Relocation: A Spanner in the Holistic Analysis?

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Just when you thought it was safe to assume that the law on relocation disputes had been settled beyond doubt, along comes *F v L (Permission to Relocate: Appeal)* [2017] EWHC 1377 (Fam).

The facts

Both parents were Italian nationals; the father had been in the UK since 2001, the mother since 2013. The child was, it seems, born in Italy in 2012 but came to this country in 2013 and had a British passport. For a while, the father was a stay-at-home carer while the mother was at work although the decision for the father not to seek employment in this period was apparently a source of criticism from the mother's family. The parents' relationship broke down in 2015. The mother left the family home with the child and the care of the child was shared in the months leading up to the hearing.

At first instance, the mother was seeking to relocate while the father had cross-applied for a child arrangements order (the detail of his application is not set out in the judgment. At the final hearing, the court heard from both parents and from the Cafcass officer who recommended in favour of the relocation. The mother made various serious allegations against the father of controlling and emotionally abusive behaviour but the court did not make any findings about these allegations. HHJ Owens refused permission for a mother to relocate to Italy with the child, and made a child arrangements order for shared care.

The appeal

The matter came before Russell J on the mother's appeal. In allowing the appeal and remitting the matter for a retrial before a different judge, Russell J identified three errors in the family court's approach:

1. The judge's approach to the two applications – for relocation and for child arrangements – was flawed, in that her judgment addressed the issue of relocation first with only a "belated, deferred analysis" of what child arrangements should be made.

2. The judge had failed to make any findings about the serious allegations made by the mother regarding the father's behaviour, in circumstances where, if those allegations were true, they would amount to an offence under s 77 of the Serious Crime Act 2015;

3. The judge had given inadequate reasons for departing from the clear recommendation of the Cafcass officer.

Let us consider the three grounds in reverse order.

The third ground

The third ground is relatively uncontentious and little is said about this in the appeal judgment which makes it is difficult to assess the extent to which HHJ Owens may or may not have addressed it. It is worth noting, though, that a judge is not required to say, in terms, "I am disagreeing with the Cafcass officer because..." as long as the overall reason for differing in conclusion is apparent from the judgment read as a whole (see, eg, *Re V (Residence: Review)* [1995] 2 FLR 1010 (CA) at 1019).

The second ground

The second is a little more interesting. Russell J's comments about the coercive controlling behaviour are worth noting for their clarity and force:

> "[T]he judge was wrong not to have considered and made findings in respect of the complaints of abusive and controlling behaviour on the part of [the father] as alleged by [the mother]. It was the Cafcass officer's view that the child was living between, 'what must be [an] incredible strain that both parents are clearly under'. The judge simply split the child's time between two homes in what may seem to be an even-handed approach to a difficult and all too common problem. This is an unsophisticated, over-simplistic approach, all too often taken by the family court when making child arrangements orders, to attempt to adhere to the amendments to the [Children Act] brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate. Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child's welfare." (para 11)

However, it is worth remembering earlier authority which said quite clearly that a high level of parental conflict was not in itself a reason to avoid a shared care arrangement. Cases like *Re R (Children)* [2005] EWCA Civ 542 FLR make clear that parental conflict of various kinds of no obstacle to shared care, while other cases like *A v A (Children) (Shared Residence)* [2004] EWHC 142 (Fam) FLR suggest that the making of a shared residence order (as it was then called) might actively help in reducing difficulties. Now, many may be sceptical about whether that approach was right but it is easier to answer these concerns if the relevant case law is addressed and analysed. As things stand, Russell J's broad claims about children's welfare in high conflict shared residence situations may strike a different note from some earlier cases. Those cases need to be tackled head on if we are to make changes in the approach to these issues.

The first ground

The most interesting point about this case, though, is Russell J's first ground for allowing the appeal. The High Court described it as "a serious procedural irregularity in the proceedings principally because the judge failed to approach the case as she should have done by considering and deciding the question of the child's main carer and child arrangements, prior to considering the application to relocate" (para 8, original emphasis). (Whether the order in which a judge considers factors in her judgment is properly called a 'procedural irregularity' is perhaps debatable.) Russell J then continued:

> "It is well established law that when the future care of a child is in dispute this must be resolved before an application for removal from the jurisdiction can be considered. The case law on relocation applications, going back over fifteen years and more, commencing with the case of *Payne v Payne* [2001] 1FLR 1052 (see Butler-Sloss P at [80]), makes it clear that the welfare of a child is best served by considering issues of care, and who can

> best provide that care is an issue that is to be decided in advance of considering relocation." (Para 8.)

These claims are, with respect, difficult to accept, particularly in the light of more recent Court of Appeal authorities, but even looking back it is difficult to locate a case which is actually clear authority for Russell J's proposition that there must be a particular order to making these kinds of determinations. Paragraph 80 of Butler-Sloss P's judgment in ***Payne*** is just part of the President's summary of the earlier caselaw; it is more likely that Russell J means para 86, which says this:

> "All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence. The mother in this case already had a residence order and the judge's decision on residence was not an issue before this court."

Now, that might go some way to supporting Russell Jbut the President's wording is more subtle : the President describes the future plans of each parent as being "clearly relevant", and the fact of a proposed relocation, "may in some cases be an important factor to weigh in the balance". The President certainly says nothing about residence having to be decided before relocation: rather, she says that it is part of the overall evaluation.

However, even if Russell J is right about the meaning of that paragraph, ***Payne*** is dangerous territory these days, when it has been clearly said by the Court of Appeal that the starting point for any analysis is *K v K (International Relocation: Shared Care Arrangement)* [2011] EWCA Civ 793, [2012] 2 FLR 880. As Ryder LJ has explained in *Re F (International Relocation Cases)* [2015] EWCA Civ 882, FLR "Selective or partial legal citation from *Payne* without any wider legal analysis is likely to be regarded as an error of law" (para 27) because what is required in a relocation case (as, indeed, in any welfare case) is a global, holistic analysis of the child's best interests (paras 28-30). The same point was summarised by Vos LJ in *Re C (Internal Relocation)* [2015] EWCA Civ 1305, FLR para 82, in this way:

> "[I]n cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. *The exercise is not a linear one.* It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child." (Emphasis added.)

With these recent cases firmly in mind, it is difficult to see how the approach in this case fits with the overall requirements of a global, holistic analysis. HHJ Owens is criticised on appeal because she dealt with the relocation issue first, and only after she had dealt with that did she consider child arrangements. Without the benefit of seeing the first instance judgment, it is hard to say but my

experience of relocation cases is that care arrangements (whether relocation is allowed or refused) are an integral part of that issue. It is hard to see how a judge could determine a relocation application without having in mind the implied (but usually express) implications for the child's care arrangements. If a relocation is refused, it is very often because the judge takes the view that the child's welfare requires him or her to have more input from the non-moving parent than would be possible if relocation were granted. That seems to me to encapsulate consideration of care arrangements, albeit a judge may come at the end of her judgment to consider in detail what the implications are, precisely, of the decision about relocation in terms of care arrangements.
More problematic, in fact, may be the approach which Russell J purports specifically to impose on the trial judge tasked with rehearing this appeal:

> "Remitted to a different circuit judge for re-hearing in the first instance of the arrangements for [the child] and, thereafter, of any renewed application by [the mother] to relocate to Italy." (para 15)

That risks being, with respect, an impermissible gloss on the welfare enquiry. First of all, this was the mother's application to relocate: the father had cross-applied for a child arrangements order. Why the mother should have to renew her application is a mystery. But more importantly, Russell J's approach here appears to be explicitly linear: first the judge must consider care arrangements, then the judge must consider relocation. I would respectfully say that that is inappropriate: it runs contrary to the more recent Court of Appeal authorities, and in any case adds an artificial delineation between two issues which are usually inseparably bound together.

A word about Brexit

No article or judgment these days can be said to be complete without some comment on Brexit. Russell J's judgment substantive judgment ended with this point:

> "The fact that as EU citizens [the child]s parents' residence and their status in the UK no longer has the certainty it previously had, and the possibility that relocation to Italy may become a necessity is a factor that should, properly, have been considered by the trial judge." (para 16)

There is no indication as to whether this issue was addressed in evidence, but it may be difficult to take this element into account in the decision. There is clearly no risk to either parent's ability to remain in this country at present, and it is not clear the extent to which hypotheticals should be considered in a welfare analysis. If relocation becomes a necessity in the future, then that will be a proper basis for an application in the future but, to my mind, its present relevance to any particular child's welfare is limited.