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RELOCATION, RELOCATION, RELOCATION

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Context

[1] As the world becomes smaller, the issue of relocation becomes more important. Twenty years ago there were a handful of Scottish cases relating to applications to the court to allow a child to be removed from the jurisdiction to live elsewhere. Now relocation cases are a matter of regular concern to family law practitioners. A brief search of the Scottish Courts website, or Westlaw, will produce several recent decisions. These generally turn on their own facts and it is difficult to extract any guiding principles from multiple sheriff court cases.

[2] By definition a relocation case is not a purely domestic issue. Such cases are the other side of the coin from removal without consent, which may invoke a return under the Hague Convention on the International Aspects of Child Abduction. If there is a disagreement about whether a child may be taken out of the country to live elsewhere, then the matter must be settled by the courts of the child's habitual residence. Given the international importance of relocation decisions it might be thought desirable that there is some international consensus on how they should be decided. These are the sort of cases where the international community might be expected to promote some guidance.

[3] In fact there have been efforts to do so. In March 2010 fifty judges and experts from fourteen countries met in Washington DC and agreed on a list of factors relevant to decisions on international relocation. These are all sensible considerations. The Washington Declaration is appended to this paper. The United Kingdom were represented at that meeting, but the Declaration is rarely, if ever, mentioned in relocation cases in Scotland.

Domestic law

[4] The Children (Scotland) Act 1995 expressly covers the issue of international relocation. Section 2(3)provides that without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without consent. Section 2(6) specifies that the person whose consent is required is a person (whether or not a parent) who for the time being has and is exercising the right to have the child living with him or otherwise to regulate the child's residence or the right to maintain personal relations and direct contact with the child. Where both parents have and exercise these rights they must both consent. That means that in cases where both parents have parental rights, one parent cannot take the child out of the UK without consent. If one wishes to relocate to another country with the child, and no consent is forthcoming, then it is necessary to apply to the court.

[5] The appropriate application will usually be for a specific issue order under section 11 of the Children (Scotland) Act 1995, but if taking a child abroad then it may be prudent to seek a residence order as well, in order to demonstrate to the receiving country that the relocation is fully authorised. If there is a contact order that is likely to require variation. It is no good securing an order allowing relocation to Australia, if there is an order in place specifying that contact should take place every other weekend from Friday at 3pm to Monday at 9am. More of contact later.

[6] The criteria for a section 11 order are familiar. Section 11(7) provides that the court shall regard the welfare of the child as its paramount consideration and shall not make any order unless it considers that it would be better for the child that the order be made than that none should be made at all. That's it. Pure and simple.

[7] There are, of course the usual qualifications about the need to protect the child from abuse and considering whether parties can co-operate, in terms of section 11(7A) to (7E), but the minute we start to develop 'guidance' and checklists of factors, then there is a possibility that attention may be diverted from the welfare of the child.

[8] Scottish case law contrasts with English case law. Back in 1970 the English Court of Appeal heard an appeal in *Poel v Poel* [1970] 1 WLR 1469. Working on the assumption, then

fair enough, that when a marriage broke up a child would remain in the 'custody' of one parent, Sachs LJ stated that the court should not lightly interfere with the way of life selected by the custodial parent, as this would introduce strains on the parent, interfere with any new marriage and "might well in due course reflect on the welfare of the child." Thirty years later the point was revisited by the Court of Appeal in *Payne v Payne* [2001] Fam 473. Thorpe LJ gave the leading judgment. He rejected any presumption in favour of the reasonable proposals of a primary carer, pointing out that such a presumption could breach the other parent's rights under articles 6 and 8 of ECHR. He did however endorse the weight to be given to the emotional and psychological wellbeing of the primary carer, as part of the evaluation of the welfare of the child as the paramount consideration. He went so far as to say that in most relocation cases the most crucial assessment and 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.

[9] English judges have since then repeatedly expressed their reservations about the emphasis in *Payne* on the reasonable proposals of the primary carer. In particular there has been concern about the potential relegation of harm done to children by permanent breach of their relationship with the left-behind parent. The assumption in *Payne* that the parent seeking to relocate will be a mother, who has primary care, is also perhaps somewhat dated. Even the English courts have had to recognise that the considerations in *Payne* are inappropriate in cases where parents share care of their children. In such cases there may be no primary carer as such, and the English courts have reverted to a straightforward application of welfare criteria (see *K v K* [2012] Fam 134).

[10] Following the *Payne* approach in Scotland, in any case, would be an error of law. This emerged from the decision of the Inner House in *M v M* [2011] CSIH 38. The focus cannot be placed on the position of the parent seeking to relocate. It must be on the child and what will serve the child's welfare. This is not a 'discretionary' decision by the court. Since *Osborne v Matthan* 1998 SC 682 we have recognised that a decision of this nature is "a matter of judgment exercised on consideration of the relevant factors. The court must consider all the relevant circumstances and decide what the welfare of the child requires. Once the court has identified that, it has no discretion: the court must do what the welfare of the child requires." In *M v M* the Inner House took a step back to *Sanderson v McManus* 1997 SC (HL)

55 and invoked the onus on a party seeking an order to show on the balance of probabilities that the welfare of the child required the order to be made.

[11] Plainly a parent who seeks to relocate must satisfy the court that practical arrangements will be in place for the child. There must be accommodation, education, care arrangements and medical facilities. If the child has special needs these must be capable of being met. In *M v M* one of the children had additional support needs. The proposed arrangements for transition to a school in the proposed new environment vague and could have exposed the child to difficulties. This formed part of the grounds for a successful appeal.

[12] In these circumstances checklists may be dangerous. Plainly the considerations set out in *Payne v Payne* will not do. It may be for the same reason that Scottish cases do not refer to the factors in the Washington Declaration. The Inner House did mention a checklist devised by Sheriff Morrison in another *M v M* (2008 Fam LR 90), but there are dangers in any checklist that does not focus on the child as the paramount consideration. For example a parent may have a thoroughly bad motive for opposing relocation, but that should not affect the question of whether, viewed objectively, the move would serve the welfare of the child.

Contact

[13] One of the critical questions in any relocation relates to contact. If a child has an established relationship with a parent who would be left behind, how will this affect the child's welfare? If the issue of contact is not resolved, then there should be no permission to relocate. This was another of the fundamental errors of the sheriff identified by the Inner House in *M v M* [2011] CSIH 38. The court should look at the feasibility of contact proposals as they will involve travel and expense. On the other hand the parent to be left behind will be required to take a constructive approach. If that parent is perceived as being simply negative, or obstructive, that will tell against refusal of relocation.

[14] *S v S* was such a case, and it is interesting to see how a number of the regular features of the argument were stood on their head. The child's established and close relationship with his father were relied on to assert that it could be maintained at a distance. While many sheriffs have viewed indirect and Skype contact as a poor substitute for direct contact, Lord Emslie expressed the view that relocation to Texas presented "very real opportunities … for the promotion and development of (the child's) relationship with the defender in

what may be new and inspiring directions." Needless to say the defender father was less than impressed.

[15] One issue mentioned in the Washington Declaration relates to the enforceability of contact provisions in the place to which the child is to be taken. If the child is going to another EU member state then a contact order should be directly enforceable, without the need for any further process in the country to which the child is taken, under article 41 of Council Regulation (EC) 2201/2003 (Brussels II bis). The court should complete a certificate in terms of the Regulation and that can then be transmitted to the receiving country. There are some surprising places where Brussels II bis applies, for example the island of Reunion in the Indian Ocean is a French dependent territory, so will enforce contact orders under the Regulation. Article 21 of the Hague Convention on the International Aspects of Child Abduction provides for co-operation in relation to access rights (for a Scottish case see *Donofrio v Burrell* 2000 SLT 251). But if the child is to be taken off to a non-EU, non-Hague country, a contact order may have little effect. Matters will rest on whether the court trusts the relocating parent to keep whatever promises they make about contact.

[16] Brussels II bis does contain a provision for the country from which a child moves to retain jurisdiction for three months after the move for the purpose of modifying a judgment on "access rights". This allows for consent to a move before new arrangements for contact have been agreed, with a contact order to follow.

Views of the child

[17] Section 11(7)(b) of the Children (Scotland) Act 1995 requires the court to give the child an opportunity to indicate whether he wishes to express views and if he does so wish, to give him the opportunity to express them, and then to have regard to such views as he may express. This section derives from Article 12 of the United Nations Convention on the Rights of the Child. Neglecting to give the child an opportunity to express views may have serious consequences. This was the case in *S v S* 2002 SC 246. The mother in that case had an offer of a promoted post in Australia for three years and wanted to take the parties' son, then aged seven and a half. By agreement the sheriff dispensed with intimation on the boy. The action dragged on until the boy was nine, when the sheriff granted the specific issue order sought by the mother. The father appealed on the ground that the sheriff had failed to give the child an opportunity to express a view. The Inner House held that the duty under

section 11(7)(b) must be discharged at the time an order is made. If necessary this may be *ex proprio motu*. The only proper test as to whether the child should be given the opportunity to express a view is practicability. The form prescribed in the court rules may be inappropriate, but there are other methods, such as using a private individual, or child psychologist to take the child's views, or for the sheriff or judge to see the child in chambers. In the *S* case a reporter had been despatched to see the child who, as it transpired, did not want to go to Australia.

[18] In practice if an older child does not wish to relocate, then that may well be determinative. The age at which a child may be able to say whether he or she wishes to express a view is contentious. Different courts plainly take different views. In the recent case of *S v S* [2012] CSIH 17 taking the child's views was hampered by the fact that he was only six and unaware of his mother's proposal to relocate to the USA. An exercise of sorts was carried out by a third party, but neither the sheriff, nor the Inner House, was impressed by the result. No material significance was attached to what the child had said. The Inner House went out of its way to discourage further inquiry of the child about his views. They rejected the proposition set out in *S v S* that the only issue was whether it was practicable to seek the child's views. They observed that it would be "most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child."

[19] In contrast in *H v H* 2010 SLT 395 the wishes of an 11 year old, who wanted to return with his father to Australia, despite the fact that his mother and 13 year old sister would remain in Scotland, were material. He was an introspective and anxious boy, who not only wanted to be with his father, but also valued his wider family in Australia and would have opportunities to participate in sports there. His wishes were a significant factor in separation of siblings, one going to Australia with father and the other remaining in Glasgow with mother. The decision was sustained on appeal.

[20] If a relocation decision results in the possibility of a contact order that will require to be enforced in another EU member state, then securing the views of a child of sufficient age and maturity is likely to be of particular importance. As mentioned, a contact order may be directly enforceable under article 41 of Brussels II bis. The court making the order must however complete a certificate, which confirms that the child was given the opportunity to

be heard, unless a hearing was considered inappropriate having regard to the child's age and maturity. Judges in a number of European countries regularly see children and there will be an expectation that the child has been given the opportunity to be heard. Giving a child of sufficient age and opportunity the opportunity to express a view is a pre-condition of all enforcement under the Regulation.

Internal relocation

[21] In *M v M* the Inner House treated a relocation within the United Kingdom as subject to broadly similar considerations as a relocation elsewhere. This again contrasts with the English approach. Procedurally there can be no doubt that there are differences. There is no bar on a parent relocating within the United Kingdom, without the consent of the other parent. If they do so, there is no equivalent to the Hague Convention to make them return. There is no need for a specific issue order to allow relocation, albeit that is what was sought in *M v M.* If a parent fears the other will leave, with the children, for another part of the United Kingdom then an application may be made for interdict to prevent this. This is where the battleground is more generally fixed. And if Lord Emslie in *M v M* is right about onus, then the person pressing for interdict is the one who bears the onus. On the other hand, if there is a contact order, that may stand in the way of relocation. A parent who has to present a child regularly for contact cannot frustrate the contact order by moving several hundred miles away. In that event the onus lies with the parent seeking a change to the contact order.

[22] The discussion tends to illustrate that the whole idea of 'onus' is alien to decision-making about children. It is a pity that the Inner House in *M v M* do not refer to *White v White* 2001 SC 689, where Lord Rodger and Lord McCluskey roundly reject the role of onus in decisions relating to children. However, in *S v S* [2012] CSIH 17 Lord Emslie was unimpressed with the suggestion that the decision in *White* meant that there was no onus of proof. A party who seeks to alter the status quo must have some liability to furnish the court with material potentially capable of justifying the making of a relevant order. There is thus an 'evidential burden' on the person seeking an order from the court.

[23] One other point to mention is the question of whether relocation will be permanent, or for a period connected, for example, with a period of employment. Because Scotland

focuses on the child, the courts do not draw any distinction in principle, although the practical implications of a temporary relocation may be quite different.

Appeals

[24] It should only be a matter of time before there is a Supreme Court decision on relocation. We will then find out whether the decision in *Payne v Payne* is correct. There is after all something to be said for the notion that in an international context, where as a matter of policy parents should be encouraged to apply to the court, rather than 'abduct' children in breach of rights of custody, the bar should not be set too high. On the other hand, domestic legislation makes the welfare of the child the court's paramount consideration. The decision may affect the article 8 rights of the parent, but those rights must be balanced against the rights of the other parent and of the child. It is the article 8 rights of the child that will predominate in such a situation (see *Yousef v Netherlands* (2002) 36 EHRR 345).

[25] Any appeal relating to children is a challenge. Until recently the courts have taken their cue from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647 where the House of Lords referred to the first instance decision in such cases as "discretionary", and indicated that an appeal court should only interfere where the first instance court "exceeded the generous ambit within which a reasonable disagreement is possible". The appeal court should not intervene unless satisfied that the judge exercised his discretion upon a wrong principle or that the judge's discretion being so plainly wrong he must have exercised his discretion wrongly. There is currently some re-thinking going on about this, largely because it is now recognised that these decisions are not discretionary, and they do affect the right to respect for family life within article 8 of ECHR. In *re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 the Supreme Court was prepared to move away from the test of "plainly wrong", at least in the context of care proceedings. A much more nuanced test emerged, based on whether the appeal court considered the first instance decision to be "wrong", albeit the court were divided on whether in a case where proportionality was an issue they should make the decision, or should decide whether the decision of the first instance judge could be said to be "wrong". The latter view prevailed on a vote of three to two.

[26] Looking at the last two reported Scottish decisions, in *M v M* the Inner House decided that the sheriff had erred by adopting the wrong legal test. His analysis was redolent of the

approach in *Payne v Payne* and was accordingly wrong. Further he had failed to address the crucial issues of how contact would operate and how transition to a school in England would be achieved, particularly for the child who had additional support needs. In *S v S* the Inner House were more forgiving of the first instance decision, which had been produced under pressure of time, given the urgency of the proposed relocation. The sheriff had misquoted the test in section 11(7)(a), and had referred to the welfare of the child as the "primary" consideration, but the appeal court held that he had nevertheless given paramount consideration to the child's welfare. He had also made a number of errors in his findings in fact, but these were not considered material. The child was only six and his views, in so far as they had been obtained, were of no material significance. The "high threshold test for appellant intervention" had not been met.

[27] The English Court of Appeal has been criticised for the attempt to provide guidance and certainty, reflective of the serious issues arising under ECHR and the international connotations of these cases. The Inner House has eschewed the English approach, but has left us with no clarity of approach to relocation cases.

Conclusion

[28] If one were being completely cynical, Scottish relocation cases do not depend on the law. They may not be discretionary decisions, but there is usually no right or obvious answer. They depend on the impact of the case on the sheriff or judge making the decision. Once the decision is made, it is relatively straightforward to clothe matters in the language of welfare. Scottish courts, by tradition, tend to set store by continuity rather than adventure. This has the benefit that the child will retain established relationships and the security of a familiar environment. If, however, the court is sympathetic to the parent who wishes to relocate, then words can be found to cover the issues. And an appeal court will be reluctant to intervene. We have all been surprised and disappointed by decisions one way or the other. The decider is generally to win the heart of the sheriff of the judge at first instance, and the rest will follow.