

Update Extra

Relocation, relocation, relocation

Here is a whistle-stop tour of the legal and practical principles to consider when dealing with applications for leave for a permanent removal from the jurisdiction following the decision of Mostyn J in *Re S and V (Children: Leave to Remove)* [2018] EWFC 26, [2018] FLR (forthcoming). On 27 April 2018, Mostyn J refused an application by a mother for permission to return to her home country of the Ukraine and reside there with the parties' two children, her new husband and their newly born child in Kiev. In refusing the application, Mostyn J provided a helpful summary of the applicable legal principles the court is to apply when determining these applications and also provided some helpful practical guidance on how to deal with common themes that often permeate these applications.

The facts

The Ukrainian mother held both Ukrainian and British passports. She met the Russian father in Vienna and the parties married in the Ukraine in 2012. Both parties were independently wealthy. The parties resided in London until they separated in 2015. The marriage produced two children, girls, aged five and two. Upon separation, the mother moved out of the family home and into a substantial property in the same area which she purchased for the sum of £9m.

In early 2017, the mother formed a new relationship with a man; S. S was an IT developer with business interests in California. Mother sought father's agreement for a move to California so she could support her new partner there. Although father originally agreed to the move in principle, his consent was subsequently withdrawn when the mother advanced contact proposals between him and the children that Mostyn J found to be 'unreasonably restricted'. Six months later the mother proposed a return to her native Kiev in order to support S's business

ventures. Father, opposing the relocation to the Ukraine, cross-applied with an application for a prohibited steps order and a child arrangements order.

The litigation

During the course of the litigation, the mother had taken the children to the Ukraine without giving the father, the court or her solicitors any prior warning. This was in direct breach of an order agreed at the first hearing. The father applied for the children's summary return pursuant to the court's inherent jurisdiction and the mother applied for temporary leave to retain the children in the Ukraine pending the final hearing. Although the mother's interim application was successful, without prejudice to the wider application for permanent leave, she was ordered to file a raft of further evidence, including comprehensive medical disclosure about why she could not travel as asserted (being pregnant with her new baby) and to obtain copies of S's passports and visas in order to substantiate arguments she was making in the litigation about S's business activities.

Mostyn J found the mother's medical evidence did not comply with the direction imposed upon her by Russel J. He found her evidence could 'scarcely be more spare'. In addition, her wilful refusal to provide S's passport evidence, as directed, was a "contemptuous disregard for the authority of the court" in Mostyn J's view. The court ordered a report from an Independent Social Worker (ISW) to consider if a move to the Ukraine was in the children's best interests. In concluding that such a move was contrary to the children's best interests, the ISW concluded:

- 1) There were too many uncertainties about the mother's new relationship with S, which was still in its infancy;
- 2) S and the mother had never lived together;
- 3) S had no experience of living with children;

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- 4) S and the mother had no experience of co-parenting.

This report was first received by the mother some two weeks prior to her decision to remove the children to Ukraine without the father's approval. Mostyn J, having considered the matter carefully, found that the ISW report made it clear that the uncertainties and risks highlighted by the ISW could be overcome if the mother was able to manufacture a situation where the mother and S lived with one another in Kiev with the children for an 'appreciable period' by the time the final hearing came round.

In a scathing commentary, Mostyn J held that the mother's decision to remove the children to the Ukraine following receipt of the ISW report was 'highly manipulative conduct', there was 'no other plausible expiation for her furtive flit to Kiev', her behaviour demonstrated an 'arrogant disregard for court-endorsed precepts' and was 'cynically contrived'. Following a number of evidential developments (including the maternal grandmother no longer considering a move to Kiev to be in the best interests of her grandchildren and the nanny echoing these sentiments), the court ordered an addendum report from the ISW.

S was interviewed for a second time. The ISW found that although he was courteous, he was 'reluctant, resistant and evasive about his past business involvement' and his demeanour changed to 'borderline aggression to any questions he considered to be personal'. Mostyn J held that S's reluctance to provide information about his business to be 'very striking' and the judge considered 'all of this gives rise to very profound questions which needed to be explored in oral evidence'.

S was encouraged (but not ordered) to file a witness statement to provide further information to assist the court but refused to do so. He refused to provide oral evidence in the witness box. In considering this, Mostyn J found that 'it is unprecedented in a case where a new relationship is relied on as the reason for the

relocation, for the new partner to not engage in the proceedings and offer him or herself in cross-examination'. In relying on the Supreme Court's authority in *Prest v Petrodel Resources Ltd & Others* [2013] UKSC 34, [2013] 2 FLR 732 that the court is entitled to draw adverse inferences from a silent or absent witness, Mostyn J considered that S and the mother had 'something serious to hide' despite submissions to the contrary from the mother's leading counsel.

Finally, the mother had also pleaded her case to support the relocation that in the event permission was refused, she would be unable to hide this frustration from the children. Indeed, her leading counsel suggested that the chances of the mother being successfully able to shield the children from her frustration were 'remote'. This was not accepted by Mostyn J, who found that the purchase of a £9m property near the family home did not resonate with the likely conduct of someone who was desperate to return to their native country, there was no evidence the mother was homesick or isolated (as she claimed) during the course of the marriage and her first proposal was to relocate to California, not Kiev. Accordingly, the mother's application for permission to relocate to Kiev was refused.

Commentary

In Mostyn J's view, since the Court of Appeal's decision in *Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882, [2017] 1 FLR 979, 'the legal test to be applied [in international relocation cases] is now very straight-forward'. The paramountcy of the s 1(3) checklist in the Children Act 1989 (ChA 1989) reigns supreme and a holistic view analysis is to be preferred and applied over the 'discipline' in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052, which should now only be considered as guidance – to be drawn on (or not) as each individual case demands. Further points to note are summarised as follows:

- 1) If the applicant's case is not thought out well enough it will likely fail.
- 2) If an application to relocate or a defence

- to relocation is not advanced in good faith then that position, too, is likely to fail.
- 3) The court must consider the impact on the parent wishing to relocate if the application is refused and the impact on the left-behind parent if the application granted. However, in respect of those parents arguing they simply will not cope if permission to relocate is denied, Mostyn J considers 'this sort of argument should be treated very circumspectly'.
 - 4) The court's role in relocation is that of an evaluative function as opposed to an exercise of the court's discretion. Whilst there is no concept of presumption and burden of proof in litigation brought pursuant to ChA 1989 (*Payne* at para 25), it is common sense that a parent seeking to alter the status-quo needs to evidence why the change promotes the children's best interests as opposed to no change at all.
 - 5) If the party seeking to relocate has a new partner, the new partner must come into that relationship with their eyes wide open in terms of the family dynamic and contact regime. On the flip side, the respondent to a relocation application must appreciate that if their former partner forms a new relationship, this may well have an impact in the event of a case for change being advanced by the former partner.

Conclusion

Practitioners dealing with applications for international relocation will obviously need to bear in mind the decision in *Re F* and the impact this has had on the application of *Payne* when dealing with such applications. The decision in *S and V* is a helpful summary of how the court will approach applications for international relocation and, by consequence, what to bear in mind when drafting an application or witness statement for a client seeking the court's permission to move abroad.

The warning from Mostyn J about how to deal with a parent who says s/he simply will

not cope if permission to relocate is refused is useful to those parents responding to relocation applications. Such protestations will feature in cases more often than not and whilst the court will inevitably have to consider the effect of refusal on the parent seeking to leave (Mostyn J himself states this is a consideration for the court) the paramountcy of the s 1(3) checklist and the holistic analysis should not play second fiddle to a parent relying on distress and disappointment as a reason why permission should be granted. Clearly, each case will need to turn on its' own facts.

The commentary from Mostyn J about S's refusal to provide evidence when the mother's case was positively advanced on needing to support him in the Ukraine was undoubtedly a powerful factor for the judge when considering whether to grant or refuse permission. If you are dealing with a case where your relocating parent has a new partner, and part of the reason to relocate is to be with and support that new partner, it is inevitable that evidence from that person will be helpful given the role they will be taking on with the children if they are permitted to relocate. In this case, the ISW considered that 90% of the mother's case was about wanting to be with and support S, rather than moving back to her native Kiev.

International relocation applications are rarely straight-forward or clear cut. It is often impossible to advise your client with any degree of certainty what the outcome will be. However, there is now clear guidance from the judiciary as to how these cases should be approached. Your route to permission may turn out to be a lot smoother if the case law and commentary outlined above is borne in mind from the outset of your journey.

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The absurdity of the law is plain: *AB v CD*

In *AB v CD and Others* [2018] EWHC 1590 (Fam), Keehan J, in no uncertain