above, note 1 at para. 70
[20] Ibid. at paras. 72, 81.
[21] Ellman, above, note 15 at 74. The ALI recommendations did construct a child support regime that included a standard of living component that might have included some of these indirect costs, but that was an unusual regime, one not subsequently adopted by any state.

after three years of marriage and is almost entirely responsible for their care. Most of her "loss" is not in the past three years, but in the sixteen or seventeen years still to come.

So, from *Moge*, we can add two additional markers of "disadvantage" flowing from the marriage roles:

(a) a spouse enters a relationship before acquiring much in the way of labour market skills and then is at home full-time or part-time, or structures her or his employment around the demands of child care;
(b) a spouse is primarily responsible for the care of children after separation.

Both of these can be seen as modest and justifiable extensions of the "pure theory" of "loss" espoused by Ellman.

(c) Economic Advantages or Benefits: A More Dubious Extension

At a couple of points in *Moge*, Justice L'Heureux-Dube ranges further afield, to talk about the sharing of the "economic advantages or benefits" to the payor spouse as part of her compensatory approach. This would be a more dubious extension, most frequently mentioned in the small number of cases where one spouse has supported another spouse during their education and acquisition of occupational or professional qualifications, which does not concern us here.

(d) What *Moge* Left Unsaid: Non-Compensatory Support and *Bracklow*

Moge focussed upon compensation, given the facts of that case. Seven years later, the Supreme Court of Canada was required to consider non-compensatory or needs-based support in *Bracklow v. Bracklow*.[22] In *Bracklow*, the wife had fallen ill towards the end of a seven-year, childless marriage. The lower courts had granted the wife limited-term support for less than four years, but the Supreme Court of Canada reversed this, on its broader view of non-compensatory entitlement, and sent the case back for rehearing.[23] Justice McLachlin (now the Chief Justice) ranged far beyond illness or disability cases, noting that need can arise from many sources, that need is a relative concept tied to the marital standard of living, and that the payor does not have to cover all the need through support, as much turns on the degree of interdependence between the spouses and the length of the marriage.

I only mention *Bracklow* here to round out the analysis, and because both compensatory and non-compensatory claims can co-exist in most relationships and marriages. Where minor children are involved, the compensatory claim will usually – but not always – predominate. In Canada, after *Bracklow*, our courts have maintained a fairly broad view of non-compensatory entitlement too, mostly in cases not involving children.[24] The Spousal Support Advisory Guidelines implemented these broad support principles in determining amount and duration.

3. Determining Amount and Duration: The Advent of the SSAG

The *Moge* decision was a breakthrough on entitlement, and offered some broad-brush principles that could guide the determination of the amount and duration of spousal support. But compensatory principles proved to be very hard to operationalise for lawyers and judge. In some early post-Moge cases, lawyers presented economic evidence, but the courts

---

[22] [1999] 1 S.C.R. 420.

[23] After the rehearing, Justice Daphne Smith of the British Columbia Supreme Court ordered support of $400 per month for 5 years from the trial, for a total of 7 years and 3 months of support (including interim support) after a relationship that lasted, yes, 7 years and 3 months: (1999), 181 D.L.R.(4th) 522.

[24] For accounts of *Bracklow* and the early case law developments afterwards, see Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001), 19 *Can.Fam.L.Q*. 185; and Thompson, "Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000), 18 *Can.Fam.L.Q*. 25.

were not enamoured of such evidence.[25] Instead, courts lapsed back to their familiar needs-and-means approach, using budgets and budget deficits as proxy measures of loss or disadvantage.[26] Very soon, lawyers and judges even forgot that such measures were proxies. Needs-and-means became the measure, and the rationale, for spousal support, with support awards simply reflecting "need" and ability to pay, just like the old days. As Ellman had demonstrated, "need" produces a very different pattern of support outcomes than "loss".

That trend was reinforced by the very broad approach to non-compensatory support in *Bracklow*. *Bracklow* reaffirmed that compensation was the primary basis for spousal support in Canada, but in practise most lawyers and judges used non-compensatory methods and thinking to resolve cases, even cases involving children. In Ontario, in cases involving children, some lawyers and judges were using net disposable income calculations to allocate income between the spouses by way of child and spousal support, using spousal support to top up child support and then looking at the percentage of net income left in the hands of each spouse. Most courts would not leave the primary parent with more than 50 per cent of the family's total net disposable income, but in 1999 the Ontario Court of Appeal upheld a spousal support order that left 60 per cent of the family's net disposable income in the household of the wife and the three children.[27]

In the aftermath of *Bracklow*, the uncertainty and unpredictability of support outcomes reached a point that lawyers and judges began to consider seriously the possibility of spousal support guidelines. In 2001, the federal Department of Justice retained Professor Rogerson and me to look into informal guidelines. After extensive research and work with an advisory committee of specialised family law lawyers, mediators and judges, we issued a full-blown *Draft Proposal* of the Advisory Guidelines in January 2005 and then, after another cross-country round of consultations, the revised *Final Version* in July 2008. We have told the story elsewhere.[28]

Before delving into the *with child support* formula, we need to cover a few basics about our Spousal Support Advisory Guidelines. They are not legislated, unlike our Child Support Guidelines. The SSAG are informal and advisory, and only deal with the amount and duration of spousal support. The issue of entitlement must be dealt with first and separately, by agreement or decision. The Advisory Guidelines provide a different *method* of determining support, but are not a law reform exercise, as they are intended to reflect the dominant patterns of current decisions and settlement practice. There are two formulas, the *without child support* formula and the *with child support* formula, the dividing line between the two being self-evident. The formulas generate ranges for amount and duration, reflecting the advisory and national nature of the guidelines. Discretion must be exercised to locate a specific amount or duration within those ranges, which can be quite broad.[29] The formulas operate for "typical" cases, with eleven categories of exceptions identified and departures otherwise possible in non-typical cases.[30] The SSAG do not offer formulaic solutions to some of the hard issues in support law, e.g. high payor incomes above $350,000 gross per year or remarriage/repartnering of the recipient spouse or post-separation income increases of the payor spouse.

[25] E.g. *Elliot v. Elliot* (1993), 106 D.L.R. (4th) 609, 48 R.F.L. (3d) 237 (Ont.C.A.).

[26] See Rogerson, "Spousal Support After *Moge*" (1997), 14 *Can.Fam.L.Q*. 281.

[27] *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 (Ont.C.A.).

[28] Rogerson and Thompson, "The Canadian Experiment with Spousal Support Guidelines" (2011), 45 *Fam.L.Q.* 241. See also Thompson, "Canada's Spousal Support Advisory Guidelines: A Halfway House Between Rules and Discretion", [2010] *International Family Law* 106.

[29] In chapter 9 of the *Final Version*, above, note 2, the following factors are identified to help locate an amount or duration within the ranges: the strength of any compensatory claim; the recipient's needs; the age, number, needs and standard of living of children; the needs and ability to pay of the payor; work incentives for the payor; property division and debts; and self-sufficiency incentives for the recipient.

[30] Specifically: (1) compelling financial circumstances in the interim period; (2) debt payment; (3) prior support obligations; (4) illness and disability; (5) compensatory exception in shorter marriages without children; (6) reapportionment of property in British Columbia (on spousal support grounds) or pension double-dipping; (7) basic needs/hardship of recipient; (8) non-taxable payor income; (9) non-primary parent to fulfil parenting role under custodial payor formula; (10) special needs of child; and (11) small amounts and inadequate compensation under the with child support formula where priority given to child support.

A word here is necessary about the *without child support* formula. It can apply to a childless marriage or relationship, or to one where the children have grown up and ceased to be dependent. The *without child support* formula thus reflects primarily non-compensatory factors, although compensatory concerns will arise in longer marriages under this formula. In brief, the *without child support* formula uses gross incomes for the spouses, with the gross income disparity multiplied by a range of percentages based upon the number of years of cohabitation, i.e. 1.5 to 2 per cent for each year of cohabitation to a maximum range for amount of 37.5 to 50 per cent of the disparity at 25 years and after. As for duration, periodic support is paid for one-half to one year for each year of cohabitation, with support becoming "indefinite (duration not specified)" for cohabitation of 20 years or more.[31] This simpler formula will be contrasted below to the *with child support* formula.

Without going into too much detail, the Spousal Support Advisory Guidelines were readily adopted by Canadian appeal courts in British Columbia, New Brunswick, Ontario and Prince Edward Island. In the other six provinces, apart from Quebec, the SSAG are used extensively by trial judges. There have been 2,200 trial decisions since 2005 applying the SSAG. More importantly, lawyers, mediators, arbitrators and unrepresented spouses use the SSAG to fashion settlements. The three major Canadian family law software programs spit out SSAG calculations at the push of a button.[32] To date, the Supreme Court of Canada has not definitively ruled upon the Advisory Guidelines.[33]

4. The *With Child Support* Formula under the SSAG

Earlier, I explained how *Moge* adopted a compensatory rationale for spousal support in Canada. In cases involving children, this means a focus upon the loss or disadvantage flowing from the disproportionate assumption of child care by one of the spouses, usually the wife. That disproportionate care may occur during the marriage or after separation or both. Under this formula, length of marriage plays a much less important role than under the *without child support* formula. More important in this formula are the child custody arrangements, the child support payments, and the pool of individual net disposable income left over to the spouses after child support, taxes and government benefits.

(a) The "Basic" Formula for Amount and Duration

As mentioned earlier, the *with child support* formula is actually a family of formulas, to reflect different custodial and child support arrangements. The "basic" formula described below accounts for more than 70 per cent of all the cases,[34] those where the higher income payor pays both child support and spousal support to the lower income recipient who has custody or primary care of the children. There are five other variants, described below.

The calculations under the *with child support* formula are complicated and require computer software. The formula gives priority to child support, as is required by law, so that spousal support is only available out of what net disposable income is left over. The individual net income remaining will reflect complex tax and benefit calculations, as each dollar of taxable, deductible spousal support is transferred from the payor to the recipient through a process of iteration until the target percentages are met.[35] The target percentages were derived from extensive modelling, to ensure that spousal support amounts reflected the dominant patterns seen in the "with

[31] To illustrate the formula for amount, after 10 years of marriage/cohabitation, the spousal support would range from 15 to 20 per cent of the gross income disparity. For more details, see *Final Version*, above, note 2, chapter 8.

[32] All three software suppliers worked closely with the project: ChildView, DivorceMate and AliForm (in Quebec).

[33] Apart from acknowledging their use in the leading case on retroactive spousal support, *Kerr v. Baranow*, above, note 7. The Court has denied leave to appeal in four cases using the SSAG.

[34] To be precise, the basic formula accounts for 70 per cent of the reported cases, and we know that an even higher percentage of settled cases involve this basic fact pattern.

[35] This formula is dealt with in detail in chapter 8 of the *Final Version*, above, note 2. The target percentages are that, after payment of spousal support, the recipient parent should be left with a range of 40 to 46 per cent of the spouse's individual net disposable income (after deducting from each spouse their respective contributions to child support). The maximum percentage is less than 50 per cent, to reflect a variety of concerns about out-of-pocket work expenses, access expenses and work incentives for the payor, not to mention a dose of caution and a better fit with the national case law.

child" case law across the country. The amounts generated by this formula are seen as generous, especially in some parts of the country, but still within the limits of ability to pay.[36]

The formula also creates ranges for the duration of support. All initial orders in cases with children are "indefinite", with time limits only imposed in future through variation or review. Nonetheless, the *with child support* formula does offer time limits, with two tests at the lower and upper ends of the range: a length-of-marriage test of one-half to one year for each year of cohabitation/marriage (as under the other formula) or an age-of-children test, from the time the youngest child starts full-time school to the time that the youngest child finishes high school. At each end of the range, the longer of the two tests will be used. For shorter marriages and younger children, the age-of-children test will more often rule, while the length-of-marriage test will dominate in medium-to-longer marriages.

There are variants of this "basic" formula for three other custodial situations: split custody, shared custody, and step-parent cases. Then there are two "hybrid" formulas: the custodial payor formula, where the higher income payor of spousal support also has custody or primary care of the children; and the adult child formula, for cases where the children are pursuing post-secondary studies away from home. These are "hybrid" formulas, because they are built upon the skeleton of the *without child support* formula, with necessary adjustments to that gross income formula to reflect the priority for child support payments.

For my purposes here, I will focus upon the "basic" formula, with some consideration of the shared custody variant. My interest is the ability of the SSAG to deliver practical outcomes based upon compensatory thinking, to adequately compensate primary carers at the end of the relationship and to send suitable incentive signals to those couples who are still together.

(b) Of Proxies, Guidelines and Second Best Solutions

One look at the *with child support* formula for amount and you can see that its calculations are not constructed around the hypothetical career path of the recipient spouse, as one would expect from a pure compensatory analysis. The formula considers not only the income of the recipient spouse, but also that of the payor spouse, in "divvying up" the available pool of net income. Does this not violate the basic principles guiding compensatory entitlement? Yes, and no.

Only rarely will the career track of the payor spouse offer any guidance on the losses incurred by the recipient spouse's care of children. Every now and then, one tax lawyer will marry another tax lawyer, and then one of the two tax lawyers will stay at home with the children and then the payor's path might be used as a measure. But, even in this world of "assortative mating", such marriages are not that frequent.[37] Thus, the inclusion of the payor's income in the formula calculations can be seen as inconsistent with the compensatory approach.

As a second-best approach, however, the *with child support* formula has many characteristics that do reflect compensatory concerns. First, the real constraint on spousal support amounts under any formula, compensatory or otherwise, is the payor's ability to pay both child and spousal support, so that support will not come close to tracking either a hypothetical career path for the recipient or the actual income of the payor. Where a couple have three young children, and the wife has stayed at home full-time or part-time, it is unlikely that there will be any room left for spousal support after the payment of child support, even though this common fact situation generates a sizeable compensatory claim. If the same couple has one young child, there will be more room for payment of spousal support.

Secondly, as the recipient's income rises, then the amount of support will reduce, when measured against the fixed end-points of the range for the

[36] The range of amounts for two children under the basic formula consistently leaves the primary parent with more, sometimes much more, than half of the family's net disposable income after the payment of both child and spousal support. Even then, the primary parent and children will live at a standard of living lower than the single payor.

[37] Despite the dubious empirical suggestion to that effect in the American Law Institute's explanation for its formula: above, note 15, section 5.05, comment (e).

recipient's share of the net income pool. The quicker the recipient's income increases, the lesser is the likely loss or disadvantage. If the recipient's income rises enough over time, the range for support may even become zero. If the education and employment efforts of the recipient are not sufficient, then a court can impute an income commensurate with the recipient's abilities. These formula characteristics reflect compensatory logic.

Thirdly, we should not forget duration and, under the *with child support* formula, there may still be a disparity and a range for amount, but support entitlement will end when compensation is satisfied. The end of entitlement requires an individualised determination under *Moge*, which will reflect the recipient spouse's employment and career path, consistent with the "loss" theory. If there is greater ability to pay, then compensation will be satisfied sooner. Or, if like Mrs. Moge, only small amounts of support are paid, payments may have to go on for a much longer time.

Fourthly, if there is a strong compensatory claim and the payor has been unable to pay spousal support by reason of the priority to child support, an exception is available consistent with section 15.3(3) of the Divorce Act. As child support reduces, as each child ceases to be dependent, spousal support can be increased with the improved ability to pay, under the *with child support* formula or even, in longer marriages, by crossing over to the *without child support* formula when all the children are gone.

Fifthly, there is a strong element of individualisation in the *Moge* analysis, as the self-sufficiency of the recipient spouse must not be "deemed" or "assumed" and time limits on support will be rare. The depth of loss or disadvantage can only be worked out over time, based upon the real-life progress of the individual spouse towards self-sufficiency. This is accomplished through variation or review of initial orders, as events unfold. The Advisory Guidelines recognise this individual element within its ranges for amount and duration.

Thus, compensatory thinking can shape the use of the formulaic ranges for amount and duration under the SSAG. Income-sharing provides a method for constructing guideline formulas, which can then apply across a wide variety of cases.[38] Contrast the traditional needs-and-means, budget-based approach. First, a budget-based approach cannot be used to create a guidelines formula. It forces individuation. And, secondly, once we move away from needs-based support, then budgets are just another form of proxy. Budgets and budget deficits will often be very poor proxies for compensatory loss or disadvantage, as Ellman demonstrated years ago. In some cases, like long traditional marriages, budgets and ability to pay may be a crude, but effective, measure of loss. But in cases involving dependent children, budgets will more often be a misleading proxy.

Before concluding, it is helpful to look at two common fact situations which fuel current debates in Canada about spousal support, thanks in part to the added focus of the Advisory Guidelines. The first is shared parenting, where compensatory arguments may be weakened and ideology enters the fray. The second is short marriages with very young children, where Canadian lawyers and judges have consistently underestimated compensatory disadvantage.

(c) What Changes With Shared Parenting?

Under our Child Support Guidelines, there is a departure from the table formula permitted under section 9 for "shared custody" arrangements, where each parent has the child for 40 per cent of the parenting time or more.[39] In these cases, there is greater discretion in setting child support, starting from a straight set-off of child support table amounts for each parent followed by adjustments.[40]

The different child support regime requires a variant of the "basic" *with child support* formula for

[38] The SSAG *with child support* formula does not adopt an "income-sharing" theory of spousal support, but only income sharing as a method of constructing formulas for amounts, an important difference.

[39] Above, note 9. To be more precise, the section 9 departure kicks in "where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year".

[40] The Supreme Court decision in *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217, 19 R.F.L. (6th) 272 sets out the principles that should guide that exercise of discretion. See also Thompson, "Annotation: *Contino v. Leonelli-Contino*" (2005), 16 *R.F.L.* (6th) 277.

spousal support. The range for duration stays the same, but the formula range for amount differs slightly, to reflect adjustments in child support and government benefits. One tweak to the formula made in the *Final Version* extends the range for amount, up or down, always to include an outcome that provides a 50/50 division of the family's net disposable income between the two households.[41] This equal living standards outcome is often preferred by shared custody parents in practice.

It is possible to hypothesise a no-entitlement shared parenting scenario: both husband and wife work full-time during the marriage, both share parenting responsibilities during the marriage, they separate and maintain a true shared custody arrangement after separation. In most of these cases, these parents would have similar incomes and the likely SSAG range would be mostly zeros. Even if there was a large enough income disparity to generate numbers, there would be a good argument for no entitlement in a contested case, as there would be minimal loss or disadvantage.

Interestingly, the shared custody cases that crop up in the reported decisions often show large income disparities.[42] These disparities often reflect the following very different scenario: the wife leaves the labour force to stay at home full-time or part-time with the children, the husband makes a large income and works long hours, they separate and now they agree to a true shared custody arrangement. In this setting, the wife will have experienced a past "loss", which may be large or small depending upon the age of the children and her time out of the labour force. Compensation will be adjusted through the amount of spousal support, depending upon her success in returning to paid employment and her career, and through duration, as the shared parenting going forward will reduce her ongoing disadvantage. These outcomes are informed by compensatory theory.

Some lawyers and clients do not see a compensatory claim in these cases, as they only look at the equal current and future care of the children under the shared arrangement. But there will be a compensatory claim arising from past sacrifices and time out of the labour market. It may not be as strong a compensatory claim as a case where the recipient also continues to be primarily responsible for child care after separation, but it will still be a compensatory claim.

(d) Young Children, Short Marriage: Lawyers and Judges Still Struggle

This fact situation continues to cause problems, as spouses, lawyers and judges often fail to apply compensatory theory as pronounced in *Moge*. Here I am attempting to focus upon the ongoing disadvantage that flows from child care *after* separation.

The scenario is familiar: a young husband and wife, together for three years; they have two-year-old twins; she is at home, he earns a sizeable income; they separate and she continues as the primary parent for the twins. The husband, and his lawyer, will see a three-year marriage and a limited spousal support obligation. But the bulk of the disadvantage is not behind the wife, but in front of her. The age of the children may complicate her return to the paid labour market and, once she does return to employment, her parenting responsibilities will be likely to continue to limit her earning capacity for a lengthy period of time.

In decided cases, judges consistently ignore or underestimate the compensatory disadvantage going forward. Too often, we see Canadian judges ordering short time limits at first instance, keyed to the length of the relationship, rather than the care of the children, a result utterly inconsistent with *Moge*. This still happens, despite the range for duration under the SSAG for such cases, using the age of children test in shorter marriages, with the lower end tied to the last child commencing full-time school and the upper end fixed by the end of high school.

Why does it still happen? Old ideas, pre-

[41] Above, note 2 at section 8.6.

[42] Thompson, "The TLC of Shared Parenting: Time, Language and Cash" in Law Society of Upper Canada, *7th Annual Family Law Summit* (Toronto, May 6-7, 2013). See also Murray and Mackinnon, "'Eight Days a Week' Post-*Contino*: Shared Parenting Cases in Ontario" (2012), 31 *Can.Fam.L.Q.* 113.

compensatory thinking. "Clean break" sneaking back, or knee-jerk non-compensatory thinking about short marriages. Or even primitive, half-formed compensatory thinking, i.e. we look for "past loss" only.

A look at common-law cases reveals this thinking more often, disconnecting the children from the adult relationship. More than 50 per cent of common-law relationships have children and, because the parents are younger, the children tend to be younger too.[43]

Our statutory definitions for common-law eligibility recognise this, by using not just length of cohabitation as a test for spousal support, but also the presence of children. The Alberta Interdependent Relationships Act includes those who have "lived in a relationship of interdependence of some permanence, if there is a child of the relationship by birth or adoption".[44] Alberta is not alone here, as six other provinces and territories also use this secondary definition: Saskatchewan, Ontario, New Brunswick, Prince Edward Island, Northwest Territories, Nunavut. If there is a child of the relationship, two other provinces reduce the cohabitation requirement from three or two years to just one year: Manitoba, Newfoundland and Labrador.

From a theoretical point of view, even these "some permanence" definitions focus upon the wrong test. Why require cohabitation at all? Again, old ideas at work. If the compensatory claim is based upon the disproportionate obligations of child care, both past and future, and the indirect costs are not compensated by the child support regime, then what matters is having a child, and not whether or not you live together. Any unmarried mother should be able to claim spousal support from the father. If anything, a non-cohabiting mother is even more likely to be saddled with the bulk of the child care than a common-law or married spouse.[45]

5. Compensation, Guidelines, Parenting and Equality

Moge offered the prospect of adequate compensation to primary parents through spousal support, compensation for the losses and disadvantages that flowed from child care. In practice, Canadian lawyers and judges fell back upon budgets, "need" and crude notions of self-sufficiency in a highly-discretionary support regime. The Spousal Support Advisory Guidelines introduced a new method of determining the amount and duration of support in 2005, one that has enjoyed widespread support in Canadian family law. The SSAG demonstrate that spousal support is amenable to a guidelines regime, provided the guidelines are not too rigid and are sufficiently sophisticated.

The Canadian guidelines have proven particularly effective in implementing the compensatory concepts of *Moge*, despite the need to make some second-best choices in proxies. The *with child support* formula has offered greater certainty, consistency, predictability and thus legitimacy to spousal support in cases involving children. Spousal support is now easier to claim, even smaller amounts.[46] The ranges serve to shape the parties' expectations and to frame their negotiations. In typical cases, like most of those involving children, resolution is easier to accomplish without need of adjudication.

The *with child support* formula under the SSAG has encouraged and solidified compensatory thinking about spousal support, through its step-by-step analysis of amount and duration. For the most part, the Advisory Guidelines have entrenched generous amounts of spousal support in cases involving children where there is ability to pay, along with more realistic durations for support. Over time, these more predictable spousal support outcomes will make their way into the popular understanding of the implications of parenting, both after separation and during marriage.

---

43 Thompson, "Annotation: Droit de la famille – 091768" (2013), 21 R.F.L. (7th) 325 at 6-7.

44 S.A. 2002, c. A-4.5, s. 3(1)(a)(ii).

45 For one legislature that did just that, take a look at section 79 of New Zealand's Family Proceedings Act 1980, N.Z. Public Act 1980, No. 94.

46 And retroactive spousal support is easier to claim, with a marked increase in claims.

A Life in the Day of Lord Justice Thorpe - Millionaires, Mothers and Children

Peter de Cruz*

It is axiomatic in law that hard cases make bad law[1], but this is by no means the norm in everyday cases heard in Britain or there would be far more dissatisfaction with the outcomes up and down the country. One of the key reasons for this is the quality of British judges who are prepared not just to apply the law, but also do not shy from making and taking difficult decisions when faced with cases which require life-changing decisions. Lord Justice Thorpe certainly comes into the category of judges prepared to put their views on the line, which has been illustrated in a number of memorable cases ranging from ancillary relief and prenuptial agreements in big money cases to relocation of children and families, shared parenting, and child protection.

The Big Money Cases

Petrodel v Prest

In *Petrodel Resources Ltd & Ors v Prest & Ors v Prest & Ors*[2] [the Court of Appeal (by a majority, Thorpe, LJ dissenting) allowed an appeal by companies owned and controlled by Mr Prest against a High Court order requiring them to transfer assets to his wife of fifteen years. Mr Prest , a Nigerian born oil tycoon based in Britain, claimed to have set up a scheme whereby the company's assets did not belong to him but were held on trust for his birth family because his father had provided the initial capital, subject to that trust. These assets would therefore be unavailable to the wife. His evidence was roundly criticised by the first instance court with Moylan, J regarding the whole structure as being for Mr Prest's benefit so that he could change the structure and distribute the wealth within it as he saw fit. The learned judge concluded Mr Prest was worth £37.5 million and awarded his wife £17.5 million. Moylan, J ordered the transfer to Mrs Prest of the London properties and shares held by Petrodel subsidiaries, to be sold and the proceeds applied in satisfaction of the lump sum ordered. Three of the companies appealed.

The Court of Appeal comprised two judges with a Chancery and Commercial background (Patten and Rimer, LJJ) and one Family judge, Thorpe, LJ, allowed the appeal. Lord Justice Patten (with whom Rimer, LJ, concurred), opined that 'Married men who choose to vest assets beneficially in a company for what the judge described as conventional reasons including wealth protection and the avoidance of tax cannot ignore the legal consequences of their actions in less happy times.' Lord Justice Rimer rejected the notion that there should be a different approach between commercial and family cases and that wives should be entitled to any preferential treatment. The majority found that despite Mr Prest's sole control of the companies, this did not render him beneficial owner of the assets thereof and 'entitled' to them within the meaning of s.24(1)(a) of the Matrimonial Causes Act (MCA) 1973.

However, Lord Justice Thorpe delivered a strongly dissenting judgment, arguing that the majority's ruling represented a radical departure from the principles established by the courts in big money

---

* Professor of Law, Liverpool John Moores University. Joint Chairman of the Editorial Board of *Family Law and Practice*.

[1] See per Robert Rolf in *Winterbottom v Wright* (1842) 10 M & W 109; also made explicitly in 1903 by V.S. Lean in Collectanae.

[2] 2012] EWCA Civ 1359.

cases. He declared 'If the court now concludes that all these cases were wrongly decided they present an open road and a fast car to the money-maker who disapproves of the principles developed by the House of Lords that now govern the exercise of the judicial discretion in big-money cases.'

In company law, there is a fundamental, well-established principle that a company is an entity which is independent of its shareholders[3] and that mere ownership of a company will not permit piercing of the corporate veil in legal proceedings so as to acquire beneficial title to assets unless there has been fraudulent or dishonest use of the money. Hence, company law confers a separate legal personality upon a corporate entity so that its assets are seen as belonging beneficially to the company itself and not its shareholders. Family judges have traditionally taken a more liberal view, particularly where the companies are owned and controlled by one spouse, there were no third party interests and the companies were used during the marriage to serve the needs of the family's lifestyle. This was not the approach taken by the majority in this case, and, at the time, was a disappointing decision for many wives who discovered on divorce that they had to deal with a network of companies used to protect their husband's wealth. Lord Justice Thorpe, to his credit, was scathing in his dissent, further stating: 'Once the marriage has broken down, the husband resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Amongst them is the invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him to do so it defeats the Family Division's judge's overriding duty to achieve fairness.'

The Supreme Court (sitting with seven justices) has now handed down its judgment on the further appeal by the companies[4] and unanimously found in the companies' favour with respect to the law, notably on the piercing of the corporate veil, on which point the Court of Appeal had already found in the companies' favour. The Supreme Court made it clear that they were not piercing the corporate veil and the family courts cannot simply give assets to wives just because the sole owner and controller of the company is the husband. However, it might be some comfort to Lord Justice Thorpe that the Supreme Court ultimately did find for the wife 'on the particular facts' of the case. They concluded that their reading of the facts was that it was the husband, and not the companies, who had originally provided the funds for the properties to be bought, thus, applying trusts law principles, the companies held the properties in trust for him. So he was 'entitled' to them within the meaning of s.24(1)(a) MCA 1973, and the court could transfer them to the wife. Hence, although the Supreme Court used a different rationale for their judgment, the wife did receive a much fairer deal than under the Court of Appeal's majority decision, and fairness was the main thrust of Thorpe, LJ's dissent.

The pre-nuptial Case

Radmacher v Granatino

Lord Justice Thorpe also presided as part of the Court of Appeal in another well-known case involving 'big-money' ie where the assets of the couple far outstripped their needs.

Radmacher v Granatino[5] involved a French husband and German wife who entered into an ante-nuptial (the term used by the Court) agreement in Germany three months before the marriage, at the instigation of the wife, to whom a further portion of her family's considerable wealth would be transferred if an agreement was signed. The agreement was subject to German law and provided that neither party was to acquire any benefit from the property of the other during the marriage or on its termination. The parties separated after eight years of marriage, by which time they had two children, and on divorce in London, where they had settled, the husband made claims for financial provision. The wife was said to be worth in excess of £100 million and the primary issue

[3] See *Saloman v Saloman* [1897] AC 22 which establishes the principle of separate corporate personality.

[4] See *Petrodel Resources Ltd v Prest* [2013] UKSC 34.

[5] [2009] UKSC 42.

for the court was whether the pre-nuptial/ante-nuptial agreement was binding. In the High Court, Baron, J granted the husband a sum of £5.5 million and the wife appealed successfully to the Court of Appeal.

Lord Justice Thorpe stated , at para 53 of the Court of Appeal judgment,[6] that:

> In future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.

The Court of Appeal allowed the wife's appeal, and held that the ante-nuptial agreement should be given decisive weight, and that the husband should only be granted provision for his role as the father of the two children and not for his long term needs.

The husband appealed to the Supreme Court, which, by a majority of 8 to 1, dismissed his appeal (Lady Hale, dissenting). Following on from the approach taken by Lord Justice Thorpe, the Supreme Court held very clearly that pre-nuptial agreements (or ante-nuptial agreements) can be decisive of the financial outcome if the marriage ends in divorce. The notion of 'due weight' which was raised by Thorpe LJ in the earlier hearing was developed further by the Supreme Court, into 'decisive weight'. They also declared that they found no error of principle on the part of the Court of Appeal.

The Gender Dimension

Re S (Children) [7]

In *Re S*, Lord Justice Thorpe was quite prepared to express his views of the role of men and women in society and in the family. This was a divorce case involving a mother (a managing partner for a City firm, earning a gross salary of £330,000 a year) and a 'house husband' who stayed at home to look after the children under a shared parenting arrangement and whose earnings were therefore minimal. If residence were awarded to the father, the status quo in London would continue but if residence were awarded to the mother then she would move with the children to Linlithgow in Scotland. It was argued for the father that it would be gender discrimination to decide residence in favour of the mother. This was because if one reversed all the roles, a father who proposed to abandon a lucrative career with the consequence that his wife and children would suffer a dramatic downturn in the standard of living, would not have the smallest chance of being given a residence order as his reward. Lord Justice Thorpe rejected this argument saying (at para 11):

> That submission seems to me to ignore the realities, namely the very different role and functions of men and women, and the reality that those who sacrifice the opportunity to provide full-time care for their children in favour of a highly competitive professional race, do, not uncommonly, question the purpose of all that striving, and question whether they should not re-evaluate their life before the children have grown too old to benefit.

A Residence Order was granted by the Court of Appeal to the mother in this case.

Relocation Cases

Perhaps one of Lord Justice Thorpe's most well-known cases in the context of cases of relocation, i.e. where the court has to decide whether to grant permission to a parent to take the children to live in another jurisdiction where such a move is opposed by the other parent. This is the leading case of *Payne v Payne*[8]. Here, the learned judge observed that unilateral relocation cases had been consistently decided for over 30 years on the basis of two

[6] [2009] EWCA Civ 649.
[7] [2002] EWCA Civ 593.
[8] [2001] 2 WLR 1826.

propositions: (i) the welfare of the child is the paramount consideration; and (ii) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Consequently, her application to relocate would usually be granted unless the court concludes that this would be incompatible with the welfare of the children.

These principles were the basis on which the Payne child was allowed to be taken to New Zealand by the mother since otherwise the effect of her being forced to stay in England was described as 'devastating'. This approach was followed in several subsequent cases such as *Re B (Children) (Removal from Jurisdiction)*; *Re S (A Child) (Removal from Jurisdiction)*[9] .

Child Protection and Interim Care Orders

A case that comes to mind in the context of child protection is *Re L-A (Children)*[10], where Lord Justice Thorpe was at pains to clarify the law relating to the criterion for making interim care orders under the Children Act 1989. This 'test' had been posited by Ryder, J in *Re L*[11] where he said that in order for a court to make an interim care order, there should be 'an imminent risk of really serious harm'. This criterion was alleged to have caused practitioners and local authorities some difficulty in that judges consequently believed that the application of Ryder, J's test would prevent them from granting interim care orders as it required too high a threshold.

When the issue of the correct threshold for interim care orders came before Thorpe, LJ in the Court of Appeal in *Re L-A*, the learned judge made it clear that the words of Ryder, J should not prevent a judge from doing what was deemed necessary in the interests of children and to promote and safeguard their welfare. He accordingly declared that the test for justifying the granting of an interim care order should be: if the child's safety demands immediate separation[12]. Indeed, he mused that the words of Ryder, J might more properly be the test of an Emergency Protection Order (under the Children Act 1989). Thorpe LJ's clarity and presence of mind led to a much-needed clarification of the law in this case, with potentially wide-ranging consequences for the more effective and widespread protection of children.

Conclusion

Even from this very small sample of cases, it can be seen that Lord Justice Thorpe has certainly left a lasting legacy in his judgments, namely of dealing with a variety of Family Law cases with a clear idea of the guiding principles that should determine the judgment to be reached in each case. Whether it was cases involving ancillary relief, shared parenting or child protection, he has never been wary of drawing a line, expressing a clear view, clarifying the law or making a difficult decision in fraught circumstances. He has continued to champion the welfare of the child and fairness for couples. Some of his decisions might not have been met with universal approval, and have sometimes polarised opinion, but they have always sought to bring clarity and fairness to the situation, through an astute and perceptive application of the law. Outside his judicial duties, he has strongly advocated reform of the Matrimonial Causes Act 1973. In the past few years, he has been very active in his role of Head of International Family Justice, and made the point that the English family justice system must remain positive about moves to harmonise matrimonial regimes in the EU. Lord Justice Thorpe's judicial influence has already been felt through his judgments over many years but his commitment to justice and a desire to see a better society will surely have a lasting impact on the international scene as well, not least through his work as the Head of International Family Justice.

---

[9] [2003] 2 FLR 1043.
[10] [2009] EWCA Civ 822.
[11] [2008] 1 FLR 575,
[12] See *Re L-A* [2002] EWCA Civ 822, para. 7

Journal of the Centre for Family Law and Practice

Submission of articles for publication in the journal *Family Law and Practice*

The Editor and Editorial Board welcome the submission of articles from academics and practitioners for consideration for publication. All submissions are peer reviewed and should be original contributions, not already published or under consideration for publication elsewhere: authors should confirm this on submission (although material prepared for the Centre's own conferences and seminars may be accepted in suitably edited versions). Any guidance required may be obtained by contacting the Editor, (Frances Burton, at frb@frburton.com) before submission.

Each issue of *Family Law and Practice* will be published on line and will be accessible through a link on the Centre's website. There will normally be three issues per annum, roughly coinciding with the standard legal and academic vacations (Spring: March-May depending on the date of Easter; Summer: August-September; and Winter: December-January). Copy deadlines will normally be three months prior to each issue. Certain issues may also be published in hard copy, for example, occasionally hard copy issues may be produced for commemorative purposes, such as to provide a collection of articles based on key conference papers in bound hard copy, but normally the policy is that provision of the online version only will enable the contents to be disseminated as widely as possible at least cost.

Copyright

The author is responsible for all copyright clearance and this should be confirmed on submission.

Submission format

Material should be supplied electronically, but in some cases where an article is more complex than usual a print out may be requested which should be mailed to the Editor, Frances Burton, at the production address to be supplied in each case NOT to the Centre as this may cause delay. If such a print out is required it should match the electronic version submitted EXACTLY, ie it should be printed off only when the electronic version is ready to be sent. Electronic submission should be by email attachment, which should be labelled clearly,giving the author's name and the article title. This should be repeated identically in the subject line of the email to which the article is attached. The document should be saved in PC compatible (".doc") format. Macintosh material should be submitted already converted for PC compatibility.

Author’s details within the article

The journal follows the widely used academic format whereby the author’s name should appear in the heading after the article title with an asterisk. The author's position and affiliation should then appear next to the asterisk at the first footnote at the bottom of the first page of the text. Email address(es) for receipt of proofs should be given separately in the body of the email to which the submitted article is an attachment. Please do not send this information separately.

Peer review, proofs and offprints

Where there are multiple authors peer reviews and proofs will be sent to the first named author only unless an alternative designated author's name is supplied in the email submitting the article. Any proofs will be supplied by email only, but the editor normally assumes that the final version submitted after any amendments suggested by the peer review has already been proof read by the author(s) and is in final form. It will be the first named or designated author's responsibility to liaise with any co-author(s) with regard to all corrections, amendments and additions to the final version of the article which is submitted for typesetting; ALL such corrections must be made once only at that stage and submitted by the requested deadline. Multiple proof corrections and late additional material MUCH increase the cost of production and will only (rarely and for good reason) be accepted at the discretion of the Editor. Upon any publication in hard copy each author will be sent a copy of that issue. Any offprints will be made available by arrangement. Where publication is on line only, authors will be expected to download copies of the journal or of individual articles required (including their own) directly from the journal portal. Payment will not at present be made for articles submitted, but this will be reviewed at a later date.

House style guide

The house style adopted for *Family Law and Practice* substantially follows that with which academic and many practitioner authors writing for a core range of journals will be familiar. For this reason *Family Law and Practice* has adopted the most widely used conventions.

Tables/diagrams and similar

These are discouraged but if used should be provided electronically in a separate file from the text of the article submitted and it should be clearly indicated in the covering email where in the article such an item should appear.

Headings

Other than the main title of the article, only headings which do substantially add to clarity of the text should be used, and their relative importance should be clearly indicated. Not more than three levels of headings should normally be used, employing larger and smaller size fonts and italics in that order.

Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

All quotations should be cited exactly as in the original and should not be converted to *Family Law and Practice* house style. The source of the quotation should be given in a footnote, which should include a page reference where appropriate, alternatively the full library reference should be included.

Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

Cross-referencing should be kept to a minimum, and should be included as follows in the footnotes:

> Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

Full case citations on each occasion, rather than cross-reference to an earlier footnote, are preferred. Please do not use End Notes (which impede reading and will have to be converted to footnotes by the typesetter) but footnotes only.

Latin phrases and other non-English expressions

These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as bona fide, i.e., c.f., ibid, et seq, op cit, etc.

Abbreviations

If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

Use of capital letters

Capital letters should be kept to a minimum, and should be used only when referring to a specific body, organisation or office. Statutes should always have capital letters eg Act, Bill, Convention, Schedule, Article.

Even well known Conventions should be given the full title when first mentioned, e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 may then be abbreviated to the European Convention. The United Nations Convention on the Rights of the Child should be referred to in full when first mentioned and may be abbreviated to UNCRC thereafter.

Spellings

Words using 's' spellings should be used in preference to the 'z' versions.

Full points

Full points should not be used in abbreviations.

Dates

These should follow the usual legal publishers' format:

1 May 2010

2010–2011 (not 2010-11)

Page references

These should be cited in full:

pp 100–102 (not pp 100–2)

Numbers

Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

Cases

The full case names without abbreviation should be italicised and given in the text the first time the case is mentioned; its citation should be given as a footnote. Full neutral citation, where available, should be given in the text the first time the case is cited along with the case name. Thereafter a well known abbreviation such as the Petitioner's or Appellant's surname is acceptable e.g. *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424 should be cited in full when first mentioned but may then be referred to as *Livesey* or *Livesey v Jenkins*. Where reference is to a particular page, the reference should be followed by a comma and 'at p 426'.

For English cases the citation should follow the hierarchy of reports accepted in court (in order of preference):

– The official law reports (AC, Ch, Fam, QBD); WLR; FLR; All ER

– For ECHR cases the citation should be (in order of preference) EHRR, FLR, other.

– Judgments of the Court of Justice of the European Communities should be cited by reference to the European Court Reports (ECR)

Other law reports have their own rules which should be followed as far as possible.

Titles of judges

English judges should be referred to as eg Bodey J (not 'Bodey', still less 'Justice Bodey' though Mr Justice Bodey is permissible), Ward,LJ, Wall, P; Supreme Court Justices should be given their full titles throughout, e.g. Baroness Hale of Richmond, though Baroness Hale is permissible on a second or subsequent reference, and in connection with Supreme Court judgments Lady Hale is used when other members of that court are referred to as Lord Phillips, Lord Clarke etc. Judges in other jurisdictions must be given their correct titles for that jurisdiction.

Legislation

References should be set out in full in the text:

Schedule 1 to the Children Act 1989

rule 4.1 of the Family Proceedings Rules 1991

Article 8 of the European Convention for the Protection of Human Rights1950 (European Convention)

and in abbreviated form in the footnotes, where the statute usually comes first and the precise reference to section, Schedule etc follows, e.g.

Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

'Act' and 'Bill' should always have initial capitals.

Command papers

The full title should be italicised and cited, as follows:

(Title) Cm 1000 (20--) NB Authors should check the precise citation of such papers the style of reference of which varies according to year of publication, and similarly with references to Hansard for Parliamentary material.

Contributions in edited books should be cited as eg J Bloggs, 'Chapter title' (unitalicised and enclosed in single quotation marks) in J Doe and K Doe (eds) 'Book title' (Oxbridge University Press, 2010) followed by a comma and 'at p 123'.

Journals

Article titles, like the titles of contributors to edited books, should be in single quotation marks and not italicised. Common abbreviations of journals should be used
whenever possible, e.g.

J.Bloggs and J. Doe 'Title' [2010] Fam Law 200

However where the full name of a journal is used it should always be italicised.