The New Age of International Relocation – the impact of 

\[ K \times K \] (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793 on international Leave to Remove

By

Lisa Fabian Lustigman
Withers LLP, London

1. I was fortunate to have acted for the father in the case of \( K \times K \). The Court of Appeal judgment was handed down on 7 July 2011, dramatically altering the international leave to remove landscape in the UK and in other jurisdictions beyond our island nation, such as Hong Kong.

2. The outcome was heralded by lawyers and academics alike as a long overdue review of our law of international relocation. In this case, Deborah Eaton, QC told the Court of Appeal: "An order that permits one parent to remove children from the jurisdiction on a permanent basis is one of the most significant orders a court can make in terms of interference with family life and that can fundamentally alter the relationship between a child and the left-behind parent, for all time."

3. \( K \times K \) has enshrined the principle that where there is no single primary carer, the role of each parent will need to be considered with equal importance. The question most frequently asked at conferences up and down England and Wales is this: has \( K \times K \) proved to be groundbreaking, or is it merely a restatement of well established law and a return to common sense, by going back to the basic tenet, namely, that the welfare of the child is the paramount consideration?

4. Going back to basics: Section 1 of the Children Act 1989 states: ‘the child’s welfare shall be the Court’s paramount consideration’. Section 13(1)(b) of the Act provides that, where a residence order is in force, no parent may remove the child from the United Kingdom without the written permission of every person with parental responsibility for the child, or leave of the court. The exception to this is that a person with a residence order may remove the child for up to one month without requiring permission. Where there is no residence order in force, neither parent can take the child outside of the United Kingdom without the written consent of the other (or any other party with parental responsibility). It matters not if the party wishing to go on a holiday is a primary carer or whether the care of the child or children is equally shared.

5. These conditions are not confined to England and Wales, but relate to the UK (England, Wales, Scotland and Northern Ireland). The restrictions relate to all residence orders. It is important to note that the automatic embargo under a residence order which restricts removal from the UK, differs from that available in wardship proceedings, which restricts removal from England and Wales without leave of the court.
6. For the last decade, the case of *Payne v Payne* ([2001] EWCA Civ 166 [2001] 1 FLR 1052) has been the reigning case in an area of law that time and again has proved to be controversial, and thought by fathers to be manifestly unfair in the 21st century. The path to *K v K* took 40 long years. So what was the state of the jurisprudence up to 7 July 2011? By way of setting the scene:

7. In the 1970 case of *Poel v Poel* (1 WLR 1469), Lord Justice Sachs justified putting the interests of the mother first and foremost (and up to *K v K*, it was usually the mother’s interests that were prioritised in the reported case law) in this way:

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

You can see the outline of the facts of the case on screen – but this was a case where the mother and her new husband wanted to move to New Zealand for a better quality of life. The very young age of the child and the damage that such a removal would do to the relationship with his father was pretty much brushed under the carpet. In order for the mother to ensure that the welfare of her son remained paramount – SHE had to be happy. It was just tough luck for the father.

8. In most cases, it was the mother who ‘properly had custody of a child’. Mothers were considered to be indispensible. Fathers went out to work. Shared residence orders hadn’t really been invented, regardless of what was happening on the ground in every individual case. This view was unfortunately reiterated by Lord Justice Ormrod in the case of *A v A* (Child: Removal from Jurisdiction) ([1980] 1 FLR 380) when he said that one had to look realistically at the mother’s position and ask the question: ‘where is she going to have the best chance of bringing up the child reasonably well? If it meant cutting the child off to a large extent, almost wholly perhaps, from the father, well, that was one of the risks which had to be run in cases of that kind’.

9. Twenty one years later, in 2001, the Court of Appeal heard the case of *Payne v Payne* ([2001] EWCA Civ 166); ([2001] 1 FLR 1052) where it was stated ‘in most relocation cases the most crucial assessment in finding for the judge is likely to be the effect of the refusal of the application on the mother’s future psychological and emotional stability’. It was a bitter pill for fathers that the effect on a young child of a removal, and an interruption of the relationship of the child with the father was dismissed in this way.

10. In *Payne*, the mother, a citizen of New Zealand, applied for leave to remove her child permanently from the UK to take her to live in New Zealand. The mother and child had been required to return to the UK from New Zealand following proceedings brought by the father under the Hague Convention on the Civil Aspects of International Child Abduction 1980. Following their
return, the father and the paternal grandmother had regular staying contact with the child which was recognised as exceptionally good. The father wanted a residence order and opposed the mother’s application for leave to remove the child. Despite the fact that the daughter had spent 41% of the time with her father, shared care was not argued. The judge rejected the father’s residence application and gave the mother leave to remove the child permanently to New Zealand, applying the relevant case law and finding that the move would be in the child’s best interests because it would make her mother happy. The father appealed, arguing that the principles applied by the courts to applications for leave to remove from the jurisdiction created a presumption in favour of the applicant parent which was in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and in conflict with the Children Act 1989.

11. Dismissing the appeal, the Court of Appeal held that there was no conflict between the domestic case law on applications for leave to remove a child permanently from the jurisdiction and either the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 or the Children Act 1989. Further, the suggestion that a refusal of a primary carer’s reasonable proposals for the relocation of the family life was likely to impact detrimentally on the welfare of her dependant children did not amount to a presumption in favour of the primary carer. Moreover, the court reiterated that the welfare of the child was always paramount.

12. The Guidance checklist set out by Lady Justice Butler-Sloss, the then President of the Family Division and one of the Court of Appeal justices in Payne is as follows:

(a) The welfare of the child is always paramount.

(b) There is no presumption created by section 13(1)(b) of the Children Act 1989 in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

From that time, until K, ‘the Payne Principles’, as they came to be known, were rigorously applied by the Courts, regardless of whether or not there was a primary carer.
In the 2004 case of Re Y, ([2004] 1 FLR 330) Mr Justice Hedley said ‘now, the court clearly contemplates two different states of affairs. The one, the more common and in some ways the more obvious, is where the child is clearly living with one parent, and it is that parent that wishes to leave the jurisdiction, for whatever reason. The other, and much less common state of affairs, is where that does not exist and either there is a real issue about where the child should live, or there is in place an arrangement which demonstrates that the child’s home is equally with both parents. In those circumstances, which are the ones that apply in this case, many of the factors to which the court drew attention in Payne v Payne whilst relevant, may carry less weight than otherwise they commonly do. …it seems to me that of those matters, the ones that are important in this case are the educational and emotional needs of child Y, the likely effect on him of any change in his circumstances, and his age and background so far as his life is presently concerned. 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.

And that remained the state of play in the United Kingdom, although various other cases did impinge on the path to change, such as Re D (Leave to Remove: Appeal) ([2010] 2 FLR 1605) where on appeal from the Luton County Court, a mother had been given permission to relocate with two boys aged seven and ten to Slovakia. In Re D, Lord Justice Wall said that Payne was the leading case on relocation and judges were obliged to follow the guidance until such time as new legislation was passed, or Payne was overruled by the Supreme Court. Effectively, he was saying we were stuck with the Payne principles until a significant change occurred. In Re H (A Child) ([2010] EWCA Civ 915), a father appealed against a decision that the mother could relocate to the Czech Republic using (in part) the argument that the law embodied in Payne was out of step with international thinking and that it should be revisited. Lord Justice Wilson dismissed the appeal and said ‘in this court we are well aware of the criticisms made, both domestically and internationally, of its decision in Payne. Nevertheless, one must beware of endorsing a parody of the decision. In the determination of applications for permission to relocate, the welfare of the child was the paramount consideration. It is only against the subsidiary guidance to be collected from Payne that criticism can perhaps more easily be levelled’.

Light at the end of the tunnel shone in the breakthrough case of C v D ([2011] EWHC 335), where there was no primary carer. In this case, the children were aged 13 and 8 and were subject to a shared care regime whereby each child spent an equal amount of time with each parent. This altered later to a 20:10 day split. The mother formed a relationship with a man in Florida and wished to relocate there with the children. Applying the lodestar principle in Re Y, Mrs Justice Theis refused the mother’s application citing the following:

- the children did not have a primary carer as such;
• the lack of primary carer meant that the principles in Payne were to be modified as opposed to rejected;
• the effect on the mother of refusal should be given less weight; and
• the children’s care was clearly shared and each parent was capable of providing a good home.
• The mother did not appeal, so there was no Court of Appeal return to Payne.

16. But, on 7 July 2011 K v K blasted 40 years of jurisprudence out of the water. The case had the perfect storm of ingredients: shared care, committed parents on each side, and very, very young children. The facts are straightforward. The mother was Canadian and the father was Polish, they had met in Canada and moved to England, they married in England in 2004 and had two little girls who at the time of the hearing were aged four and just under two. The parents had separated in July 2010.

17. A shared residence order was made the following month in August 2010, under which the parents shared the care of their daughters with the girls spending five nights (or six days) with their father and nine nights with their mother in every 14 day period. Parental care was more or less equal in that the mother had at that time the assistance of a nanny, whereas the father did not. The mother worked as did the father, but the father worked part time so as to accommodate the children during his five night six day period. The mother worked four days out of five.

18. The mother applied for a permission to relocate to Canada as she wanted to go home to enjoy the support of her family. It was what we call a ‘classic going home case’ as opposed to a ‘lifestyle’ case. Mr K took the view that this move would seriously affect the children’s relationship with him and essentially, the relationship would be lost for all time because of the children’s ages. He would become a distant memory, a sort of a ‘pal’ during holiday visiting periods, and in essence, with long blocks of time elapsing between holidays, the children and Mr K would be starting the relationship all over again on each visit – a kind of parental Ground-Hog Day nightmare. The court and family reporter had described the case as ‘a fine and difficult balance’, but, had recommended that the mother’s application be refused. However, applying Payne, at first instance, the mother was given permission to go to Canada. The judge did not consider Mr K’s position in her judgment. The Court of Appeal allowed the father’s appeal and took the golden opportunity to revisit Payne. Interestingly, one of the Lord Justice’s of Appeal, Lord Justice Thorpe had been one of the principal architects in the Judgment in Payne back in 2001.

19. The three Lord Justices of Appeal in K, Lord Justice Thorpe, Lord Justice Moor Bick and Lady Justice Black agreed that the welfare of the child is the only real principle to be applied in a
relocation case and the guidance in *Payne* is no more than that. The main ingredients of the lead
Judgment of Lord Justice Thorpe can be summarised in this way:

- that the only principle to be extracted from *Payne* was the paramountcy principle;
- that certain paragraphs of his Judgment in *Payne* and that of Lady Justice Butler Sloss
  (the then President of the Family Division) constitute guidance as to factors to be weighed
  in search of the welfare paramountcy principle;
- most importantly, that the guidance in *Payne* was put on the basis that the applicant was
  the primary carer (and please remember that there was no primary carer in *K*, and that
despite the 9:5 split, the court held that that was pretty much good enough not to militate
towards a primary carer, so the definition of primary carer/shared care has shifted);
- it is the practical arrangements for sharing the care between two equally committed
  parents that is significant;
- where each parent is providing (and here are the key words are *a more or less equal
  proportion* of care) then the approach in *Payne* should not be utilised; and
- a judge should exercise his discretion to grant or refuse an application by applying the
  welfare checklist in the Children Act, and not the guidance in *Payne*.

20. Lord Justice Moor Bick pretty much agreed and emphasised that the welfare of the child was
paramount and that everything else was guidance. He said that the difficulties that have echoed
down the ages came about as a result of treating the guidance in *Payne* as if it *contained
principles of law from which no departure is permitted*. In other words, the courts had got
stuck in the judicial mud of *Payne*.

21. Only Lady Justice Black differed from Lord Justice Thorpe on the relationship between *Payne*
and *Re Y*, which was cited. Lady Justice Black saw shared care as part of the framework of
which *Payne* was a part. This meant that the court would consider all the factors that might be
relevant to the application to relocate. The weight to be attached to each factor would differ on
the facts of each case. She expressed it like this *I would not expect to find cases bogged down
with arguments as to whether the time spent with each of the parents or other aspects of the care
arrangements are such as to make the case a ‘Payne case’ or a ‘Re Y case’ and she emphasised
that there was nothing in the *Payne* guidance that elevated any one factor above another in the
overall welfare equation.

22. To sum up the positions of the three judges in the appeal hearing on *K v K*, the Court of Appeal
held by a majority that where the children’s care was shared between the parents the *Payne*
guidance should not apply. It is to be hoped that in the 21st century, parent-child relationships
will no longer be decided by reference to 20th-century jurisprudence. The way we live now, the changing roles of mothers and fathers, and stage of the attachment and relationship of the children to each parent needs to carefully considered.

23. So what is the effect of K? Does this decision signal the end of Payne and all the emotional baggage that accompanied that case? Whilst K v K has been trumpeted as an end to the Payne era, it is worthwhile taking a look at one more pre-K case called Re H (Children) ([2011] EWCA Civ 529). That decision came out only months before, in March 2011, and headlined the movements and emphasis being made by the Court of Appeal prior to the decision in K v K. In Re H, the father applied for a permission to appeal a decision made in the Oxford County Court, granting permission to the mother to relocate with the party’s two children aged ten and nine also to Canada.

24. The appeal was made in person by the father in the Court of Appeal and was unsuccessful. Lord Justice Hughes sought to move away from the Payne perceived emphasis on the effect of a refusal of an application to relocate on the primary carer, and instead reinforced an emphasis on the paramountcy of the welfare of the children. He accepted that some first instance courts misread Payne, and believe that if workable plans were made for the relocation, and the primary carer argued that the children would be adversely affected by a refusal of the application on them, then ‘that is more or less the end of the matter’. But, the Court of Appeal did not consider that the judge in the Oxford County Court had made such a mistake. It was held that he had kept the paramountcy of the welfare of the children fully in the front of his mind, and had balanced the relevant factors in his judgment. He had adequately considered the effect of the move on the children’s relationship with the father and his new family but had concluded that on the facts specific to that case, the impact on the primary carer (and therefore the subsequent impact on the children) were the tipping factors and leave to remove was granted. Clearly, the Court of Appeal was looking for a case where there was no primary carer and K fit the bill.

25. Is K slavishly followed, like so many judicial lemmings falling over the relocation cliff? The issues in K have not always translated into the jurisprudence of the courts of first instance. In Re F (A Child) [2012] (EWCA Civ 1364), on the appeal by a father who had become the primary carer against an order granting the mother of their seven-year-old child leave to permanently remove the child from the jurisdiction, it did not. The parents were Spanish; were not married but had been together in a relationship since 1993. The mother, father and child came to England in 2009. The relationship broke down and the child and father remained in England, with the mother returning to Spain, but on the understanding (she claimed) that the child would later join her in Spain.

26. The judge made a shared residence order, but gave permission to the mother to permanently remove the child from the jurisdiction. The father appealed on the basis that neither Payne nor K v K (both authorities on the welfare checklist that the judge had gone through in some detail)
were necessarily authorities that applied to this case because the father was the primary carer, and before the shared residence order was made at the hearing, he was again the primary carer.

27. The Court of Appeal held that there was no error in law in the approach adopted by the judge and in fact the attempt to label the case either a primary carer case or a Payne case or a K v K case was completely unhelpful. In support of this view, Lord Justice Munby (as he then was) said that the focus from the beginning to the end must be the child’s best interests and the child’s welfare as paramount, and the appeal was dismissed. The father has now lost his application to appeal to the Supreme Court.

28. The final leave to remove case of 2012 heard by the Court of Appeal was Re E (Children) (unreported). In that case, the father appealed against a decision granting the mother permission to remove their two children from England to live in the United States. The mother had a residence order in her favour and, as part of her case, proposed that the children should spend three months every summer and alternate Christmas holidays with their father in England. The judge rejected the CAFCASS officer’s report (which did not recommend removal to the US) and granted the mother’s application on the grounds that her ability to care for the children would be adversely affected should permission be refused. The father’s appeal was refused by the Court of Appeal which held that the judge had directed himself in law in accordance with Payne.

29. In February 2013, the reported case of TC v JC (Children Relocation) Also Known as KAC v DJC ([2013] EWHC 292), before Mostyn J enunciated the point of principle that presumptions have no place in a relocation application. It all comes down to a factual evaluation and then a value judgment by the judge. In this case, the parties were married with two children aged 3 and 2 years. Father asked for a divorce and 3 days later, Mother left the house with the children to go to work and drop the kids at nursery, but in fact took the 3pm flight to Melbourne with them instead. Protracted proceedings in Australia ensued, with Bennett J applying Australian domestic law, which was successfully appealed by the Central Authority in Australia. The result was an order for the return of the children to the UK under the Hague Convention. Mostyn J recited that Payne was considered in K v K and the entire jurisprudence was recently summarised by Munby LJ (as he then was) in Re F (A Child), already referred to. The issues were complicated by the Mother’s immigration position, which diminished her capacity to look after the children in England and ultimately, but with very harsh words for the Mother, her application to relocate with the children to Australia was granted. Fortunately, the Father was qualified as a sports masseur and had applied to immigrate to Australia himself. An order was made for the children to reside with both parents, with any future disputes to be decided by the Family Court in Australia. Mostyn J repeated: Child abduction seldom, if ever, has a happy ending. It has rightly been described as a form of child abuse. Yet because of the circumstances, the children went back to Australia.
30. Jurisprudence in Hong Kong closely follows England – but generally speaking, the approach adopted by the Courts in England and Wales is rejected in many other jurisdictions. In 2010, the Washington Declaration on International Family Relocation set out the premise that ‘the best interests of the child should be the paramount (primary) consideration’. Professor Marilyn Freeman explored the potential impact of relocation on the lives of the families it affects in her research for Reunite in July 2009.

31. So where does all this leave us? Important issues such as whether one forfeits a right to ‘go home’ – if home is halfway around the globe and young children are habitually resident elsewhere have not yet been touched upon. There is no long-study body of evidence or funding for research that I am aware of that follows up on what happens to children who have ‘lost’ a parent because of the international relocation of the other parent. Do these children grow up damaged? Do they reach their full potential? What are the issues they face in their own relationships when they grow up? Professor Marilyn Freeman has been banging this particular drum for quite a while now, but as always, funding is the major problem. If our judges could have such a body of research, would it influence their thoughts insofar as the paramountcy principle is concerned? I have my own anecdotal evidence from clients who ‘lost’ their children from England to California, New York, Canada, France and the Middle East, but I am not a psychologist.

32. What I am doing is keeping a careful eye on the decisions as they emerge from our courts. I am heartened that the decisions in Hong Kong following K are, in effect, using the K guidance of Lord Justices Thorpe and Moor-Bick. That is causing upset to the party who is refused permission to relocate – of that I am in no doubt. But I am hopeful that it will open the debate about responsibilities of parents. We live in a mobile world – the girl from Staten Island, or Seville, or Sydney marries the boy from London. Men are house-husbands, women are breadwinners. Where there is no defined primary carer – regardless of how one party or the other views him or herself in the family dynamic, the facts as they are in reality, not on a paper Order, determine the regime within separated homes.

33. My colleague Angie Todd of Withers’ Hong Kong office will now address you on the application of K to her jurisdiction’s Relocation cases.

34. The old rules have to go into the dust bin of history – we are in brave, new territory.

© Lisa Fabian Lustigman

Special Counsel

Withers LLP

16 Old Bailey

London EC4M 7EG, UK