Payne can't trump paramountcy

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Most practitioners will be familiar with the guidelines set out in *Payne v Payne* [2001] 1 FLR 1052. However, in brief, these are as follows:

- The welfare of the child is paramount.
- There is no presumption created by s13(1)(b) in favour of the applicant.
- The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.
- Consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is genuine motivation for the move.
- The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.
- The effect upon the child of the denial of contact with the other parent and in some cases his/her family is very important.
- The opportunity for continuing contact between the child and the parent left behind may be very significant.

There was a general feeling following *Payne* that so long as (what is usually) the mother sets out a well researched plan to move, and said that staying in the UK would leave her unhappy, then the Court would rubber stamp the move. However, more recent cases, and in particular *MK v CK* [2011] EWCA Civ 793 have made it clear that the *Payne* guidance is indeed just guidance, and not principles of law. It certainly does not upstage the paramountcy principle.

It is right to say that where there is a primary carer, there must be a proper recognition of the commitment of that primary carer. They carry the burden of the childcare and it is easy to see how, if they are unhappy, that would impact negatively on the child. However, that is not the case where the care of the child is shared between the parents. It does not automatically mean that unhappy mother equals unhappy child. You can have unhappy mother, happy father, happy child. By making the mother happy, you could have an unhappy father and an unhappy child.

Re Y [2004] 2 FLR 330 was the first case in which the courts considered the issue of shared care. This was a first instance decision of Hedley J where the parents had almost equal shared care of the child. It was an informal shared care arrangement between the parents and the child lived with each of them on an almost equal basis. The family were living in Wales and had one child, who was aged 5½ when the matter came to court. The mother was American and wanted to return to the US, saying she was feeling increasingly isolated in Wales and wanted to take the child with her. The child was bilingual with Welsh as his preferred language, and had made excellent progress at his Welsh school. The court found that the child's home was equally with both parents, and that the parents had conducted themselves with the upmost decency and unfailing concern for the child's welfare. In response to the mother's application to remove the child from the jurisdiction, the father applied for a residence order.

In this case, Hedley J found that it was readily apparent that Y loved his parents in equal measure and he did not think he would find it at all easy, therefore, to deal with a major disruption to the current shared care arrangement with which he had become familiar and comfortable. At paragraph 23 he said:

"In the end, I have concluded that the welfare of this child compels me to refuse the mother's application. In my judgment the cost to this child of such a move is too high. He has settled into a way of life in which he sees effectively an equal amount of both parents; in which he is a settled member of a school with a circle of friends and interests; he is a bilingual and bicultural child... [When] one looks at his position in Wales, what he has and what he would lose by moving, and compares that with his position in Texas – what he would have gained and what he would have lost – at the very least I find myself forced to conclude that the course of less detriment is for him to continue to live in Wales..."

At paragraph 16 Hedley J said "It seems to me that I need to remind myself that the welfare of this child is the lodestar by which the court at the end of the day is guided".

The next reported shared care case of interest was *Re: AR (a child: relocation)* [2010] EWHC 1346 (Fam). This was a first instance decision of Mostyn J. The family were living in England and the mother, who was French, was seeking to return to France. The mother said that she found living in an inner city estate with a young child very stressful and lonely. However, the child (A) spent 40% of his time with his father. A curious feature of this case is that the application before Mostyn J was in fact the second application by the mother for permission to relocate. She was granted leave by district judge Segal in August 2008. However, the district judge did not have the full picture during that hearing and in fact six weeks before they appeared in court, the mother had become pregnant as a result of a sexual encounter with the father. Unfortunately, on the day that the parties appeared before the district judge the mother started bleeding and subsequently miscarried. The mother later sent an email to the father on 11 January 2009 where she had said that if she had had the second child, she would have stayed in England so that the father could have got to know the baby. Although the mother had left England in September 2008 to go and live in France, she returned to England in April 2009. In July 2009, the father applied for an Order and was granted, *inter alia*, contact with the child on 5 days out of 14. Although the mother was free to travel, albeit not with the child, she did not travel back to France even once after August 2009. The matter came before the Court in June 2010 when the mother applied to take the child home to France again. The mother proposed that when she moved to France that the father would have contact for 71 days a year, or 20% of *A's* time.

Mostyn J considered the personalities of both parents. There was a written report from a psychiatrist on the mother's mental state who said that in his opinion "the mother had traits of some diagnoses relating to dimensions of personality, for example histrionic or narcissistic personality disorder". Mostyn J found that the father in personality was the polar opposite of the mother. He said at paragraph 49 "He is reflective, almost introspective. He gave his evidence calmly and persuasively. His devotion to his son was obvious. Other than an unwarranted degree of suspicion as to the mother's motives, he gave credit to the mother where that was due. Mrs Walton (CAFCASS Officer) said of him "he does not dish the dirt on M" and "he offers to A an evenness and stoicism".

Mostyn J said at paragraph 53:

"If one were to draw up a hierarchy of human rights protected by the Convention I would have thought that very near the top would be the right of a child, whilst he or she is growing up, to have a meaningful participation by both of his parents in his upbringing."

He went on to say at paragraph 54:

"I believe that the relationship between F and A, which must be of equal importance to the relationship between M and A would be badly affected by removal to France. The quality of the relationship, its intimacy and depth would in my view suffer greatly. To ask whether this would be offset by the relationship that A would have with M's family in France seems to me to compare chalk with cheese. Plainly the importance of the relationship that A has with F cannot be compared in any meaningful way with the relationship that A has with his maternal family in France."

Mostyn J concluded that A's best interests would be best served by his continuing to live here and being cared for by M and F in terms of quantum and periodicity along the lines presenting obtaining. The mother's application for permission to relocate was therefore refused.

The case of *C v D* [2011] EWHC 335 (Fam) came before the court in February 2011. In that case, there were two boys aged 13 and 8 years old and they were living in London under a shared care arrangement. During term time the mother had the children for 20 nights out of 30, and the father for the rest. Both parents ran successful businesses. The mother's business required her to work in Europe and in America, and the father's business required him to work in Europe, America and Asia. In 2009, the mother formed a relationship with a new partner who was based in the south of the US and had business interests in the US, the Caribbean and South America. The mother and the new partner saw each other when they could in the US, the Caribbean, England or Europe. In June 2010, the mother informed the father that she wished to move to live with her new partner in US south and take the children with her. The father did not agree and the matter eventually came to court. It was clear from each parent's respective working pattern that the children's contact with the father would be very much curtailed if the children moved to the US. Mrs Justice Theis DBE found at paragraph 65:

"having carefully considered all the evidence and the welfare check list I have come to the clear conclusion that the welfare of each of these children is met by the mother's application being refused. I recognise that this will be devastating for the mother but I have come to this conclusion primarily based on the evidence that the children are thriving under the regime the parents have devised in this jurisdiction and the adverse impact on their time and the relationship with their father if they did move to the USA. For the reasons set out above I do not believe it can be effectively replicated if the children move to South USA and that any different regime will not meet the children's needs. With the welfare of these children as the lodestar by which I am guided I am satisfied that the move to South USA would not meet the welfare needs of these children, however disappointing that decision will be for the mother."

The most recent decision relating to shared care is the Court of Appeal's in *MK v CK* [2011]. This was heard in July 2011 by Thorpe and Moore-Bick LLJ and Black LJ.

In this case, the mother was of Canadian origin and the father was Polish, albeit that he spent his childhood years in Canada. He moved to England in 1993 and the mother moved to England in

2003. The parties had 2 daughters and looked after them under a shared care arrangement. They were both employed in the banking world and both worked less than full time to enable them to be fully involved with the children. A shared residence order was made in August 2010 and under its terms the girls spent five nights with their father and nine nights with their mother in every 14-day period. However, the father did not work on the Fridays and Mondays so that he had six consecutive days with his daughters. During that period, he cared for the girls unaided. The mother did not work on Wednesdays and on that day and at the weekends, she cared for the girls unaided. Thus, although the mother had more nights with the girls, they spent more daylight hours in the company of their father.

At trial, the mother said that she wanted to go home as she was isolated and stressed living here. She said that if she went home, she would be able to live at her parents' home and receive emotional and material support. The father's response to this was to point to his great commitment to the girls and the significance of the shared care arrangement. The Cafcass officer recommended the mother's application be refused (albeit that she said it was a fine and difficult balance) but she said:

"It would be essential for the mother to feel supported as a parent and an adult in her own right in England and, I feel, some acceptance by the father that should she still wish to return to Canada in three to four years' time, all being equal, this is likely to be in the best interests of the children."

At the end of the trial, HHJ Bevington granted the mother's application to relocate to Canada. The father appealed on the following bases:

1. The judge rejected the recommendations of the Cafcass officer without proper analysis and explanation.
2. The judge directed herself by reference to the guidance in *Payne* rather than by reference to the decision in *Re: Y.*
3. In her judgment, the judge referred only to the case that the mother had presented. Even when that deficit was raised by the father's counsel, she had not remedied the defect.

On appeal, Thorpe LJ said at paragraph 35:

"Given the extent to which the father was providing daily care, the judge should have considered and applied the dicta of Hedley J in Re Y rather than those of the President in Payne. Unfortunately it appears that the case of Re Y was not cited and the judge can surely be excused from overlooking it."

At paragraph 57 he said:

"What is significant is the practical arrangements for sharing the burden of care between two equally committed carers. Where each is providing a more or less equal proportion and one seeks to relocate externally then I am clear that the approach which I suggested in paragraph 40 in Payne v Payne should not be utilised. The judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in s1(3) of the Children Act 1989."

Lord Justice Thorpe allowed the father's appeal and the order was set aside. Neither parent could afford further litigation and both were suffering from depression and stress and were not, at that time, fit to litigate at a retrial. Lord Justice Thorpe urged the parties to consider mediation and said that from the children's point of view the ideal future move would be of both parents to Canada. All four members of the family had Canadian and British citizenship.

Lord Justice Moore-Bick said at paragraph 86:

"As I read it, the only principle of law enunciated in Payne v Payne is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted."

Lady Justice Black said at paragraph 141:

"The first point that is quite clear is that, as I have said already, the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child."

She went on to say at paragraph 143:

"Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption, however it may be expressed."

Accordingly, it can be seen that *MK v CK* highlights three important principles:

(1) The court should always determine the outcome of a leave to remove application by applying the paramountcy principle and the welfare check list.

(2) The *Payne* guidance is guidance only. It does not upstage the paramountcy principle and there are no principles of general application to be drawn from that decision. Each case will turn on its own facts.

(3) The approach in *Payne*, insofar as it purports to elevate certain factors, is inapt in shared care cases.

Practitioners must remember that the child's welfare is the lodestar. The *Payne* checklist approach has no place other than in the true primary carer case and one must look at the more recent shared care cases rather than *Payne* in all but true primary carer cases.