



PENNINGTONS
MANCHES

INTERNATIONAL FAMILY LAW REPORT



CAN WE GO OR MUST WE STAY?
THE INTERNATIONAL CHILD
RELOCATION RANKINGS

As the world becomes increasingly international and mobile, it is not surprising that family lawyers have seen a great surge in the number of cases requiring international expertise over the last decade. This has been accompanied by an increase in the number of couples whose separation inevitably involves international children issues.

Relocation cases are increasingly common in many jurisdictions - including England and Wales - and the legal position is continually evolving to reflect the realities of international family life. They are notoriously difficult cases in which to achieve a compromise or reach an agreement and are typically "all or nothing" cases.

For this reason, it is vital that practitioners are experienced, well versed in international developments and acutely aware of the disappointment and distress caused by an unsuccessful application. Regardless of the jurisdiction, cases will always stand a greater prospect of success if they are thoroughly researched, carefully planned and clearly evidenced.

LANDMARK CASE:

Re C (Internal Relocation) [2015] EWCA Civ 1305

Re C is a landmark case which provides long awaited guidance for practitioners in England and Wales who have universally hailed it as valuable clarification.

The case makes it quite clear that the approach in internal relocation cases is to consider the proposals in a holistic way which encompasses the practicalities of the move, the motivation of the relocating parent, and the child's view.

The 2015 Court of Appeal case of Re C involved a proposed move by the mother with the parties' 10-year-old child from London to Cumbria. The trial judge had given

the mother permission to relocate and the father had appealed that decision.

In her leading judgment, Black LJ states that the governing principle in an internal relocation case is the welfare of the particular child concerned. Crucially, the judge said in clear terms that there is no reason to differentiate between internal and external relocation cases.

The court is unlikely to prevent a parent from choosing where they would like to live in the UK unless the child's welfare requires it. The court will consider the interests of the child and the parents. If there is a conflict, the best interests of the child will take priority.

While relocation has become easier to justify as frequent air travel is the norm for international families and the iPad generation of children is used to chatting via Skype, this has coincided with the growing proportion of families where both parents play an equal role in raising their children. It is therefore becoming even more crucial to determine how a child's relationship with a parent will be maintained across the miles.

Our team collated the evidence for the rankings in this report from the International Relocation of Children, A Global Guide from Practical Law 2016*. We have been surprised by the varying approach to relocation across the 31 jurisdictions covered in the book - 22 of which

feature in this report. Although England and Wales does not rank highly as an easy location from which to relocate a child, we are encouraged by its position in the middle ground of our league table. This reflects the discretionary, nuanced approach to each case which, while not without its flaws, results in a careful analysis of the impact which a proposed move would have on the child.

We have no doubt that all jurisdictions, regardless of their current approach, will need to keep this area of family law under review over the coming years and ensure that it continues to evolve to meet the needs of the modern family - and particularly the children.

* In recognition of the wide experience of the Penningtons Manches' international family team in child relocation cases, partner Anna Worwood was invited by Thomson Reuters to be the General Editor of International Relocation of Children, A Global Guide from Practical Law 2016. This comprises Q & A guides on international child relocation law and practice in 31 jurisdictions. www.uk.practicallaw.com/resources/global-guides/childrenrelocation-guide

ENGLAND AND WALES: IMPORTANT CASES AND OTHER ASPECTS OF RELOCATION LAW

Payne v Payne [2001] EWCA Civ 166

In this case Lord Justice Thorpe suggested that judges should adopt the following guidelines for determining relocation applications:

- Is the mother's desire to relocate genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life?
- What would be the extent of the detriment to the father and his future relationship with the child if the application was granted?
- What would be the impact on the mother of a refusal of her realistic proposal?

Over the years, the *Payne* guidelines have been criticised on the basis that they did not give sufficient weight to the impact of a move on the child's relationship with their father.

The presumption of parental involvement, introduced by s1(2A) and s1(2B) of the Children Act 1989 in 2014, increased the focus on the impact of the move on the child's relationship with the opposing parent and it is now accepted that the only principle to be extracted from *Payne* is that a child's welfare is the paramount consideration. However, the direction provided in *Payne* should still be used as a guide.

Re F (International Relocation Cases) [2015] Civ 882

Lord Justice Ryder emphasised that "*the Payne questions were not intended to be elevated into principles or presumptions... the court must weigh up all the relevant factors and look at the case as a whole*". He described this as a 'global holistic evaluation' approach.

THE POSITION NOW

The court will now take a global holistic welfare evaluation to determine where the child's interests lie. The approach in *Payne* is not overturned but it is now simply guidance. Each case is decided on its own facts, with the welfare of the child prevailing and the interests of both parents are just two of the many factors to be considered.

INTERNAL RELOCATION

Unlike international relocation, there is no restriction in law on internal relocation. While a move to another part of the jurisdiction will generally cause fewer difficulties than a move to another country, an internal relocation can be disruptive. If a parent moves from London to Newcastle, the parent who remains in London is unlikely to be able to spend time with the child during the week and contact will be limited to weekends and holidays.

In England and Wales there is no automatic restriction on internal relocation. Any parent who wishes to prevent an internal relocation must apply for a Prohibited Steps Order under s8 of the Children Act 1989. A parent who wants to ensure they can move may want to apply for a Specific Issue Order, also under s8 of the Children Act 1989.

WELFARE APPROACH FOR TWO OR MORE SIBLINGS

In *Re S (Relocation: Interests of Siblings) (2011)*, the court considered whether the interests of each child must be considered individually. The father was granted permission to relocate and the older sibling happily relocated with him after the hearing. The mother accepted this and appealed only for the younger child who seemed less willing to relocate. The Court of Appeal found that the judge had erred in not considering the interests of each child separately. As the present situation worked for both children - with the older sibling in Canada with his father and the younger in the UK with his mother - there was a heavy onus on the father to show that it was in the children's long-term interests for the younger sibling to relocate.

ORDERS FOR TEENAGERS

The court in *Re C (Older Children: Relocation) (2015)* found it "inappropriate and even futile" to make orders that conflict with the wishes of older children. This principle can be seen in the recent case of *Ciccone v Richie (No1) (2016)*, and Ciccone's attempt to relocate her 15 year old son to the US. The judges gave significant consideration in the judgment to her son's age and level of maturity. That her son had instructed a solicitor to represent his interests demonstrated his level of involvement. As a result, the court found it appropriate for her son to be joined as a party to proceedings.

RELOCATION IN ENGLAND AND WALES

Last year there were several interesting and widely reported relocation cases in England and Wales – including *Re C* – involving both relocating families within the jurisdiction and internationally. All of these have reflected the discretionary, nuanced approach of the courts.

THE CURRENT POSITION

If there is a child arrangements order (CAO) in place, a parent must not remove a child from the UK without the written consent of all parental responsibility holders or leave of the court.

The overriding principle remains that the welfare of the child is paramount. The court will also have regard to what is known as the 'welfare checklist' which includes factors such as the ascertainable wishes and feelings of the child, the likely effect on them of any change in their circumstances, and any harm which the child is suffering or is at risk of suffering.

Although that central principle made clear by the case of *K v K [2011] EWCA Civ 793* remains, relocation law is continually evolving. There is a clear and continuing trend towards recognising the importance of greater paternal involvement. Judges in England and Wales do not automatically assume that the mother will be the primary carer and we are seeing more parents sharing the care of children equally.

CAOs were introduced in 2014 to replace what was seen as the old-fashioned terminology of residence and contact orders. A child is now described as "spending time with" one parent and "living with" either one or both parents. It is less common for a distinction to be made between the primary carer of the child, the person with whom the child lives, and the other parent who sees the child on occasional weekends. More common are arrangements whereby parents share the upbringing of their children who spend part of the week with each parent.

It has been suggested that a remarkable 95% of applications to relocate in England and Wales are brought by mothers. Despite a clear trend for fathers to be more involved in their children's care, only around 5% of cases involve shared care arrangements that are genuinely split equally between the parents.

Regardless of the different attitudes to relocation across jurisdictions, it is always beneficial to approach a case with the child's best interests as paramount. This includes considering a young child's ability to adapt to extended periods apart from one parent and whether the timing of the proposed move is appropriate.

MOTIVATION

The court will also look at the motivation behind the move, particularly if it becomes apparent that the parent wishing to relocate is trying to exclude the other parent from the child's life. Similarly, so called 'lifestyle' cases are among the most difficult to succeed as it can be difficult to show that the benefit of an improved lifestyle will be outweighed by the other parent's difficulties in maintaining contact.

Cases where a parent is returning home are the most likely to succeed, provided it can be shown that the return home will benefit the child.

PSYCHOLOGICAL CONSIDERATIONS

The development of technology makes it much easier to keep in touch with relatives overseas and this has, to a certain extent, assisted relocation cases. But the courts equally recognise that technology has its limitations. Indirect contact over webcam can be difficult for young children who may struggle to concentrate for any meaningful amount of time.

Regardless of their age group, if the distance across which a relocating parent is moving does not allow for frequent contact to take place - for example, from London to Melbourne - children may find it difficult to spend meaningful time with a parent they have not seen for several months. The courts recognise the vital importance of face to face contact between children and both their parents and they are becoming less willing to permit international relocation regardless of the improvement in technology.

TIMING AN APPLICATION

Part of the holistic approach to relocation cases is the timing of an application. It is important to consider whether the application is best determined before a child starts school or reaches another milestone in their life. In England and Wales that can mean the issue of an application up to one year before the proposed relocation date to allow sufficient time to achieve a final determination. Recent research indicates that most international relocation cases are for children of pre-school age while internal cases are more typically for school age children.

THE INTERNATIONAL CHILD RELOCATION RANKINGS

	Country	Are relocation cases a familiar feature?	From whom must the relocating parent seek permission and what are the consequences if they do not?	How relocation disputes are typically determined by the courts
↑ MOST LIKELY TO ALLOW INTERNATIONAL RELOCATION	1  Greece	✓	A parent with sole custody has the right to determine the child's residence, even outside Greece. But if the parent does not inform the court about relocating the child, the other parent could be given sole custody.	Tend to allow mothers to relocate with children, as sole custody is usually awarded to mothers.
	2  Japan	X	The married parent who shares parental responsibility must get the consent of the other parent.	Tend to allow the primary carer (Kangosha) to relocate with the child unless there is concern for child's safety.
	3  Ukraine	✓	Ukrainian citizens under 16 can only travel outside Ukraine with one parent if the other parent has provided notarised consent. But a child with foreign citizenship and foreign documents can freely enter and leave Ukraine with one parent.	Permission for a child to travel abroad usually granted if in the child's interest/does not infringe the other parent's rights.
	4  Israel	✓	The court can issue an injunction restraining the parent without custody from taking the child out of the country. The parent seeking to relocate must apply to the court to set aside an injunction/or seek leave to relocate.	The mother, as the primary carer, is the usually the applicant and the courts tend to allow child to relocate with her.
	5  Turkey	X	For a married couple, the relocating parent should have the permission of the other parent. Permission is not needed for unmarried mothers but if a non-custodial parent relocates a child, it is a crime of abduction.	Mothers can make unilateral decisions to relocate to the detriment of the father's rights.
	6  Guernsey	✓	A parent needs the permission of everyone with parental responsibility for the child or court permission. It is an offence of international child abduction to take a child under 16 out of the jurisdiction.	Public perception is that mothers are favoured by the courts but each case determined on merits.
	7  Ireland	✓	A parent needs the written consent of the other parent and very compelling reasons for relocation are required. A non-married father is vulnerable.	Always preferable to seek permission from the court prior to relocation.
	8  United States: Pennsylvania	✓	The relocating parent must notify any party with custody rights and the non-relocating party has 30 days to object and file any objection with the court. The parent can also request both criminal and civil measures for the child's return.	Any court order requires the service of relocation notice on the other party.
	9  Australia	✓	Parents with equal shared parental responsibility must obtain written consent from the other parent. It is a criminal offence to remove a child without written consent or court order.	The public view that mothers are generally permitted to relocate with children is not reflective of the courts' decisions.
	10  Poland	✓	International relocation must be decided together by both parents. In absence of consent, the relocating parent must initiate court proceedings.	Little case law and guidance for judges so courts focus on the best interests of the child.
↓ LEAST LIKELY TO ALLOW INTERNATIONAL RELOCATION	11  Russian Federation	✓	An underage Russian citizen must be accompanied by at least one parent/guardian and have a valid document. If a parent opposes the child's exit, the matter must be resolved in court.	Lack of restrictions on a parent's discretion leads to rising numbers of relocation disputes.
	12  South Africa	✓	Everyone with guardianship of a child must consent to the child's departure or removal and to the application for a passport for the child. If a parent refuses consent, the other parent must bring an application to the High Court for an order.	Awareness that there is no maternal preference in the courts and that each case is judged on its facts and circumstances.
	13  Jersey	✓	Written permission is required of everyone with parental responsibility if there is an order in place. An injunction preventing a child being removed can be applied for with or without notice to the other parent.	No specific gender difference and cases decided on the best interests of the child - more difficult where child care is shared.
	14  United Kingdom: England and Wales	✓	A parent must not remove the child from the UK without the written consent of everyone with parental responsibility or leave of the court if there is a CAO. It is an offence of child abduction for a parent to remove a child under 16 without consent.	Used to be easier for mothers to obtain permission but more difficult to predict now there is presumption of parental involvement.
	15  United Arab Emirates	✓	If there is no parental agreement to a child relocating, the only options are to seek the court's permission or simply to do it. But taking a child without permission could give rise to criminal proceedings for child abduction.	The father is more likely to succeed in preventing a relocation than the mother.
	16  France	✓	Any change of residence of one of the parents must be agreed by the other parent. If there is disagreement, one of the parents will refer the matter to a family judge.	Outcomes of relocation disputes are unpredictable and most depend on the reasons of the parent making the application.
	17  Spain	✓	The parent must seek and obtain authorisation from the court which must be agreed by both parents. The parent with custody does not have the power to make the decision unilaterally.	Judges reluctant to change the child's place of habitual residence. Shared care considered to be in the best interest of children.
	18  United States: Florida	✓	Unless a relocation agreement has been made, a parent seeking relocation must file and serve a petition to everyone entitled to access to the child. Unilateral relocation without agreement or court permission is prohibited.	Outcome depends on the judge's tendencies and the facts of each case as to whether or not the court will allow relocation.
	19  United Kingdom: Scotland	✓	If both parents have parental rights and responsibilities (PRRs), one parent cannot remove a child without the consent of the other. If there is no consent, the relocating parent must make an application for removal to the court.	For the last five years, it has been easier to persuade a Scottish court to refuse an application to relocate than to grant it.
	20  Denmark	✓	A national relocation is permitted if six weeks' notice is given to the other parent but the parent left behind must give permission for an international relocation. Without this a child cannot be taken out of Denmark.	Courts tend not to allow parents to relocate with children regardless of the proximity of the other country.
	21  New Zealand	✓	The parent seeking relocation must have the consent of the other parent/guardian. Without this, the relocating parent runs the risk of the court ordering the return of the child.	Court is concerned with "this child in his or her particular circumstances". Relocation cases are difficult to win.
	22  Belgium	X	The parent seeking to relocate a child internationally needs clear written permission of the other parent or must seek permission from the court. A parent who removes a child without permission will face criminal charges.	A relocation order is very hard to obtain from the Belgian courts because both parents have equal rights.

COUNTRY OBSERVATIONS AND CASE LAW

Perhaps unsurprisingly, it is countries with a large international workforce that see the most international relocation cases. But that does not mean that those countries share the same approach to what tend to be highly discretionary cases.

The United Arab Emirates has a highly international population where the majority of residents are foreign nationals. Although there are many relocation cases, the legal system has not caught up with the population's desire to relocate. The father has a far greater ability to prevent relocation than the mother which is perhaps a reflection of the patriarchal society which has been in place over centuries rather than a presumption towards paternal involvement.

TEMPORARY LEAVE TO REMOVE

In England and Wales the same principles apply to applications for temporary leave to remove as to permanent removal. However, it has been suggested in Re A (Temporary Removal from Jurisdiction) (2004) that 'the more temporary the removal, the less regard should be paid to the principles in Payne v Payne'.

The English courts are reluctant to permit temporary leave to remove to countries which are not signatories to the Hague Child Abduction Convention. In S v S (2014), the court refused the father permission to take the child to Dubai, despite the father offering various undertakings and safeguards because, if the father did abduct the child and remain in Dubai, those undertakings would be worthless due to the approach of the Dubai courts to foreign orders.

By contrast, Jersey, which has a similarly international populace, has adopted a pragmatic attitude to relocation. Only 35% of Jersey's population was born in Jersey. If no residence order is in force, permission is not required to remove a child from Jersey. An objecting parent is dependent upon making an application to the court to prevent the child from being removed. This is in stark contrast to Guernsey which is ranked in the top tier of countries most likely to allow relocation. There is a strong public perception in Guernsey that relocation disputes are decided in favour of the mother and this may be reflected by the fact that, over the last 10 to 15 years, there has been a far greater likelihood of relocation applications being granted.

New Zealand's isolated geographic location means that relocation cases are always subject to particularly intense scrutiny as contact is likely to be difficult for the parent left behind. New Zealand has adopted a strict approach to relocation cases and the cases are difficult to win for the parent who wishes to relocate.

Europe has, of course, been a hot topic of conversation since the UK's surprise Brexit vote in June 2016. It is interesting to note that the European states vary widely in their approach to relocation law. It is inevitable that all jurisdictions within the European Union see relocation cases as a frequent feature given the free movement afforded by being a member state.

However, the different states adopt a nuanced approach which has, in turn, resulted in the states which have been examined in this report being scattered across the relocation rankings. While Greece is considered to be most likely to allow relocation and Ireland is also within the top tier, France, Spain, and England and Wales have mid to low rankings reflecting both their similar approaches and attempts to adopt a careful and balanced approach to each case on its own merits.

Perhaps the most surprising result is Belgium, a country with a reputation as an international hub and the home of the European Parliament. Relocation orders are considered to be very difficult to obtain even though the majority of cases seek to relocate to another European country. It will be interesting to observe how relocation law evolves and whether it begins to catch up with its increasingly international population.

Like Europe, the individual states within the USA do not necessarily adopt the same approach. While Pennsylvania takes a prominent position in the rankings, making it one of the most likely jurisdictions to allow relocation, Florida takes a more cautious view and the approach adopted is heavily dependent on the individual judge.

RELEVANT CASE LAW

Country	Case
Ireland	<i>EM v AM (High Court) 16 June 1992</i>
Australia	<i>A v A: Relocation Approach (2000 FLC 93-035)</i>
Poland	<i>Warsaw District Court (30 October 2014, VI Nsm 736/14)</i>
England and Wales	<i>F (A child) [2015] EWCA Civ 882</i>
Jersey	<i>H v T and B 2003 JLR Note 26</i>
France	<i>Civ. 1re, 20 November 1996; 93-19937</i>
Scotland	<i>M v M (2008 Fam LR 90)</i>
Denmark	<i>TFA 2010 486</i>
New Zealand	<i>Brown v Argyll (2006) 25 FRNZ 383 (HC)</i>



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**INTERNATIONAL FAMILY LAW
AT PENNINGTONS MANCHES:**

Penningtons Manches acts in some of the leading cases in England and Wales representing clients including professionals, entrepreneurs, wealthy individuals, landowners, those in the public eye, or for their partners. The family law team has unparalleled expertise in the field of international family law.

Our team includes six Fellows of the International Academy of Family Lawyers (IAFL), an organisation of the world's leading international family law practitioners. In addition, members of our team hold leadership positions in other key global family law organisations, including the Family Committee of the International Bar Association (IBA), the Private Client Commission of the Association Internationale des Jeunes Avocats (AIJA) and the International Family Law Committee.

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ANNA WORWOOD



Anna is an international relocation partner in the London office, one of 'The Lawyer's Hot 100 2016', and a leader in her field in the 2015 Thomson Reuters London Super Lawyers List. Recognised by Chambers UK as 'particularly well versed in international relocation matters', Anna has a high success rate on behalf of fathers as well as mothers.

She has represented parents in a number of reported cases, including the landmark Court of Appeal case of *Re C (Internal Relocation)*.

Described by one source as 'The first port of call for a client looking for an astute solicitor equally at home in high wealth cases and sensitive cases involving children', Anna was the President of the Private Client Commission of the AIJA between 2013 and 2016. She is also a Fellow of the IAFL, a member of Resolution's International Committee and a collaborative lawyer. On the invitation of the IAFL Amicus Committee, Anna has recently submitted the UK paper for intervention in a French Supreme Court case concerning international visitation.

LUCY CUMMIN



Lucy works alongside Anna Worwood advising clients on international relocation and other specialist family matters. Since qualifying in 2010, Lucy has gained considerable experience in negotiating financial settlements on divorce. Having initially qualified as a commercial litigation lawyer before transferring to family law, she now enjoys applying

her commercial knowledge to her clients' circumstances.

An active member of Resolution, Lucy regularly receives excellent feedback from her clients who have described her as professional, understanding, strong and determined with "a sense and sensitivity unerring and remarkable in one so young".