
Reassessing Relocation: A Comparative Analysis of Legal Approaches to Disputes Over Family Migration After Parental Separation in England and New Zealand

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Relocation cases are disputes between separated parents which arise when one proposes to move to a new locality with their child and the other objects. Relocation disputes are increasingly common and are becoming a topic of international concern. This thesis takes a comparative socio-legal approach to examining the legal responses to relocation cases in England and New Zealand.

In England, *Payne v Payne* [2001] 1 FLR 1052 continues to apply principles first enunciated in *Poel v Poel* [1970] 1 WLR 1469, and generally sees children's welfare as being promoted by allowing primary carers to relocate, so long as such moves are bona fide and well-considered. New Zealand rejected this approach in the mid-1990s, and now places more emphasis on children having strong relationships with both parents. Consequently, where England is characterised as 'pro-relocation', New Zealand is 'anti-relocation'.

Qualitative interviews with legal practitioners in both countries suggest that these characterisations are reflective of the law in practice. Looking at hypothetical case-studies, English practitioners are more likely to support proposed relocations than New Zealanders. Many English practitioners think their law to be outdated, and in particular that it gives too much weight to applicants' well-being and too little to the value of children having strong relationships with both parents. However, in New Zealand, where an approach similar to that favoured by many English participants is applied, practitioners have the opposite concern, that applicants' well-being is given insufficient weight, and promoting strong relationships with both parents has become overly dominant when assessing children's welfare.

It is suggested that the current variation in approaches to relocation may fit broader trends in post-separation parenting in different countries. However, given the current 'search for common principles' which can be applied to relocation cases internationally, this thesis raises questions about the likelihood of international agreement being reached.

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Table of Abbreviations

AJFL	Australian Journal of Family Law
All ER	All England Reports
CFLQ	Child and Family Law Quarterly
CLJ	Cambridge Law Journal
CLY	Current Law Yearbook
COCA	Care of Children Act 2004 (NZ)
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
Fam Law	Family Law [journal]
Fam LJ	Family Law Journal
Fam LQ	Family Law Quarterly
FCR	Family Court Reports
FLR	Family Law Reports
IFL	International Family Law [journal]
IJL(P)F	International Journal of Law(, Policy) and the Family
JSWFL	Journal of Social Welfare and Family Law
LS Gaz	Law Society Gazette
MLR	Modern Law Review
NLJ	New Law Journal
NZCA	New Zealand Court of Appeal
NZDC	New Zealand District Court
NZFC	New Zealand Family Court
NZFLJ	New Zealand Family Law Journal
NZFLR	New Zealand Family Law Reports
NZHC	New Zealand High Court
NZLJ	New Zealand Law Journal
NZLR	New Zealand Law Reports
NZSC	New Zealand Supreme Court
OJLS	Oxford Journal of Legal Studies
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
WLR	Weekly Law Reports
WN	Weekly Notes

Throughout this thesis, ‘England’ should be taken to mean the legal jurisdiction of England and Wales, unless otherwise stated.

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Chapter 1

Locating Relocation

Relocation cases are disputes between separated parents which arise when one parent proposes to move to a new locality with their child, and the other parent objects to the move. Relocation is a topic of increasing debate in countries around the world,¹ and legal approaches to relocation disputes vary significantly between countries, despite general agreement that the welfare and best interests of the children concerned should be the guiding principle. This thesis offers an empirically-based examination of the ways in which the courts in England and New Zealand address relocation disputes, these countries representing the furthest points found in the common law world. The thesis draws on reported caselaw, literature, and interviews with legal practitioners in the two countries to examine the reality of relocation law in practice. The analysis raises questions about the approaches currently taken in both countries, and about the ways in which we might advance the ‘search for common principles’ in relocation law which is now starting.²

¹ See, eg, the meeting of judges from 14 countries at the *International Judicial Conference on Cross-Border Family Relocation* (Washington DC, 23-25 March 2010), and the international conference on *International Child Abduction, Forced Marriage and Relocation* (London Metropolitan University, 30 June-2 July 2010).

² Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Introduction

Courts around the world note that ‘[r]elocation disputes are widely regarded as one of the most controversial and difficult issues for the Family Court’.³ While all relocation cases involve a proposal to move the child to a new location, there is debate even about what constitutes a relocation case.⁴ Defining a relocation dispute is difficult, because the key issue is the effect which the move would have on the child’s life, rather than the geographic distance involved.⁵ Consequently, relocation disputes vary considerably, encompassing moves between different suburbs of the same city, between different parts of the same country, and between different countries.

In legal terms, relocation disputes form part of private child law, which governs disputes between family members about the upbringing of children. In most Western countries, the guiding principle for courts adjudicating private child law disputes is that the welfare and best interests of the child concerned should be the paramount consideration.⁶ In the leading interpretation of this provision, Lord MacDermott held that, once all relevant factors had been considered, ‘the course to be followed will be that which is most in the

³ *Bashir v Kacem* [2010] NZCA 96, unreported, [1], quoting P Tapp and N Taylor, ‘Relocation: A Problem Or A Dilemma?’ (2008) 6 *NZFLJ* 94, 94; see similarly *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052; *Tropea v Tropea* 665 NE 2d 145 (1996) (Court of Appeals, New York, USA); *Ford v Ford* Case No 52/05 (Supreme Court of Appeal, South Africa); *U v U* (2002) 191 ALR 289 (High Court, Australia).

⁴ See, eg, *AJL v BSO* [2010] NZFLR 476 (NZFC), [9]: ‘Surprisingly there is little case law on the issue of definition of a relocation case’.

⁵ *Ibid*, [18]; Judge Burns suggested that relocation be defined as ‘a shift of the child’s residence which affects the child’s relationship with his or her parents, both practically and emotionally, and/or gives rise to other changes which raise guardianship issues’.

⁶ See, eg, United Nations Convention on the Rights of the Child 1989, Article 3; Children Act 1989, s 1 (England); Care of Children Act 2004, s 4 (New Zealand); Family Law Act 1975 (Cth), s 60CA (Australia); Divorce Act 1985, s 16 (Canada).

interest of the child's welfare'.⁷ As his Lordship went on to explain, this approach means that 'the rights and wishes of parents ... must be assessed and weighed in their bearing on the welfare of the child'.⁸ To put it another way, factors 'are only relevant in a case involving the upbringing of children in so far as they affect the welfare of the child'.⁹

Relocation is an increasingly important topic as the number of disputes over post-separation migration increases. It is estimated¹⁰ that around 1,200 cases involving international relocation are litigated each year in England,¹¹ and this number tells us nothing about the number of cases which are not adjudicated in court,¹² nor about the number of moves within the country.

Relocation disputes are also likely to become more frequent. One reason for this is increasing mobility amongst the population in general. Not only do people move more frequently within countries,¹³ but over recent years 'the phenomenon of what may be called "cross-border families" and the frequency of consequential litigation has undoubtedly

⁷ *J v C* [1970] AC 668 (HL), 711.

⁸ *Ibid*, 715.

⁹ J Herring, 'The Welfare Principle and the Rights of Parents' in A Bainham, S Day Sclater and M Richards (eds) *What Is A Parent? A Socio-Legal Analysis* (Hart, Oxford: 1999), 92.

¹⁰ As no data are collected in England, it is impossible to know how many cases there are.

¹¹ M Freeman, 'Relocation: The Reunite Research' (Reunite, London: 2009), 3.

¹² In relation to children's residence and contact, it is estimated that only around ten per cent of separating families litigate: J Hunt and C Roberts, *Child Contact With Non-Resident Parents* (University of Oxford, Oxford: 2004). However, research in Australia suggests that three fifths of relocation cases are judicially adjudicated: P Parkinson, 'What Happens When the Relocation Dispute Is Over? Findings from a Prospective Longitudinal Study' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010). Similarly, English and New Zealand lawyers interviewed for this research suggest that almost all cases that they see (ie where parties seek legal advice) go to a final hearing: see Chapter 3, text from n 12.

¹³ See, eg, T Champion, 'Population Movement within the UK' in *Focus on People and Migration* (ONS, London: 2005).

dramatically increased'.¹⁴

Another reason relates to changing family practices after parental separation, with an increasing trend in Western countries for both parents to have a hands-on role in children's upbringing.¹⁵ We have also seen increasing focus internationally by courts and legislatures¹⁶ on the importance of both parents remaining involved in their children's lives after separation.¹⁷

These changes combine to mean that, as migration becomes more frequent, so too non-moving parents have more incentive to litigate in opposition to proposed moves, and more powerful arguments that their children's welfare is better served by their remaining where they are than by moving. It may be in part because of these factors that relocation is becoming an increasingly politicised issue.¹⁸ In England,¹⁹ relocation is increasingly a topic

¹⁴ N Lowe, 'Where in the World Is International Family Law Going Next?' in G Douglas and N Lowe (eds) *The Continuing Evolution of Family Law* (Jordan, Bristol: 2009), 261.

¹⁵ This trend is seen to differing extents in different countries: see, eg, R Collier and S Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, Oxford: 2008); P Amato, C Meyers and R Emery, 'Changes in Nonresident Father-Child Contact from 1976 to 2002' (2009) 58 *Family Relations* 41.

¹⁶ For legislation, see, eg, Care of Children Act 2004 (New Zealand); Children and Adoption Act 2006 (England); Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (Australia). For cases, see, eg, *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279; *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593; *H v C* [2009] NZFLR 414 (NZHC); *MRR v GR* [2010] HCA 4, unreported (High Court, Australia).

¹⁷ For discussion, see Chapter 7, text from n 115.

¹⁸ For newspaper coverage, see, eg, L Rogers, 'Fathers to Fight Removal of Children Overseas' *The Telegraph* (11 Feb 2007); C Overington, 'Divorced Mums Forced to Stay Put' *The Australian* (1 June 2009).

¹⁹ Again, the trend is seen to differing extents in different countries.

of concern for families' groups.²⁰ A report commissioned by the child abduction charity Reunite²¹ noted the increasing number of relocation cases reported to its helpline,²² which led David Maclean MP to put forward an Early Day Motion on relocation.²³ The online organisation The Custody Minefield²⁴ has begun a campaign,²⁵ supported by Bob Geldof and the fathers' group Families Need Fathers,²⁶ which received national press coverage.²⁷

It is not surprising, therefore, that relocation has become an increasingly important

²⁰ J Junk, "'Your Number's Up, Payne v Payne': Time for Change?" (2010), online at <http://www.mckenziefriend.com/2010/04/27/your-numbers-up-payne-v-payne-time-for-change> (last accessed 27 May 2010).

²¹ See www.reunite.org.

²² M Freeman, 'Relocation: The Reunite Research' (Reunite, London: 2009), 1. There were 122 cases reported to Reunite in 2008.

²³ Early Day Motion 373: 'That this House believes that a child's relationship with its parents requires greater legislative protection with regard to the Family Court's current application of precedent in international and national relocation cases; further believes that the Family Courts of England and Wales' position on the importance of the father/child relationship does not reflect the current authoritative research on the importance of father involvement in educational and psychological development in relocation cases; further believes that the courts in practice place too great an emphasis on the unsubstantiated emotional risk to the child from the mother's possible distress and disappointment if not allowed to relocate; considers that this emphasis over-rides all other considerations including the needs and rights of the child; and calls on the Government to respond positively to the research report by the charity Reunite, entitled Relocation, funded by the Ministry of Justice and published in July 2009': <http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=39934&SESSION=903> (last accessed 6 May 2010).

²⁴ See www.thecustodyminefield.org.

²⁵ See www.relocationcampaign.co.uk.

²⁶ See www.fnf.org.uk.

²⁷ J Bingham, "'Barbaric' Family Courts Behind 'State Sponsored Kidnap' – Bob Geldof" *The Telegraph* (7 Dec 2009); S Doughty, 'Bob Geldof Accuses "Barbaric" Family Courts of "Kidnapping Children from Their Fathers"' *The Daily Mail* (8 Dec 2009).

issue for academics,²⁸ practitioners²⁹ and judges³⁰ as the law in different countries responds to these disputes. There is considerable writing on relocation, with existing literature in England providing an excellent analysis of the approach taken by the higher courts.³¹ However, this research is unable to examine the day-to-day application of this legal approach in the trial courts because, as with all child law research, the main source used tends to be reported cases which, in turn, almost inevitably come from the High Court or the appeal courts.³²

Reliance on reported cases has two consequences. First, High Court and appeal cases, of their nature, tend to involve ‘unusual’ or especially complex issues: cases are filed in the High Court because they are complex, and are appealed either because there is something unusual about them, or because something unusual happened procedurally. Second, there is the issue of reporting of cases: cases are reported because of their significance to the law or its practice,³³ meaning that it is difficult to assess the extent to which such cases reflect the experience of everyday litigation.

²⁸ See, eg, the recent conference, *International Child Abduction, Forced Marriage and Relocation* (London Metropolitan University, 30 June-2 July 2010), which included 20 papers and three discussion sessions on relocation.

²⁹ See, eg, F Judd and P Pressdee, ‘Breaking Through the *Payne* Barrier: What Would the Supreme Court Make of International Relocation?’ (*Harcourt Chambers Seminar*, London: 2010); C Renton, ‘Rethinking Relocation’ [2010] *NLJ* 958.

³⁰ See, eg, *Re D (Children)* [2010] EWCA Civ 50, [2010] 2 FLR, forthcoming (Wall LJ); *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131 (Mostyn J).

³¹ Below, text from n 142.

³² The Family Law Reports provide ‘case reports of ... Family Division, Court of Appeal, House of Lords and European courts case[s]’, while the Family Court Reports cover ‘cases in the High Court, Court of Appeal and House of Lords’.

³³ The Family Law Reports cover ‘every important ... case’, while the Family Court Reports cover ‘cases ... which are of interest to family law practitioners’.

Looking at the literature on relocation in other jurisdictions,³⁴ it can be seen that academics have responded to these difficulties by broadening the scope of their analytical approach. In particular, scholars are increasingly turning to empirical research to help to overcome the gaps left by reported caselaw.

As we will see in Chapter 7, thought is now being given to the possibility of harmonising international relocation law around ‘common principles’.³⁵ However, at the moment legal approaches to relocation around the world range from those which strongly favour relocation applications to those which look unfavourably on them.³⁶ The focus of this thesis is on the approaches taken in England and New Zealand. These jurisdictions represent the furthest points on the range of approaches in the common law world; they see relocation disputes very differently despite their shared ‘liberal’ social values³⁷ and common law tradition (including both having the welfare of the child as the guiding principle³⁸). If, despite these commonalities of legal and social history, and the common starting point of the child’s best interests, such divergence exists over relocation, questions may be raised about the likelihood of finding a common approach to relocation law. We might also ask whether the welfare principle itself – already a shared common principle – is able to be used as a substantive international standard in this field.

³⁴ Below, text from n 179.

³⁵ Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010); see also the Washington Declaration on International Family Relocation 2010.

³⁶ Below, text from n 39.

³⁷ See, eg, G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity, Cambridge: 1990).

³⁸ Children Act 1989, s 1 (England); Care of Children Act 2004, s 4 (New Zealand).

This thesis examines relocation disputes from a comparative socio-legal perspective. It builds on a body of literature in England which is largely doctrinal in approach, and attempts to contribute to filling the gap which exists due to the lack of empirical research. The thesis draws on qualitative interviews with family law practitioners in England and New Zealand to examine the everyday practice of relocation law in these two countries. Questions are raised about the approaches of both jurisdictions to relocation law, and we consider what the findings tell us about the likelihood of finding ‘common principles’ to guide relocation law in a global context.

This chapter starts by giving a brief overview of the legal approaches to relocation in a number of jurisdictions, focusing on common law countries. We explain why England and New Zealand have been chosen as the particular focus of this research, and review the existing literature on relocation. As we will see from this review, little is known about the day-to-day reality of relocation disputes in the trial courts. This information gap, combined with the variation in legal approaches to relocation, gives rise to a number of issues. The chapter closes by setting out the Research Questions which this thesis will address.

Overview of Legal Approaches to Relocation Disputes

In order to make sense of the existing knowledge on relocation, it is necessary to provide an overview of the way in which the law addresses these disputes. However, despite the fact that most jurisdictions are guided by the same underlying objective – to promote the welfare

and best interests of the children concerned³⁹ – different countries currently take different approaches to relocation cases.

These legal approaches to relocation disputes range from those jurisdictions which tend to look favourably on relocation applications, to those which generally prevent such moves. This section provides a brief overview of some of these approaches. The aim is to give an understanding of the different ways in which relocation disputes can be disposed of by courts; but it is not intended to provide a complete picture of each jurisdiction on what is always a complex issue. In Chapter 3, we will look in detail at the law in England and New Zealand, but here the intention is simply to map the variety of approaches around the world.

While it is difficult to divide jurisdictions precisely, Thomas Foley helpfully suggests three categories: pro-relocation, anti-relocation, and neutral.⁴⁰ According to his conclusions:

A general acceptance of a proposal by a primary carer to relocate unless it is unreasonable or detrimental to the child's best interests would place England, France, Spain, South Africa, probably Scotland, and certain States of The United States including (eg) ... New Jersey, Washington and Minnesota in the 'pro-relocation' category.

A strong and almost unwavering commitment to not frustrating in any way the relationship of both parents (and in some cases the use of presumptions) would place New Zealand ... and certain States of The United States including (eg) Pennsylvania, Alabama, Virginia in the 'anti-relocation' category.

Countries such as Canada, Germany, Belgium, certain States of The United States including (eg) New York, California, and Florida ... can be categorized as 'neutral' since they have neither a presumption

³⁹ Ibid; see also, eg, Family Law Act 1975 (Cth), s 60CA (Australia); Divorce Act 1985, s 16 (Canada).

⁴⁰ T Foley, 'International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention on Child Abduction' (London: 2006), available online at www.family-justice-council.org.uk/docs/International_Child_Relocation_research_paper.pdf, 33.

in favour or against relocation and apply a fresh inquiry into each case as it arises.⁴¹

It can be seen that both common law and civil law jurisdictions are represented in all three of Foley's categories.⁴² Looking briefly at civilian approaches, significant variation is apparent. In France, for instance, although there is a requirement to notify the other parent of a proposed move,⁴³ the only way to prevent relocation is to transfer the child's residence.⁴⁴ By contrast, in Sweden, if the parents have shared (legal) custody then relocation is not permitted and the court has no power to allow it; the only option is for the parent wanting to relocate to apply for sole custody, which is difficult to obtain.⁴⁵

The overview which follows focuses on four common law jurisdictions, England, Canada, Australia and New Zealand. This focus reflects a shared legal tradition, meaning that decisions about relocation are being taken against the background of similar legal frameworks and approaches.

⁴¹ Ibid, 33-34 (footnote omitted). A few jurisdictions have been omitted from the quotation to account for changes which have taken place since Foley's lists were compiled. For example, Connecticut was listed as 'pro-relocation' but the case establishing this position, *Ireland v Ireland* 246 Conn 413, 428, 717 A2d 676 (1998) (Supreme Court, Connecticut, USA), was overruled by the Act Concerning the Relocation of Parents Having Custody of Minor Children 2006, making Connecticut 'anti-relocation'.

⁴² See similarly J Morley and J Maguire, 'International Relocation of Children: American and English Approaches' [2006] *IFL* 77; Family Law Council, 'Relocation: A Report to the Attorney General' (Canberra, Australia: 2006).

⁴³ *Code Civil*, Art 373-2.

⁴⁴ See R George, 'Practitioners' Approaches to Child Welfare After Parental Separation: An Anglo-French Comparison' [2007] *CFLQ* 337, 348-352, discussing internal relocation, but the same approach applies to international moves.

⁴⁵ This position was reported by delegates at the *International Child Abduction, Forced Marriage and Relocation Conference* (London Metropolitan University: 2010).

England and Wales

Court decisions relating to the upbringing of children in England are governed by the welfare principle, which states that ‘the child’s welfare shall be the court’s paramount consideration’.⁴⁶ This core provision is supplemented in certain circumstances by the *welfare checklist*,⁴⁷ which includes a number of factors relevant to welfare, such as the child’s wishes and feelings, the effect of any change in circumstances, the child’s needs, and each parent’s capacity to provide for those needs.

England is alone in those jurisdictions discussed here in dividing its legal approach to relocation between international and internal moves.⁴⁸ This distinction stems from the wording of the Children Act 1989, which provides that, where a residence order is in force,⁴⁹ removal of a child from the United Kingdom for more than one calendar month requires the consent of all those with parental responsibility or the leave of the court.⁵⁰ Because moves outside the UK require specific leave, the court concluded that no leave was required for moves within the UK.⁵¹ Internal relocation is, in effect, presumptively allowed, with restrictions on a parent’s place of residence within the country considered ‘truly

⁴⁶ Children Act 1989, s 1(1).

⁴⁷ Children Act 1989, s 1(3).

⁴⁸ For textbook summaries, see N Lowe and G Douglas, *Bromley’s Family Law* (10th edn, OUP, Oxford: 2007), 534-536 and 555-559; J Masson, R Bailey-Harris and R Probert, *Cretney’s Principles of Family Law* (8th edn, Sweet and Maxwell, London: 2008), 595-597 and 607-608; J Herring, *Family Law* (4th edn, Pearson, Harlow: 2009), 493-494 and 533-537.

⁴⁹ Children Act 1989, s 8.

⁵⁰ Children Act 1989, s 13(1)(b).

⁵¹ *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA).

exceptional'.⁵²

A different approach is taken to international relocation cases. The leading case is *Payne v Payne*,⁵³ as supplemented by later decisions,⁵⁴ in which Butler-Sloss P and Thorpe LJ both gave full judgments. *Payne* stresses that the welfare of the child is the paramount consideration,⁵⁵ and gives guidance as to what that means in the relocation context.

According to the President's summary:

All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in view of the arguments presented to us in this case, it may be worthwhile to repeat them:

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created by s 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.⁵⁶

⁵² *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

⁵³ [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, '*Payne*').

⁵⁴ Especially *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043.

⁵⁵ *Payne*, [26] and [83]; Children Act 1989, s 1(1).

⁵⁶ *Payne*, [85].

In Thorpe LJ's judgment, the following approach was suggested:

- (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?
- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? [Where the mother cares for the child or proposes to care for the child within a new family, the impact of refusal on the new family and on the stepfather or prospective stepfather must also be carefully calculated.⁵⁷]
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.⁵⁸

To summarise, the law on internal relocation in England strongly favours relocation, with restrictions on movement 'truly exceptional'.⁵⁹ In terms of international relocation,

⁵⁷ Thorpe LJ added this sentence in *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [11].

⁵⁸ *Payne*, [40]-[41].

⁵⁹ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

there is formally no presumption,⁶⁰ but proposals for relocation are given strong weight, as is the effect of refusal of leave to relocate. Consequently, the High Court has said that ‘usually the harm that is likely to flow from a reduction in contact will not found a conclusion that the welfare of the child would be best promoted by refusing an application by the primary or custodial parent to take the child abroad’.⁶¹ In effect, relocation is looked on favourably, and a well-planned and genuinely motivated application has good prospects of success.⁶²

Canada

In Canada,⁶³ family law jurisdiction is split between the Federal government and the Provinces/Territories, with the former having jurisdiction over children’s upbringing in divorce cases and the latter having jurisdiction either where the parents have separated but not divorced,⁶⁴ or were not married.⁶⁵ However, court decisions about children’s upbringing

⁶⁰ Commentators are unconvinced by this claim: see, eg, M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351; C Geekie, ‘Relocation and Shared Residence: One Route or Two?’ [2008] *Fam Law* 446.

⁶¹ *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, [24](10).

⁶² It should be noted that there are no data on success rates at trial, and one should be cautious about assessing general trends from appeal court cases, which are not representative: see further above, text from n 31.

⁶³ Thanks to Rollie Thompson for comments on this section.

⁶⁴ And so have not engaged the Divorce Act 1985.

⁶⁵ In practice, there is no substantial difference relevant to relocation, and the leading case of *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada) applies ‘not only to proceedings under the Divorce Act but also to proceedings under provincial legislation’: J Payne and M Payne, *Canadian Family Law* (3rd edn, Irwin Law, Toronto: 2008), 489.

are subject to various versions of the welfare principle, regardless of this distinction.⁶⁶

Looking at relocation law,⁶⁷ Canada has a two-stage process. First, the court asks whether the proposed move constitutes a material change in circumstances; if it will, ‘the issue becomes a reconsideration of which parent is better qualified to have custody of the child under the present circumstances’.⁶⁸ Whether a move constitutes a material change in circumstances depends on the facts, including both the distance of the move and the effect on the relationship with the other parent.⁶⁹

In the leading case of *Gordon v Goertz*,⁷⁰ McLachlin J offered a seven-point summary:⁷¹

- 1) The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
- 2) If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child’s needs and the ability of the respective parents to satisfy them.

⁶⁶ See, eg, Divorce Act 1985, s 16 (Federal government); Family Relations Act 1996, s 24 (British Columbia); Family Services Act 1980, s 1 (New Brunswick); Maintenance and Custody Act 1989, s 18(5) (Nova Scotia); Children’s Law Reform Act 1990, s 19 (Ontario).

⁶⁷ For a textbook summary, see J Payne and M Payne, *Canadian Family Law* (3rd edn, Irwin Law, Toronto: 2008), 485-491; a useful overview is provided by The Honourable Jacques Chamberland, ‘The Canadian Law of Parental Relocation’ [2010] *IFL* 17.

⁶⁸ J Payne and M Payne, *Canadian Family Law* (3rd edn, Irwin Law, Toronto: 2008), 488.

⁶⁹ *Spencer v Spencer* [2005] AJ No 934 (Court of Appeal, Alberta).

⁷⁰ [1996] 2 SCR 27 (Supreme Court, Canada).

⁷¹ Note the warning that ‘judicial summaries ... tend to take on a life of their own. Forgotten are the bodies of judgments, with their subtleties and nuances, the summary becomes a code in itself. So has been the case of McLachlin J’s judgment in *Gordon v Goertz*’: C Davies, ‘Custody and Mobility: *Gordon v Goertz* Revisited’ (2001-02) 19 *Canadian Fam LQ* 109, 109.

- 3) This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
- 4) The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
- 5) Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
- 6) The focus is on the best interests of the child, not the interests and rights of the parents.
- 7) More particularly the judge should consider, *inter alia*:
 - a) the existing custody arrangement and relationship between the child and the custodial parent;
 - b) the existing access arrangement and the relationship between the child and the access parent;
 - c) the desirability of maximizing contact between the child and both parents;
 - d) the views of the child;
 - e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - f) disruption to the child of a change in custody;
 - g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?⁷²

To these considerations, Rollie Thompson suggests that three other points can be discerned from McLachlin J's judgment:

- 8) Where a parent's access is specified in precise terms, or is frequent and meaningful, or assumes the child's principal residence will remain near the access parent, an intended move by the custodial

⁷² *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada), [49]-[50].

parent will be a material change of circumstance.

- 9) A custodial parent's reason or motive for moving is "conduct," to be considered only if relevant to the ability of that parent to act as parent of the child under section 16(9) of the *Divorce Act*.
- 10) Where a child's best interests are in issue, neither party bears a burden of proof, but each parent bears an evidential burden of leading evidence relevant to the trial judge's inquiry.⁷³

The law therefore requires all factors to be taken into account, with no presumptions about whether moving with the current care-giver will be better than remaining with the other parent (though existing custody arrangements are one relevant factor). Within this framework, there is an acceptance that 'the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration'.⁷⁴

According to recent research, relocation case outcomes vary sharply depending on whether the court characterises the relocating parent as a 'primary carer' or not.⁷⁵ In the period January 2005 – July 2008, 82 per cent of sole care relocation applications were granted at trial, whereas only two of 14 shared care cases ended with relocation.⁷⁶ While some Canadian commentators lament the current law for its lack of predictability⁷⁷ and for encouraging unnecessary re-litigation,⁷⁸ others argue that this uncertainty is inherent in

⁷³ R Thompson, 'Relocation and Relitigation: After Gordon v Goertz' (1998-99) 16 *Canadian Fam LQ* 461, 465 (footnotes omitted).

⁷⁴ *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada), [48].

⁷⁵ R Thompson, 'International Relocation from Canada' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

⁷⁶ E Jollimore and R Sladic, 'Mobility: Are We There Yet?' (2008) 27 *Canadian Fam LQ* 341, 370-371.

⁷⁷ R Thompson, 'Ten Years After Gordon: No Law, Nowhere' (2007) 35 *Reports of Family Law* (6th) 307.

⁷⁸ R Thompson, 'Relocation and Relitigation: After Gordon v Goertz' (1998-99) 16 *Canadian Fam LQ* 461.

decision-making based solely on the facts of each case, and that the current caselaw ‘is true to the majority view in *Gordon*: “Each case turns on its own unique circumstances”.’⁷⁹

Australia

Private child law in Australia is part of Federal law,⁸⁰ and underwent significant reform in 2006.⁸¹ Court decisions about the upbringing of children are governed by the welfare principle,⁸² guided by ‘primary considerations’ and ‘additional considerations’.⁸³ The primary considerations are ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’ and ‘the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’.⁸⁴ The 12 additional considerations include:

- the child’s views;
- the nature of the child’s relationship with each parent and with other people;
- each parent’s willingness to promote the child’s relationship with the other parent;

⁷⁹ E Jollimore and R Sladic, ‘Mobility: Are We There Yet?’ (2008) 27 *Canadian Fam LQ* 341, 381, quoting *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada), [49](5).

⁸⁰ Public law is currently within the jurisdiction of the States and Territories.

⁸¹ Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth); see R Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, Melbourne: 2009), esp chapters 6-9, 11 and 15.

⁸² Family Law Act 1975 (Cth) (hereafter, ‘FLA’), s 60CA.

⁸³ FLA, s 60CC.

⁸⁴ FLA, s 60CC(2).

- the likely effect on the child of any change in circumstances, including of any separation from either parent or anyone else with whom he or she has been living; and
- ‘the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis’.⁸⁵

Australian law presumes that it is in the best interests of a child for parents to have equal shared parental responsibility.⁸⁶ Parental responsibility means ‘all the duties, powers, responsibility and authority which, by law, parents have in relation to children’,⁸⁷ and those with parental responsibility must consult with each other about major issues relating to the child (including relocation) and ‘make a genuine effort to come to a joint decision’.⁸⁸

Relocation decisions are also affected by the law’s approach to shared care. Where equal shared parental responsibility is ordered, FLA section 65DAA requires the court to consider, in turn, whether the child should spend ‘equal time’ with each parent or, if not, ‘substantial and significant time’ with each parent. Starting with equal time, the court must:

- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
- (b) consider whether the child spending equal time with each of the

⁸⁵ FLA, s 60CC(3), and quoting s 60CC(3)(e).

⁸⁶ FLA, s 61DA.

⁸⁷ FLA, s 61B.

⁸⁸ FLA, s 60DAC.

parents is reasonably practicable; and

- (c) if it is, consider making an order ... for the child to spend equal time with each of the parents.⁸⁹

Where equal time is not ordered, the same process is then undertaken in relation to 'substantial and significant time'.⁹⁰

In terms of relocation,⁹¹ although everyone has a right of free movement under section 92 of the Australian Constitution, this right is subordinate to the best interests of the child.⁹² There are few statutory provisions specifically on relocation, but general principles promote strong parent-child relationships and therefore militate against relocation.

Indeed, the latest High Court decision on relocation focused entirely on the statutory provisions relating to shared care. In *MRR v GR*, the mother wished to move from the mining town of Mount Isa back to her home town of Sydney with the six-year-old child. The trial judge ordered equal shared parental responsibility and, consequently, considered care arrangements under FLA section 65DAA.⁹³ Finding that equal time would be in the child's interests, the judge so ordered, and the Family Court of Australia upheld his decision.⁹⁴

⁸⁹ FLA, s 65DAA(1).

⁹⁰ FLA, s 65DAA(2); 'substantial and significant time' must include weekend, holiday and other days, with each parent involved in the child's daily routine, as well as in days which are significant to the child and those significant to the parent: s 65DAA(3).

⁹¹ For textbook summaries, see B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, Melbourne: 2008), 302-308; G Monahan and L Young, *Family Law in Australia* (7th edn, Butterworths, Adelaide: 2009), 437-446; P Parkinson, *Australian Family Law in Context: Commentary and Materials* (4th edn, Thompson Reuters, Sydney: 2009), 808-816.

⁹² *U v U* (2002) 191 ALR 289 (High Court, Australia).

⁹³ Section 60DAA, set out above, text at n 89.

⁹⁴ *Rosa v Rosa* [2009] FamCAFC 81 (Family Court of Australia).

The High Court,⁹⁵ in a detailed textual analysis of the Act, held that section 65DAA had two pre-conditions to making an order for either ‘equal time’ shared care or ‘substantial and significant time’ shared care, namely that such an order be in the child’s best interests,⁹⁶ and that the order be ‘reasonably practicable’.⁹⁷ The courts below had failed to consider the second condition. As the High Court explained, the mother was unable to obtain reasonable accommodation in Mount Isa, had no employment prospects, and ‘was “definitely despondent” ... as ... she was isolated from her family’.⁹⁸ Consequently, had consideration been given to the ‘reasonable practicality’ of shared care in Mount Isa, ‘only one conclusion could have been reached, one which did not permit the making of the order’.⁹⁹ The case was remitted for retrial.

It is difficult to know what *MRR v GR* says about relocation law in Australia. Although the High Court criticised the judge for failing to consider that the mother’s unhappiness in Mount Isa made shared care in that location not reasonably practicable, the issue of the relocation itself is barely mentioned in the judgment. The decision turns entirely on the trial judge’s failure to consider one of the statutory considerations necessary to the making of an order for equal time shared care. The significance of a parent’s desire to move if it is otherwise reasonably practicable for them to remain is, therefore, unaddressed.

⁹⁵ *MRR v GR* [2010] HCA 4, unreported (High Court, Australia).

⁹⁶ FLA, s 65DAA(1)(a).

⁹⁷ FLA, s 65DAA(1)(b).

⁹⁸ *MRR v GR* [2010] HCA 4, unreported (High Court, Australia), [18].

⁹⁹ *Ibid*, [16].

In summary, Australian relocation law turns largely on general provisions relating to post-separation parenting. Although the child's best interests are paramount,¹⁰⁰ the analysis is guided by strong statutory considerations. It is presumed that equal shared parental responsibility is in a child's interests,¹⁰¹ and where equal shared parental responsibility is ordered, equal time or substantial and significant time shared parenting is favoured.¹⁰² Although all factors are considered in a relocation dispute, the factors on which the Australian legislation places emphasis would seem, in general, to disfavour relocation.¹⁰³

New Zealand

Court decisions about the upbringing of children in New Zealand are governed by the welfare principle,¹⁰⁴ supplemented by six 'principles relevant to child's welfare and best interests',¹⁰⁵ though the court ought only to take into account those which are relevant.¹⁰⁶ The principles are:

- a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing;
- b) there should be continuity in arrangements for the child's care,

¹⁰⁰ FLA, s 60CC.

¹⁰¹ FLA, s 61DA.

¹⁰² FLA, s 65DAA.

¹⁰³ See further below, text from n 198.

¹⁰⁴ Care of Children Act 2004 (hereafter, 'COCA'), s 4(1).

¹⁰⁵ COCA, s 5.

¹⁰⁶ COCA, s 4(5)(b).

development, and upbringing, and the child's relationships with his or her family, family group, whānau, hapū, or iwi,^[107] should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

- c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:
- d) relationships between the child and members of his or her family, family group, whānau, hapū, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing:
- e) the child's safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whānau, hapū, or iwi, or by other persons):
- f) the child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.¹⁰⁸

Looking at relocation,¹⁰⁹ the leading case remains the Court of Appeal decision in *D v S*,¹¹⁰ though the introduction of the Care of Children Act 2004 may have had some effect. In *D v S*, the Court of Appeal explicitly rejected the English law, describing it as 'marked by the emphasis on guidelines, by the prescribing of an approach ... and by the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer'.¹¹¹ In New Zealand, 'presumptive or *a priori* weighing is inconsistent

¹⁰⁷ Māori terms, roughly translated as 'family' (broadly conceived), 'sub-tribe' and 'tribe'.

¹⁰⁸ COCA, s 5.

¹⁰⁹ For textbook summaries (which pre-date the latest Court of Appeal decision), see D Webb *et al*, *Family Law in New Zealand* (14th edn, LexisNexis, Wellington: 2009), 271-300; B D Inglis, *New Zealand Family Law in the 21st Century* (Thomson Brookers, Wellington: 2007), 456-467.

¹¹⁰ [2002] NZFLR 116 (NZCA).

¹¹¹ *Ibid*, [46].

with the wider all-factor child-centred approach required'.¹¹²

The Care of Children Act 2004 imposed the section 5 principles on top of this 'all-factor' approach, but it was not clear whether the Act affected the substance of relocation law. While the High Court had stressed that welfare was still the paramount consideration and that section 5 should not be seen as a checklist,¹¹³ the Court of Appeal in *Bashir v Kacem* recently pointed out that '[p]lainly Parliament did not engage in a meaningless exercise in including s 5 in COCA'.¹¹⁴ In an approach which bears resemblance to a form of checklist, the Court of Appeal said that judges

...should consider each of the s 5 principles to determine whether it is relevant and, having identified those principles that are relevant, should take account of them in determining the best interests of the child. Because the analysis must be undertaken in the context of the circumstances of the particular case, the court must evaluate how the relevant principles should be taken into account – the assessment is a highly individualised one which cannot be undertaken in a formulaic way.¹¹⁵

The Court of Appeal also considered that the wording of the principles indicated that 'there is some priority or weighting as between the various principles'.¹¹⁶ In particular, the fact that the child's safety 'must' be protected gave that principle emphasis above the other principles which merely 'should' be pursued;¹¹⁷ there was also emphasis on the importance

¹¹² Ibid, [47].

¹¹³ See, eg, *Brown v Argyll* [2006] NZFLR 705 (NZHC); *S v L [Relocation]* [2008] NZFLR 237 (NZHC).

¹¹⁴ *Bashir v Kacem* [2010] NZCA 96, unreported, [49].

¹¹⁵ Ibid, [50].

¹¹⁶ Ibid, [51], citing M Henaghan, 'Doing the COCAcobana – Using the Care of Children Act for Your Child Clients' [2008] *NZLJ* 53.

¹¹⁷ COCA, s 5(e).

to children's welfare of an ongoing relationship with both parents.¹¹⁸ The effect of section 5 was, therefore, to

...provide a structure or framework for consideration of what best serves a child's welfare and best interests, with a partial indication of weighting as between principles. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child.¹¹⁹

However, since *Bashir* was further appealed to the Supreme Court, where the judgment remains pending,¹²⁰ the current position is not clear. While New Zealand has an 'all-factor child-centred approach' to relocation,¹²¹ it may no longer be true that all factors are presumptively equal. While protecting the child's safety is, perhaps, more likely to work in favour of relocation,¹²² promotion of parent-child relationships will almost always work against relocation applications. New Zealand was already seen as being 'anti-relocation' before *Bashir*,¹²³ and might become more so if the Supreme Court agrees with the Court of Appeal's position.¹²⁴

¹¹⁸ COCA, s 5(b).

¹¹⁹ *Bashir v Kacem* [2010] NZCA 96, unreported, [52] (footnotes omitted).

¹²⁰ The hearing took place on 12 August 2010.

¹²¹ *D v S* [2002] NZFLR 116 (NZCA), [47].

¹²² Although note that indirect psychological effects on children caused by parental conflict were said not to fall under s 5(e) in *Bashir v Kacem* [2010] NZCA 96, unreported, [62](a).

¹²³ T Foley, 'International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention on Child Abduction' (London: 2006), available online at www.family-justice-council.org.uk/docs/International_Child_Relocation_research_paper.pdf. See also the views of New Zealand practitioners, discussed in Chapter 5.

¹²⁴ See Chapter 3, text from n 227.

Summary

It can be seen from this brief overview of relocation law in England, Canada, Australia and New Zealand that there is a range of approaches to relocation disputes. Despite the fact that all four jurisdictions place the welfare of the child as the paramount consideration, the interpretation of that requirement in the relocation context varies considerably. At one end of the spectrum is England,¹²⁵ where internal relocation is automatically allowed and international relocation is looked upon favourably (though technically there is no presumption). At the other end are Australia and New Zealand, where relocation is thought hard to achieve because of increasing focus on strong parent-child relationships. Canada is somewhere in between, with no particular weighting of factors (which raises concerns about unpredictability).

In order to examine relocation law in more detail, this thesis will focus on two jurisdictions, namely England and New Zealand. These jurisdictions have been selected for a number of reasons. One is that they represent the range of approaches to relocation disputes, being at the two ends of the spectrum found in the common law world. A second is that the New Zealand Court of Appeal specifically rejected the English law;¹²⁶ this suggests that New Zealand's approach is intended to remedy perceived problems with the English law, which was considered in detail.¹²⁷ Third, as will be explored in Chapter 3, England and

¹²⁵ Note, though, that England is at one end of the common law spectrum, not of the global spectrum. Some jurisdictions are more pro-relocation, having no provision for preventing relocation by a parent with sole (legal) custody.

¹²⁶ *D v S* [2002] NZFLR 116 (NZCA).

¹²⁷ The Australian courts have also considered *Payne*, but not in the detail with which the New Zealand court analysed it: see, eg, *U v U* (2002) 191 ALR 289 (High Court, Australia), [92].

New Zealand have significant similarities, both in their legal and their social contexts, although there are also differences. Finally, the unitary legal system in New Zealand makes the country a more straightforward comparator than would be Australia or Canada, with their split systems.

Having thus seen, in summary, the ways in which courts address relocation disputes, we are now in a position to turn to the existing literature and to see what commentators have said about relocation law already. Because the thesis focuses on the approaches to relocation in England and New Zealand, the literature review will primarily cover existing research in those jurisdictions. However, since relocation disputes have significant commonalities across the common law world, relevant literature from other jurisdictions is also reviewed, especially that in Australia, with which New Zealand has strong ties.¹²⁸

Literature Review

As we have seen, relocation disputes are part of the law's approach to private law child disputes, governed by the welfare principle – that is, that the child's welfare and best interests are the court's paramount consideration. Within this field, there are three particular areas of literature with which relocation overlaps.

¹²⁸ A leading New Zealand relocation decision reviewed approaches to relocation in England, Australia and Canada: *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (NZCA), 499-500. Cf *D v S* [2002] NZFLR 116 (NZCA), [36]: 'decisions of Courts outside New Zealand are likely to be of limited assistance'.

First, there is a sizeable literature on the welfare principle itself.¹²⁹ Some of that literature relates specifically to relocation, and some relocation literature links to the welfare principle more broadly; much of that literature will be examined here, with additional discussion relating to the welfare principle in general also found in the concluding chapter.¹³⁰

Second, relocation disputes are closely connected to residence and contact law.¹³¹ Australian research suggests that relocation is often ‘part of an on-going story’ of litigation, preceded by high levels of conflict over residence, contact and other aspects of parenting.¹³² In addition, many relocation applications are met with a cross-application for residence by the other parent,¹³³ and the reason for most opposition to relocation is the diminution in contact which relocation would produce.¹³⁴ Relocation disputes therefore sit as part of a spectrum of private law disputes, interwoven with residence and contact. The sizeable

¹²⁹ For textbook summaries pointing to relevant literature, see, eg, N Lowe and G Douglas, *Bromley’s Family Law* (10th edn, OUP, Oxford: 2007), chapter 10; J Herring, *Family Law* (4th edn, Pearson, Harlow: 2009), 417-437; J Masson, R Bailey-Harris and R Probert, *Cretney’s Principles of Family Law* (8th edn, Sweet and Maxwell, London: 2008), chapter 19; S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (OUP, Oxford: 2007), 586-609. Key literature includes R Mnookin, ‘Child-Custody Adjudication: Judicial Functions In The Face Of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226; H Reece, ‘The Paramountcy Principle: Consensus Or Construct?’ (1996) 49 *Current Legal Problems* 267; J Eekelaar, ‘Beyond the Welfare Principle’ [2002] *CFLQ* 237. On the historical origins of welfare as the paramount consideration in guiding the courts’ decisions relating to children in English law, see S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford: 2003), 566-573.

¹³⁰ Chapter 7, text from n 83.

¹³¹ Indeed, relocation disputes are often brought under the same section of the relevant legislation as residence or contact disputes: see, eg, COCA, s 48; Children Act 1989, s 8. (In England, international relocation cases can also purportedly be brought under Children Act 1989, s 13, but cf R George, ‘Changing Names, Changing Places: Reconsidering Section 13 of the Children Act 1989’ [2008] *Fam Law* 1121, discussed in Chapter 5, text from n 98.

¹³² J Behrens, ‘Court Decisions About Relocation in Australia: An Empirical Study Focusing on Parents’ Experiences’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

¹³³ *Payne*, [42].

¹³⁴ *Payne*, [27].

literature on residence and contact is not reviewed in depth here,¹³⁵ but much of that work is drawn on as the thesis progresses.

Finally, there is significant overlap between international relocation and international parental child abduction,¹³⁶ both of which involve the cross-border movement of children with one parent; however, the literature on abduction is not reviewed here as, despite this factual similarity, there are important distinctions. Relocation cases are requests for permission to relocate *prior to the event* in the absence of consent from the other parent, whereas abduction cases are requests for a court to return a child where removal has *already taken place* without consent. This difference is crucial in legal terms: relocation cases are part of the domestic law of the country in which the child was originally resident, whereas abduction cases are governed either by international law¹³⁷ or the national law of the country to which the child has been taken,¹³⁸ depending on whether the destination country is a

¹³⁵ For textbook summaries pointing to relevant literature, see, eg, N Lowe and G Douglas, *Bromley's Family Law* (10th edn, OUP, Oxford: 2007), chapter 12; J Herring, *Family Law* (4th edn, Pearson, Harlow: 2009), chapter 9; J Masson, R Bailey-Harris and R Probert, *Cretney's Principles of Family Law* (8th edn, Sweet and Maxwell, London: 2008), 592-604; S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (OUP, Oxford: 2007), chapter 11. Useful literature includes A Bainham *et al* (eds), *Children and Their Families: Contact, Rights and Welfare* (Hart, Oxford: 2003); M Maclean (ed), *Parenting After Partnering: Containing Conflict After Separation* (Hart, Oxford: 2007).

¹³⁶ For overviews, see A-M Hutchinson, R Roberts and H Setright, *International Parental Child Abduction* (Jordan, Bristol: 1998); P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (OUP, Oxford: 1999); N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), chapters 12-18.

¹³⁷ N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), chapters 12-19.

¹³⁸ *Ibid*, 457-462.

signatory of a relevant international Treaty or not.¹³⁹ This legal difference distinguishes abduction from relocation as topics of legal enquiry and therefore, although we will see occasional reference to abduction throughout this thesis, it is not a main area of focus, and the abduction literature is not reviewed here.

The review starts with the relocation literature in England which is largely doctrinal in its methodological approach, and falls into four categories. One group compares the English law with other jurisdictions, often without making any particular comment on the English approach. A second offers a broad defence of the *Payne v Payne* approach to relocation, seeing it as an appropriate interpretation of the requirements of the welfare principle. A third view disputes the way in which the English courts apply the welfare principle in the relocation context. The fourth group uses relocation law to examine the question of whether decisions ought to be based purely on welfare at all.

This literature provides a detailed analysis of the reported caselaw, and offers an excellent discussion of the approach of the higher courts to relocation law. However, when we turn to look at the literature in other jurisdictions, it becomes clear that there are a number of gaps in the existing English scholarship. In particular, academics in other jurisdictions have increasingly supplemented traditional doctrinal analyses with other methodological and disciplinary perspectives. There is a developing body of work, especially in New Zealand and Australia, involving empirical research specifically focused

¹³⁹ The main Treaty is the Hague Convention on the Civil Aspects of International Child Abduction 1980, which has 82 contracting states; other international instruments include the European Convention on the Recognition and Enforcement of Custody of Children and on Restoration of Custody of Children 1980; and Council Regulation (EC) No 2201/2003 (the Brussels II revised Regulation). There are also bi-lateral agreements between individual states, such as the UK-Pakistan Judicial Protocol 2003; see N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), chapter 23.

on relocation.¹⁴⁰ When we look back to the English scholarship, there is almost no literature of this kind, and it will be suggested that the use of empirical approaches to relocation research in New Zealand and Australia highlights a gap which can usefully be filled in England.

English relocation literature – doctrinal analysis

Relocation disputes are not a new phenomenon in English law,¹⁴¹ but as a subject of academic enquiry they are a relative newcomer.¹⁴² One of the first publications specifically

¹⁴⁰ Cf debates, especially in America, about the utility of general psychological and sociological research to relocation scholarship. For a useful summary, see J Herring and R Taylor, 'Relocating Relocation' [2006] *CFLQ* 517, 519-522; on the difficulty of translating this research into the relocation context, see B Horsfall and R Kaspiw, 'Relocation in Separated and Non-Separated Families: Equivocal Evidence from the Social Science Literature' (2010) 24 *AJFL* 34. Key literature in this controversial and at times vitriolic debate includes: C Bruch and J Bowermaster, 'The Relocation of Children and Custodial Parents: Public Policy, Past and Present' (1995) 30 *FamLQ* 245; J Wallerstein and T Tanke, 'To Move Or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce' (1996) 30 *FamLQ* 305; J Tucker, J Marx and L Long, '"Moving On": Residential Mobility and Children's School Lives' (1998) 71 *Sociology of Education* 111; W Austin, 'Relocation Law and the Threshold of Harm: Integrating Legal and Behavioural Perspectives' (2000) 34 *FamLQ* 63; R Warshak, 'Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited' (2000) 34 *FamLQ* 83; J Kelly and M Lamb, 'Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?' (2003) 17 *Journal of Family Psychology* 193; S Braver, I Ellman and W Fabricius, 'Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations' (2003) 17 *Journal of Family Psychology* 206; J Wallerstein, 'Comments on Sanford Braver's "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations"' (2003), online at <http://www.thelizlibrary.org/~liz/liz/braver-wallerstein.html> (last accessed 11 May 2010); N Glenn and D Blankenhorn, 'Does Moving After Divorce Damage Kids?' (2003), online at <http://www.thelizlibrary.org/lamusga/glenn.html> (last accessed 11 May 2010); C Bruch, 'Sound Research or Wishful Thinking in Child Custody Case? Lessons from Relocation Law' (2006) 40 *Fam LQ* 281; P Stahl and L Drozd (eds), *Relocation Issues in Child Custody Cases* (The Haworth Press, Binghamton, NY: 2006); W Austin, 'Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility on Children of Divorce' (2008) 46 *Family Court Review* 137; N Taylor and M Freeman, 'International Research Evidence on Relocation: Past, Present and Future' (2010) 44 *Fam LQ* forthcoming.

¹⁴¹ See Chapter 3, text from n 40.

¹⁴² Moreover, the literature focuses almost entirely on international relocation; on internal relocation, see P Pressdee, 'Relocation, Relocation, Relocation: Rigorous Scrutiny Revisited' [2008] *Fam Law* 220, 223-224; R George, 'Re L (Internal Relocation: Shared Residence Order)' [2009] *EWCA Civ* 20, [2009] 1 *FLR* 1157' (casenote) [2010] *JSWFL* 71.

on relocation, other than brief case commentaries in *Family Law*,¹⁴³ was a short article in 1989.¹⁴⁴ There followed sporadic commentary through the 1990s,¹⁴⁵ culminating at the end of that decade with a suggestion that ‘the bandwagon may be beginning to roll’ in relation to relocation.¹⁴⁶ This prediction was borne out in the literature, though the real trigger for scholars appears to have been *Payne* in February 2001.¹⁴⁷

As suggested earlier, the current literature can be divided into four broad categories. First there is literature which takes no particular view of the English law,¹⁴⁸ and discuss its provisions in comparison with other jurisdictions while leaving readers to come to their own conclusions about the pros and cons of each. For example, Anna Worwood provides a helpful summary of the approaches taken in eight jurisdictions; she acknowledges that relocation is a difficult issue and that many wonder whether the English approach is correct, but offers no particular view on those questions.¹⁴⁹ Thomas Foley’s research similarly

¹⁴³ See, eg, L Polak, ‘Note on *Bevan v Bevan*’ [1974] *Fam Law* 127; N Lowe, ‘Note on *Lonslow v Hennig* (Formerly *Lonslow*)’ [1986] *Fam Law* 304.

¹⁴⁴ M Mears, ‘Removal of Children from the Jurisdiction’ [1989] *Fam Law* 322.

¹⁴⁵ See, eg, C Barton, ‘Emigration After Divorce: (Not) the Children Act 1989’ (1990) 24 (1) *The Law Teacher* 81; G Bishop, ‘Brookside or Stateside: A Residence Battle’ (1993) 137 *Sol J* 556; M Hayes and C Williams, *Family Law: Principles, Policy and Practice* (1st edn, Butterworths, London: 1995), 243-248; C Barton, ‘When Did You Next See Your Father? Emigration and the One-Parent Family: *Re T* (Removal from Jurisdiction); *Goertz v Gordon* (formerly *Goertz*)’ [1997] *CFLQ* 73.

¹⁴⁶ A Kirkconel, ‘Removing Children From The Jurisdiction’ [1999] *Fam Law* 333, 334.

¹⁴⁷ A Perry, ‘Case Commentary: Leave to Remove Children from the Jurisdiction: *Payne v Payne*’ [2001] *CFLQ* 455; A Bainham, ‘Taking Children Abroad: Human Rights, Welfare and the Courts’ [2001] *CLJ* 489.

¹⁴⁸ See, eg, W Longrigg, ‘The Leave to Remove Debate’ [2005] *Fam Law* 911.

¹⁴⁹ A Worwood, ‘International Relocation - The Debate’ [2005] *Fam Law* 621; see also The Hon Justice Tim Carmody, ‘Child Relocation: An Intractable International Family Law Problem’ (2007) 45 *Family Court Review* 214.

provides a neutral overview of approaches.¹⁵⁰ While such summaries helpfully highlight the range of approaches to relocation, they have not yet offered critical engagement which analyses the benefits and problems of different approaches.

The second group of commentators is in broad support of the English approach to relocation.¹⁵¹ District Judge Glenn Brasse discusses the English cases and suggests that '[t]here are sound psychological, emotional and policy considerations to support this approach'.¹⁵² The judge points out that the law 'offers a high degree of predictability which facilitates the task of advising the parties' and 'may also encourage constructive definition of post-location contact, preserving and helping to adapt family relationships'.¹⁵³ Piers Pressdee, while critical of the interpretation subsequently given to aspects of *Payne*, is in broad agreement with its approach.¹⁵⁴ This work is helpful in giving insight into the day-to-day experience of the relocation practitioner, which is difficult to obtain from other sources, though the writers tend to draw mainly from personal experience, which may or may not be representative.

The third approach challenges the way in which the welfare principle is interpreted by

¹⁵⁰ T Foley, 'International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention on Child Abduction' (London: 2006), available online at www.family-justice-council.org.uk/docs/International_Child_Relocation_research_paper.pdf.

¹⁵¹ See, eg, K Beatson and S Turrell, 'Leave to Remove: The Carer's Prerogative?' (2005-6) 52 (Dec/Jan) *Fam LJ* 9.

¹⁵² District Judge G Brasse, 'The Payne Threshold: Leaving the Jurisdiction' [2005] *Fam Law* 780, 782.

¹⁵³ *Ibid*, 783.

¹⁵⁴ P Pressdee, 'Relocation, Relocation, Relocation: Rigorous Scrutiny Revisited' [2008] *Fam Law* 220.

the English courts in the relocation context.¹⁵⁵ The leading work in this area is a detailed caselaw analysis by Mary Hayes,¹⁵⁶ aptly described as ‘a powerful and stimulating critique’ of relocation law.¹⁵⁷ In an outstanding review of nearly four decades of relocation decisions, Hayes argues that ‘the court has focused on too narrow a range of questions when determining a child’s best interests [in relocation cases]’.¹⁵⁸ She provides a detailed critique of *Payne*, suggesting that it ‘imposes a gloss on the welfare principle’ by being overly directive as to the considerations relevant to relocation decisions.¹⁵⁹ The result of this guidance, Hayes says, is to require trial judges to give especial weight to considerations that favour applicants, which ‘offends the fundamental principle that justice should be even-handed’.¹⁶⁰

This ‘deeply flawed’ English approach to relocation is worsened, according to Hayes, by the Court of Appeal’s insistence that judges should ‘treat discretion-based [relocation]

¹⁵⁵ See, eg, M Mears, ‘Removal of Children from the Jurisdiction’ [1989] *Fam Law* 322; A Perry, ‘Case Commentary: Leave to Remove Children from the Jurisdiction: *Payne v Payne*’ [2001] *CFLQ* 455; R Spon-Smith, ‘Relocation Revisited’ [2004] *Fam Law* 191; C Geekie, ‘Relocation and Shared Residence: One Route or Two?’ [2008] *Fam Law* 446, 450; M Robinson, ‘Relocation and Leave to Remove’ (2009), online at www.thecustodyminefield.com, 12; D Hodson, ‘Every Family Matters: An In-Depth Review of Family Law in Britain’ (Centre for Social Justice, London: 2009), 165; R George, ‘The Shifting Law: Relocation Disputes in New Zealand and England’ (2009) 12 *The Otago Law Review* 107.

¹⁵⁶ M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351 (hereafter, ‘M Hayes, ‘Relocation Cases’’); this article builds on ideas which can be seen developing in M Hayes and C Williams, *Family Law: Principles, Policy and Practice* (1st edn, Butterworths, London: 1995), 243-248, and M Hayes and C Williams, *Family Law: Principles, Policy and Practice* (2nd edn, Butterworths, London: 1999), 311-316.

¹⁵⁷ J Herring and R Taylor, ‘Relocating Relocation’ [2006] *CFLQ* 517, 518 (hereafter, ‘J Herring and R Taylor, ‘Relocating Relocation’’)

¹⁵⁸ M Hayes, ‘Relocation Cases’, 351.

¹⁵⁹ *Ibid*, 362.

¹⁶⁰ *Ibid*, 364.

rulings as “authoritative”;¹⁶¹ this enables the appeal court to interfere with judges’ decisions by ruling that discretionary decisions refusing relocation constitute an error of law. Hayes considers that this approach robs trial judges of any real discretion in relocation decisions because ‘[t]he Court of Appeal has ruled that a judge makes a serious error where he gives less weight to the impact on the mother of denial of leave than he does to other factors relevant to the welfare checklist’.¹⁶² This compelling analysis is central to this thesis, and is discussed further when we review the development of the English law in Chapter 3.

The final area of literature on relocation in England uses relocation to examine the welfare principle and its application to child law disputes more broadly. John Eekelaar’s work shows the use that can be made of relocation cases in this way.¹⁶³ Eekelaar describes a number of existing criticisms of the welfare principle, one of which he calls ‘the *lack of transparency* objection’: using the welfare principle ‘conceals the fact that the interests of others, or, perhaps, untested assumptions about what is good for children, actually drive the decision’.¹⁶⁴ Eekelaar highlights relocation cases as ‘demonstrat[ing] the classic signs of the lack of transparency objection’: the interests of resident parents are promoted under the guise of the interests of children.¹⁶⁵

Eekelaar’s work, amongst others’,¹⁶⁶ is drawn on by Jonathan Herring and Rachel

¹⁶¹ Ibid, 366.

¹⁶² Ibid, 370.

¹⁶³ J Eekelaar, ‘Beyond the Welfare Principle’ [2002] *CFLQ* 237.

¹⁶⁴ Ibid, 237.

¹⁶⁵ Ibid, 242.

¹⁶⁶ Especially S Harris-Short, ‘Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution?’ [2005] *CFLQ* 329.

Taylor when they use relocation as a case study to argue that the English courts have taken inadequate account of the introduction of the Human Rights Act 1998.¹⁶⁷ They suggest that ‘the problem with the relocation cases is not that the *Payne* discipline prevents a full welfare analysis [as Hayes argues¹⁶⁸], but that the welfare principle prevents a full analysis of the interests of all those affected by the decision’.¹⁶⁹ In particular, they argue that resident parents have ‘three important interests ...: financial, emotional and autonomy’,¹⁷⁰ while for non-resident parents the key interest is ‘the right to maintain and develop a relationship with his child’.¹⁷¹ The welfare approach, Herring and Taylor say, ‘automatically assumes that *any* interference with the rights of family members is justified in order to protect the welfare of the child’.¹⁷² By contrast, a rights-based approach under the Human Rights Act would enable the court to give attention to all the ‘underlying values raised in each particular case’¹⁷³ – though Herring and Taylor suggest that this approach may have little impact on case outcomes as compared with the current law.¹⁷⁴ These discussions of the welfare principle themselves are of the highest importance, and we take up this issue in Chapter 7, when we ask about the use of the welfare principle as an international standard for relocation

¹⁶⁷ J Herring and R Taylor, ‘Relocating Relocation’; see similarly A Bainham, ‘Taking Children Abroad: Human Rights, Welfare and the Courts’ [2001] *CLJ* 489.

¹⁶⁸ Above, text from n 156; the authors note that if welfare is the correct test ‘then, as Mary Hayes has argued, the *Payne* discipline appears to be an unwarranted judicial gloss on the statutory test which inhibits judges from freely assessing welfare in the individual case’: J Herring and R Taylor, ‘Relocating Relocation’, 522.

¹⁶⁹ J Herring and R Taylor, ‘Relocating Relocation’, 522.

¹⁷⁰ *Ibid.*, 523.

¹⁷¹ *Ibid.*, 525.

¹⁷² *Ibid.*, 527.

¹⁷³ *Ibid.*, 531.

¹⁷⁴ *Ibid.*, 532. See also S Choudhry and J Herring, *European Human Rights and Family Law* (Hart, Oxford: 2010); relocation is discussed at 282-285.

disputes.¹⁷⁵

To summarise, the relocation literature in England offers detailed and varied accounts of the English law. Though practitioners have supplemented this discussion with accounts of their experiences, the dominant methodological approach is doctrinal, based on reported caselaw. However, while such analysis is important, it risks missing a number of key aspects. First, as we saw earlier,¹⁷⁶ reported caselaw is not a representative sample, and may not reflect ‘normal’ cases in the trial courts. Second, discussions of reported cases inevitably cannot account for the role of the law’s ‘shadow’ in which pre-trial bargaining occurs,¹⁷⁷ and in particular the role of lawyers as ‘gatekeepers’.¹⁷⁸ As we turn to the literature in other jurisdictions, we see that interdisciplinary empirical research is increasingly being used to start addressing these issues.

Literature outside England – doctrinal and empirical work

The relocation literature outside England is copious. The purpose of this section is not to

¹⁷⁵ Chapter 7, text from n 83.

¹⁷⁶ Above, text from n 31.

¹⁷⁷ R Mnookin and L Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale LJ* 950.

¹⁷⁸ J Behrens, B Smyth and R Kaspiew, ‘Outcomes in Relocation Decisions: Some New Data’ (2010) 24 *AJFL* 97, 100.

review all of this material, much of which is jurisdiction-specific in nature,¹⁷⁹ but rather to identify some key debates relevant to this thesis.

As in England, some literature elsewhere takes a predominantly doctrinal approach, though a number of different perspectives are apparent. One perspective, taken by several scholars, emphasises the gender dimension of relocation law.¹⁸⁰ The fullest expression of this argument comes from Juliet Behrens, whose feminist commentaries on relocation law are broadly supportive of relocation applications being allowed. Behrens notes that relocation has potentially huge gender implications, and that ‘restrictions on residence parents argued for by contact parents are usually restrictions on women argued for by

¹⁷⁹ In addition to the work noted elsewhere, examples of literature relevant to national debates include:

Canada: R Thompson, ‘“Beam Us Up Scotty”: Parents and Children on the Trek’ (1995-96) 13 *Canadian Fam LQ* 219; C Davies, ‘Mobility Rights and Child Custody: A Contradiction in Terms?’ (1997) 15 *Canadian Fam LQ* 115; M Bailey and M Giroux, *Relocation of Custodial Parents: Final Report* (Status of Women Canada, Ottawa, Canada: 1998); J McLeod, ‘Annotation to *Singer v Davila-Singer*’ (2003) 42 *Reports of Family Law* (5th) 202; N Bala and J Harris, ‘Parental Relocation: Applying the Best Interests of the Child Test in Ontario’ (2006) 22 *Canadian J Fam Law* 127; E El Fateh, ‘A Presumption for the Best?’ (2009) 25 *Canadian J Fam Law* 73.

The United States: C Ford, ‘Untying the Relocation Knot: Recent Developments and a Model for Change’ (1997) 7 *Columbia J of Gender and Law* 1; J Bowermaster, ‘Relocation Custody Disputes Involving Domestic Violence’ (1997) 46 *U Kansas Law Rev* 433; C Kindregan, ‘Family Interests in Competition: Relocation and Visitation’ [2002] *Suffolk U Law Rev* 31; T Glennon, ‘Mobility and the Post-Divorce Family: Resolution of Relocation Disputes in the US’ in K Boele-Woelki (ed) *Common Core and Better Law in European Family Law* (Intersentia, Antwerp: 2005); J Morley and J Maguire, ‘International Relocation of Children: American and English Approaches’ [2006] *IFL* 77; The Hon D Duggan, ‘Rock-Paper-Scissors: Playing the Odds with the Law of Child Relocation’ (2007) 45 *Family Court Review* 193; M Weiner, ‘Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation’ (2007) 40 *Uni of California Davis LR* 1747; P Messitte, ‘Relocation of Children: Law and Practice in the United States’ [2010] *IFL* 73.

¹⁸⁰ See, eg, S Boyd, ‘Child Custody, Relocation and the Post-Divorce Family Unit: *Gordon v Goertz* at the Supreme Court of Canada’ (1997) 9 *Canadian J of Women and Law* 447; S Boyd, ‘Gendering the Best Interests Principle: Custody, Access and Relocation in a Mobile Society’ in H Niman and G Sadvari (eds) *Family Law: ‘The Best Interests of the Child’* (Law Soc of Upper Canada, Ottawa: 2000); F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009), 55-60; S Boyd, ‘Autonomy for Mothers? Relational Theory and Parenting Apart’ (2010) 18 *Feminist Legal Studies* forthcoming.

men’.¹⁸¹ Moreover,

...restrictions on relocation operate unfairly against the person who is likely to be providing the majority of care to a child. In doing so, they compound the social and economic disadvantages that accompany the provision of care, particularly where the caregiver is a woman.¹⁸²

Behrens suggests that the law implies that ‘residence parents (usually mothers) should be expected to sacrifice their interests to what a judge perceives as being in their child’s best interests, but contact parents (typically fathers) should not’.¹⁸³

This work contrasts with doctrinal work by others, especially Patrick Parkinson. Parkinson has written several articles on relocation, making what the Chief Justice of the Family Court of Australia has aptly described as an ‘erudite and incisive, but not uncontroversial, contribution to the relocation “debate” in Australia’.¹⁸⁴ Part of the debate surrounding Parkinson’s work stems from the limited discussion of the assumptions underpinning his writing,¹⁸⁵ in a field where other scholars have been more explicit in noting their perspectives.¹⁸⁶

¹⁸¹ J Behrens, ‘A Feminist Perspective on *B and B* (The Family Court and Mobility)’ (1997) 2 *Sister in Law* 65, 66.

¹⁸² J Behrens, ‘U v U: The High Court on Relocation’ [2003] *Melbourne U Law Rev* 572, 584.

¹⁸³ *Ibid*, 585.

¹⁸⁴ See, eg, Chief Justice Bryant, ‘Freedom of Movement in an Era of Shared Parenting: The Difference in Judicial Approaches: A Critique’ [2010] *IFL* 11, 11.

¹⁸⁵ *Ibid*.

¹⁸⁶ Behrens, for instance, acknowledges her feminist approach in the title of one article and the opening section of the other: J Behrens, ‘A Feminist Perspective on *B and B* (The Family Court and Mobility)’ (1997) 2 *Sister in Law* 65; J Behrens, ‘U v U: The High Court on Relocation’ [2003] *Melbourne U Law Rev* 572, 573.

In one somewhat controversial article,¹⁸⁷ Parkinson locates relocation disputes within a conception of parenthood as an ‘indissoluble’ tie which, he argues, means that although adult relationships can be ended, ‘the freedom which that dissolution brings is limited by the connection of parenthood’.¹⁸⁸ Parkinson claims that relocation ‘can only be resolved by developing a *prima facie* policy position on where the balance is to be found between post-divorce autonomy and the importance to both the child and to the non-resident parent of their parent-child relationship’.¹⁸⁹ Parkinson favours restricting relocation, saying that being ‘honest’ about the relocation debate requires us to recognise ‘that relocation cases raise fundamental issues about the importance which should be given to the best interests of children in the post-separation family’.¹⁹⁰

Similar themes are found in another of Parkinson’s articles, which expressly proposes to give guidance to judges that ‘an outcome that allows the child to form and maintain strong attachments with both parents, and to spend time on a frequent basis with both parents ... shall be preferred’.¹⁹¹ Elsewhere, Parkinson suggests that relocation is an inherently risky activity for both parent and child in terms of emotional and psychological wellbeing,¹⁹² but without acknowledging that an individual’s circumstances may mean that

¹⁸⁷ See also the debate between Parkinson and Chisholm, centring on relocation, in R Chisholm, ‘Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006’ (2007) 21 *AJFL* 143; P Parkinson, ‘The Values of Parliament and the Best Interests of Children: A Response to Professor Chisholm’ (2007) 21 *AJFL* 213; R Chisholm, ‘A Brief Reply to Professor Parkinson’ (2007) 21 *AJFL* 229.

¹⁸⁸ P Parkinson, ‘Family Law and the Indissolubility of Parenthood’ (2006) 40 *Fam LQ* 237, 281; relocation specifically is discussed at 256-268. See further Chapter 7, text from n 116.

¹⁸⁹ *Ibid*, 266.

¹⁹⁰ *Ibid*, 267.

¹⁹¹ P Parkinson, ‘Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation’ (2008) 36 *Federal Law Review* 145, 170.

¹⁹² P Parkinson, ‘The Realities of Relocation: Messages from Judicial Decisions’ (2008) 22 *AJFL* 35.

not relocating can also be inherently risky.

However, although these articles offer a useful discussion, they also highlight Parkinson's assumptions, namely that most parents who seek to move do so for their own purposes, and that maximal contact with both parents is always in children's best interests. With those assumptions in place, he presents relocation as an anti-child decision, and as one which promotes the relocating parent's interests at the expense of the child's.

Parkinson's view is, at best, controversial,¹⁹³ and represents an example of what Eekelaar might call an 'objectivized' approach to best interests.¹⁹⁴ Such an approach 'draws on beliefs which indicate conditions which are deemed to be in the child's best interests' and 'presuppose[s] various states of affairs the experience of which are thought to have beneficial or adverse results for the child'.¹⁹⁵ By presupposing that frequent time with both parents should be favoured as almost always being in a child's best interests, relocation might indeed appear as a debate between the best interests of the child and the wishes of the would-be relocating parent. However, if one does not accept this 'objectivized' construction of best interests, instead taking the view that the significance of different factors to different children's welfare will vary,¹⁹⁶ then relocation is not a debate about children's interests

¹⁹³ See, eg, R Chisholm, 'A Brief Reply to Professor Parkinson' (2007) 21 *AJFL* 229; Chief Justice Bryant, 'Freedom of Movement in an Era of Shared Parenting: The Difference in Judicial Approaches: A Critique' [2010] *IFL* 11.

¹⁹⁴ J Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *IJLF* 42, 46.

¹⁹⁵ *Ibid*, 46-47.

¹⁹⁶ See, eg, *D v S* [2002] NZFLR 116 (NZCA); *Re B (A Child) (Residence Order)* [2009] UKSC 5, [2010] 1 FLR 551; J Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *IJLF* 42; R Chisholm, 'Making It Work: The Family Law Amendment (Shared Parental Responsibility) Act 2006' (2007) 21 *AJFL* 143.

versus adults' interests, but is rather a debate about which factors best promote each individual child's interests given the particular circumstances.

The final doctrinal approach focuses on detailed caselaw analysis, similar to Hayes' work in England. In Australia,¹⁹⁷ doctrinal work of this nature has been done by Parkinson. Looking in detail at legislative changes and the Australian caselaw,¹⁹⁸ Parkinson assesses apparent variation in the approach of different judges within Australia, and suggests from a sample of 58 court decisions under the Family Law Amendment (Shared Parental Responsibility) Act 2006 that the success rate of relocation applications was just over 50 percent, with 'the pattern of decisions suggest[ing] that relocation has become significantly more difficult than it was before 2006'.¹⁹⁹

In New Zealand, Mark Henaghan has produced detailed studies, analysing the outcomes of virtually all trial court decisions over many years. His work has two focal points. One is shifts in the weight given by courts to different factual considerations,²⁰⁰ showing how different factors are treated as more or less significant at different points in time.²⁰¹

¹⁹⁷ On Canada, see above, text at nn 75-79.

¹⁹⁸ But cf P Easteal and K Harkins, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act' (2008) 22 *AJFL* 259; M Henaghan, 'Relocation Cases in Australia Post The Family Law Amendment (Shared Parental Responsibility) Act 2006 – Considerations Not Rules Determine the Best Interests of the Child' (6th *Annual Family Law Summit*, Brisbane, Australia: 2009).

¹⁹⁹ P Parkinson, 'The Realities of Relocation: Messages from Judicial Decisions' (2008) 22 *AJFL* 35, 37.

²⁰⁰ Such as the health and wellbeing of the relocation parent, the child's relationship with the other parent, parental conflict, the child's views, etc.

²⁰¹ M Henaghan, B Klippel and D Matherson, 'Relocation Cases' (*New Zealand Law Society Seminar*, Wellington: 2000); although unattributed, Henaghan is also the author of the relevant section of D Webb *et al*, *Family Law in New Zealand* (14th edn, LexisNexis, Wellington: 2009), 271-300.

Henaghan's other focus has been on case outcomes. His research shows that the success rate for applicants in 1999-2000 was 48 percent,²⁰² whereas in the three years from 2005-2008, following the introduction of the Care of Children Act 2004, the success rate fell to 35 percent.²⁰³ Later cases suggest that the success rate in relocation applications in New Zealand may have returned to around 50 percent,²⁰⁴ but this figure requires further explanation to be understood fully.

In interpreting these changes, scholars in New Zealand and Australia have made effective use of empirical work. The difficulty with looking at success rates in litigated cases (even when one has access to almost all such cases, as Henaghan does), is that they miss a crucial part of the process. As with analyses of reported cases, this research cannot assess the role of advisors and pre-litigation decision-making. Decisions are made based on *perceptions* of the law, on the law's *shadow*,²⁰⁵ and it is possible that that shadow is changing in relocation cases. Consequently, it is possible that cases being litigated now are substantially different from those seen in earlier studies:

It may well be that lawyers are “gatekeeping” many relocation disputes out of court by advising clients that it will be harder to relocate ..., or that, even without legal advice, potential “relocators” are making that assumption. This might mean that the cases actually getting to court are ones in which there is a stronger case for

²⁰² M Henaghan, B Klippel and D Matherson, 'Relocation Cases' (*New Zealand Law Society Seminar*, Wellington: 2000); the success rate from 1988 to 1998 was 62 percent.

²⁰³ M Henaghan, 'Care of Children Act Cases: Where Are We, Where Are We Going?' (*LexisNexis Annual Child Law Conference*, Auckland: 2008).

²⁰⁴ M Henaghan, 'Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question' (*NZFL Conference*, Auckland: 2009).

²⁰⁵ R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950.

relocation than in the typical [earlier] case.²⁰⁶

In other words, it may be that cases which are now litigated were previously settled in favour of relocation, while those which were previously litigated are now settled in favour of staying in the current location.

Evidence to support this proposition is apparent from a number of studies. In New Zealand, Fiona Mackenzie used questionnaires to obtain the views of family lawyers and judges, assessing the effects of the introduction of the Care of Children Act 2004 on relocation law in practice.²⁰⁷ As Mackenzie explains:

There has been a shift in judicial thinking in the Family Court with respect to relocation cases, resulting in increased weight being given to the factor of the importance of a child's relationship with the non-relocating parent. There also appears to have been decreased weight given to the factor of the relocating parent's (usually the mother's) emotional health and happiness within the matrix of a welfare and best interests enquiry. The outcome has led to an increasing difficulty in achieving a successful relocation in the Family Court.²⁰⁸

Further empirical work in New Zealand²⁰⁹ is being conducted by Nicola Taylor,

²⁰⁶ J Behrens, B Smyth and R Kaspiew, 'Outcomes in Relocation Decisions: Some New Data' (2010) 24 *AJFL* 97, 100. See similarly the views of New Zealand practitioners in this study, discussed in Chapter 6.

²⁰⁷ F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009), 69-92.

²⁰⁸ *Ibid*, 2 (footnote omitted).

²⁰⁹ In Australia, see also J Behrens, 'Court Decisions About Relocation in Australia: An Empirical Study Focusing on Parents' Experiences' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010); P Parkinson, 'What Happens When the Relocation Dispute Is Over? Findings from a Prospective Longitudinal Study' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Megan Gollop and Mark Henaghan, with early findings published.²¹⁰ Their sample includes 100 families where the mother, the father or both were interviewed; in 30 families the children were also interviewed.²¹¹ The researchers highlight a number of areas arising from their data which require further debate, and suggest the need ‘to reconsider whether an appropriate balance has been struck between the tensions implicit in relocation cases’.²¹² This is especially so, they say, in cases seen in their study (n=12) where relocation was refused in order to maintain or improve the children’s relationship with the respondent even where the applicant relocated anyway, with the children ‘removed from their mother’s primary care ... and placed with their father (sometimes in a new locality)’.²¹³ This project will undoubtedly continue to provide fascinating insights into families’ experiences of life after relocation disputes and, as the authors suggest, help to ‘provide an informed basis for applying the best interests principle in relocation disputes’.²¹⁴

Commentary

Looking at the literature outside England, it can be seen that doctrinal caselaw analysis is increasingly being supplemented by various kinds of empirical research. In the English context, only one study has so far been published which has attempted to add empirical data

²¹⁰ N Taylor, M Gollop and M Henaghan, ‘Relocation Following Parental Separation in New Zealand: Complexity and Diversity’ [2010] *IFL* 97.

²¹¹ *Ibid*, 100-101.

²¹² *Ibid*, 104.

²¹³ *Ibid*, 103.

²¹⁴ *Ibid*, 105. This study should be compared with Parkinson’s work, discussed above, text from n 184, and highlights the dangers of having overly strong assumptions about children’s interests in relocation cases.

to the relocation debate, namely a report by Marilyn Freeman.²¹⁵

Freeman's research, commissioned by the child abduction charity Reunite,²¹⁶ looks at the experiences of parties involved in relocation disputes over the last decade or so.²¹⁷ Freeman interviewed 25 fathers and 11 mothers who were involved in relocation litigation between 1999 and 2009, and reported considerable concern about the way in which the law appears to prioritise the interests of applicants over those of respondents. The legal advice received by participants in this study was that applicants 'will inevitably be granted leave to remove from the jurisdiction, and that fathers should not bother to defend such applications as it is better to try to make good contact arrangements'.²¹⁸ However, concerns were expressed about the practicality of the contact ordered by the court,²¹⁹ along with doubt about the prioritisation of applicant parents' wellbeing over other factors in the welfare assessment.²²⁰ Freeman proposes reforms which she suggests 'may result in a readjustment to the "pro-relocation" attitude which is routinely adopted by our courts'.²²¹

As Frances Judd QC and I say, this study

...is of great interest, and is valuable in bringing forward the views of

²¹⁵ The following discussion is based on F Judd and R George, 'International Relocation: Do We Stand Alone?' [2010] *Fam Law* 63, 65-66.

²¹⁶ See www.reunite.org.

²¹⁷ M Freeman, 'Relocation: The Reunite Research' (Reunite, London: 2009).

²¹⁸ *Ibid*, 20.

²¹⁹ *Ibid*, 14-16.

²²⁰ *Ibid*, 16-17; cf M Hayes, 'Relocation Case', 364.

²²¹ *Ibid*, 33.

some participants in relocation disputes, [but] the conclusions which it draws may be premature. It is difficult to see how meaningful conclusions about the state of relocation law in general can be drawn from a study which looks almost exclusively at the views of only one constituent group, particularly one made up predominantly of parties who have been unsuccessful in court. ... Freeman recognises these limitations in the opening section of her report, but nonetheless goes on to present powerfully-worded conclusions which, respectfully, risk going beyond the data available from the study.²²²

What is apparent, though, is the significant contribution that empirical research has to play in our understanding of relocation disputes. Freeman offers a small insight into the views of one constituent group involved in relocation cases, but there is clearly scope for more work.

This review of the literature shows a number of gaps within the existing research. First, English scholars have produced excellent doctrinal analyses of reported cases, but these discussions are inevitably limited by the fact that reported cases are unlikely to be representative of ‘normal’ cases in the trial courts. Second, while a small amount of comparative work has been undertaken, the studies are small and descriptive, suggesting that detailed evaluative comparison may usefully be added. Third, other jurisdictions are examining outcomes of litigated cases; but it is acknowledged that such data are unable to account for the role of advisors in ‘gatekeeping’ the cases that reach trial, meaning that the statistics may be an unreliable indicator of changing practices over time. These analyses are also unable to compare approaches between countries. We know that different jurisdictions have approaches which, on paper, look different, but we are unable to tell whether those differences are likely to cause individual cases to be treated differently.

²²² F Judd and R George, ‘International Relocation: Do We Stand Alone?’ [2010] *Fam Law* 63, 66, referencing C O’Flinn, ‘Back in the Fold’ (2009) 159 *NLJ* 1416.

Research Questions

Having summarised the range of legal approaches to relocation disputes and reviewed the existing literature, we see a number of unanswered questions. In contributing to filling those gaps, five main questions will be addressed by this thesis.

The first question asks how relocation law has developed and, in particular, why it might be that countries with social and legal backgrounds as similar as England and New Zealand have developed such different approaches to relocation disputes.

The second question is whether these differences in legal approach cause individual cases to be treated differently. Would the same set of facts lead to a different outcome if it were decided in New Zealand as opposed to in England?

Third, we can ask whether our understanding of the law at the moment, based as it is almost entirely on reported cases which originate mainly in appeal courts, is reflective of the law in practice in the trial courts. Are cases ‘on the ground’ following the same approaches as are set out by the appeal courts?

The fourth question asks how practitioners who are experienced in dealing with these daily realities of relocation law evaluate that law. Does the law work well, from the point of view of the professionals who apply it, or are there concerns?

Finally, since we have seen that there is significant variance in the approaches to relocation at present, coupled with increasing debate about whether harmonisation is either

possible or desirable, we can ask what these findings tell us about ‘the continuing search for common principles’.²²³ Given that most jurisdictions already base relocation law on what they perceive to be the welfare and best interests of the children involved, are we likely to be able to progress in agreeing common substantive principles which achieve uniformity of approach to relocation disputes?

Thesis Plan

This chapter has introduced the issue of relocation disputes. England and New Zealand have been selected for in-depth study because they represent the range of legal approaches to relocation taken in the common law world. There is considerable literature on relocation, but the English writing is primarily confined to doctrinal analysis of reported caselaw. This thesis therefore aims to contribute to that existing literature by providing empirical evidence about the day-to-day reality of relocation cases, based on the experiences of practitioners who work in this field.

The thesis now develops in six further chapters. Chapter 2 sets out the research methodology. In Chapter 3, we look at the development of the legal approaches to relocation disputes in England and New Zealand, critically examining the reported caselaw and mapping their divergent developments. We also start to offer some possible explanations for the divergent legal approaches based on aspects of the social and legal backgrounds in the two countries.

²²³ Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Chapters 4, 5 and 6 are primarily empirical in nature, reporting interviews with practitioners in England and New Zealand. Chapter 4 looks at how the differences in legal approach seen in Chapter 3 might affect individual cases, by asking practitioners to analyse three hypothetical disputes. Chapter 5 looks in detail at English practitioners' experiences of relocation law, examining the reality of day-to-day practice from their perspective and assessing the evaluations of the law offered by those who use it on a daily basis. Chapter 6 turns to New Zealand practitioners' perspectives on their law, offering an equivalent analysis to that seen in Chapter 5. The thesis concludes, in Chapter 7, by suggesting ways in which this research fits into the on-going international 'search for common principles' on relocation,²²⁴ and, in particular, what it might say about our understandings of the welfare principle and the ability of the paramountcy principle itself to underpin a common international approach to relocation.

²²⁴ Ibid; see also Washington Declaration on International Family Relocation 2010.

Chapter 2

Research Methodology

Three sources of data are used in this analysis of relocation law. One is published work,¹ looking at relocation disputes from a variety of disciplinary perspectives, though with a focus on legal analyses. The literature examined also looks more broadly at the welfare principle as a legal construction. The second source of data is published court judgments.² In England, these judgments come mainly from the Court of Appeal and High Court,³ but in New Zealand many relocation cases are reported from first instance decisions in the Family Court.⁴

The third source of data, which constitutes the main contribution of this thesis and which starts to fill the gap which has been noted in the English relocation literature, is

¹ Other sources include academic conference papers, government reports, media articles and internet web pages.

² These judgments are primarily found in law reports, but some unreported cases are used when available. For example, many English Court of Appeal and High Court judgments are available on the British and Irish Legal Information Institute website, whether they are reported or not: see www.bailii.org.

³ No case directly on relocation has ever been heard in the House of Lords/Supreme Court.

⁴ On varying court structures in England and New Zealand, see Chapter 3, text from n 14.

empirical research.⁵ Empirical work comes in a number of forms, both qualitative and quantitative. Because the focus of this research is on legal processes and the ways in which different legal systems address relocation disputes, rather than on statistically significant comparison of case outcomes, the empirical methodology chosen here is qualitative in nature.

Qualitative research methodology

Qualitative research is exploratory, used to obtain detailed insight into individuals' experiences. As Carol Smart and colleagues explain, qualitative research is 'a systematic, rigorous and theoretically sound method for investigating and understanding the social world' and, as a methodological approach, 'is grounded in the interpretative tradition in that it is concerned with how the social world is interpreted, understood, experienced and produced'.⁶ Qualitative research 'is flexible and sensitive to the social context in which the data is produced',⁷ and typically draws its sample of participants in a purposive, rather than representative, way.⁸

Empirical research related to family law usually addresses one of two constituent

⁵ Oxford University Research Ethics Committee Approval No. SSD/CUREC1/08-216; a copy is contained in Appendix 1.

⁶ C Smart, B Neale and A Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity, Cambridge: 2001), 174-175.

⁷ Ibid, 175; see also J Mason, *Qualitative Researching* (Sage, London: 1996); M Miles and M Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd edn, Sage, London: 1994); N Denzin and Y Lincoln, *The Sage Handbook of Qualitative Research* (3rd edn, Sage, London: 2005).

⁸ Studies vary in the extent to which they attempt to be representative.

groups:⁹ one is the individuals involved, comprising family members whose lives are either directly or indirectly related to family law;¹⁰ the other looks at the legal profession, at practitioners who work in family law.¹¹

Qualitative empirical research in this study is particularly aimed at addressing three of the research questions. The first of these questions is about whether different approaches to relocation law seen from reported caselaw are likely to be affecting individual cases (question two). The second relevant question is whether reported relocation cases reflect the experiences in the courts of trial; about whether the conclusions which would be reached about the law based on reported caselaw are reflective of the daily reality (question three). The final question which empirical work will help to answer is what those who are experienced in the application of the law in practice think about it in evaluative terms (question four). Talking to practitioners, particularly senior ones who have been working in this area for many years, may also offer insight into the way in which the law has developed in the two countries, and about why they have diverged (question one).

These questions focus on the legal process involved in resolving relocation disputes in the courts. This study looks only at the experiences and views of legal practitioners, since its

⁹ Some studies combine both: see, eg, G Douglas *et al*, *Research into the Operation of Rule 9(5) of the Family Proceedings Rules 1991* (Dept for Constitutional Affairs, London: 2006); G Douglas, J Pearce and H Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (Bristol and Cardiff Universities, 2007), available online at www.law.cf.ac.uk/researchpapers/papers/1.pdf

¹⁰ See, eg, M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood Across Households* (Hart, Oxford: 1997); C Smart, B Neale and A Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity, Cambridge: 2001).

¹¹ See, eg, J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart, Oxford: 2000); M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart, Oxford: 2009).

aim is to obtain information about the day-to-day practice of relocation law in the trial courts.¹² Several kinds of qualitative research methodology could have been used to explore these questions,¹³ including observational / ethnographic work, questionnaires,¹⁴ and qualitative interviews.

In researching legal processes, observational work offers an effective way to follow legal practitioners in their everyday work;¹⁵ but because relocation disputes are not the everyday work of even most specialist lawyers,¹⁶ this approach would have been impractical. Questionnaire work is especially useful for obtaining an overview of an issue, and is capable of reaching a wide population. However, the complexity of relocation disputes, and the fact that relatively few practitioners specialise in them, make it difficult to explore the full depth of relocation using questionnaires.¹⁷ The specialisation and complexity of the legal issues involved mean that the issues lent themselves to the kind of in-depth qualitative research which interviews provide.

Having selected qualitative interviewing as the main methodology, a semi-structured

¹² For studies which look at the experiences of individuals involved in the legal adjudication of relocation disputes, see, eg, M Freeman, 'Relocation: The Reunite Research' (Reunite, London: 2009); N Taylor, M Gollop and M Henaghan, 'Relocation Following Parental Separation in New Zealand: Complexity and Diversity' [2010] *IFL* 97.

¹³ See generally N Denzin and Y Lincoln, *The Sage Handbook of Qualitative Research* (3rd edn, Sage, London: 2005).

¹⁴ Questionnaires can be qualitative, quantitative or both.

¹⁵ J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart, Oxford: 2000), 201-205; M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart, Oxford: 2009).

¹⁶ Below, text from n 20.

¹⁷ For an exploratory study using questionnaires, see F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009).

format was selected to enable the complexity and detail of the subject-matter to be explored.

As John Eekelaar and colleagues explain:

With a qualitative interview, the researcher pre-defines the subject matter in his or her own words, but by adopting a less structured approach, the [participants] would be able to describe their experiences and practices in their own words. The flexibility inherent in a qualitative approach would also allow [the researcher] to follow up any new themes and ideas as they emerged.¹⁸

Selecting a sample of legal professionals to interview

There are four main categories of professional involved in the legal resolution of relocation disputes: family court judges, family barristers, family solicitors, and specialists who provide expert evidence to the court about the children and families involved (usually social workers or psychologists).¹⁹ As noted in Chapter 1, English published judgments tend to come from the Court of Appeal and, to a lesser extent, the High Court, though this is less true in New Zealand.²⁰ In both countries, though, cases reach the public domain because there is something unusual or interesting about them. What is missed by looking at these cases is the experience of day-to-day cases heard in the trial courts. In general, therefore, participants whose work was not focused on appellate work were favoured in the selection of participants for the study.

¹⁸ J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart, Oxford: 2000), 199.

¹⁹ See further below, text from n 28.

²⁰ Chapter 1, text at n 32.

Judges and court welfare officers, in general, do not specialise in particular areas of child law. With regard to barristers and solicitors, while a small number of practitioners specialise in relocation cases, most of those working on relocation are ‘child law’ practitioners more generally.²¹ Because of this lack of specialisation within the professions, the population of potential participants is large, but many of its members have only limited experience. The aim, therefore, was to obtain a range of experiences, both from those who *do* specialise in relocation and from those who do not; but in order to ensure that participants had a reasonable experience of relocation, they were invited to participate if they had done three or more cases in the last two years.

In order to obtain a full range of experience, the aim was to interview five participants in each of the four professional categories in each country. In fact, to obtain this range of participants, and in particular because of difficulties in obtaining a reasonably even gender split, the numbers in each group varied slightly. In the end, participants comprised: seven English judges and six New Zealand judges; seven barristers in each country; five English solicitors and six New Zealand lawyers who worked as both solicitors and barristers; and three court experts in each country (in England, court welfare advisors; in New Zealand, psychologists who do work for the Family Court).

Table 2.1 provides a full list of participants, divided by nationality and professional group, and also showing their sex, approximate time in practice, and the approximate number of relocation trials done each year. The table also shows the identity tags which are

²¹ One solicitor in this study explained that relocation ‘is not exactly our bread and butter – it’s slightly off the beaten track for us. We do it because we feel comfortable enough doing it, but ... [we] have never done enough of them to major in them’ (ES1).

Table 2.1 – List of participants by identifying tag, showing nationality, professional group, sex,²² time in practice,²³ and approximate number of relocation trials per year

English Participants					New Zealand Participants				
Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year	Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year
EJ1	Judge	-	-	4	NJ1	Judge	-	-	9-14
EJ2		-	-	1	NJ2		-	-	5/6
EJ3		-	-	2	NJ3		-	-	3/4
EJ4		-	-	3	NJ4		-	-	5/6
EJ5		-	-	2/3	NJ5		-	-	5/6
EJ6		-	-	3/4	NJ6		-	-	10-12
EJ7		-	-	2/3	NB1	Barrister	F	23	2/3
EB1	Barrister	M	7	1	NB2		M	25	1/2
EB2		M	18	2/3	NB3		F	15	1/2
EB3		M	19	2/3	NB4		M	40	3/4
EB4		F	8	1	NB5		F	35	3/4
EB5	Barrister, QC	M	30	2/3	NB6		M	21	3
EB6		F	24	5/6	NB7		F	25	1/2
EB7		F	24	1/2	NS1	Solicitor / Barrister	M	23	2/3
ES1	Solicitor	M	28	1	NS2		F	30	1/2
ES2		F	9	1/2	NS3		F	22	3
ES3		M	15	2	NS4		F	18	2/3
ES4		F	18	1/2	NS5		F	19	2/3
ES5		M	12	6-8	NS6		F	31	1
EC1	Court Welfare Officer	F	20	1/2	NC1	Psychologist	M	25	7/8
EC2		M	25	3/4	NC2		F	25	12
EC3		F	33	1/2	NC3		M	13	6

used to identify individuals in the thesis. These tags have three components, identifying i) the country in which the individuals work,²⁴ ii) their professional group,²⁵ and iii) an allocated number within that group. So, for example, EJ2 is an English judge, NB5 is a New Zealand barrister, ES1 an English solicitor and NC3 a New Zealand court expert (psychologist).

²² In the interests of preserving anonymity, the sex of judges is not included in the table. There were five men and two women amongst the English judges, and three men and three women amongst the New Zealand judges.

²³ In the interests of preserving anonymity, the time that judges had been on the bench is not included in the table; the average time sitting full time for English judges was 9.5 years, and for New Zealand judges was 8.5 years.

²⁴ 'E' for England and Wales, 'N' for New Zealand.

²⁵ 'J' for judges, 'B' for barristers, 'S' for solicitors in England and for lawyers who worked as both solicitors and barristers in New Zealand, 'C' for court experts (welfare officers in England, court-appointed psychologists in New Zealand).

Before explaining in detail how these participants were recruited, a few comments may be made about the participants themselves in terms of how well they fitted the criteria set. The range of experience in general terms is apparent from the time in practice, ranging, as Table 2.1 shows, from relatively junior barristers and solicitors to those who had been in practice for 30 years or more. Judges, who had all previously been practising lawyers, had a range of experience, from relatively recent appointees to those with over two decades of judicial experience.

In relation to relocation specifically, we similarly see a range, from those who do just one or two trials per year,²⁶ to those doing six, seven or eight trials each year. The only notable variation between the groups in this respect was that New Zealand judges and court experts reported more cases per year than other groups. These groups averaged 7.4 and 6.75 cases per year on average, where all other groups averaged between two and three per year. One possible explanation could be that these participants said (on average) that two thirds of their relocation cases were moves within New Zealand which, as we will see,²⁷ is a category of case almost unknown in England. It may be that the higher average is not seen for New Zealand lawyers because, with relocation cases themselves being more common, more lawyers do them; in other words, relocation may be more part of the daily experience of child lawyers in New Zealand, and so the population of practitioners is less specialised than in England.

²⁶ Note, though, that many lawyers said that they gave advice in several more, but that those cases either did not go to trial or, more commonly, were tried by another lawyer.

²⁷ Chapter 3, text from n 168.

Turning to explain how these participants were recruited, the approach in the two countries was broadly similar but, since there was some variation, will be explained in turn. Starting with the English sample, relocation cases can be filed in either the High Court or the county court, and so trial judges from both levels of court were recruited. The seven judicial participants included five men and two women;²⁸ two sat in the Family Division of the High Court,²⁹ and five were county court judges,³⁰ who either were or had been Designated Family Judges.³¹ Judges in the High Court are all specialists and highly experienced; they were contacted in no particular order, and the seventh and ninth to be contacted were the ones who participated. Circuit judges were contacted by writing to the Designated Family Judges of courts in a variety of locations, including large cities and smaller towns.

Family barristers were selected by drawing up a list of all those who were named as having represented litigants in reported relocation cases since 2000. This produced a list of some 50 individuals, with few names coming up more than once.³² Since most reported cases are from the Court of Appeal, it was not uncommon for leading counsel to be engaged for the appeal. Since most cases do not reach an appeal, however, it was necessary to see juniors as well as silks, so as to gain a more rounded impression of ‘normal’ relocation cases

²⁸ This gender split (29 percent women) approximates that found on the English bench: of the 20 Family Division High Court judges, 7 are women (35 percent), but only 19 percent of circuit judges are women: see Baroness Neuberger, ‘The Report of the Advisory Panel on Judicial Diversity 2010’ (Ministry of Justice, London: 2010), 15.

²⁹ A further seven declined to participate: one said that she ‘preferred to remain neutral’, but most gave time pressure as the reason.

³⁰ A further two declined to participate. One worked primarily in public law and had not done a relocation case in some years; the other gave no particular reason.

³¹ Designated Family Judges are responsible for the administration of family justice from their court, and work predominantly on family cases.

³² Of these, some are now judges and so not eligible to participate in the ‘barrister’ category.

(rather than ones which are appealed). Barristers were shortlisted if their name appeared on this list and their chambers' website listed leave to remove as one of their areas of practice. Two of those interviewed also made specific recommendations of other people to interview. Seven barristers were interviewed (four men, three women), three of whom were QCs (one man, two women).³³

Family solicitors were also selected by listing firms which had been named in the law reports in relocation cases since 2000. This produced a rather shorter list, since the names of solicitors are often omitted in the interests of preserving litigant anonymity. The websites of firms which were mentioned were searched, and five individuals who specifically stated that relocation cases were one of their specialisms were interviewed (three men, two women).³⁴

The standard source of expert input to the court in England is a report from the Child and Family Court Advisory and Support Service (CAFCASS). Five CAFCASS offices were contacted, and three individuals participated (one man, two women).

Turning to New Zealand, relocation cases start in the Family Court, which is where all judicial participants worked. Six judges were interviewed (three men, three women).³⁵ These judges were contacted by virtue of their being the Family Judges of their courts, and were spread across a variety of locations, including both urban and rural areas.

In New Zealand, there is no split legal profession amongst lawyers, but there is an

³³ A further three, all juniors, declined to participate.

³⁴ A further four declined to participate.

³⁵ Of the 48 Family Court judges in New Zealand, 19 are women (40 percent).

increasing trend for more senior family lawyers to specialise in advocacy work, and to be referred to as specialist family law barristers. In total, 13 lawyers were interviewed,³⁶ of whom seven were specialist barristers (three men, four women); the other six worked as both solicitors and barristers (one man, five women).

Most New Zealand lawyers were selected in the same way as the English, by listing those who had appeared in reported cases since 2000. This group was supplemented using snowball sampling, with several participants also suggesting colleagues whom they thought would be willing to participate. As well as acting for parties in relocation cases, most of these lawyers (in both categories) did some of their work as Lawyer for Child, representing the child's views to the court.³⁷ Three psychologists experienced in working for the Family Court were also interviewed (two men, one woman).

In all cases, participants were initially contacted by letter (or, in some cases, email). This initial communication explained the nature of the research and what was being asked of the person, and included a copy of the informed consent form.³⁸ If no reply was received within approximately two weeks, follow-up telephone calls were made.

Participants were told that interviews would be entirely anonymous, and that they would be identified using only their professional group, their gender, the approximate time they had been in practice, and the approximate number of relocation cases they did each year. All participants were also given the option, on the informed consent form, of asking to

³⁶ A further five declined to participate.

³⁷ Care of Children Act 2004, s 7.

³⁸ For samples of the initial letter and the informed consent form, see Appendix 1.

see any direct quotations taken from their interviews to ensure that they were happy with the material that was used; 24 participants exercised this option.

Conduct of interviews

Most English interviewees (18 participants) were seen between November 2008 and January 2009, with the remainder (four participants) seen in May and June 2009. All New Zealand interviews took place in February and March 2009.

Before interviews began, participants were asked to sign the informed consent form, if they had not already done so. These forms were later marked with a randomly generated combination of two letters (DG, IC, etc), and were stored safely, separate from other materials related to the research to ensure that anonymity was preserved.

All interviews were digitally audio recorded.³⁹ As soon as recording began, participants were reminded of two key points from the informed consent form, that they were free not to answer any individual questions, and that they could withdraw from the study entirely at any time, including after the interview had ended. The audio files were later labelled using a random combination of three letters (WRV, GSZ, etc), and an anonymised transcript produced of the interview. Each transcript was identified with the participant tag which was to be used in the thesis itself.

³⁹ Due to a technical fault, the recording of one interview failed about 45 minutes in; hand-written notes were made of the remainder of the interview.

Interviews were intended to last around 45 minutes, though in practice they ranged from 36 to 81 minutes. The two data sets were similar in this respect: in England, the average was 51.30 minutes, ranging from 37 to 67 minutes, with a standard deviation of 10.20 minutes; in New Zealand, the average was 53.00 minutes, ranging from 36 to 81 minutes, with a standard deviation of 10.40 minutes.

Interviews themselves were divided into three broad sections.⁴⁰ First, a number of background questions were asked, designed to elicit information about the participant's experience of relocation disputes, and to learn more about those disputes. The second section asked participants about their experiences of the law in practice and their evaluations of it. The final section looked at three hypothetical cases, presented in the form of 350-word vignettes.⁴¹

The interview schedule was discussed informally with three English practitioners (one family judge, one barrister and one solicitor) before fieldwork began.⁴² This preparation proved invaluable in highlighting difficulties and in drawing attention to questions which were expressed in a way which made it hard for practitioners to know how to answer. The changes made as a result of these preparatory conversations meant that there were no significant problems during the interviews themselves.

⁴⁰ A sample of the interview schedule is included in Appendix 1.

⁴¹ The methodology relating to the use and analysis of vignettes is discussed below, text from n 46

⁴² Thanks to His Honour Judge Vincent, Piers Pressdee QC and Katie Rainscourt.

Analysis of interviews

Interviews were transcribed from the recording. Most of what participants said was transcribed verbatim, though parts (especially relating to the initial questions on the number of cases participants had done, and so on) were summarised; what the interviewer said was transcribed verbatim only where it was crucial to understanding the participant's response. Verbatim transcription was indicated with quotation marks and bold text to ensure that it was clear whether a section was direct quotation or not. In one or two cases, sections which initially seemed unnecessary to transcribe verbatim were later needed, and so the relevant sections were re-transcribed. Although the vast majority of what participants said was transcribed verbatim, it should be recognised that this method of transcription may increase the danger that '[w]hat you "see" in a transcription is inescapably selective'.⁴³

Analysis of the transcripts was conducted using a broadly grounded methods theory approach, which involves 'coding' data in several 'phases', though the phases are not linear nor entirely distinct from one another.⁴⁴ The first stage of analysis involved familiarisation with the data and identification of emerging issues. These issues were used to develop a thematic framework, enabling the views and experiences of respondents to be explored within a common analytical framework grounded in and driven by participants' own accounts.⁴⁵ Key themes, largely coming from the interview schedule but also arising out of

⁴³ M Miles and M Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd edn, Sage, London: 1994), 56.

⁴⁴ There is some debate as to how many phases there are, or should be, as discussed in R LaRossa, 'Grounded Theory Methods and Qualitative Family Research' (2005) 67 *J Marriage and Family* 837, 840.

⁴⁵ L Spencer *et al*, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence* (Cabinet Office, London: 2003).

the data, were used to organise ideas, and were arranged so as to retain their source and keep national and professional groups separate for ease of comparison.

Vignettes

In addition to the general methodological discussion, it is necessary to look at the methodology around the use of vignettes.⁴⁶ Vignettes are ‘short stories about hypothetical characters in specified circumstances, to whose situation the interviewee is invited to respond’.⁴⁷

Vignettes offer a number of advantages as a research tool in socio-legal research. In particular, they ground discussion in specific examples and so avoid ‘a series of answers which are simply bland generalisations’.⁴⁸ For comparative work, they also provide a standard stimulus for the two groups of participants (ie English and New Zealand practitioners), enabling the effect of the legal background to be examined when applied to the same sets of facts. For participants in this research, there is also the particular advantage of more closely approximating legal practitioners’ daily work: whereas critical analysis of the law in the abstract may be an unusual activity for practitioners, a detailed analysis of how the law would be applied to a set of facts resembles their everyday work.

⁴⁶ On the use of vignettes in general, see M Miles and M Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (2nd edn, Sage, London: 1994), 80-82; S Arthur and J Nazroo, ‘Designing Fieldwork Strategies and Materials’ in J Ritchie and J Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage, London: 2003), 129-130.

⁴⁷ J Finch, ‘The Vignette Technique in Survey Research’ (1987) 21 *Sociology* 105, 105.

⁴⁸ *Ibid*, 110.

To assist with ‘the need to construct vignettes in which both the characters and the story line[s] are believable’,⁴⁹ the three vignettes were based on the facts of reported English cases,⁵⁰ though in each case the facts were modified. These modifications were intended both to distance the vignettes from the reported cases, since expert practitioners were likely to know a large number of cases,⁵¹ and also to ensure that a wide range of factors was present in the three vignettes.⁵² Each vignette was about 350 words long. This length was designed to strike a balance between the amount of time available in each interview, and the need for detail in order for meaningful analysis to be forthcoming.

When discussing the vignettes, all non-judicial participants were asked the same three questions before they started their discussions:

What are the relevant factors in this case?

What advice would you give to the parties?

What do you think the outcome of the case would be if it went to trial?

Judges were asked only the first and third of these questions, since they would not normally

⁴⁹ Ibid, 111.

⁵⁰ The cases were *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277; *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC); and *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

⁵¹ Despite the changes, eight English participants expressly recognised the case on which Jane’s facts were based, and two the case on which Mark and Hannah’s facts were based.

⁵² For example, the parents’ reasons for moving in each vignette are different, whereas in two of the reported cases the reasons were the same.

give advice in the way that a lawyer or court advisor would. Some participants chose to answer these questions separately, while others combined the questions in a single answer. Where particular issues were not raised by participants in their initial answers, supplementary questions were asked to assess the relevance of those factors.

Participants themselves frequently commented on the use of vignettes as a research tool. Some said that the ‘case scenarios are very well put’ (NJ2), and some evidently enjoyed discussing them: as one New Zealand judge said on finishing the second of the three vignettes, ‘Right! This is almost fun!’ (NJ5). Other participants pointed out that analysing 350-word summaries was ‘quite an unreal task’ (EC1), with the information provided offering more questions than answers. Almost all participants identified aspects about which they needed more detail, and a common theme was that the personalities of the parties as they presented themselves to the court could be crucial. As one English judge explained, ‘it is the difference between [reading the vignette] and walking in there and seeing them’ (EJ7). An English barrister similarly likened vignette analysis to the difference between ‘sentencing exercises in judicial training ... [and] sentencing real people, [which] is an entirely different task’ (EB5).

These methodological criticisms are important, and it should be recognised that vignettes can only approximate the work which practitioners undertake in real cases. However, given the time constraints of interviews, and the amount of work which volunteer participants can be asked to do, these limitations are unavoidable. Moreover, the primary purpose of the vignettes is to identify differences between English and New Zealand practitioners’ analyses; since all participants received identical information, the comparison is internally consistent, even though not a perfect replica of participants’ day-to-day work.

The analysis of the vignettes involved three elements. The first looked at the factors which participants considered relevant to each case. Although participants were not asked to rank the relevant factors, the order in which they listed their considerations may be of some interest; and since all participants were asked the same questions, the data are internally consistent. The aim of this exercise was to obtain an impressionistic view of the factors which practitioners thought relevant, the issues that one New Zealand judge called the ‘really moving factors’ (NJ2). Some participants stated that one factor was the most significant, even when it was not the first one that they mentioned. In these cases, it was treated as if it were the first listed, followed by the remaining factors in the order given. Conversely, some participants said that specific factors were not relevant; where this happened, these factors were excluded from this analysis, since the aim was to obtain an indication of the factors which participants thought *did* matter. It is important to acknowledge the limitations of this analysis: it is intended to indicate participants’ thinking, and does not involve quantitative data.

The second part of the analysis, which informs the majority of the discussion in Chapter 4, looked qualitatively at participants’ discussions. This work involved the same grounded methods framework analysis used for the general parts of the interviews.⁵³

The final part of the analysis was an assessment of participants’ predictions of the likely outcomes of each vignettes. To make participants’ views comparable, their predictions

⁵³ L Spencer *et al*, *Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence* (Cabinet Office, London: 2003); see above, text from n 43

of the likely outcomes were standardised on a 0-10 scale,⁵⁴ with 0 representing participants who thought the relocation certain to be refused and 10 those who thought it certain to be allowed.

Some participants gave a specific numerical estimate of the chances that relocation would be allowed in each case; where that happened, these numerical estimates were converted onto the 0-10 scale. In other cases, the chances of success were estimated based on non-numerical indicators which participants gave in their discussions. To give examples, participants who said that an applicant ‘hasn’t got a hope’ (NS2) were allocated 0; at the other end, when an opposition to relocation was ‘bound to fail’ (EB5), the participant was allocated 10. Participants who said that cases ‘could go either way’ (NJ6) were put at 5, while those who said that a case might succeed or fail ‘by a narrow margin’ (EJ1) were given 6 or 4 respectively. Cases which were ‘probably’ going to succeed or fail were given 7 or 3 respectively; participants who described ‘a strong case’ (EB3) were given 8 or 2, while a very strong case was given 9 or 1. Given that not all participants expressed specific numerical chances, it is again important to treat these numbers with caution, and they should be seen as indicative of participants’ strength of feeling, rather than as mathematical predictions.

Having thus set out the research methodology, we can now turn to the substance of relocation law. In Chapter 3, we start with an analysis of the development of relocation law in England and New Zealand, based primarily on reported cases and secondary literature. In the chapters which follow, we draw on the interviews with practitioners discussed in this

⁵⁴ On scaling, see, eg, L Guttman, ‘A Basis for Scaling Qualitative Data’ (1944) 9 *American Sociological Review* 139.

chapter in exploring the day-to-day practice of relocation law, looking at how the legal position seen in Chapter 3 is applied and evaluated by practitioners who use it in their professional capacity.

Chapter 3

Relocation Law in England and New Zealand: The Development of Divergent Legal Approaches

From their earliest origins in the Court of Chancery's inherent jurisdiction over wards,¹ the legal principles applicable to relocation disputes in England and New Zealand have developed through caselaw and legislative change. This chapter explores the different ways in which these legal principles have evolved in the two countries,² mapping the paths which have led to the current positions which, as we saw,³ represent the two ends of the spectrum of common law approaches to relocation.

The chapter starts by explaining aspects of the court structures and legislation relevant to relocation law. We then look in detail at *Poel v Poel*,⁴ which was the leading case in

¹ See generally J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origin' (1994) 14 *OJLS* 159.

² Parts of this Chapter were published in the Otago Law Review, as 'The Shifting Law: Relocation Disputes in New Zealand and England' (2009) 12 *OLR* 107. I am grateful to the Editor for permission to reproduce sections of that text here.

³ Chapter 1, text from n 124.

⁴ [1970] 1 WLR 1469 (EWCA).

England and New Zealand for some 25 years. Put simply, *Poel* suggested that courts should not normally interfere with the reasonable plans of a primary carer because of the adverse consequences which were likely to flow from such interference. The next section of the chapter focuses on the English law, which continued to build on *Poel* to the now-leading case of *Payne v Payne*.⁵ English law thus continues to favour applications, and ‘is commonly perceived as walking and talking like a presumption’ in favour of relocation.⁶

New Zealand, by contrast, rejected this approach in 1995.⁷ At first, New Zealand law simply required all factors to be assessed without *a priori* weight being given to any one consideration, but subsequent developments have led to a position where there is ‘difficulty in achieving a successful relocation’.⁸ The chapter closes with some brief comments on the social contexts of England and New Zealand which may start to explain the differences seen in relocation law.

Court Structures and Legislation

In order to understand some of the development of relocation law, it is necessary to have an overview of the family justice system within which these disputes are adjudicated.

⁵ [2001] EWCA Civ 166, [2001] 1 FLR 1052.

⁶ C Geekie, ‘Relocation and Shared Residence: One Route or Two?’ [2008] *Fam Law* 446, 451-452.

⁷ *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (NZCA).

⁸ F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009), 2.

The family courts are the main focus of this section, but it may also be noted that many countries have seen an increasing focus on ‘alternative dispute resolution’,⁹ attempting to move family disputes out of the traditionally adversarial family court structure.¹⁰ However, despite a recent suggestion on high authority that there is no reason why relocation disputes should not be mediated,¹¹ it is thought that few contested relocations do not end up before a judge.¹²

According to lawyers interviewed as part of this research, almost all cases which get as far as seeking legal advice proceed to trial. One English solicitor described relocation as ‘the one area of family work that I do where I start the case with the expectation of going to trial’ (ES3). There are two reasons why this may be so. One is that relocation is ‘an issue where it’s very difficult to compromise. You either go and live [somewhere else] or you don’t – there’s no halfway point’ (EB3). The other is that ‘the stakes are high for both sides ... [so] quite often people don’t agree even when they know they’re going to lose’ (EB7); moreover, ‘I don’t think there is pressure from the court ... to settle [relocation cases]

⁹ See generally S Roberts, ‘Family Mediation After the Act’ [2001] *CFLQ* 265; B Zondag, *Procedural Innovation in the New Zealand Family Courts: The Parenting Hearings Programme* (unpublished PhD Thesis, Auckland University: 2009); J McIntosh, H Bryant and K Murray, ‘Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia’ (2008) 46 *Family Court Review* 125.

¹⁰ The description ‘adversarial’ is somewhat misleading, belying the enormous amount of negotiation and settlement undertaken by parties, advocates and judges involved in family cases: see, eg, J Eekelaar, M Maclean and S Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart, Oxford: 2000); M Maclean and J Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Hart, Oxford: 2009).

¹¹ Baroness Hale of Richmond, ‘Relocation’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010); see also A Thomas, ‘Relocation Dispute Resolution Hearings’ [2010] *Fam Law* 872.

¹² In an Australian empirical study, three fifths of participants had their relocation dispute judicially resolved: P Parkinson, ‘What Happens When the Relocation Dispute Is Over? Findings from a Prospective Longitudinal Study’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

because the court understands that ... it is reasonable for a father to say ... “I want to fight this because when my child is 14, 15, I want them to know that I didn’t want them to go” (EB2).¹³

While there are undoubtedly relocations which are not litigated, either because there is no dispute or because the case is settled before trial, it seems likely that a high proportion of relocation cases are adjudicated in court. It follows that understanding more about court structures of England and New Zealand may be important.

In England, relocation cases can be tried either in the Family Division of the High Court or by a circuit judge¹⁴ in the county court.¹⁵ One consequence of this structure is that there is no collegiate family bench, and many judges hearing relocation cases may have limited (or no) prior experience of such cases. This may mean that clear appellate guidance is particularly important in the English system, helping judges who have limited expertise in child law.

Appeals are heard in the Court of Appeal,¹⁶ which is a generalist bench which sits in panels of two or three; however, the usual practice in appeals from family cases is for at

¹³ New Zealand lawyers made similar points.

¹⁴ Relocation cases should not be tried by district judges: *Re D (Children)* [2009] EWCA Civ 957, unreported, [3]; circuit judges may be very experienced in family work, or ‘may have nothing but a private law ticket to equip [them] for the task’: *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [18].

¹⁵ If the proposed relocation is to a country which is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction 1980, the case must go before a High Court judge; however, many circuit judges sit as High Court judges under s 9 of the Supreme Court Act 1981.

¹⁶ Further appeals to the Supreme Court on points of law are possible, but no relocation case has ever gone beyond the Court of Appeal.

least one judge to be experienced in family work.¹⁷ In England, judicial decisions about children's upbringing are 'discretionary', and therefore the appeal court has a limited power to interfere unless the judge misdirected himself in law.¹⁸

Turning to New Zealand, relocation cases are heard in the specialist Family Court. There are just 48 Family Court judges, selected by virtue of 'training, experience, and personality, [such as make them] suitable person[s] to deal with matters of family law'.¹⁹ The Family Court is acknowledged as having specialist experience and expertise, especially with regard to the evaluation of witnesses and expert evidence.²⁰ By contrast with England, this court structure creates a limited and expert field of judges hearing relocation cases, which could mean less guidance is needed in specific areas.

Family appeals in New Zealand are heard in the High Court, usually by a single judge, with further appeals on points of law possible to the Court of Appeal and, then, the Supreme Court. The High Court is a generalist bench whose members are appointed from the bar; most have limited or no experience of family work, either as lawyers or as trial judges. This point is significant because New Zealand no longer considers judicial decisions about

¹⁷ All reported relocation appeals in the last ten years have been heard by a panel including at least one former judge of the Family Division.

¹⁸ *G v G (Minors: Custody Appeal)* [1985] 1 FLR 894 (HL); for an argument that this deferential approach is not applied in relocation appeals, see M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351 (hereafter, 'M Hayes, 'Relocation Cases''), 369-371; see also Chapter 5, text from n 135.

¹⁹ Family Courts Act 1980, s 5(2)(b).

²⁰ *SCS v GMS* [2009] NZCA 505, unreported, [11].

children's welfare to be discretionary,²¹ meaning that the appeal court gives no especial weight to the decision below except in relation to witness credibility.²² Consequently, the non-specialist High Court may overturn the specialist Family Court even where the trial judge directed herself correctly in law and made a decision which was reasonable: 'If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ'.²³

The key differences between the family justice systems of England and New Zealand can thus be seen. England has a mixed first instance bench, with both specialist and non-specialist judges, whereas New Zealand's trial courts are all specialist. By contrast, whereas English relocation appeals are heard by a panel of judges which always includes a family law expert and whose power to intervene with the first instance decision is limited, New Zealand appeals are heard by a single judge from a generalist bench, and who is entitled to reverse the decision below on the simple ground that it is not the decision she would have made. It is within these judicial structures that relocation law in England and New Zealand has developed.

Before looking at the development of the caselaw, the relevant statutory frameworks within which relocation disputes are resolved are set out. In New Zealand, it was specified

²¹ *D v S (No 2)* [2003] NZFLR 81 (NZCA), [18]; *Blackstone v Blackstone* [2008] NZCA 312, unreported, [22]-[25]; on the previous approach, which mirrored that in England, see, eg, *Swayne v Lush* [1999] NZFLR 49 (NZHC).

²² *B v B [Relocation]* [2008] NZFLR 1083 (NZHC), [42]; *Bashir v Kacem* [2010] NZCA 96, unreported, [37].

²³ *Austin, Nichols & Co v Stichting Lodestar* [2008] 2 NZLR 141 (NZSC), [16].

by legislation in 1968 that ‘the Court shall regard the welfare of the child as the first and paramount consideration’.²⁴ In a complete revision of private child law in 2004, it was confirmed that ‘[t]he welfare and best interests of the child must be the first and paramount consideration’,²⁵ and that ‘[t]he welfare and best interests of the particular child in his or her particular circumstances must be considered’.²⁶ This general provision is supplemented by six ‘principles relevant to child’s welfare and best interests’,²⁷ considered below.²⁸

In England, the law previously provided that ‘the court ... shall regard the welfare of the infant as the first and paramount consideration’,²⁹ and custody orders specifically prohibited the removal of the child from the jurisdiction without the written consent of the other parent or the leave of the court.³⁰ The Children Act 1989 confirms that ‘the child’s welfare shall be the court’s paramount consideration’ when making decisions about his or her upbringing,³¹ and lists seven considerations to which ‘the court shall have regard in particular’ (the so-called *welfare checklist*):

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

²⁴ Guardianship Act 1968, s 23.

²⁵ Care of Children Act 2004 (hereafter, ‘COCA’), s 4(1).

²⁶ COCA, s 4(2), effectively codifying *Cohen v Ellis* (1987) 4 NZFLR 438 (NZFC).

²⁷ COCA, s 5.

²⁸ Below, text from n 208.

²⁹ Guardianship of Infants Act 1925, s 1; later, Guardianship of Minors Act 1971, s 1.

³⁰ This practice was well established by the early Twentieth Century: see, eg, W Rayden, *Practice and Law in the Divorce Division of the High Court and on Appeal Therefrom* (1st edn, Butterworth, London: 1910), 190.

³¹ Children Act 1989, s 1(1).

- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.³²

The restriction on removal from the jurisdiction (ie England and Wales) was changed by statute to incorporate the entire United Kingdom:³³

Where a residence order is in force with respect to a child, no person may—

- (b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.³⁴

International moves therefore require court permission (in the absence of consent), which can be granted either with an order under section 13 itself,³⁵ or with a *specific issue order*;³⁶ internal relocation does not require such permission, but can be prevented with a *prohibited*

³² Children Act 1989, s 1(3).

³³ It was considered 'quite unrealistic' to continue the previous restriction: Law Commission, 'Review of Child Law: Guardianship and Custody' (Law Com No 172, HC 594: HMSO, 1988), [4.15].

³⁴ Children Act 1989, s 13(1).

³⁵ It is not clear that s 13 in fact contains any such power, and it is arguable that the order should always be made under s 8: see *Re M (Leave to Remove Child from Jurisdiction)* [1999] 2 FLR 334 (EWHC) (Hale J); R George, 'Changing Names, Changing Places: Reconsidering Section 13 of the Children Act 1989' [2008] *Fam Law* 1121, discussed in Chapter 5, text from n 98.

³⁶ Children Act 1989, s 8.

steps order,³⁷ a *specific issue order* about, for example, which school the child should attend,³⁸ or by imposing conditions on a *residence order*.³⁹

Having thus set out the court structures and the relevant legislative provisions of both England and New Zealand, we can examine the development of the substantive law relating to relocation. For some 25 years, the two jurisdictions adopted much the same approach, led by developments in the English courts.

The Common Starting Point: Relocation Law, 1970-1995

Although there were a few relocation cases reported before it,⁴⁰ the decision of the English Court of Appeal in *Poel v Poel* on 24 July 1970 was the first truly significant event in the development of the modern relocation law.⁴¹ For twenty-five years after *Poel* was decided, England and New Zealand walked much the same path in relocation law. However, since there are few reported cases from New Zealand during this period, and those that there are applied *Poel*,⁴² this section focuses on English developments.

³⁷ Ibid.

³⁸ Ibid. See Chapter 5, text from n 45.

³⁹ Ibid; s 11(7) clarifies that conditions can be imposed under s 8, but is not a separate power ('A section 8 order may ... impose conditions...').

⁴⁰ See, eg, *Hunt v Hunt* (1884) 28 Ch D 606 (EWCA); *Re Benner (Infants)* [1951] WN 436 (EWHC); *Halstern v Halstern*, The Times, 23 May 1955 (EWHC); *Aglionby v Aglionby* [1956] CLY 2563 (EWCA); *Re O (Infants)* [1962] 1 WLR 724 (EWCA).

⁴¹ [1970] 1 WLR 1469 (EWCA) (hereafter, '*Poel*').

⁴² See, eg, *Willamson v Willamson* (HC Invercargill, M42/77, 1 Dec 1974, Somers J); *Kennedy v Tyley* (1988) 4 NZFLR 708 (NZFC); *C v C* [1995] NZFLR 360 (NZFC).

Poel was, perhaps, an unlikely candidate to become the leading case on relocation. As Rachel Taylor has said, ‘it is quite astounding that a 5 page case which cites no authority and does not appear to have roused any particular argument on principle has been interpreted as establishing a principle that has lasted 40 years’.⁴³

Indeed, it may be pertinent to adapt an observation by F H Newark, made in a rather different context:

Decisive cases in the development of the law are of two kinds. There is the weighty cause which passes leisurely from the High Court to the House of Lords, argued at length from a multitude of authorities at every stage of its progress, while onlookers in the Inns of Court and the universities eagerly canvass the result. Equally decisive may be the obscure case, casually decided and even more casually reported. All lawyers are familiar with half a dozen or so cases which must have appeared to the judges who tried them to be so straightforward and lacking in novelty that they were doubtless surprised when the case was reported at all, and would be astounded to learn later that they were supposed to have played a part in the formulation of new doctrines. [*Poel v Poel*] would seem to fall into this second category.⁴⁴

Despite *Poel*’s apparent shortcomings, ‘the reasoning within it continues to underpin modern thinking’ in English relocation cases.⁴⁵

In *Poel*, the mother was the primary carer, the father having weekly contact. The

⁴³ R Taylor (email to author: 16 June 2010), quoted with permission.

⁴⁴ F Newark, ‘*Twine v Bean’s Express Ltd*’ (casenote) (1954) 17 *MLR* 102, 102; see *Twine v Bean’s Express* [1946] 1 All ER 202 (EWHC), aff’d (1946) 62 TLR 155, 458 (EWCA), about employers’ vicarious liability for employees’ torts.

⁴⁵ M Hayes, ‘Relocation Cases’, 352; see, most recently, *Re B (A Child)* [2009] EWCA Civ 553, unreported, [10], refusing leave to appeal a case which was within ‘the classic territory of *Poel*’.

mother had remarried, was pregnant, and wished to emigrate to New Zealand where her new husband had better job prospects. The trial judge refused leave, but the Court of Appeal reversed him.

The reasoning of *Poel* is not entirely straightforward. Sir Gordon Willmer treated the case as primarily about the court's appellate function, and questioned whether there were grounds to interfere with the judge's decision. The issue was, said his Lordship, 'a matter very much for the discretion of the judge'.⁴⁶ However, since the other two judges had taken 'a more decided view' that the appeal should be allowed, Sir Gordon agreed.⁴⁷

The other two judgments were based more on substantive principles. Winn LJ noted that the welfare of the child was the guiding consideration, within which

...it is to be regarded, I think, as a very dominant factor in such a dispute that there has been an order ... for custody in favour of the one parent ... and ... the custody thus ordered has been working satisfactorily in every respect; and that although, naturally, the other parent will feel ... that the access permitted to him is not all that he would wish, in no other respect is it suggested in the slightest degree that the custody arrangements have been anything but entirely beneficial to the child and satisfactory in general to the parties concerned.⁴⁸

The child, said Winn LJ, was now part of the stepfather's family, and the mother and stepfather had a legitimate reason for relocating.⁴⁹ Given these considerations, his Lordship

⁴⁶ *Poel*, 1474.

⁴⁷ *Ibid*, 1474.

⁴⁸ *Ibid*, 1471.

⁴⁹ The reason was 'to go again to a climate which [the stepfather] has enjoyed in the past and to surroundings in an agricultural type of country which he finds pleasant and enjoyable': *Poel*, 1471.

could not see

...that there is any reason why they should be prohibited from emigrating, and taking this boy with them. It is a grave thing that the boy will be deprived of the advantage, which he would have had if he had been brought up in close contact with his natural father, of having the advice of his father from time to time, and, in case of need, of falling back upon him for protection and care.⁵⁰

However, despite this loss, it was important to be aware of the effect of keeping the mother and stepfather in England against their will:

I am very firmly of opinion that the child's happiness is directly dependent not only upon the health and happiness of his own mother but upon her freedom from the very likely repercussions, of an adverse character, which would result affecting her relations with her new husband and her ability to look after her family peacefully and in a psychological frame of ease, from the refusal of the permission to take this boy to New Zealand which I think quite clearly his welfare dictates.⁵¹

Much the same points were made by Sachs LJ in a passage much quoted since:

When a marriage breaks up, ... the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may ... produce considerable strains which would not only be unfair to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. 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

⁵⁰ *Poel*, 1471.

⁵¹ *Ibid*, 1473.

who has not been given custody may well have to bear...⁵²

Thus the key aspects of *Poel* were, first, that there needed to be a single primary carer and, second, that the court ought not to interfere with the way of life chosen by that parent: interfering with decisions about her life would likely bring repercussions which would affect the child more adversely than the loss of ‘the advice of [the] father from time to time’.⁵³

However, despite these clearly stated principles, the precise effect of *Poel* in the years following it is not clear. The recollection of one judge interviewed for this research was that, during the 1970s, *Poel* was ‘thought to have been overtaken by a general consideration of welfare’.⁵⁴ A number of points support this contention.

First, it might be noted that, with one significant exception,⁵⁵ reported cases in the 1970s placed little emphasis on the ‘principles’ expressed in *Poel*. For instance, Scarman LJ said in 1973 that ‘all the circumstances were to be looked at and each factor weighed against another. One factor was not to take priority against another’.⁵⁶

Indeed, a number of cases attempted to limit the scope of *Poel*. In *A v A (Child: Removal from Jurisdiction)*,⁵⁷ Ormrod LJ said that

⁵² Ibid, 1473.

⁵³ Ibid, 1471.

⁵⁴ Participant EJ1: see Chapter 5, text at n 109.

⁵⁵ *Nash v Nash* [1973] 2 All ER 704 (EWCA).

⁵⁶ *Bevan v Bevan* (1974) 4 Fam Law 126 (EWCA), 127.

⁵⁷ (1980) 1 FLR 380 (EWCA).

...although [counsel] has argued persuasively for the test which was suggested in the case of *Poel v Poel* ..., the test which is often put on the basis of whether it is reasonable for the mother to return to her own country with the child, I myself doubt whether it provides a satisfactory answer to this question. The fundamental question is what is in the best interest of the child...⁵⁸

Similarly, in *Chamberlain v de la Mare* (later reversed on appeal⁵⁹), Balcombe J said that the welfare principle was the only applicable law, and that '[i]f and in so far as what is said by [*Poel v Poel* and *Nash v Nash*⁶⁰] is contrary to that principle of law then I must, respectfully, decline to follow them'.⁶¹

A second indicator of *Poel*'s limited scope in the 1970s might be found in the Court of Appeal's approach to its appellate function. It may indicate that little weight was being given to *Poel*'s 'principles' that trial judges were generally upheld on appeal, whether they granted the relocation application⁶² or not,⁶³ so long as they based their decision on welfare.⁶⁴ Such an approach might be considered inconsistent with the existence of an

⁵⁸ Ibid, 381; see also *Hurwitt v Hurwitt* (1982) 3 FLR 194 (1979) (EWCA), 197 (Cumming-Bruce LJ).

⁵⁹ Below, text from n 67.

⁶⁰ [1973] 2 All ER 704 (EWCA).

⁶¹ *Chamberlain v de la Mare* (1983) 4 FLR 434 (EWHC), 437.

⁶² See, eg, *T v T* (1970) 114 Sol J 909 (EWCA); *Khalil v Khalil* [1980] CLY 242 (EWCA).

⁶³ See, eg, *Bevan v Bevan* (1974) 4 Fam Law 126 (EWCA); *O'N v O'N* [1977] CLY 311 (EWCA); *Frost v Hartley* [1977] CLY 329 (EWCA).

⁶⁴ The analysis in *Godfrey v Godfrey* 31 Jan 1980, unreported (EWCA) stands in stark contrast to *Poel*. Walton J (Orr and Ormrod LJJ agreeing), said that contact with the father 'must be borne very, very much in mind'; the key consideration was 'the effect upon the children of uprooting them from the comparative placidity of life in England and subjecting them to the swirling democratic ferment of the United States of America', which had not been a consideration in *Poel* because the child there was so young; and the argument that the mother would be distressed by refusal was merely 'a little amateur psychology'.

established legal principle favouring relocation.⁶⁵

Despite this resistance, *Poel* was rejuvenated in the mid 1980s. The first indication came in the unreported case of *Moodey v Field* in 1981, in which Ormrod LJ said:

The question therefore in each case is, is the proposed move a reasonable one from the point of view of the adults involved? If the answer is yes, then leave should only be refused if it is shown beyond any doubt that the interests of the children and the interests of the custodial parent are incompatible.⁶⁶

However, it was not until the Court of Appeal decision in *Chamberlain v de la Mare* in 1983 (where, as we saw, Balcombe J at first instance declared *Poel* inconsistent with the welfare principle⁶⁷) that the resurrection of *Poel* took hold. Ormrod LJ quoted *Moodey* and, with reference to the judgments in *Poel*, said that he ‘would be sorry to think that anything should be said to throw doubt on them as authority for the approach of the courts to this very difficult and continuing problem’.⁶⁸ As to Balcombe J’s interpretation of *Poel*, Ormrod LJ took a different view:

What Sachs LJ was saying, I think, is that if the court interferes with the way of life which the custodial parent is proposing to adopt so that he or she and the new spouse are compelled to adopt a manner of life which they do not want, and reasonably do not want, the

⁶⁵ Cf Hayes’ argument (discussed below, text at n 132) that in more recent years, the appeal court has treated a failure to follow the principles of *Poel* (and later cases) as an error *of law*, liable to be overturned on appeal: M Hayes, ‘Relocation Cases’, 369-371.

⁶⁶ *Moodey v Field* 13 Feb 1981, unreported (EWCA); one should be wary of dissecting judgments as if they were Acts of Parliament, but note that ‘beyond any doubt’ is a standard of proof otherwise unknown to the law.

⁶⁷ Above, text at nn 58-61.

⁶⁸ *Chamberlain v de la Mare* (1983) 4 FLR 434 (EWCA), 442.

likelihood is that the frustrations and bitterness which would result from such an interference with any adult whose career is at stake would be bound to overflow on to children. It would be bound to prejudice the relationship between the step-father ... and the children, whom he must see as a drag on him (to put it no higher). It is that factor which is so important which has to be brought into account when the balancing exercise is done. ... Consequently, in ordinary sensible human terms the court should not do something which is, *prima facie*, unreasonable unless there is some compelling reason to the contrary.⁶⁹

In a short concurring judgment, Griffiths LJ stressed the importance the child of the new family unit in which he or she was living:

The welfare of young children is best served by bringing them up in a happy, secure family atmosphere. When, after divorce, the parent who has custody of the children remarries, those children then join and become members of a new family and it is the happiness and security of that family on which their welfare will depend. However painful it may be for the other parent that parent has got to grasp and appreciate that fact.⁷⁰

It can be seen, therefore, that the English courts increasingly emphasised the importance to children's welfare of a stable and functional family unit, with contact between the child and the other parent secondary.⁷¹

These developments were not explicitly discussed in New Zealand, but *Poel* continued to dominate; however, the first seeds of change began to emerge. A particularly revealing

⁶⁹ Ibid, 442-443.

⁷⁰ Ibid, 445; see similarly *Belton v Belton* [1987] 2 FLR 343 (EWCA); *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043.

⁷¹ See also *Lonslow v Hennig (Formerly Lonslow)* [1986] 2 FLR 378 (EWCA); *Re F (A Ward) (Leave to Remove Ward Out of Jurisdiction)* [1988] 2 FLR 116 (EWCA).

case was *Wright v Wright*.⁷² Cooke and Richardson JJ started by laying out the *prima facie* position: ‘unless restricted by statutory provision or court order or agreement, the person entitled to custody must have reasonable freedom to select the child’s place of residence’.⁷³

Thus far, this decision reflects *Poel*; but the judges went on:

Restrictions, however, are common. By s 11(2) of the Guardianship Act a custody order may be made subject to such conditions as the Court thinks fit. Consequently there can be conditions as to place of residence ... Access rights ordered or agreed may be infringed by significant changes of the child’s residence without consent or Court approval. For instance a term that the non-custodial parent is to have reasonable access could be broken by moving the child from one city to another.⁷⁴

So, while the English court was saying that international moves which were reasonable for the parent should not lightly be stopped, the New Zealand court was suggesting that restrictions were common, even for moves within the country, and could be implied from a contact order (as it would now be called).

However, perhaps surprisingly, *Wright* had little effect in the New Zealand trial courts. Again, there is little caselaw available, but, for example, *Poel* was the main authority cited in one reported 1988 case.⁷⁵ *Poel*’s dominance continued through the early 1990s,⁷⁶ and as

⁷² (1984) 2 NZFLR 335 (NZCA).

⁷³ *Ibid*, 341.

⁷⁴ *Ibid*.

⁷⁵ *Kennedy v Tyley* (1988) 4 NZFLR 708 (NZFC).

⁷⁶ See, eg, *Reeves v Reeves* (FC Dunedin, FP 190/92, 18 June 1993, Judge Kean); *Bachelor v Parker* (FC, Lower Hutt, FP 432/92, Dec 1993, Judge Frater).

late as March 1995 both countries were citing it,⁷⁷ seeing the applicant parent's well-being as the single most important factor in promoting the child's welfare.

One notable event which did nothing to interrupt this steady development of relocation law was the introduction of the English Children Act 1989. Despite some debate,⁷⁸ the Act was said to make no difference to relocation law.⁷⁹ What might have happened had *Re S (Minors)* been reported is a matter for speculation.⁸⁰ As it turned out, few ever knew of Waite LJ's view that the Children Act meant that cases like *Poel* and *Chamberlain* 'need to be regarded with reservation', because

...they were decided at a time when rights of parenthood were governed by the legalistic concept of custody... Custody is a concept which the Children Act has swept away. Notions of custody with its legalistic and proprietary overtones are now replaced with an approach which sees parents as sharing responsibility equally for the upbringing of their children...⁸¹

The cases which did reach the law reports took a different view, seeing no significance in the changed terminology or the Act's focus on shared parental responsibility:

The test remains the same as was laid down in *Poel v Poel*, although there is undoubtedly an emphasis by reason of the Children Act 1989 in relation to the wishes of the children where they are of sufficient

⁷⁷ See, eg, *C v C* [1995] NZFLR 360 (NZFC); *Re WB (Residence Orders)* [1995] 2 FLR 1023 (EWHC).

⁷⁸ C Barton, 'Emigration After Divorce: (Not) the Children Act 1989' (1990) 24 (1) *The Law Teacher* 81.

⁷⁹ *Re W (Minors) (Removal from Jurisdiction)* [1994] 1 FCR 842 (EWHC).

⁸⁰ *Re S (Minors)* 2 April 1996, unreported (EWCA).

⁸¹ *Ibid.* See also Robert Walker LJ's comment that *Poel* 'is not readily reconcilable with the disappearance of custody orders and the introduction of ... the Children Act 1989': *Re A (Specific Issue Order: Parental Dispute)* [2001] 1 FLR 121 (EWCA), 126. His Lordship recanted from this view in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052, [65].

age and understanding to be able to express any views. ... The implementation of the Act has not changed the test, but has merely emphasised that the [s 1(3) welfare] check-list is to be applied when considering welfare.⁸²

A similar fate later befell another section of the Act, the so-called *no-order principle*.⁸³ In the connected area of applications to change a child's surname,⁸⁴ the House of Lords ruled that the *no-order principle* required an applicant to 'make out a positive case ... that it is in the interests of the child that the order should be made'.⁸⁵ In *Re X and Y (Leave to Remove from Jurisdiction: No Order Principle)*,⁸⁶ Munby J applied this decision to relocation law, concluding that inadequate attention had been paid to the statutory instruction not to make any order unless doing so was better for the child than making no order at all:

The proper application of s 1(5) is inconsistent with identifying any particular factor(s) as ... being all important or as only to be displaced by strong countervailing factors. ... However, ... it remains the case that the wish of the custodial parent to remove a child from the jurisdiction will always be a relevant factor. Typically it will properly be treated not merely as important but as carrying very great weight'.⁸⁷

However, when this case came to the attention of the appeal court, Munby J's reasoning was summarily rejected: it was said that relocation cases usually involve cross-

⁸² *M v A (Wardship: Removal from Jurisdiction)* [1993] 2 FLR 715 (EWHC), 720-721; see also *M v M (Removal from Jurisdiction)* [1993] 1 FCR 5 (EWCA); *H v H (Residence Order: Leave to Remove from Jurisdiction)* [1995] 1 FLR 529 (EWCA).

⁸³ Children Act 1989, s 1(5).

⁸⁴ Children Act 1989, s 13(1)(a).

⁸⁵ *Dawson v Wearmouth* [1999] 1 FLR 1167 (HL), 1179.

⁸⁶ [2001] 2 FLR 118 (EWHC).

⁸⁷ *Ibid*, 148-149.

applications for residence, and that consequently '[n]o order is simply not an option. The court has to impose one order or the other... Accordingly, ... the decision in *Re X and Y* ... should not be followed'.⁸⁸ Whether this reasoning is convincing or not is open to question,⁸⁹ but clearly the Court of Appeal was not going to allow established relocation law principles to be displaced by the side-wind of section 1(5).

Any thought that the Children Act might change relocation law thus came to nothing. Indeed, at the end of 1994, a new level of certainty was reached in the English rhetoric. In an influential first instance decision, Thorpe J said that

...leave should not be withheld unless the interests of the children and those of the custodial parent [are] clearly shown to be incompatible. That statement of principle creates a presumption in favour of the reasonable application of the custodial parent...⁹⁰

Although the New Zealand courts had never referred to a presumption, it can be seen that in the mid-1990s the approaches being taken by the two jurisdictions were similar, both underpinned by *Poel*. However, this similarity ended in May 1995 with the New Zealand Court of Appeal decision in *Stadniczenko v Stadniczenko*.⁹¹ Because of the divergence in approaches at this point, the chapter now splits, looking first at England and then New Zealand.

⁸⁸ *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277, [19].

⁸⁹ R George, 'Changing Names, Changing Places: Reconsidering Section 13 of the Children Act 1989' [2008] *Fam Law* 1121, 1125.

⁹⁰ *MH v GP (Child: Emigration)* [1995] 2 FLR 106 (EWHC), 110.

⁹¹ [1995] NZFLR 493 (NZCA).

Building on *Poel*: English Law, 1995-2010

English law continued to build on the *Poel* approach. In terms of international relocation, the ‘presumption in favour of the reasonable application’⁹² held sway⁹³ in the English law until the Human Rights Act 1998 entered force.⁹⁴ Following the Act’s introduction,⁹⁵ relocation law was fully reconsidered in the now-leading case of *Payne v Payne*,⁹⁶ in which both Butler-Sloss P and Thorpe LJ gave full judgments.

In *Payne*, the mother was a New Zealander who had lived in England for some years, and was the main carer of the four year old child. After an abortive move which ended with Hague abduction proceedings,⁹⁷ the mother sought leave to relocate to New Zealand. Pending the decision, the daughter was spending about 40 percent of her time with the father and the rest with the mother. The trial judge granted leave to relocate, and the father

⁹² *MH v GP (Child: Emigration)* [1995] 2 FLR 106 (EWHC), 110; *Re K (Application to Remove from Jurisdiction)* [1998] 2 FLR 1006 (EWHC), 1015; *Re C (Leave to Remove from Jurisdiction)* [2000] 2 FLR 457 (EWCA).

⁹³ Cf C Barton, ‘When Did You Next See Your Father? Emigration and the One-Parent Family: *Re T* (Removal from Jurisdiction); *Goertz v Gordon* (formerly *Goertz*)’ [1997] *CFLQ* 73: Barton argued on the basis of *Re T (Removal from Jurisdiction)* [1996] 2 FLR 352 (EWCA) that the English approach was no longer presumptive but rather ‘favours the more even-handed ... Canadian approach’ seen in *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada), on which see Chapter 1, text from n 63. Respectfully, *Re T* was a slim basis for this contention: the judge refused leave because the move was ill-considered and poorly planned, which were long-established grounds for refusing leave regardless of any ‘presumption’: see, eg, *Hurwitt v Hurwitt* (1982) 3 FLR 194 (1979) (EWCA); *Re K (A Minor) (Removal from Jurisdiction)* [1992] 2 FLR 98 (EWHC).

⁹⁴ The Act entered force on 2 October 2000.

⁹⁵ See also *Re A (Permission to Remove Child from Jurisdiction: Human Rights)* [2000] 2 FLR 225 (EWCA).

⁹⁶ [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, ‘*Payne*’); see A Bainham, ‘Taking Children Abroad: Human Rights, Welfare and the Courts’ [2001] *CLJ* 489; A Perry, ‘Case Commentary: Leave to Remove Children from the Jurisdiction: *Payne v Payne*’ [2001] *CFLQ* 455.

⁹⁷ Hague Convention on the Civil Aspects of International Child Abduction 1980.

appealed on the ground that a presumption in favour of the move was contrary to the welfare principle of the Children Act 1989 and the Human Rights Act.

With reference to the ‘presumption’ in favour of relocation, the Court of Appeal was clear that this approach was unacceptable. The President said that a presumption ‘over-emphasised one element of the approach’,⁹⁸ while Thorpe LJ said that, although the word had been used ‘in the non-legal sense’,⁹⁹ talk of presumptions was inappropriate:

...there is a danger that if the regard which the court pays to the reasonable proposals of the primary carer were elevated into a legal presumption then there would be an obvious risk of the breach of the respondent’s rights not only [to respect for private and family life] under Art 8 but also his rights under Art 6 to a fair trial.¹⁰⁰

Regarding the father’s claim that existing caselaw was contrary to the Children Act, the Court of Appeal noted that all the authorities based themselves on the welfare principle.¹⁰¹ Little further was said about whether the application of the welfare principle to relocation was correct or not, but the judges did conclude that the welfare principle was itself compatible with human rights.¹⁰²

The Court of Appeal then turned to the substantive issues. A review of the caselaw

⁹⁸ *Payne*, [83].

⁹⁹ *Ibid*, [25].

¹⁰⁰ *Ibid*, [40].

¹⁰¹ *Ibid*, [16], [83].

¹⁰² For criticism of this analysis, see S Harris-Short, ‘Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution?’ [2005] *CFLQ* 329, 355; J Herring and R Taylor, ‘Relocating Relocation’ [2006] *CFLQ* 517, 527-529.

showed that the authorities ‘have stood the test of time and give valuable guidance as to the approach the court should adopt in these most difficult cases’.¹⁰³ Such guidance is rare in the family context, because the factors relevant to the child’s welfare vary from case to case,¹⁰⁴ but Thorpe LJ gave three reasons why it was appropriate in the relocation context.¹⁰⁵ However, as all three reasons have subsequently been opened to doubt, some may question whether the basis for this guidance was as strong as was claimed.

First, his Lordship said, relocation applications are ‘invariably’ brought by mothers and primary carers. It is not clear what the implication of these factors is, but it is doubtful that a difference of approach because applicants are mothers, rather than – presumably – fathers, could be justified; indeed the court has since confirmed that the same principles apply to a primary carer father.¹⁰⁶ Regarding the presence of a primary carer, the question which Thorpe LJ’s point may raise is what happens in cases where the parents are sharing care, which we discuss below.¹⁰⁷

The second reason that Thorpe LJ gave was that the motivation for relocating is usually a new partner or a desire to return home. However, this is not the only reason why parents seek to relocate, and it has subsequently been confirmed that the same principles

¹⁰³ *Payne*, [83]; similarly [27].

¹⁰⁴ A Perry, ‘Case Commentary: Leave to Remove Children from the Jurisdiction: *Payne v Payne*’ [2001] *CFLQ* 455.

¹⁰⁵ *Payne*, [27].

¹⁰⁶ *Re W (A Child) (Removal from Jurisdiction)* [2005] EWCA Civ 1614, [2006] 1 FCR 346.

¹⁰⁷ Text from n 151.

apply regardless of motivation.¹⁰⁸

The final reason was that the other parent's opposition to relocation is usually based on the effect it will have on the child's relationship with him.¹⁰⁹ Elsewhere, Thorpe LJ has argued persuasively that the value of the child's relationship with a non-resident parent will vary depending on whether contact is intended 'to maintain an existing relationship, to revive a dormant relationship or to create a non-existent relationship', and will 'surely wane across that spectrum'.¹¹⁰ Although this consideration is not mentioned in *Payne*, the court has subsequently implied that a similar approach may be taken to relocation.¹¹¹

Thorpe LJ then reviewed the caselaw, which, he said:

...demonstrate[d] that relocation cases have been consistently decided upon the application of the following two propositions:

- (a) the welfare of the child is the paramount consideration; and
- (b) refusing the primary carer's reasonable proposals for the relocation of her family life is likely to impact detrimentally on the welfare of her dependent children. Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of the children.¹¹²

¹⁰⁸ *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239, [16]-[17].

¹⁰⁹ There are other reasons why parents oppose relocation, such as cultural considerations (*Re A (A Child) (Leave to Remove: Cultural and Religious Considerations)* [2006] EWHC 421 (Fam), [2006] 2 FLR 572), the child's education (*Re S (Removal from Jurisdiction)* [1999] 1 FLR 850 (EWHC)), or concerns about the destination (*Nash v Nash* [1973] 2 All ER 704 (EWCA)).

¹¹⁰ *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (EWCA), 364; see similarly J Herring and R Taylor, 'Relocating Relocation' [2006] *CFLQ* 517, 526.

¹¹¹ *Re W (A Child) (Removal from Jurisdiction)* [2005] EWCA Civ 1614, [2006] 1 FCR 346, [20]; *Re F and H (Children: Relocation)* [2007] EWCA Civ 692, [2008] 2 FLR 1667, [9].

¹¹² *Payne*, [26].

The first point is unobjectionable; the second requires analysis.

To paraphrase, children require psychological stability and security and, since those things come mainly from the primary carer, the primary carer herself needs psychological stability and security: '[t]he parent cannot give what she herself lacks'.¹¹³ Two issues arise. First, it is worth comparing proposition (b) with Thorpe J's comment six years before:

...leave should not be withheld unless the interests of the children and those of the custodial parent [are] clearly shown to be incompatible. That statement of principle creates a presumption in favour of the reasonable application of the custodial parent.¹¹⁴

A virtually identical proposition in *Payne* was said not to create a presumption.¹¹⁵

Second, the link between the two clauses of point (b) raises questions. Because refusing leave 'is likely to' impact detrimentally on the mother and child,¹¹⁶ leave *will* be granted (unless contrary to the child's welfare). One might think that this statement either creates a *de facto* presumption, or is a circuitous way of saying that the welfare principle applies. Although *Payne* explicitly rejected presumptions,¹¹⁷ the former fits better with the

¹¹³ Ibid, [31].

¹¹⁴ *MH v GP (Child: Emigration)* [1995] 2 FLR 106 (EWHC), 110.

¹¹⁵ However, *Payne* is 'commonly perceived as walking and talking like a presumption': C Geekie, 'Relocation and Shared Residence: One Route or Two?' [2008] *Fam Law* 446, 451-452.

¹¹⁶ In later cases, the strength of this wording increased, not only regarding the effect of refusal on the parent, but also to say that 'almost inevitable is the transference of unhappiness from primary carer to child': *Re G (Removal from Jurisdiction)* [2005] EWCA Civ 170, [2005] 2 FLR 166, [24]; similarly *Re C (Children)* [2003] EWCA Civ 413, unreported, [8]. One may wonder whether these are not questions of fact, rather than things which the Court of Appeal may assert.

¹¹⁷ *Payne*, [25] and [83].

plain meaning of the words:¹¹⁸ relocation has to be shown to be ‘incompatible’ with the child’s welfare for it to be vetoed by the court (which might be thought different from ascertaining the solution which best meets the child’s interests).¹¹⁹

If, alternatively, point (b) is simply a formulation of the welfare principle, one may wonder whether the conclusion (that leave *will* be granted) is perhaps misplaced: although refusing leave has been identified as detrimental to the child, it does not necessarily follow that that outcome is not in the child’s best interests. Unfortunately, something can impact negatively on a child and still be in her best interests if all other options will impact on the child *more* negatively.¹²⁰ In other words, just because the child might be being cared for by an unhappy parent does not mean that, overall, this option might not sometimes be the best available.

The President and Thorpe LJ then laid out guidelines on how relocation should be approached. Butler-Sloss P prefaced her summary by saying that she was not excluding other factors that would arise in each case, but that the following should be taken into account:

- (a) The welfare of the child is always paramount.
- (b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.
- (c) The reasonable proposals of the parent with a residence order

¹¹⁸ This interpretation is taken by courts in other jurisdictions; see below, text from n 195.

¹¹⁹ Cf J Eekelaar, ‘Access Rights and Children’s Welfare’ (1988) 51 *MLR* 629, 631, discussing the difference between a right to do *x* unless there is significant objection, and a right to do *x* only if a committee decides that *x* is the best option.

¹²⁰ See generally J Eekelaar, ‘Beyond the Welfare Principle’ [2002] *CFLQ* 237, esp 244.

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.

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.¹²¹

In his summary, Thorpe LJ said:

To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

- (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

¹²¹ *Payne*, [85]-[86].

- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? [Where the mother cares for the child or proposes to care for the child within a new family, the impact of refusal on the new family and on the stepfather or prospective stepfather must also be carefully calculated.¹²²]
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.¹²³

While Wall LJ has recently said that 'the best summary of the approach which judges are required to take to these difficult decisions is contained in the judgment of the President, Dame Elizabeth Butler-Sloss in *Payne*',¹²⁴ it has been Thorpe LJ's 'discipline' which has dominated the English approach.

The law since *Payne* has been stable and consistent, with the impact of refusing leave consistently stressed as the key factor.¹²⁵ The Court of Appeal has rejected calls to review

¹²² Thorpe LJ added this sentence in *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [11].

¹²³ *Payne*, [40]-[41].

¹²⁴ *Re D (Children)* [2010] EWCA Civ 50, [2010] 2 FLR, forthcoming, [18].

¹²⁵ See, eg, *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043; *Re G (Removal from Jurisdiction)* [2005] EWCA Civ 170, [2005] 2 FLR 166.

the law,¹²⁶ and the House of Lords consistently refused leave to appeal,¹²⁷ meaning that *Payne* remains the leading case.¹²⁸ However, despite this clarity of approach, the English law on relocation has been subjected to increasing criticism.

One ground of dissatisfaction relates to a view that the Court of Appeal has been overly interventionist in relocation law appeals. In a 1999 case called *Re C (Leave to Remove from Jurisdiction)*,¹²⁹ Thorpe LJ gave a judgment bearing strong resemblance to his approach in *Payne*. However, Morritt and Chadwick LJ rejected Thorpe LJ's analysis of the trial judge's decision. Noting the House of Lords' warning to appellate judges that 'they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to say that he misdirected himself',¹³⁰ Chadwick LJ said of Thorpe LJ's analysis that 'to subject the judgment to that degree of critical analysis exposes this court to the charge that what it is really doing is seeking to find an excuse to substitute its own discretion for that of the judge'.¹³¹

These comments may be compared with Mary Hayes' argument.¹³² In her discussion,

¹²⁶ *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587; *Re W (Leave to Remove)* [2008] EWCA Civ 538, [2008] 2 FLR 1170, [18]; *Re H (A Child)* [2010] EWCA Civ 789, unreported; *Re H (A Child)* [2010] EWCA Civ 915, unreported.

¹²⁷ See, eg, *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043 (leave refused 1 April 2004); *Re W (A Child) (Removal from Jurisdiction)* [2005] EWCA Civ 1614, [2006] 1 FCR 346 (leave refused 21 June 2006); *Re W (Leave to Remove)* [2008] EWCA Civ 538, [2008] 2 FLR 1170 (leave refused 9 June 2008).

¹²⁸ There have been other reported cases since but, other than the points made here, they affirm *Payne*, and are not discussed in detail.

¹²⁹ [2000] 2 FLR 457 (EWCA).

¹³⁰ *Piglowska v Piglowski* [1999] 2 FLR 763 (HL), 784.

¹³¹ *Re C (Leave to Remove from Jurisdiction)* [2000] 2 FLR 457 (EWCA), 466.

¹³² M Hayes, 'Relocation Cases'.

focusing on cases since *Payne*, Hayes notes that the Court of Appeal appeared to be taking an interventionist approach to relocation appeals:¹³³

The weight to be given to the wishes and feelings of the [applicant] mother has been elevated to a matter of principle. ... The Court of Appeal has ruled that a judge makes a serious error where he gives less weight to the impact on the mother of denial of leave than he does to other factors relevant to the welfare checklist. ... Treating the impact on the applicant of denial of leave as a consideration which the court must, as a matter of law, give very great weight, has enabled the Court of Appeal to respond in three ways where the mother's application has been denied. First, it may overrule the trial judge. Secondly, it may substitute its own discretion for that of the judge. Thirdly, it may grant the mother leave to remove the children from the jurisdiction of the courts of England and Wales.¹³⁴

It could be suggested that *Re C* gave some indication that this interventionist approach was on the rise. It may be noted that of the 23 international relocation judgments available¹³⁵ from the Court of Appeal since *Re C* was decided in 1999, only four ended with relocation being refused;¹³⁶ by contrast, 13 of the 23 cases were refused by the trial judges.

Great care is required in assessing these numbers, since there are so few cases; moreover, in order for leave to appeal to be granted, the appeal must have 'a real prospect of success'.¹³⁷ Given this, finding that nine of the cases heard on appeal resulted in a reversal of the original decision is, perhaps, not surprising. What is notable, though, is that all the

¹³³ For English participants' views on this point, see Chapter 5, text from n 135.

¹³⁴ M Hayes, 'Relocation Cases', 370-371.

¹³⁵ Judgments refusing leave to appeal are excluded.

¹³⁶ One other case was sent for a retrial *Re N (Relocation Outside the Jurisdiction)* [2006] EWCA Civ 872, [2006] All ER (D) 132 (Jun).

¹³⁷ CPR 52.3(6).

reversals are of judges who refused relocation.¹³⁸

It is also notable that all four decisions upholding trial judges who refused relocation came after 2005, when the House of Lords issued a further warning to the Court of Appeal about respecting trial judges' discretions. In *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)*,¹³⁹ Baroness Hale of Richmond cautioned that

Too ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law. In short, if trial judges are led to believe that, even if they direct themselves impeccably on the law, make findings of fact which are open to them on the evidence, and are careful ... in their evaluation and weighing of the relevant factors, their decisions are liable to be overturned unless they reach a particular conclusion, they will come to believe that they do not in fact have any choice or discretion in the matter.¹⁴⁰

As Frances Judd QC and I say, '[t]his remark might be thought relevant to international relocation as well. While there is not enough evidence to be sure, ... it may be that a subtle change in the Court of Appeal's approach to relocation followed after *Re J*'.¹⁴¹ Any such shift would also have taken place subsequent to Hayes' analysis,¹⁴² and so this point does not undermine her argument as the cases stood at the time. However, the extent to

¹³⁸ The only reported Court of Appeal case since *Poel* which reversed a decision to grant leave was *M v M (Removal from Jurisdiction)* [1993] 1 FCR 5 (EWCA).

¹³⁹ [2005] UKHL 40, [2005] 2 FLR 802.

¹⁴⁰ *Ibid*, [12].

¹⁴¹ F Judd and R George, 'International Relocation: Do We Stand Alone?' [2010] *Fam Law* 63, 66.

¹⁴² Hayes' article appeared in the September 2006 edition of CFLQ.

which the same conclusion applies to the current position is a matter of debate.¹⁴³

Another line of attack on the English law claims that *Payne* is ‘outdated’ and ‘antiquated’: ‘[t]he essential complaint [is] that in modern times, when joint residence orders have become commonplace, judges [are] applying the principles in *Payne* ... which were predicated upon a status of sole residence order and sole primary carer’.¹⁴⁴

In *Re AR (A Child: Relocation)*,¹⁴⁵ Mostyn J picked up this line of attack. According to his Lordship’s discussion, the English approach

...has not been uncritically accepted. Indeed, there is a strong view that the heavy emphasis on the emotional reaction of the thwarted primary carer represents an illegitimate gloss on the purity of the paramountcy principle. Moreover, some argue that it promotes selfishness and detracts from the importance of co-parenting. Some argue that on the birth of children parents are indentured to sacrifice throughout their minority, but that the one word missing from *Payne* is, in fact, sacrifice.¹⁴⁶

In similar (if more moderate) vein, Wall LJ has commented that

There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the

¹⁴³ One of the first relocation appeals after *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, [2005] 2 FLR 802, *Re H (A Child) (Removal from Jurisdiction)* [2007] EWCA Civ 222, [2007] 2 FLR 317, upheld the judge’s refusal of leave to relocate; one commentator suggested that the decision ‘may herald a more “hands off” approach to the trial judge’s exercise of discretion’ in relocation appeals: C Bridge, ‘Case Reports: Relocation’ [2007] *Fam Law* 707, 708.

¹⁴⁴ *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [13], referring to the skeleton argument of Nicholas Mostyn QC; see also C Geekie, ‘Relocation and Shared Residence: One Route or Two?’ [2008] *Fam Law* 446; M Freeman, ‘Relocation: The Reunite Research’ (Reunite, London: 2009).

¹⁴⁵ [2010] EWHC 1346 (Fam), [2010] 3 FCR 131.

¹⁴⁶ *Ibid*, [8]. See also M Hayes, ‘Relocation Cases’, 362-365.

proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done to children by a permanent breach of the relationship which the children have with the left behind parent.¹⁴⁷

However, in a sign that the debate is a live one, Wilson LJ has indicated that this comment is, for him, too strongly worded:

With respect, I wonder whether there *is* any respectable argument for the proposition that the decision in *Payne* “ignores” the harm of which Wall LJ there spoke. I would agree, however, that there is at any rate a respectable argument for the proposition that it inappropriately “relegates” such harm to a level below that of the harm likely to be sustained by a child through the negative impact upon the applicant of refusal of the application.¹⁴⁸

As we will see, much the same argument underpinned the New Zealand Court of Appeal’s rejection of *Payne*.¹⁴⁹

Before we examine the New Zealand position, however, there are two subsidiary lines of English relocation law to discuss. Most English cases fit the broad fact pattern of *Payne* – that is, a clear primary carer seeking to relocate to another country. Outside this core area, however, we find authorities related to international relocation where there is no single primary carer, and relocation within the UK.

¹⁴⁷ *Re D (Children)* [2010] EWCA Civ 50, [2010] 2 FLR, forthcoming, [33].

¹⁴⁸ *Re H (A Child)* [2010] EWCA Civ 915, unreported, [23] (original emphasis).

¹⁴⁹ Below, text from n 195.

In terms of shared care relocation,¹⁵⁰ *Re C and M (Children)* could so easily have marked a divergence in the English law;¹⁵¹ but since it was not reported, few ever knew of it, and it has since disappeared into history. The potential significance of this case came from Thorpe LJ's acknowledgement that 'the classic approach directed by [*Poel*] is to be applied only in those cases where there is a relatively clear definition of roles between the parents into primary carer or custodial parent and secondary carer or contact parent'.¹⁵² Where there was shared care, 'however strong may be the mother's internal desire to return to her homeland, such a plan is almost certain to impact adversely on the child's sense of security and thereby on the child's welfare'.¹⁵³

Few shared care cases have since arisen in the English reports. Those that do reveal a tension as yet unresolved. On the one hand, there are cases which imply that *Payne* applies to shared care cases. One was *Re G (Leave to Remove)*,¹⁵⁴ in which counsel argued that *Payne* paid insufficient attention to shared care. The Court of Appeal rejected this argument, implying that shared residence does not affect the applicability of *Payne*. Whether or not this was what the Court of Appeal intended, that appears to have been the effect: the High Court recently said that *Re G* showed 'that the principles to be considered are as applicable to

¹⁵⁰ Note the difference between *shared care* and a *shared residence order*: an order can be called 'shared residence' even where care is split substantially unequally, and there might still be a clear primary carer: see, eg, *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397; S Gilmore, 'Court Decision-Making in Shared Residence Order Cases: A Critical Examination' [2006] *CFLQ* 478; see further below, text from n 263.

¹⁵¹ *Re C and M (Children)* 30 July 1999, unreported (EWCA).

¹⁵² *Ibid*, [17] (my paragraph numbering).

¹⁵³ *Ibid*, [18].

¹⁵⁴ [2007] EWCA Civ 1497, [2008] 1 FLR 1587.

cases where there is shared residence’.¹⁵⁵

A similar conclusion might be implied from *Re L (Internal Relocation: Shared Residence Order)*.¹⁵⁶ Internal relocation cases proceed on a different legal basis from international moves, as will be seen:¹⁵⁷ put briefly, restrictions on relocation within the UK are ‘truly exceptional’.¹⁵⁸ In *Re L*, Wall LJ thought it ‘wrong in principle to apply different criteria to a question of internal relocation simply because there is a shared residence order’.¹⁵⁹ If this reasoning is apt to apply to internal relocation,¹⁶⁰ where restrictions on movement are almost unheard of in English law, it arguably applies *a fortiori* to international relocation: if shared care does not stop restrictions on relocation within the UK being ‘truly exceptional’, it is hard to see that shared care would stop *Payne* applying, since *Payne* is less favourable to relocation than the ‘exceptionality’ test.¹⁶¹

Conversely, two decisions of Hedley J (before *Re G* and *Re L*), suggest that *Payne* may be inapplicable to shared care relocation, because ‘many of the factors to which the court drew attention in *Payne* ... whilst relevant may carry less weight than otherwise they

¹⁵⁵ *Re TG (Relocation)* [2009] EWHC 3122 (Fam), unreported, [9].

¹⁵⁶ [2009] EWCA Civ 20, [2009] 1 FLR 1157.

¹⁵⁷ Below, text from n 169.

¹⁵⁸ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

¹⁵⁹ *Re L (Internal Relocation: Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157, [36].

¹⁶⁰ For criticism, see R George, ‘*Re L (Internal Relocation: Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157’ (casenote) [2010] *JSWFL* 71.

¹⁶¹ Some might disagree with this view of *Payne*: cf Mostyn J’s summary, below at n 184.

commonly do'.¹⁶² Frances Judd QC and I describe these cases as being decided 'by the old fashioned method – by reference to s 1 and the welfare checklist', with little reference to other relocation cases.¹⁶³ These decisions might suggest that the *Re C and M* approach has been adopted despite the case itself being unknown.

A recent Court of Appeal decision may also support this view, though the judgment is not wholly clear. In *Re H (A Child)*,¹⁶⁴ the primary carer mother sought to relocate to Australia, and in response the father issued an application for residence. The trial judge directed himself according to *Payne*, but Thorpe LJ, while agreeing that this approach was acceptable, thought it not ideal:

The decision in *Payne* is directed to the paradigm relocation application where the judge has to choose between permitting the mother to go ... or refusing the mother, confining her in this jurisdiction... Here the judge had a very different choice. He had to choose between the mother's residence order application, which was for her responsibility as primary carer [to be] discharged in an Australian community with her new partner, or for grant of the father's competing residence order application which proposed an English future...

So where there are cross residence order applications, the judge has to apply the ordinary principles that apply in any competition between parents for the responsibility to provide primary care.¹⁶⁵

Respectfully, some may be surprised that *Payne* is inapplicable to this case, where there was a clear primary carer and the father's application for residence was a response to

¹⁶² *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC), [14]; see also *Re D (Leave to Remove: Shared Residence)* [2006] EWHC 1794 (Fam), [2006] Fam Law 1006.

¹⁶³ F Judd and R George, 'International Relocation: Do We Stand Alone?' [2010] *Fam Law* 63, 67.

¹⁶⁴ [2010] EWCA Civ 789, unreported.

¹⁶⁵ *Ibid*, [10]-[11].

the plan to relocate.¹⁶⁶ As Thorpe LJ recognised in *Payne*, '[i]n very many cases the mother's application to relocate provokes a cross-application by the father for a variation of the residence order in his favour. Such cross-applications may be largely tactical'.¹⁶⁷

Regardless, *Re H* may suggest that shared care cases ought, after all, to be treated differently. Such cases do appear to raise different issues, and to be amenable to a general welfare enquiry as to whether the child's welfare is better served by relocating with one carer or remaining with the other. However, the English law on shared care remains somewhat uncertain.¹⁶⁸

The other area of English law which is outside the *Payne* approach is relocation within the UK. There is very little reported caselaw on internal relocation in England, perhaps because of the court's approach to such disputes, stemming from *Re E (Residence: Imposition of Conditions)*.¹⁶⁹

In *Re E*, the trial judge made a residence order in favour of the mother, but imposed a condition requiring her to live at a given address. Butler-Sloss LJ noted that '[t]here is no statutory requirement of consent or leave of the court in respect of moving the child anywhere within the UK'.¹⁷⁰ Although the law provided a power to make restrictions on a

¹⁶⁶ Ibid, [4].

¹⁶⁷ *Payne*, [42].

¹⁶⁸ See further Chapter 4, text from n 72, and Chapter 5, text from n 35.

¹⁶⁹ [1997] 2 FLR 638 (EWCA).

¹⁷⁰ Ibid, 641.

child's place of residence,¹⁷¹ her Ladyship explained that:

A general imposition of conditions on residence orders was clearly not contemplated by Parliament and where the parent is entirely suitable and the court intends to make a residence order in favour of that parent, a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the UK or with whom. There may be exceptional cases, for instance, where the court, in the private law context, has concerns about the ability of the parent to be granted a residence order to be a satisfactory carer but there is no better solution than to place the child with that parent.¹⁷²

Later cases have confirmed that restrictions on relocation within the United Kingdom are 'truly exceptional'.¹⁷³

However, while *Re E* has been quoted with apparent approval by the House of Lords,¹⁷⁴ it is not without its critics. For example, Ward LJ has twice indicated that he may not agree with making restrictions so exceptional.¹⁷⁵ One difficulty with making restrictions on movement all but impossible to obtain is that the issue of relocation itself can disappear from consideration.

¹⁷¹ Children Act 1989, s 11(7).

¹⁷² *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA), 642.

¹⁷³ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7]. For examples where restrictions were made, see *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277; *Re S (A Child) (Residence Order: Condition) (No 2)* [2002] EWCA Civ 1795, [2003] 1 FCR 138; *B v B (Residence: Condition Limiting Geographic Area)* [2004] 2 FLR 979 (EWHC).

¹⁷⁴ *Re G (Residence: Same-Sex Parents)* [2006] UKHL 43, [2006] 2 FLR 629, [15].

¹⁷⁵ *Re W (Children)* [2005] EWCA Civ 717, unreported, [12]; *Re G (Contact)* [2006] EWCA Civ 1507, [2007] 1 FLR 1663, [26].

This arguably happened in *Re G (Residence: Same-Sex Parents)*,¹⁷⁶ where one parent took the child and travelled through the night to a new location, being found only with police assistance. The trial judge ordered a transfer of primary residence, which the House of Lords reversed; but the clandestine relocation, aimed at terminating contact, received almost no attention, beyond Baroness Hale's remonstrance that 'the mother had behaved very badly'.¹⁷⁷ Had the child been taken across an international border, the other parent would have obtained an order for immediate return;¹⁷⁸ indeed, many countries would order return following a domestic move.¹⁷⁹

A second difficulty is that the assumptions which inform *Re E* may no longer hold true. The argument is that an approach which makes restrictions 'truly exceptional'

...is premised on the existence of a primary carer in the child's life. In 1997, when *Re E* was decided, almost all cases would have fitted this model: a shared residence order, while not exceptional, required proof of "positive benefit" and was "not the conventional order". It may therefore be understandable that restrictions on relocation were considered to be appropriate only in the rarest of circumstances.

However, while 1997 is not that long ago, parenting practices and parenting attitudes are changing fast and in child law cases "statements of principle may not hold their value much beyond the times in which they were expressed". Since 1997 the courts have increasingly emphasised the importance of contact, and the benefits of having positive relationships with two involved parents. Fathers are increasingly involved in their children's lives, though it is still

¹⁷⁶ [2006] UKHL 43, [2006] 2 FLR 629.

¹⁷⁷ *Ibid*, [43].

¹⁷⁸ Assuming the destination country was a signatory of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

¹⁷⁹ See, eg, *JDT v KD* [2009] NZFLR 184 (NZFC); see further Chapter 6, text from n 105.

true that mothers do the bulk of the care work.¹⁸⁰

However, there is no indication that *Re E* is likely to be revised in the foreseeable future, Thorpe LJ recently saying extra-judicially that it is ‘not a fragile decision’.¹⁸¹

To summarise, this section has focused on ‘the line of cases which begins with *Poel v Poel* ... and finds its most recent expression of principle in *Payne v Payne*’,¹⁸² which constitutes the core of English relocation law. The current position is ‘a reiteration of the principles which the English courts have consistently applied since the decision in *Poel*’,¹⁸³ which Mostyn J recently summarised as being ‘tendentious in the true sense of the word, ie supplying a tendency, and that tendency is the almost inevitable success of the application, save in those cases where it is demonstrably irrational, absurd or malevolent’,¹⁸⁴ though that may overstate matters.¹⁸⁵

Having thus established the English position, we can compare the approach in New Zealand. We saw earlier that, until the middle of 1995, New Zealand followed *Poel*.¹⁸⁶ The

¹⁸⁰ R George, ‘*Re L (Internal Relocation: Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157’ (casenote) [2010] *JSWFL* 71, 74, references omitted, quoting *A v A (Minors) (Shared Residence)* [1994] 1 FLR 669 (EWCA), 678, and *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (EWCA), 365.

¹⁸¹ The comment was made in a discussion session at the *International Child Abduction, Forced Marriage and Relocation Conference* (London Metropolitan University: 2010).

¹⁸² *E v E (Shared Residence: Financial Relief: Yardstick of Equality)* [2006] EWCA Civ 843, [2006] 2 FLR 1228, [32].

¹⁸³ *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [7].

¹⁸⁴ *Ibid.*

¹⁸⁵ See further Chapter 5.

¹⁸⁶ Above, text from n 76.

next section addresses the shift which occurred thereafter.

Rejecting *Poel*: New Zealand Law, 1995-2010

The moment when New Zealand law departed from *Poel* can be identified clearly. In March 1995, the Family Court was following the English approach;¹⁸⁷ in May 1995, the New Zealand Court of Appeal set out a different approach. Since the key case involved internal relocation, it is worth noting that New Zealand takes the same approach regardless of whether the move is international or domestic. Indeed, there is an increasing trend to litigate, and restrict, moves over distances of just a few kilometres,¹⁸⁸ though most cases are long-distance.

In *Stadniczenko v Stadniczenko*,¹⁸⁹ the mother wished to move from Wellington to Auckland. The Family Court allowed the move, but the High Court imposed conditions requiring the children to reside in Wellington. In dismissing the mother's appeal, the Court of Appeal set out general guidance on relocation.

The Court of Appeal began by echoing *Wright v Wright*,¹⁹⁰ that '[w]here children should reside is normally a matter to be determined by the custodial parent',¹⁹¹ albeit the

¹⁸⁷ *C v C* [1995] NZFLR 360 (NZFC).

¹⁸⁸ See, eg, *Brown v Argyll* [2006] NZFLR 705 (NZHC), restricting relocation of 21 miles (34km).

¹⁸⁹ [1995] NZFLR 493 (NZCA) (hereafter, '*Stadniczenko*').

¹⁹⁰ (1984) 2 NZFLR 335 (NZCA); see above, text from n 71.

¹⁹¹ *Stadniczenko*, 498.

court could impose conditions.¹⁹² The Court of Appeal confirmed that the child's best interests should decide the matter; 'Subject to that consideration, the rights of the custodial parent to pursue his or her own life or career and the rights of the non-custodial parent to access can be taken into account' since these rights 'may also be important considerations in their impact on the welfare of the child'.¹⁹³ The Court of Appeal went on:

The preferable approach is for the Court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. In most cases, an important factor in favour of the custodial parent is that the award of custody shows that from the day to day point of view the best interests of the child lie with its being with the custodial parent, and an incident of custody is the decision where to live. The wellbeing of the new family unit bears on the best interests of the child. The nature of the relationship between the child and the access parent will always be of importance, and the closer the relationship and the more dependent the child is on it for his or her emotional wellbeing and development the more likely an injury resulting from the proposed move will be. The reason for the move is important, and also the distance of the move. The child's views are relevant. The foregoing factors are far from representing a complete list of what may be relevant.¹⁹⁴

The court therefore identified five 'important' factors bearing on the assessment of the child's welfare in a relocation case: the well-being of the new family unit; the relationship with the access parent; the reason for the move; the distance involved; and the child's views.

This approach offers little guidance as to which of the relevant factors will be most important. In contrast to the English cases, the Court of Appeal evidently thought it would be not uncommon to refuse relocation.

¹⁹² Guardianship Act 1968, s 11(2).

¹⁹³ *Stadniczenko*, 500.

¹⁹⁴ *Ibid*, 500.

With this approach in place, there were few developments until the English Court of Appeal decision in *Payne*, which led directly to the New Zealand Court of Appeal decision in *D v S*.¹⁹⁵ The mother was Irish, though she had lived with the New Zealander father in New Zealand for many years. After their relationship ended, she sought to return to Ireland with the three children, aged ten, eight and six. In her evidence, the mother said that she had decided to return to Ireland whether the children went or not. The mother was the main attachment figure in the children's lives, though they spent about 40 per cent of their time with their father. The Family Court refused leave, but the High Court, after discussing *Payne*, allowed the mother's appeal. No stay was obtained, and so by the time the father's further appeal was heard the mother and children had relocated.

The Court of Appeal held that *Payne* was inconsistent with New Zealand law and should not be followed. In a full consideration of relocation law, the Court of Appeal made seven points of principle relevant to relocation, which can be summarised as:

1. Although the child's welfare was 'not the only consideration' (because, for example, 'freedom of movement is an important value in a mobile community'), it was paramount, meaning that it 'rules upon or determines the course to be followed'.¹⁹⁶
2. '[T]he approach mandated by [the welfare principle] and the emphasis on the parents' responsibilities for the wellbeing of the child are wholly consistent with the relevant

¹⁹⁵ [2002] NZFLR 116 (NZCA) (hereafter, '*D v S*'); for similar reasoning before *D v S* was decided, see *Gray v McGill* [2001] NZFLR 782 (NZFC); *Hemer v Eden* [2001] NZFLR 913 (NZFC).

¹⁹⁶ *D v S*, [30], quoting *J v C* [1970] AC 668 (HL), 710-711.

provisions of the United Nations Convention on the Rights of the Child'.¹⁹⁷

3. The court needed to consider all aspects of welfare and 'weigh all relevant factors in the balance in determining what will be in the best interests of the child. It is necessarily a predictive assessment. It is a decision about the future. It is not a reward for past behaviour. There is no room for *a priori* assumptions'.¹⁹⁸
4. There must be no presumptions about which parent will be best suited to being a child's primary carer based on gender.¹⁹⁹
5. Decisions about relocation may be affected by 'the nature and duration of the existing custodial arrangements'.²⁰⁰
6. Decisions of foreign courts are of limited use, because even if those courts apply the welfare principle, 'the social landscape in which it is applied will not replicate our local circumstances.' Examples of differences include 'the growth and degree of involvement of both parents in family care, and a clear move in Family Court orders, away from ... concepts of sole custody and access, to shared care'.²⁰¹
7. Relocation cases were difficult and Family Court judges had given anxious thought as

¹⁹⁷ Ibid, [31]; a similar conclusion was reached in *Payne*, [39], [78].

¹⁹⁸ Ibid, [32]-[33].

¹⁹⁹ Ibid, [34].

²⁰⁰ Ibid, [35].

²⁰¹ Ibid, [36].

to how they should be resolved. It would not be appropriate to give further guidance, because that would interfere with the individualised assessment required in every case.²⁰²

The Court of Appeal also discussed *Payne*. The court set out Thorpe LJ's two propositions (namely, (a) the child's welfare is paramount, and (b) refusing leave is very likely to be harmful for the child and so leave should be granted unless it is incompatible with the child's interests²⁰³) and said:

...so far as New Zealand law is concerned, ... proposition (a) is the governing requirement under New Zealand law and not simply a proposition to be weighed alongside [proposition] (b); and as to (b), there can be no justification for isolating one factor and according it presumptive effect. ...

Payne v Payne is thus marked by the emphasis on guidelines, by the prescribing of an approach to relocation cases where there is a primary carer who wishes to remove the child from the jurisdiction; and by the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer. It is not a long step to the assumption that the happiness of the relocating parent will meet the best interests of the child's welfare.

For reasons apparent from the earlier analysis, presumptive or *a priori* weighing is inconsistent with the wider all-factor child-centred approach required under New Zealand law.²⁰⁴

The court thereby affirmed *Stadniczenko*: all factors are to be weighed in determining best interests; no factor carries any *a priori* weight; it is for the trial judge to decide, on the facts, what is most important for this particular child.

²⁰² Ibid, [37]-[38].

²⁰³ *Payne*, [26].

²⁰⁴ *D v S*, [41], [46] and [47].

In contrast with more recent developments in the New Zealand courts, attention may be drawn at this stage to one particular aspect, namely the effect on the applicant parent of allowing or refusing relocation. *D v S* held that, unlike *Payne*, New Zealand courts must not give this factor especial weight in advance of the hearing. However, this meant only that trial judges had to determine from the evidence before them what weight to give that factor (as with all other factors). In *R v S*, Heath J said:

It cannot be right to prevent a Family Court judge from taking into account, when dealing with ... relocation, the fact that a parent who intends to move overseas will improve his or her own wellbeing, and therefore his or her ability to provide parental guidance to a child. Those are the very sorts of considerations which ought to be taken into account...²⁰⁵

Priestley J later reiterated that '[t]he fact that the health and wellbeing of a primary carer will be enhanced if relocation occurs is a potent factor which should not lightly be ignored'.²⁰⁶ We return to this point later.²⁰⁷

The next event of significance was the introduction of the Care of Children Act 2004 ('COCA').²⁰⁸ The only explicit reference to relocation in COCA is the specification that relocation is a guardianship issue,²⁰⁹ meaning that guardians must cooperate to address relocation together, with the child as appropriate, and seek court assistance if they are unable

²⁰⁵ *R v S* [2004] NZFLR 207 (NZHC), [47].

²⁰⁶ *MBS v EAC* [2005] NZFLR 1 (NZHC), [39].

²⁰⁷ Below, text from n 233

²⁰⁸ The Act entered force on 1 July 2005; see generally M Henaghan, 'Legally Rearranging Families: Parents and Children After Break-Up' in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington: 2007).

²⁰⁹ COCA, s 16(1) and (2)(b).

to agree.²¹⁰

More generally, COCA confirmed the centrality of welfare,²¹¹ guided by six ‘principles relevant to the child’s welfare and best interests’:

- (a) the child’s parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child’s care, development, and upbringing:
- (b) there should be continuity in arrangements for the child’s care, development, and upbringing, and the child’s relationships with his or her family, family group, whānau, hapū, or iwi,^[212] should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):
- (c) the child’s care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child’s parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child:
- (d) relationships between the child and members of his or her family, family group, whānau, hapū, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child’s care, development, and upbringing:
- (e) the child’s safety must be protected and, in particular, he or she must be protected from all forms of violence (whether by members of his or her family, family group, whānau, hapū, or iwi, or by other persons):
- (f) the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.²¹³

However, although there are six listed principles, the court should consider only the relevant

²¹⁰ COCA, ss 5(c) and 16.

²¹¹ COCA, s 4.

²¹² Māori terms, roughly translated as ‘family’ (broadly conceived), ‘sub-tribe’ and ‘tribe’. Whānau, in particular, is a very important concept in New Zealand, for Māori and non-Māori alike.

²¹³ COCA, s 5.

ones,²¹⁴ together with other relevant matters.²¹⁵

COCA also places emphasis on the child's views:

In proceedings [involving guardianship, day-to-day care, or contact]:

- (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
- (b) any views the child expresses (either directly or through a representative) must be taken into account.²¹⁶

While the law does not require the child to express views, it does demand that reasonable opportunities be given to do so. If the child does choose to express views, the court 'must' take them into account.²¹⁷ There are three main ways in which the court can offer the child the opportunity to give his or her views: via the lawyer for child;²¹⁸ via a psychologist;²¹⁹ or directly, using a judicial interview.²²⁰ Moreover, as Randerson J said in *C v S [Parenting Orders]*:

The opportunities given to the child to express views may be by any one of the means discussed or by a combination of them. And ... the

²¹⁴ COCA, s 4(5)(b).

²¹⁵ COCA, s 4(6).

²¹⁶ COCA, s 6(2).

²¹⁷ 'The expression "take into account" is stronger than the common statutory formula "have regard to" but it does not go so far as to oblige the decision maker to act in accordance with any view expressed by the child. That would run counter to the Court's wider obligation to assess what the child's welfare and best interests require': *C v S [Parenting Orders]* [2006] NZFLR 745 (NZHC), [31](h).

²¹⁸ A lawyer must be appointed to represent the child in any litigated case involving day-to-day care or contact: COCA, s 7.

²¹⁹ A psychologist or other expert may be appointed in any litigated case involving day-to-day care or contact, if the court considers such an appointment necessary for the proper disposal of the case: COCA, s 133.

²²⁰ *C v S [Parenting Orders]* [2006] NZFLR 745 (NZHC), [31](f).

process “should be one which best suits the wishes and characteristics of the particular child concerned, the type and stage of the dispute (including the personalities of the parents) and the personalities, skills and experience of the members of the Family Court team responsible for the particular matter”.²²¹

There has been debate about whether these provisions have altered the approach set out by *D v S*. Before COCA entered force, Principal Family Court Judge Boshier wrote extra-judicially that the Act would probably make relocation more difficult,²²² a view subsequently adopted by some judges in the Family Court.²²³

However, the High Court has taken a different view. In *ACCS v AVBM [Parenting Order]*, Panckhurst J referred to Judge Boshier’s comments, and said that he was ‘not ... persuaded that the new Act does herald a change in approach. Most importantly, the paramountcy principle remains at centre stage’.²²⁴ Four days later, Priestley J also considered Judge Boshier’s paper:

...portions of [Judge Boshier’s] paper are being deployed in submissions in support of the proposition that the Act makes it more difficult under New Zealand law to succeed in relocation than was the case prior to July 2005.

In my judgement, such submissions are misconceived. Despite a phrase in the paper, the Act gives no express guidance whatsoever as to what should be taken into account during the s 4 assessment in a relocation case. Nor, with respect ... is it correct to regard the s 5

²²¹ Ibid, [31](g), quoting P Tapp, ‘Judges Are Human Too’ (*LexisNexis Family Law Conference*, Auckland: 2005).

²²² Judge Peter Boshier, ‘Relocation Cases: An International View from the Bench’ (2005) 5 *NZFLJ* 77.

²²³ See, eg, *BDD v IBG [Relocation]* [2007] NZFLR 1 (NZFC) (Judge Boshier); *MBF v SRF* (2007) 26 FRNZ 370 (NZFC) (Judge Callinicos).

²²⁴ *ACCS v AVMB [Parenting Orders]* [2006] NZFLR 986 (NZHC), [52]-[53]; see also *NW v MW [Parenting Order]* [2006] NZFLR 485 (NZFC), [27]; *C v W [Custody]* [2005] NZFLR 953 (NZFC), [30].

principles as tantamount to a deeming provision in the area of the child's welfare and best interests. ...

The suggestion that the Act has in some way altered the required assessment of a relocation case, or skewed in advance its outcome, is in my judgment untenable.²²⁵

Priestley J also said that judges should not use the section 5 principles as a checklist:

...the s 4 [welfare] assessment will not be made any easier by some formulaic consideration of s 5 principles. Certainly the principles must be considered, but such consideration will not necessarily clarify the decision-making process. In many cases before Courts, the laudable norms embodied in the principles become casualties to circumstances or parental conflict. ...

Understandably, some Judges may feel less vulnerable if they clear out all s 5 principles or at least refer to those principles they consider applicable to the facts before them. It would be wrong, however, to conclude that such references will necessarily enhance the s 4 assessment. And it would be equally wrong ... to conclude that failure to embark on a s 5 recital somehow renders the [welfare] assessment suspect.²²⁶

However, it is not clear whether this analysis survives the Court of Appeal's recent decision in *Bashir v Kacem*.²²⁷ (Since that decision itself has been appealed to the Supreme Court,²²⁸ with judgment pending at time of writing, only a brief discussion is given here.)

The Court of Appeal did not accept Priestley J's view of section 5, saying instead that

...a court should consider each of the s 5 principles to determine whether it is relevant and, having identified those principles that are

²²⁵ *Brown v Argyll* [2006] NZFLR 705 (NZHC), [58], [59] and [63]; see also *Downing v Stamford* [2008] NZFLR 678 (NZHC).

²²⁶ *Brown v Argyll* [2006] NZFLR 705 (NZHC), [39]-[40]; see also *S v L [Relocation]* [2008] NZFLR 237 (NZHC), [25] (Harrison J).

²²⁷ [2010] NZCA 96, unreported.

²²⁸ The hearing was on 12 August 2010.

relevant, should take account of them in determining the best interests of the child. Because the analysis must be undertaken in the context of the circumstances of the particular case, the court must evaluate how the relevant principles should be taken into account – the assessment is a highly individualised one which cannot be undertaken in a formulaic way.²²⁹

The Court of Appeal also considered that the wording of section 5 indicated that ‘there is some priority or weighting as between the various principles’.²³⁰ In particular, the child’s safety ‘must’ be protected under section 5(e), giving that principle emphasis above the other principles which merely ‘should’ be pursued; the importance of ongoing relationships with both parents was also stressed in section 5(b). Section 5 therefore

...provide[s] a structure or framework for consideration of what best serves a child’s welfare and best interests, with a partial indication of weighting as between principles. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child.²³¹

If the Supreme Court agrees, it will be difficult to say that the Care of Children Act did not mark a subtle change in legal approach. If the Supreme Court accepts that section 5(b)’s parenthetical final phrase, ‘(in particular, the child should have continuing relationships with both of his or her parents)’, puts particular emphasis on the importance of children having relationships with both parents at the same time, relocation is likely to become more difficult.

²²⁹ *Bashir v Kacem* [2010] NZCA 96, unreported, [50].

²³⁰ *Ibid*, [51]; also M Henaghan, ‘Doing the COCACobana – Using the Care of Children Act for Your Child Clients’ [2008] *NZLJ* 53.

²³¹ *Ibid*, [52] (footnotes omitted).

However, this is not the only possible interpretation. The Supreme Court could, for instance, see greater significance in the parenthesis which Parliament chose to use.²³² It could also be said that having relationships with both parents need not mean, as implied by the Court of Appeal, the same relationship with each.

A related development in New Zealand law, not considered by *Bashir*, relates to the weight given to the applicant parent's health and well-being in assessing the child's welfare. *D v S* rejected the English approach of giving this factor especial *a priori* weight,²³³ but it was clear that this aspect could still be important if the evidence supported that conclusion.²³⁴ However, recent cases appear increasingly to take a different view.

In *LH v PH [Relocation]*, Winkelmann J stated that the Family Court judge 'would have erred if he had addressed the application [by] focusing on the issue of the mother's emotional wellbeing as the primary or central issue'.²³⁵ As a general proposition, Winkelmann J's comment conforms with *D v S*: no factor should be given *a priori* weight. However, if the judge intended to mean that this factor could never be the central consideration, then some may consider that she has overstated the point: a parent's emotional and psychological well-being might, on the facts, be 'the primary or central

²³² Brackets are the most disconnective form of parenthesis: E Gowers, *Fowler's Modern English Usage* (2nd edn, OUP, Oxford: 1965), 592.

²³³ Above, text from n 203.

²³⁴ Above, text from n 205.

²³⁵ *LH v PH [Relocation]* [2007] NZFLR 737 (NZHC), [37].

issue’.²³⁶

Other judges have gone further, suggesting that an applicant’s well-being will be relevant only if her health is at risk in a medical sense. In one case, Duffy J criticised the trial judge for assuming that relocation would enhance the mother’s psychological well-being without obtaining expert evidence,²³⁷ and said that:

Relocation will only be in the child’s best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child.²³⁸

With respect, some may see this decision as coming close to giving *a priori* weight to one factor – that is to say, the primary carer’s emotional and psychological well-being is being given presumptively little weight.²³⁹ *D v S* requires that judges assess the weight of this, and every, factor based on the facts of the case before them.

The current position in New Zealand is therefore not entirely clear. While all factors are relevant, two trends suggest that there is now some *a priori* weighting of the welfare factors. First, the applicant parent’s well-being seems to be given presumptively little weight unless the mother would be ‘compromised in a medical ... sense’.²⁴⁰ Second, if the Court of

²³⁶ See *R v S* [2004] NZFLR 207 (NZHC), [47]; *S v L [Relocation]* [2008] NZFLR 237 (NZHC), [35]-[36].

²³⁷ Cf the English approach, which assumes precisely that.

²³⁸ *B v B [Relocation]* [2008] NZFLR 1083 (NZHC), [62].

²³⁹ See further Chapter 6, text from n 83.

²⁴⁰ *Bartlett v Bartlett* [2003] NZFLR 49 (NZFC), [51].

Appeal's view in *Bashir* is upheld,²⁴¹ the COCA principles will be read as promoting parental relationships above all other factors, apart from the child's safety.

These two factors, part of existing trends,²⁴² are likely to militate against relocation. As we saw in Chapter 1,²⁴³ Mark Henaghan's research shows a drop in the success rate of litigated cases between 2005 and 2008;²⁴⁴ and although that rate has since risen,²⁴⁵ it is likely that relocation is nonetheless harder, since lawyers will be 'gatekeeping' cases based on their understanding that the law opposes relocation.²⁴⁶ We will see in Chapter 6 that New Zealand practitioners interviewed for this research were clear that relocation had become more difficult in recent years, suggesting that New Zealand is rightly seen as 'anti-relocation'.²⁴⁷

²⁴¹ *Bashir v Kacem* [2010] NZCA 96, unreported.

²⁴² See, eg, W Atkin, 'From Parental Relocation, Rights and Responsibilities to 'Relationship' Property' in A Bainham (ed) *The International Survey of Family Law: 2003 Edition* (Jordan, Bristol: 2003), 324; F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009).

²⁴³ Chapter 1, text from n 201.

²⁴⁴ M Henaghan, 'Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question' (*NZFL Conference*, Auckland: 2009).

²⁴⁵ *Ibid.*

²⁴⁶ In the Australian context, see J Behrens, B Smyth and R Kaspiew, 'Outcomes in Relocation Decisions: Some New Data' (2010) 24 *AJFL* 97, 100; see generally R Mnookin and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale LJ* 950.

²⁴⁷ T Foley, 'International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention on Child Abduction' (London: 2006), available online at www.family-justice-council.org.uk/docs/International_Child_Relocation_research_paper.pdf.

Discussion

So far, this chapter has mapped the development of relocation law in England and New Zealand. The two legal systems increasingly focus on different factors: the English law emphasises the importance to children's welfare of a stable, functional primary carer, while New Zealand promotes active involvement by both parents in the child's life.

However, this analysis is based almost entirely on reported cases which, as we saw in Chapter 1,²⁴⁸ are not necessarily representative of day-to-day cases in the trial courts. The following chapters examine the everyday practice of relocation law from practitioners' perspective. In order to further contextualise that discussion of relocation law in practice, it may be helpful to look briefly at some of the social background against which relocation decisions are being made.

In starting to explain the legal differences between relocation law in England and New Zealand, three aspects in particular could be relevant to contextualising the discussion. One could be the physical geography of the two countries, both in terms of their internal characteristics and their distance from neighbouring countries. A second could be the social context in which family law disputes take place – the structures of families, issues of migration, and so on. The third could be general aspects of family law policy surrounding relocation law. This section will take each of these in turn, though it should be noted that the intention is to suggest lines of enquiry rather than to offer conclusions.

²⁴⁸ Chapter 1, text at n 32.

Starting with the physical geography, there are several reasons why this aspect may be relevant. The size of a country and the spread of its population centres is likely to affect the amount and distance of migration within a country, while its geographic proximity to neighbouring countries may be relevant to international moves. We saw that English law almost never restricts relocation within the confines of the United Kingdom and tends to look favourably on international moves, whereas New Zealand's more restrictive approach applies regardless of whether a move is international or domestic. Could this difference be explained by looking at the two countries' geographies?

While the United Kingdom and New Zealand are of similar size,²⁴⁹ New Zealand is longer and thinner.²⁵⁰ Moreover, while the United Kingdom is only 21 miles (34km) from France at its closest point, New Zealand's nearest neighbour, Australia, is 1,350 miles (2,150km) away. In addition, while the UK has a population of over 60 million, New Zealand's population is around 4 million, with towns and cities consequently more dispersed than in England.

However, it is not apparent that these factors explain the differences in relocation law. While New Zealand's physical isolation might explain a reluctance to allow international relocation (because of the difficulty of contact), it does not explain why the courts so readily restrict moves within the country, including over short distances.²⁵¹ Moreover, since many

²⁴⁹ 243,610km² and 270,530km² respectively.

²⁵⁰ The United Kingdom is about 600 miles (960km) north to south, whereas New Zealand's two main islands stretch over 1,000 miles (1,600km) north to south.

²⁵¹ See, eg, *Brown v Argyll* [2006] NZFLR 705 (NZHC), prohibiting a move of 21 miles (34km).

English cases involve moves to the USA, Asia and the Antipodes,²⁵² it is not apparent that geography offers much explanation.

Perhaps, then, more can be gained from looking at social factors. Britain has a long history of migration to and from other countries, especially the Commonwealth;²⁵³ and now, as a member of the European Union,²⁵⁴ the UK is part of a community of some 500 million people, with guaranteed rights to free movement between Member States.²⁵⁵ These factors can be seen when looking at international destinations in English relocation cases: while historically people were migrating (or returning) to former colonies, there are now increasing relocations to Europe, especially Eastern Europe.²⁵⁶

New Zealand was formerly a British colony, and has had strong migration links with the UK, Holland and East Asia, as well as with Australia.²⁵⁷ The majority of international relocation cases in New Zealand are to Australia, where there is an automatic right to work,²⁵⁸ the UK and the USA being next most common.

²⁵² Both *Poel* and *Payne* involved relocations to New Zealand.

²⁵³ See, eg, I Spencer, *Immigration Policy Since 1939: The Making of Multi-Racial Britain* (Routledge, London: 1997).

²⁵⁴ The European Law dimension of relocation has been rather overlooked in the English debates: see Chapter 7, text at n 166.

²⁵⁵ Article 18(1) EC; see generally C Barnard, *The Substantive Law of the EU: The Four Freedoms* (2nd edn, OUP, Oxford: 2007), Part III; C McGlynn, *Families and the European Union: Law, Politics and Pluralism* (CUP, Cambridge: 2006).

²⁵⁶ See, eg, *Re B (A Child)* [2009] EWCA Civ 553, unreported (Latvia); *Re D (Children)* [2010] EWCA Civ 50, [2010] 2 FLR, forthcoming (Slovakia).

²⁵⁷ A detailed history is found on the government-run Encyclopaedia of New Zealand, *Te Ara*, online at www.teara.govt.nz/en/history-of-immigration (last accessed 5 June 2010).

²⁵⁸ Trans-Tasman Mutual Recognition Arrangement 1998.

In keeping with changes seen across Western societies,²⁵⁹ in both England and New Zealand marriage rates have declined and divorce rates have risen, while non-marital relationships are increasingly common;²⁶⁰ families are ‘increasingly heterogeneous’ and, for children, the concept of *family* ‘increasingly involves absent and re-partnered parents’.²⁶¹ More generally, conceptions of family forms and family norms have shifted, and traditional gender roles are changing.²⁶² The ways in which these changes manifest themselves has varied between different countries, though in general there is a shift towards co-parenting.²⁶³

It may be that New Zealand has experienced this shift more than England. Although in England shared residence orders are ‘nowadays the rule rather than the exception’,²⁶⁴ the extent to which these orders imply an increased sharing of care responsibilities is a matter of

²⁵⁹ See generally R van de Kaa, ‘Europe’s Second Demographic Transition’ (1987) 42 *Population Bulletin* 1; I Théry, *Le Démarriage: Justice et Vie Privée* (Odile Jacob, Paris: 1993).

²⁶⁰ See, eg, B Hale *et al*, *The Family, Law and Society: Cases and Materials* (6th edn, OUP, Oxford: 2008), chapter 4; B Zondag, *Procedural Innovation in the New Zealand Family Courts: The Parenting Hearings Programme* (unpublished PhD Thesis, Auckland University: 2009), 11-13.

²⁶¹ J Masson, ‘Caring for Our Future Generations’ in G Douglas and N Lowe (eds) *The Continuing Evolution of Family Law* (Jordan, Bristol: 2009), 221-222; see generally C Gibson, ‘Changing Family Patterns in England and Wales over the Last Fifty Years’ in S Katz, J Eekelaar and M Maclean (eds) *Cross Currents: Family Law and Policy in the US and England* (OUP, Oxford: 2000).

²⁶² For an excellent overview, see J Lewis, ‘Introduction: Children in the Context of Changing Families and Welfare States’ in J Lewis (ed) *Children, Changing Families and Welfare States* (Edward Elgar, Cheltenham: 2006). On the changing roles of fathers, see R Collier and S Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, Oxford: 2008).

²⁶³ See, eg, R van Krieken, ‘The “Best Interests of the Child” on Parental Separation: On the “Civilizing of Parents”’ (2005) 68 *MLR* 25, discussed in Chapter 7, text from n 116.

²⁶⁴ *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [52]; see generally S Gilmore, ‘Court Decision-Making in Shared Residence Order Cases: A Critical Examination’ [2006] *CFLQ* 478.

debate.²⁶⁵ The English courts make shared residence orders as a ‘label’²⁶⁶ to indicate that both parents are important;²⁶⁷ but research suggests that 80 percent of children ‘live exclusively or mainly with their mother’ after separation.²⁶⁸ Moreover, although English law promotes shared parental responsibility, it also explicitly states that there is no requirement for persons with parental responsibility to consult about parenting decisions.²⁶⁹

By contrast, in New Zealand shared day-to-day care is common, with equal and near-equal time arrangements now the norm;²⁷⁰ for instance, the Principal Family Court Judge has said that if a parent wants equal time, he orders it unless there are specific reasons not to.²⁷¹ The law encourages guardians to cooperate and make decisions together and to agree about major decisions (including the child’s place of residence).²⁷² As Berry Zondag has said, this shift in approach to post-separation parenting ‘creates a range of hitherto unfamiliar relationships and roles such as the actively involved non-custodial post-separation parent, the post-separation shared-parenting parent-child relationship, and the

²⁶⁵ See, eg, L McCallum, ‘Shared Residence: Just A Label?’ [2004] *Fam Law* 528; P Harris and R George, ‘Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations’ [2010] *CFLQ* 151.

²⁶⁶ *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, [32].

²⁶⁷ See, eg, *Re P (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 2 FLR 347, [22]; *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593.

²⁶⁸ J Hunt and C Roberts, *Child Contact With Non-Resident Parents* (University of Oxford, Oxford: 2004), 1.

²⁶⁹ Children Act 1989, s 2(7).

²⁷⁰ See, eg, M Henaghan, ‘Legally Rearranging Families: Parents and Children After Break-Up’ in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington: 2007), 326-333.

²⁷¹ Judge Peter Boshier, quoted in F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009), 73; see similarly Judge Boshier’s comments cited in S Catherall, ‘The Half & Half Kids’ *The Dominion Post* (Wellington, 5th April 2008), E1.

²⁷² COCA, ss 5(c) and 16.

post-separation parent-parent co-ordination relationship'.²⁷³

It seems likely that these factors are relevant to relocation law. If, as suggested, New Zealand society and legal policy increasingly favours shared parenting to a greater extent than seen in England, that might go towards explaining a more restrictive approach to relocation.²⁷⁴ These social differences are evidently reflected in and led by aspects of the substantive legal frameworks which govern disputes over children. However, the points raised in this section were designed only to introduce contextual factors, and in the chapters which follow we draw on this information in assessing practitioners' comments about relocation law.

Conclusions

In this chapter we have seen how relocation law developed in England and in New Zealand. At first, the two countries applied the same principles, which stressed the importance of supporting reasonable life choices of a child's main carer because of the adverse effect which interference was likely to have on that parent and, consequently, on the child.²⁷⁵ In England, these principles continue to be applied, with a result that the English courts are generally thought to look favourably on relocation applications.²⁷⁶

²⁷³ B Zondag, *Procedural Innovation in the New Zealand Family Courts: The Parenting Hearings Programme* (unpublished PhD Thesis, Auckland University: 2009), 37.

²⁷⁴ See further Chapter 7, text from n 116.

²⁷⁵ *Poel*.

²⁷⁶ M Hayes, 'Relocation Cases'; C Geekie, 'Relocation and Shared Residence: One Route or Two?' [2008] *Fam Law* 446.

In New Zealand, the courts departed from this approach in 1995,²⁷⁷ later confirming that the English approach was ‘inconsistent with the all-factor child-centred approach required’.²⁷⁸ A number of factors suggest that it is generally more difficult to relocate now than when *D v S* was decided.²⁷⁹

However, while reported caselaw can tell us a lot about relocation law, there is much that it cannot tell us. Why did the New Zealand courts revise their approach to relocation while the English courts continued on the same path? Could it be that relocation law is able to tell us something of more general applicability about the views of these two societies about parenting after separation? For instance, as we will discuss in the final chapter,²⁸⁰ it could be that England and New Zealand base their approaches to relocation on different ‘logics’ of welfare, with England retaining an approach which focuses on creating a single stable home for children and New Zealand moving to a model which promotes shared parenting to a greater degree.²⁸¹

Another dimension which reported cases from two jurisdictions cannot tell us about is what difference the approach adopted might make to individual cases. While in New

²⁷⁷ *Stadniczenko*.

²⁷⁸ *D v S*, [47].

²⁷⁹ M Henaghan, ‘Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question’ (*NZFL Conference*, Auckland: 2009); F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009).

²⁸⁰ Chapter 7, text from n 116.

²⁸¹ See generally R van Krieken, ‘The “Best Interests of the Child” on Parental Separation: On the “Civilizing of Parents”’ (2005) 68 *MLR* 25.

Zealand we know that the success rate of litigated cases dropped after 2005,²⁸² in England, we have no equivalent data on success rates, making it is impossible to compare the two jurisdictions. Such a comparison would, in any case, tell us little, because cases in each jurisdiction are decided against different background factors. It is therefore difficult to tell from the caselaw discussed in this chapter whether the law itself is likely to make a difference to relocation case outcomes.

In the chapters that follow, we investigate these issues further. In Chapter 4, we examine the likely effects of the law on individual cases by asking practitioners who are experienced in the day-to-day working of relocation law to analyse three hypothetical relocation disputes. In Chapters 5 and 6 we analyse what those practitioners think about the law in their respective countries.

²⁸² M Henaghan, 'Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question' (*NZFL Conference*, Auckland: 2009).

Chapter 4

Practitioners' Applications of English and New

Zealand Relocation Law to Hypothetical Cases

English and New Zealand approaches to relocation have developed in different ways since 1995, as we saw in Chapter 3. The English courts place emphasis on the well-being of the applicant parent;¹ the New Zealand courts initially rejected *a priori* weighing of factors,² but increasingly promote children's relationships with both parents.³ However, it is difficult to assess from these separate developments whether individual cases are likely to be treated differently under the two legal approaches. Does the English focus on the applicant parent's well-being make relocation easier to achieve? Does the New Zealand approach of leaving all factors to be assessed on the facts, but stressing the significance of family relationships, make relocation less likely?

This chapter offers one way to address these questions. In the first of three chapters

¹ *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, '*Payne*').

² *D v S* [2002] NZFLR 116 (NZCA) (hereafter, '*D v S*').

³ Care of Children Act 2004 (hereafter, 'COCA'), esp s 5(b).

drawing on qualitative interviews with legal practitioners, this chapter looks at three hypothetical cases, in the form of 350-word vignettes, which participants were asked to assess. The three vignettes were designed to explore practitioners' views on different aspects of relocation disputes.

New Zealand has only one 'approach' to relocation: the welfare principle,⁴ guided by *D v S* and COCA,⁵ requires all factors to be assessed and balanced as a question of fact to determine whether relocation is in the child's interests or not. In England, on the other hand, three distinct approaches can be discerned, though in all cases welfare is paramount.⁶ In an international relocation with shared care, a similar approach may be taken by English law as in New Zealand;⁷ but outside the shared care context, *Payne* places more emphasis on the primary carer's well-being than does New Zealand law. For domestic relocation, English law has another test again, allowing relocation other than in 'truly exceptional' cases.⁸

This chapter analyses participants' responses to the three vignettes and suggests a number of conclusions. In two vignettes (Tom's case and Mark and Hannah's case), English participants were applying legal approaches which are more favourable to relocation than the New Zealand law; it is therefore not surprising to find that the results of those cases as predicted by practitioners were also more favourable to relocation. In the third case (Jane's

⁴ COCA, s 4.

⁵ Especially the principles in s 5 and the obligation to consider the child's views in s 6.

⁶ Children Act 1989, s 1(1).

⁷ See, eg, *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC).

⁸ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7]; *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA).

case), the law in the two countries is ostensibly the same, but the English nonetheless thought relocation more likely to be permitted on the facts presented. These findings are consistent with the conclusions of Chapter 3, and suggest that the different legal approaches of the two countries may affect the way individual cases are decided. Significantly, though, even when the two sets of practitioners were applying similar principles, English practitioners thought relocation more likely to be allowed. Since both jurisdictions are ultimately governed by the welfare of the children involved in relocation disputes, these differences may cause us to start to ask about the universality of the language of welfare.

Methodology

The methodology for the empirical research was explained in Chapter 2, including details on the vignettes discussed in this chapter.⁹ There were 44 participants in the study. As a reminder, Table 4.1 lists these participants, showing their nationality, professional group, sex, the length of time they had been in practice and the approximate number of relocation trials they dealt with each year, and shows the identifying tags by which they are referred to in the text. For ease of reference, identifying tags indicate nationality¹⁰ and professional group,¹¹ such that, for example, EJ1 is an English judge, and NB5 a New Zealand barrister. One English barrister (EB2) and one New Zealand barrister (NB3) did not have time to

⁹ Chapter 2, text from n 46.

¹⁰ ‘E’ for English participants; ‘N’ for New Zealand participants.

¹¹ ‘J’ for judges in both countries; ‘B’ for barristers in England, and for lawyers who work as specialist barristers in New Zealand; ‘S’ for solicitors in England, and for lawyers who work as both solicitors and barristers in New Zealand; ‘C’ for court welfare reporters in England, and for psychologists who work as Family Court advisors in New Zealand.

Table 4.1 – List of participants by identifying tag, showing nationality, professional group, sex,¹² time in practice,¹³ and approximate number of relocation trials per year

English Participants					New Zealand Participants				
Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year	Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year
EJ1	Judge	-	-	4	NJ1	Judge	-	-	9-14
EJ2		-	-	1	NJ2		-	-	5/6
EJ3		-	-	2	NJ3		-	-	3/4
EJ4		-	-	3	NJ4		-	-	5/6
EJ5		-	-	2/3	NJ5		-	-	5/6
EJ6		-	-	3/4	NJ6		-	-	10-12
EJ7		-	-	2/3	NB1	Barrister	F	23	2/3
EB1	Barrister	M	7	1	NB2		M	25	1/2
[EB2]		[M]	[18]	[2/3]	[NB3]		[F]	[15]	[1/2]
EB3		M	19	2/3	NB4		M	40	3/4
EB4		F	8	1	NB5		F	35	3/4
EB5	Barrister, QC	M	30	2/3	NB6		F	21	3
EB6		F	24	5/6	NB7		M	25	1/2
EB7		F	24	1/2	NS1	Solicitor / Barrister	M	23	2/3
ES1	Solicitor	M	28	1	NS2		F	30	1/2
ES2		F	9	1/2	NS3		F	22	3
ES3		M	15	2	NS4		F	18	2/3
ES4		F	18	1/2	NS5		F	19	2/3
ES5		M	12	6-8	NS6		F	31	1
EC1	Court Welfare Officer	F	20	1/2	NC1	Psychologist	M	25	7/8
EC2		M	25	3/4	NC2		F	25	12
EC3		F	33	1/2	NC3		M	13	6

discuss the vignettes, and therefore did not contribute to the data being analysed in this chapter. There was a technical fault with recording equipment during one interview (ES5), meaning that discussions of two of the vignettes in his case were not audio recorded; hand-written notes were taken contemporaneously, but were inevitably less complete than the transcript available for all other participants.

¹² In the interests of preserving anonymity, the sex of judges is not included in the table. There were five men and two women amongst the English judges, and three men and three women amongst the New Zealand judges.

¹³ In the interests of preserving anonymity, the time that judges had been on the bench is not included in the table. Five of the English judges were Circuit Judges and two sat in the Family Division of the High Court; the average time sitting full time was 9.5 years. All six New Zealand judges sat in the Family Court, and the average time sitting full time was 8.5 years.

Tom's Case

The first vignette is Tom's case,¹⁴ which was intended to reflect a 'typical' relocation dispute from an English practitioner's perspective. Tom has a primary carer mother and frequent contact with his father; his mother has re-partnered, and her partner's desire to return to his home country has prompted the application to relocate. The full vignette as given to participants is reproduced in Figure 4.1.

Figure 4.1: Tom's case, as given to participants

Tom's parents separated when he was 2 years old. Now aged 6, Tom lives with his mother. He has always had good contact with his father, which has been increasing since the parents separated and now includes overnight stays once or twice a fortnight. Although the parents' relationship has been reasonably amicable, Tom's father thinks the mother is indifferent about contact, and she has sometimes resisted increases in the amount of contact between Tom and the father. About a year ago, the mother married an American and is 4 months pregnant with their first child. The mother's husband is very keen to return to California to be nearer his family, to make a home there, and because he thinks it will provide better opportunities for his growing family. Tom's mother lived in California for a year when she was a student and strongly supports her husband's desire to move home. The father opposes the move because of the great difficulties of contact and otherwise maintaining his relationship with Tom. He is unconvinced by the mother's plans for webcam chat, thinking it more likely he will be sidelined, given Tom's age and the mother's history of indifference to contact generally. The father points out that the mother and Tom are both happy living in [the United Kingdom/New Zealand], and all of the mother's wider family and support networks are here. He is also worried that the mother was unable to tell him what she would do if Tom did not settle well in the USA. The mother counters that her husband's family will all be nearby if they move, and is worried that her husband would be very resentful if he were stopped from returning home because Tom could not be taken too. She also stresses her role as primary carer and the fact that Tom's father works long hours and is not well placed to care for Tom if she went to America anyway.

Of the three vignettes, Tom's case most sharply drew out the significance of the differences in legal approach between England and New Zealand, both in terms of participants'

¹⁴ Tom's case was based loosely on *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

discussions of the case and their predictions of the likely outcome. The presence of a primary carer and an international move put the case within *Payne*'s framework for English participants, while New Zealanders were governed by *D v S* and COCA (as with all relocation cases). From the discussion of the law in Chapter 3, it will not be surprising that English and New Zealand participants saw Tom's case differently.

However, before turning to participants' analyses in detail, it may be useful to give an overview of their approaches to Tom's case. The analysis therefore starts by looking at the factors which participants mentioned as being relevant to their determination of Tom's case.¹⁵ Participants collectively picked out 13 relevant factors, but there were marked differences between the two national groups.

Table 4.2 lists the 13 factors, and shows the order in which each participant put the factors which he or she thought relevant.¹⁶ The table also includes, for each national group, the number of participants who listed each factor as their first choice, as one of their first three choices,¹⁷ and in total. The following two Figures illustrate the spread of answers, with Figure 4.2 showing each participant's first listed factor, and Figure 4.3 showing each participant's first three factors.

¹⁵ On methodology, see Chapter 2, text above n 53.

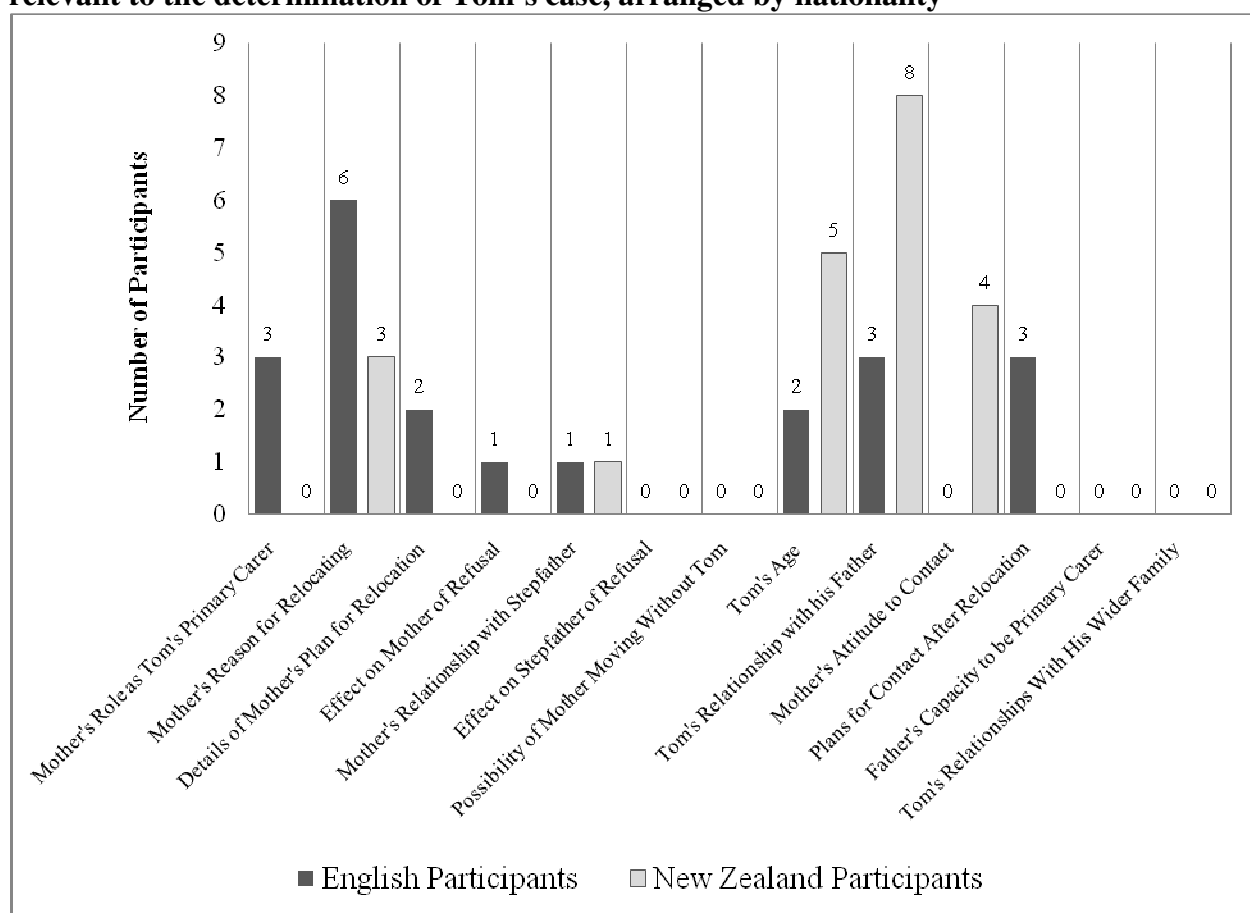
¹⁶ The 42 participants who discussed Tom's case listed between three and seven factors each, with the average being 5.3 factors.

¹⁷ In all three vignettes, all participants selected at least three factors. Looking at their first three factors as well as their first factors may offer a more balanced view of the key considerations, since participants often linked their first three considerations together. This process also helps to counteract instances where participants selected a factor first because it was unusual, rather than necessarily determinative.

Table 4.2 – Table showing participants’ choices of factors relevant to the determination of Tom’s case, in rank order, together with the total number of participants who listed each factor first, in their first three choices, and in total, separated by nationality

	Each factor rated by M's in their first three entries, and in total, separated by nationality																				No. first	No. first three	No. total			
	EJ1	EJ2	EJ3	EJ4	EJ5	EJ6	EJ7	EB1	EB3	EB4	EB5	EB6	EB7	ES1	ES2	ES3	ES4	ES5		EC1				EC2	EC3	
	NJ1	NJ2	NJ3	NJ4	NJ5	NJ6		NB1	NB2	NB4	NB5	NB6	NB7	NS1	NS2	NS3	NS4	NS5	NS6	NC1	NC2	NC3				
M's role as primary carer						1	5		2		2	3			1	3	1	5			3			3	8	10
	2		5	6				5	4		4						4							0	1	7
M's reason for relocating	3	1	1	1		5	2	6	1			1	3	2	5	2	3	1		2		2		6	14	17
	5	3	1	1		4		6	5		5	5		1	3	3	2	6		4	6	3		3	8	17
Details of M's plan for relocation		4	2	2		2	3		3	1	4			5		4		3			2	1		2	9	13
								2										3						0	2	2
Effect on M of refusal			3					1			3		5		2									1	4	5
					3									3										0	2	2
M's relationship with stepfather		2	4	5	2	6	5	2				4	2	3		1		2		5	5	5		1	7	15
	4		2							1	6				2			5			4	5		1	3	8
Effect on stepfather of refusal		3			3							2				5					6	4		0	3	6
		5												6				4	5			4		0	0	5
Possibility of M going without Tom				3																	4			0	1	2
				5	5			4				4					5							0	0	5
Tom's Age	2		5						6		1		1											2	3	5
	1	1			1	1			3		1		3	4				7	2					5	8	10
Tom's relationship with F						3	1	4	4			5			3						1	1		3	5	8
	3	2			2	2		1	2	3	2	2	1	2	1	2	1	1	1		2	1	1	8	19	19
M's attitude to contact					6			5		3					4		5	4						0	1	6
	7		3	3		3			1		7	1				1		3		1	2			4	9	11
Plans for contact after relocation	1			4	1	4	4	3	7	2	5		4	1		6	4			3	4			3	6	15
			4	2	4								2	5		4			4	5	3	2		0	4	10
F's capacity to be primary carer					5				5					4			2				4	3		0	2	6
		4		4	6			3	6		3						6							0	2	7
Tom's relationships with wider family					6							6			6									0	0	3
	6				7					2		3				5	3	2	6	3	5			0	5	10

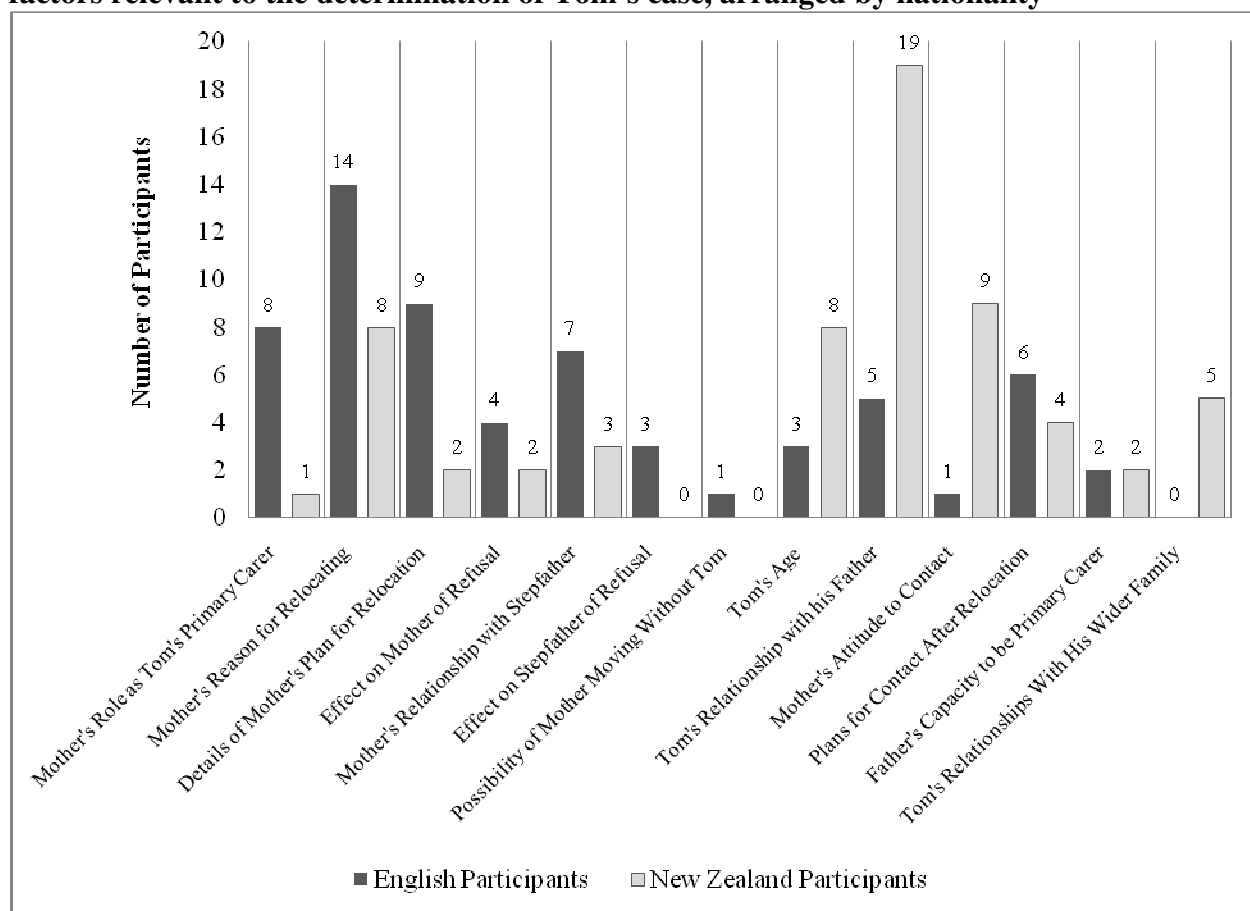
Figure 4.2 – Graph showing the distribution of participants' first choice of factors relevant to the determination of Tom's case, arranged by nationality



Looking first at Figure 4.2, one factor stands out amongst the English first-choice factors, namely the reason for the relocation: this factor was listed first by six English participants (three of whom were judges). There were then three factors, each placed first by three participants: the fact that the mother was Tom's primary carer; Tom's current relationship with his father; and plans for contact after relocation.

New Zealanders listed fewer first-choice factors. The factor which stands out amongst New Zealand responses on Figure 4.2 is Tom's existing relationship with his father (eight participants). This was followed by Tom's age (five participants, four of whom were judges), the mother's attitude to contact (four participants), and the reasons for relocation (three participants).

Figure 4.3 – Graph showing the distribution of participants' first three choices of factors relevant to the determination of Tom's case, arranged by nationality



In Figure 4.3, which shows participants' first three listed factors, there are 63 choices being allocated in each national group (since each of 21 participants had three choices), and each factor can be listed a maximum of 21 times. Figure 4.3 shows that each national group selected one factor which clearly stands out. For the English, that factor (as with Figure 4.2) was the reason for the relocation (14 participants). The next two factors for the English were details of the plans for relocation (nine participants) and the fact that the mother is Tom's primary carer (eight participants). These were followed closely by the mother's relationship with her new husband (seven participants) and plans for contact after relocation (six participants).

For New Zealanders (also consistently with Figure 4.2) the leading factor, listed by 19

of the 21 participants, was Tom's existing relationship with his father. Next was the mother's attitude to contact (nine participants), Tom's age (eight participants) and the reasons for the relocation (eight participants).

There is strong consistency between participants' first-choice factors, and their first three factors. The English had the reasons for relocation first on both lists, while New Zealanders did the same with Tom's relationship with his father. The English also focused on the mother's role as Tom's primary carer and the importance of the details of the plans for relocation, while the New Zealanders emphasised Tom's age and his mother's attitude to contact.

While these data should be treated with caution because participants were not specifically asked to rank factors,¹⁸ it is interesting to note the differences already apparent between English and New Zealand participants. The three factors which dominate the English analysis – reasons for relocating, the mother's role as primary carer, details of the plan for relocation – all focus on the mother and her role in Tom's life. The factors which emerge from the New Zealand analysis, on the other hand – Tom's relationship with his father, Tom's age,¹⁹ Tom's mother's attitude to contact – emphasise the father's role in Tom's life.²⁰

¹⁸ On methodology, see Chapter 2, text above n 53.

¹⁹ Tom's age was usually mentioned in relation to the expected future pattern of contact, or to his likely ability to maintain a meaningful relationship with his father if he relocated to America.

²⁰ New Zealanders also focused on the reasons for relocation, and the English also looked at Tom's relationship with his father; however, as will be seen, the relevance of these factors was different for the two national groups.

The discussion which follows suggests that these findings are supported by the qualitative analysis of participants' responses, and also that they are not surprising given the respective law of England and New Zealand. As Chapter 3 demonstrated, English law requires relocation cases to focus on the applicant's motivation for relocating and the details of the plan as the first considerations,²¹ and that the guidance generally assumes a primary carer.²² In New Zealand, the law stresses that 'the child's relationships with his or her family ... should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents)',²³ and such relationships 'should be preserved and strengthened'.²⁴

Turning to an analysis of participants' reasoning in Tom's case, four key themes emerged, highlighting clearly the differences in the application of relocation law to particular facts. The four themes, which overlap and interrelate, are:

- the reasons for the relocation, together with the impact of refusal of leave on the mother, the stepfather and their family unit;
- Tom's age and relationship with his father, and the likely effect of relocation on that relationship;
- the mother's attitude to contact between Tom and the father; and
- the role of the wider family in Tom's life.

These themes will be addressed in turn.

²¹ *Payne*, [40](a).

²² *Payne*, [86].

²³ COCA, s 5(b).

²⁴ COCA, s 5(d).

Starting, then, with the reasons for relocation and the effect of refusal of leave to relocate, although this factor was frequently listed by both English and New Zealand participants, its relevance differed. English participants generally thought that the motivations for moving to California ('to be nearer [the stepfather's] family, to make a home there, and because [the stepfather] thinks it will provide better opportunities for his growing family') indicated 'that the mother was wanting to relocate for sound reasons' (EJ3). One English barrister said that 'the absolute point, to me, is the belief that the move to California will provide better opportunities for the growing family' (EB6). This barrister went on, like most English participants, to say that she wanted to know more about these 'better opportunities', but most agreed that 'the mother is going to be able to be convincing about it ... and she sounds like she has got it all sussed' (ES1). Although some participants said that specific plans such as a job offer would help the application, little difficulty was expected about the details of the plans: 'you can make an assumption that if he is going back to America to be near his family, the plans are likely to be reasonable and realistic' (ES3). In other words, the mother would easily meet *Payne*'s requirement that her application be 'founded on practical proposals both well researched and investigated'.²⁵

English participants linked these reasons for relocating to the likely effect of refusal of permission. As the barrister quoted above went on to say, 'then I would be looking at the Sedley judgment in *B and S*' (EB6).²⁶ This case stresses the importance of 'the impact of refusal [of leave] on the new family and the stepfather',²⁷ and puts 'emphasis on the

²⁵ *Payne*, [40](a).

²⁶ *Re B (Removal from Jurisdiction); Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043.

²⁷ *Ibid*, [11] (Thorpe LJ).

importance to the children's welfare of a stable and viable family unit in which to grow up'.²⁸ Participants frequently picked this point up:

EB1: Authorities are quite clear on this: if you have a new family unit, and you want to move abroad, and you are going to find it very difficult to maintain that new family unit if you are split over different continents, [you] will probably be allowed to go.

EJ3: It seemed likely that, if relocation was refused, not only would that cause [the mother] considerable distress, but would also put pressure on her new marriage.

Most English participants therefore thought that refusing permission would impact negatively on the stepfather and put a strain on the marriage,²⁹ which would be bad for Tom.

In contrast, New Zealand participants were generally unimpressed with the reasons for wanting to relocate, and were sanguine about the possible effects of refusing permission. While some said that the reasons for moving were 'not frivolous' (NJ1), more thought that it was 'not the best reason in the world to go' (NJ2). Some suggested that the outcome 'will be very much dependent on how *essential* [the relocation] is' (NB2; emphasis added), but most did not think it a strong reason. As one New Zealand lawyer said, 'it is just that he want to go back to make a home there – it is not as if his job has been transferred – so that questions the genuineness of the move' (NS4).

As to the impact of a refusal of leave, a few New Zealand participants thought that this factor might be relevant (NS2, NS5). One barrister, when 'playing devil's advocate',

²⁸ Ibid, [31] (Sedley LJ).

²⁹ Some participants queried this impact, with two judges (EJ2, EJ5) and a barrister (EB7) suggesting that it might need to be proved in the evidence.

wondered whether ‘one of the repercussions [of refusing relocation] is potentially that her new husband is going to hate the father ... [and] is going to be so bloody annoyed about this that he is going to create every problem he can’ (NB5). Most, however, thought these considerations – especially the effect on the stepfather – to be ‘not particularly significant at all’ (NC3), as these exchanges show:

Q: What about the suggestion that the mother’s husband will be resentful?

NS3: Well, he’ll get over it. He should have thought of that before he decided to marry a Kiwi woman.

Q: The mother says her husband will be resentful if he is stopped from going.

NJ4: Yes, well, he will definitely be giving evidence ... but of course that’s nothing really. I mean, too bad. I think really he is the least of the issues.

Others doubted whether there would, in fact, be much detriment to the stepfather:

NS1: There isn’t a lot of information [to show] that ... having to stay here ... is actually a bad result for them. It may not be that bad. ... Yes, [the stepfather] may be grumpy,^[30] but he might not be in two weeks’ time. This may not be the beginning of life-long domestic violence, disharmony and separation.

The dismissal of this factor by New Zealanders is particularly remarkable in contrast to the dominant treatment which it received in English discussions. The views of these two judges highlight the difference particularly well:

³⁰ A number of New Zealand participants described the effect on the stepfather as making him ‘grumpy’ or words to similar effect, which was notably different from English descriptions of resentment and distress.

EJ5: It looks as though one would let her [relocate] because otherwise it looks as though it is going to have a very negative impact on her new family unit.

NJ2: Her husband may be unhappy, and that may spill over onto the mother, but when you keep your eye on Tom, on Tom's needs, I think that is not a good enough reason.

However, these differences between the English and New Zealand participants fit with the legal approaches of each country. Chapter 3 showed that the English enquiry focuses on 'the impact [of refusal of leave] on the mother',³¹ together with 'the impact of refusal on the new family and on the stepfather'.³² *Payne* highlights 'the importance ... [of] the emotional and psychological well-being of the primary carer', to which 'great weight must be given'.³³ Moreover, while the 'explanation for fundamental relocation is the core of every case',³⁴ there are no 'sub-classes of case to which some different approach or principle would be applied',³⁵ meaning that 'lifestyle reasons' for seeking to relocate are as valid as any others.

In New Zealand, on the other hand, the courts rejected 'the allocation of particular weight to the reasonable proposals and the emotional and psychological wellbeing of the

³¹ *Payne*, [40](c).

³² *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [11].

³³ *Payne*, [41] and, similarly, [85](e); see also *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239; *Re G (Removal from Jurisdiction)* [2005] EWCA Civ 170, [2005] 2 FLR 166.

³⁴ *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239, [17].

³⁵ *Ibid*, [16].

primary carer’.³⁶ Moreover, there is a ‘clear move ... to shared care’,³⁷ with family relationships to be ‘preserved and strengthened’,³⁸ ‘stable and ongoing (in particular ... with both ... parents)’.³⁹ Thus, while ‘status quo should not be elevated to a presumption’,⁴⁰ ‘the nature and duration of existing custodial arrangements’ are relevant,⁴¹ and thus the reasons for relocating may be important.⁴²

Some of these legal factors are also relevant to the second theme, Tom’s existing relationship with his father and the effect of relocation on that relationship. New Zealand’s statutory focus on ‘stable and ongoing [relationships] (in particular ... with both ... parents)’⁴³ is evidently a key consideration, along with the ‘clear move ... to shared care’.⁴⁴ In England, *Payne* shows that ‘[t]he impact upon the child of the denial of contact with the other parent ... is very important’,⁴⁵ and therefore that ‘the opportunity for continuing contact ... may be very significant’.⁴⁶ However, this factor tends to be treated as being

³⁶ *D v S*, [46]. Cf *B v B [Relocation]* [2008] NZFLR 1083 (NZHC), [62], implying that the applicant’s emotional and psychological wellbeing is only relevant if shown to be ‘impact[ing] detrimentally on the child’ already. One participant, although strongly critical of *B v B*, nonetheless noted in Tom’s case that ‘the impact on mum if she didn’t go ... doesn’t seem to be elevated to a point where there might be some psychological impact on Tom’ (NJ5).

³⁷ *D v S*, [36].

³⁸ COCA, s 5(d).

³⁹ COCA, s 5(b).

⁴⁰ *Brown v Argyll* [2006] NZFLR 705 (NZHC), [55].

⁴¹ *D v S*, [35].

⁴² Relocation need not be ‘essential’ to be permitted: *S v D* [2002] NZFLR 865 (NZHC); *R v S* [2004] NZFLR 207 (NZHC).

⁴³ COCA, s 5(b).

⁴⁴ *D v S*, [36].

⁴⁵ *Payne*, [85](f).

⁴⁶ *Payne*, [85](g).

subordinate to the applicant parent's well-being.⁴⁷

Looking at participants' discussions of this point, the two national groups tell sharply different stories. With the exception of one solicitor (ES2),⁴⁸ the English saw the father as having 'a contact role, and that is always going to be his role' (EB3). English participants thought that Tom 'obviously has a good relationship with the father, but it is not what you might call an unusually close one' (EJ6). Overall, most English practitioners thought that Tom was 'very young to be going that far away from his father, ... but I don't think that would tip [the outcome] in the father's favour' (EB5). Indeed, as will be seen,⁴⁹ most English participants thought relocation so likely in Tom's case that their advice to the father was that 'we would be better trying to get some concessions about the amount of time the child can spend online ... is there any financial support offered for the father to make trips to the States, that sort of thing' (EB4).

The focus for the English was therefore on ensuring 'that we get very good contact arrangements' (EB7). Many spoke in detail about the arrangements they would seek ('telephone contact once a week, webcam, ... four visits a year ... and I am talking four or five weeks in the summer': EB7), which they saw as crucial.⁵⁰ The English, therefore, saw Tom's relationship with his father as 'a pretty standard contact arrangement which, in terms of days and nights spent between father and son, can almost be made up' with a different

⁴⁷ *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, [24](7), (9).

⁴⁸ In an analysis similar to most New Zealanders', ES2 was concerned that, 'at the age that Tom is, which is relatively young, a move away would have a significant effect on [his] increasing contact at a stage where presumably their relationship [ie Tom and the father's] is really developing'.

⁴⁹ Below, text from n 62.

⁵⁰ A common theme was that the mother would need to fund a large part of the cost of contact.

arrangement after relocation (EJ6). The contrast, when looking at New Zealanders, could not be more stark.

While New Zealand participants accepted that Tom ‘has good contact with his dad’ (NJ5), they were ‘very concerned at a boy of this age only seeing his dad once or twice a fortnight – why is that?’ (NJ5). As a psychologist said, ‘my first reaction is ... I am surprised that he only has overnight stays once or twice a fortnight’ (NC2). There was considerable emphasis on the fact that Tom has ‘an evolving relationship’ with his father (NB4).⁵¹ Participants thought that Tom’s case fitted a broad pattern whereby ‘in the normal course of events, [contact] would be expected to increase’ (NS2). Indeed, whereas the English thought that Tom’s father was always going to be a contact parent, several New Zealand practitioners thought that ‘you could envisage it moving into a shared care type of arrangement’ (NC3), with ‘the possibility for Tom to come, maybe in a year or thereabouts, to live with his father’ (NJ2).

Given that New Zealanders thought that Tom’s ‘overall interest is to increase [contact with the father]’ (NJ5), it is not surprising that they were concerned about the loss of that relationship in the event of relocation. The fact that Tom was only six years old, coupled with ‘increasing ... albeit still not extensive’ contact (NB7), raised a concern that Tom ‘is actually quite vulnerable at this stage to the loss of the relationship with the left-behind parent’ (NJ1). Participants thought the relationship would be ‘very adversely affected’ (NJ6) and ‘seriously disrupted’ (NB4); several remarked that there was ‘a developing relationship,

⁵¹ Cf ES2: ‘their relationship is really developing’.

so you would be concerned at this age of killing it' (NB2).⁵²

These findings are consistent with the fact that 19 of the 21 New Zealand participants put Tom's current relationship with his father as one of their first three considerations, whereas only five English participants did so. The findings also fit with what one would expect given the statutory provisions and caselaw in the two countries.

The third theme of Tom's case – the mother's attitude to contact between Tom and the father – links strongly to the second. For the English, the mother's apparent indifference to contact raised two difficulties: whether her attitude suggested 'some selfish desire to exclude the father from the child's life',⁵³ and whether the detailed contact plans, which they thought so important, were likely to be complied with.

A noticeable feature of English comments on the mother's attitude was the lack of surprise. A typical remark was that 'a certain amount of indifference is to be expected in a situation like this' (EB3). For most participants, the mother's attitude was less significant than her actions, because 'there is a difference between indifference and positive obstruction' (EJ2): 'he says she has been indifferent to contact, [but] he's still having regular contact' (EB1). Participants thought that the problems over contact were minor – described by one judge as 'the odd niggle' (EJ6) – and 'if contact is going well now, that is probably what the court is going to draw a line under' (EB4).

⁵² Cf NJ2 ('it would be something like an end to his relationship with his father'), NB5 ('it is going to end that [relationship], almost certainly') and NS3 ('this will be one of those cases where Tom goes off to America and that will be that').

⁵³ *Payne*, [40](a).

English participants also thought that, although the mother's attitude could be significant,⁵⁴ it would be difficult to build the point up enough for it to have much effect:

EJ5: ...she may be somewhat indifferent and see [relocation] as a good excuse not to support the father's position, but it is going to be very hard to winkle that out because she, if she is represented ably, is going to present you with a nice little package of how she is going to achieve it all.

EJ7: I would have to be convinced that [the mother's] indifference would spill over into actually stopping [contact] or ... allowing it to wither on the vine. ... But I suspect, having heard her, she would probably say all the right things, even if she didn't mean them.

The English therefore saw the mother's attitude as relatively unimportant, unless the father could 'show that her *motivation* [for relocating] is ... to decrease the relationship between Tom and his father' (ES2, emphasis added). If this were established, it would show that the mother had a 'selfish desire to exclude the father from the child's life';⁵⁵ but English participants saw 'no convincing evidence that the mother would not ... facilitate contact' (EJ6). In any case, the English thought they would obtain a mirror order with the American courts. Lawyers thought that a mirror order would 'show the court that they can really trust her to promote contact' (ES2), while one judge referred to 'another decision of Lord Justice Thorpe's ... where he says, "she may be indifferent about contact, but if you have got an enforceable contact order then you have got to assume that the foreign court will enforce it"'

⁵⁴ Indeed, ES5 thought that the point even had potential to be decisive in the father's favour, though this was by no means certain.

⁵⁵ *Payne*, [40](a).

(EJ2).⁵⁶

New Zealand participants took a different approach to both of these aspects. As to the enforcement of contact orders, many New Zealanders agreed with this barrister's remark that he would have 'no confidence whatsoever that the Americans would uphold the legal arrangements we put in place' (NB4). This was particularly an issue in America, participants thought, because of 'the ability to be transient within the USA: ... you go to a different state, and all of a sudden you have got enforcement issues' (NJ5).

As to the mother's attitude, a number of New Zealand participants said that it would need exploring, but many took the view that 'if it emerged at trial that she is [indifferent], I think that is definitely the last nail in the coffin' (NB5). A similar remark was made by this lawyer as the first thing she said about Tom's case:

NS3: The mother's history of indifference – well, she's sunk before she starts. ... Sorry mum, you can't head off and be indifferent – that's not what it's about. You have got to promote, improve, maintain, and indifference is not enough. ... She's not even trying.

As seen above,⁵⁷ New Zealanders placed greater weight on Tom's relationship with his father than did the English. They were also more concerned with the mother's attitude to contact, which made them 'wonder whether the mother has ... an agenda not to genuinely support the relationship' (NJ1). They doubted whether an enforceable contact order would

⁵⁶ Possibly *Re B (Children) (Removal from Jurisdiction)* [2001] 1 FCR 108 (EWCA), [14], or *Re B (Leave to Remove)* [2008] EWCA Civ 1034, [2008] 2 FLR 2059, though the latter would seem suggest that the applicant's desire to terminate contact may justify refusing leave to relocate despite having enforceable contact orders in the destination country.

⁵⁷ Above, text at n 51.

overcome the mother's lack of support.

The final theme in Tom's case related to the importance of wider family for Tom's welfare. New Zealanders described these relationships as being 'important for this child' (NB6), because 'they seem to feature prominently here too' (NS3). Several New Zealand participants linked the wider family specifically to statutory provisions about the continuity of family relationships,⁵⁸ which was of particular concern to participants who questioned the stability of the mother's relationship with her husband:

NC2: [The fact that the mother's family would be left behind] doesn't bode well, to start with: statistically, we know that second marriages have got quite a high risk of collapsing.

The English analysis of this point had a very different feel. Only three English participants referred specifically to the extended family who would be left behind (though several mentioned the husband's family in California, which New Zealanders dismissed as 'far less important': NB6), and none gave significant weight to this consideration in its own right. For two participants, the importance of Tom's left-behind family related to opportunities for contact between Tom and the father:

ES2: [The mother] would be leaving her own support network behind ... so hopefully she may be visiting here quite regularly, and that will hopefully give an opportunity for there to be good contact [with the father].

EJ5: ...enforcement of contact orders can become rather problematic, but she has got quite a family here, so she is going to be coming back

⁵⁸ COCA, s 5(b) ('...the child's relationships with his or her family ... should be stable and on-going') was specifically mentioned by NJ1, NJ5 and NB6 regarding Tom's extended family.

now and again, so I am sure something could be held over her.

The only other reference amongst English practitioners picked up *Payne*'s question about the extent to which the loss of relationships in one country can be 'offset' by the development of relationships in another:⁵⁹ 'the stepfather's ties with [California] ... would go to ameliorate the loss of the paternal family in this country' (EB6).

So, whereas New Zealanders considered Tom's relationship with his wider family to be an additional reason for refusing relocation, the English either ignored this factor or thought it an indirect reason for allowing relocation because it suggested that contact was likely to continue. The only English participant to mention the wider family specifically, raised the point only to say that this loss would be offset by the stepfather's family in California.

The analysis of Tom's case has therefore shown that English and New Zealand practitioners focused on different aspects in assessing the relocation application. The English were concerned to protect the mother as primary carer, and her relationship with the stepfather, which they saw as likely to be affected detrimentally by refusal of leave. They saw the father as a secondary figure in Tom's life whose role could be adequately preserved with post-relocation contact. New Zealanders, by contrast, focused on Tom's relationship with his father, which they saw as developing towards shared care and likely to be all but destroyed by relocation. The effect of refusal of leave on the mother and the stepfather was not significant for most New Zealanders. These differences are consistent with the differences in legal approach seen in Chapter 3, and highlight the potential effect of those

⁵⁹ *Payne*, [40](b).

legal differences in practice.

From these conclusions, it is not surprising to find that the two national groups also disagreed about the likely outcome of Tom's case. Table 4.3 contains the numerical representations of participants' views on the likely outcome of Tom's case,⁶⁰ and Figure 4.4 provides an illustration of these predictions.

Many participants in both countries saw Tom's case as the most clear-cut, the one about which they were most sure, of the three at which they looked. The opening remarks of two participants illustrate the certainty felt by many, and highlights the differences between the two countries: an English judge's opening words were, '[w]ell, she's going isn't she' (EJ2),⁶¹ while a New Zealand lawyer said that the mother was 'sunk before she starts' (NS3).⁶²

⁶⁰ On methodology, see Chapter 2, text from n 53.

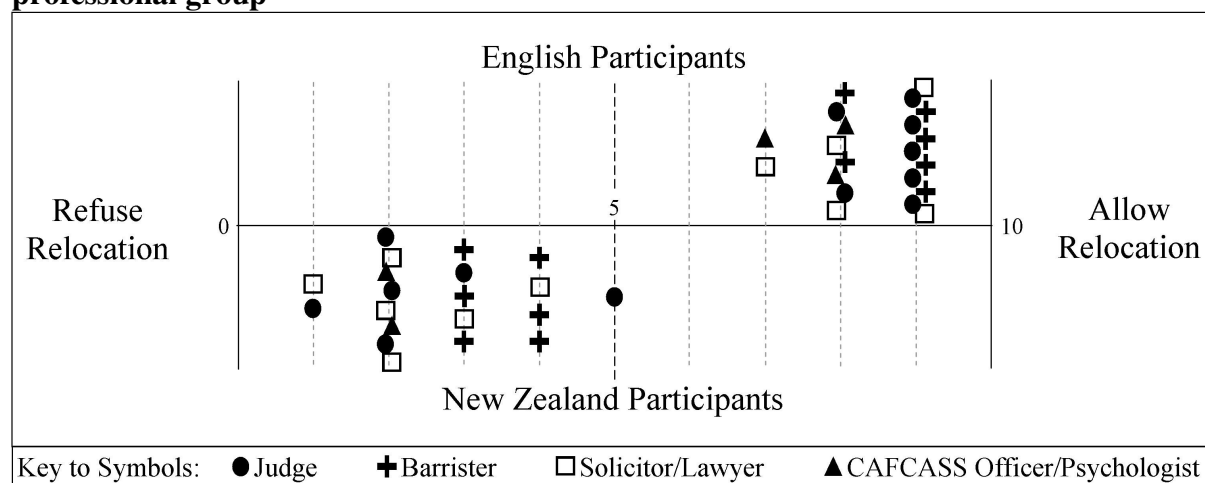
⁶¹ As another English judge concluded, 'I can't really envisage any other decision being made' (EJ6).

⁶² A New Zealand judge said that 'unless ... this father was a bit of a prick, I wouldn't think [the mother had] much chance of success' (NJ3).

Table 4.3 – Table showing numerical representation of participants’ views on the likely outcome of Tom’s case, on a scale from 0 to 10 where 10 is most likely to allow relocation, arranged by nationality and professional group

Relocation, arranged by nationality and professional group								
	ENGLISH PARTICIPANTS				NEW ZEALAND PARTICIPANTS			
	EJ	EB	ES	EC	NJ	NB	NS	NC
1	8	9	8	8	2	4	2	-
2	9	-	7	7	3	4	4	2
3	9	9	9	8	1	-	1	2
4	9	9	8		2	3	2	
5	9	8	9		2	3	3	
6	9	8			5	3	2	
7	8	9					4	
Average	8.43				2.70			

Figure 4.4 – Illustration of participants’ views on the likely outcome of Tom’s case on a scale of 0 to 10 where 10 is most likely to allow relocation, arranged by nationality and professional group



As Figure 4.4 shows, participants in the two countries had strongly divergent views on Tom’s case. English participants unanimously thought the mother’s application very likely to succeed, with predictions ranging from seven out of ten to near certainty.⁶³ While caution is required in looking at the numerical representations of qualitative data on the likelihood of

⁶³ It will be unsurprising, following the discussion above, that one English participant who rated the mother’s chances at ‘only’ seven out of ten was ES2, the solicitor whose discussion was seen in many ways to fit more neatly with New Zealanders’ analysis: see above, nn 48 and 51.

relocation being allowed,⁶⁴ the average of the numbers ascribed to English participants based either on their specific assessments of the mother's chances or on their general discussion of the case was 8.43.

By contrast, Figure 4.4 shows that, with the exception of one judge who said Tom's case 'could go either way' (NJ6), New Zealand participants were clear that the mother's application would probably fail. Again, caution is needed in using this figure, but the equivalent average of New Zealanders' assessments of the mother's chances of success was 2.70. This figure suggests that, while New Zealanders were slightly less certain about the outcome than the English, both saw the case as clear.

This divergence of both analysis and outcome in Tom's case highlights the key differences arising from the legal approaches of England and New Zealand. The differences between *Payne* and *D v S* when applied to Tom's case meant that practitioners in the two countries applied different processes to their evaluations of the facts, which in turn led to highly divergent outcomes. Might the same variation occur if *Payne* is removed from the English analysis?

Jane's Case

The second vignette, Jane's case,⁶⁵ was designed to look at a relocation dispute in circumstances when *Payne*'s influence is lessened because of a shared care arrangement.

⁶⁴ On methodology, see Chapter 2, text from n 53.

⁶⁵ Jane's case was based loosely on *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC).

The care arrangements here were more unusual from an English perspective, but fitted a fairly standard pattern for New Zealanders. Jane, who is 12 years old, spends four nights per week with her mother and three with her father. Her mother is South African and, feeling unhappy where she is, wishes to return home; her father is either Welsh or Māori,⁶⁶ and Jane is a bilingual and bicultural child. The full vignette as given to participants is reproduced in Figure 4.5.

Figure 4.5 – Jane’s case, as given to participants

Jane is 12 years old, the only child of a [Welsh/Māori] father and a South African mother, currently living [in Pembrokeshire/near Taupo]. Before her parents separated 3 years ago, Jane’s parents were both very involved in her day-to-day care. Although they have had some difficulties in their post-separation relationship, the parents have managed to co-operate well over issues to do with Jane. They live close to one another and, by flexible and informal agreement, Jane normally spends three nights a week with her father and the rest with her mother. The father views his cultural background as particularly important and, with the mother’s support, has ensured that Jane is fully aware of her bi-cultural heritage. Both the father and Jane are fluent in [Welsh/Māori], and the mother has what she calls a workable use of the language. Jane’s mother has begun to feel increasingly isolated in [Wales/New Zealand], and has several times mentioned that she would prefer to live in Cape Town with her family. The mother has kept close ties with her family, and South Africa generally, and she and Jane have returned many times for visits. The mother has now decided that she wants to return permanently to Cape Town, and take Jane with her. She says she would facilitate generous contact, both in [the UK/New Zealand] and South Africa, and continue to promote Jane’s [Welsh/Māori] heritage. The mother has suggested that she might go even if leave to take Jane is refused because she feels so trapped and unhappy, but says that she would be torn and hopes not to have to make that choice. The father opposes the move because of the impact it would have on his relationship with Jane, and on her exposure to the [Welsh/Māori] culture and language. He says he is happy to have full time care of Jane if the mother decides to move, and would facilitate generous contact both in [the UK/New Zealand] and South Africa. Jane says she wants the present arrangement of shared care to continue, but also that she wants her parents to be happy.

Compared to Tom’s case, the facts relating to Jane produced similar analyses from the two national groups, which may fit with the fact that the legal approaches to this type of case are

⁶⁶ NB6 thought the combination of a Māori father and South African mother unlikely, but no other participants commented on it.

similar. Jane's maturity meant that her age and views were the dominant factors for most participants,⁶⁷ along with the shared care. The two points which showed divergence between the groups were the importance of Jane's bicultural heritage, and the psychological and emotional well-being of her mother.

Looking first at the factors listed by participants,⁶⁸ the similarities between the national groups are apparent. Table 4.4 lists the 12 factors picked out in Jane's case, and shows the order in which each participant put the factors he or she considered relevant.⁶⁹ The table also includes the number of participants in each national group who placed each factor as their first choice, the number who listed each factor amongst their first three choices, and the total number who listed each factor.

⁶⁷ While the analysis which follows will show that Jane's age and views are separate, albeit connected, factors, in the first section it is necessary to treat them as one 'factor', since most participants linked them together. A typical start to Jane's case was that 'she is 12, so her views are going to carry probably significant weight' (NJ1).

⁶⁸ On methodology, see Chapter 2, text above n 53.

⁶⁹ Technical difficulties meant that no recording was made of ES5 (though notes were taken by hand); so he is excluded from this section. The 41 participants in this section picked between three and eight factors, with the average being 5.4 factors.

Table 4.4 – Table showing participants’ choices of factors relevant to the determination of Jane’s case, in rank order, together with the total number of participants who listed each factor first, in their first three choices, and in total, separated by nationality

Each factor first, in their first three choices, and in total, separated by nationality																									
	EJ1	EJ2	EJ3	EJ4	EJ5	EJ6	EJ7	EB1	EB3	EB4	EB5	EB6	EB7	ES1	ES2	ES3	ES4	ES5		EC1	EC2	EC3	No. first	No. first three	No. total
	NJ1	NJ2	NJ3	NJ4	NJ5	NJ6		NB1	NB2	NB4	NB5	NB6	NB7	NS1	NS2	NS3	NS4	NS5	NS6	NC1	NC2	NC3			
Jane's age and views	1	4	1	4	1	1	3	2	1	1	2	4	2	1	1	2	1			1	4	2	10	16	20
	1	2	5	3	1			2	1			1	1	1	1	6	4	4	4	1	1	1	10	13	18
Shared care / relationships	2	1	6	3	3	4	2	1	2	5	1	1	1		2	4	3			5	1	4	6	13	19
	2	3				4		1	2	2	2	3	3	4		2	1	1	1	3	4	5	4	13	17
Jane's family in the UK / NZ						2						5				3							0	0	0
																							0	2	3
Jane's school, friends, etc		3		5				7		2		2	3	2		7				4			0	5	9
		5	7		4				5							7						2	0	1	6
Cultural considerations					2	5		5	4		4	3		3	3	3				2	3	3	0	8	12
	3	4	4	1	3	1		3	4	1	1	6	2	7		1	2	2	2	2	2	3	5	15	20
Jane's family in South Africa										4				4									0	0	2
	4		3											6							3		0	2	5
M's reasons for relocating	3	2	2			3	1	4	5							1						1	3	7	9
	5	1	2					4		4		2		5									1	3	7
M moving without Jane			5			7	5	3	4	6			6	5	4	8	2					6	0	2	12
			1			5				6	4			3	2		3	3	5	4		4	1	5	11
Details of M's plan for relocation			3	1		2										5					2	1	4	5	
								7															0	0	1
Effect on M of staying			4	2		6	4			2	3					6				3		5	0	4	9
	6			4	6	3		5	3	3	3	4				4	5		3			0	5	12	
Plans for contact if M relocates					4			6					4	2						6		7	0	1	6
	7			2	5			6	6	5			4	2	3		6			5			0	3	11
Not long until Jane can decide										7		5	5									8	0	0	4
			6		2													5			5		0	1	4

Figure 4.6 – Graph showing the distribution of participants’ first choice of factors relevant to the determination of Jane’s case, arranged by nationality

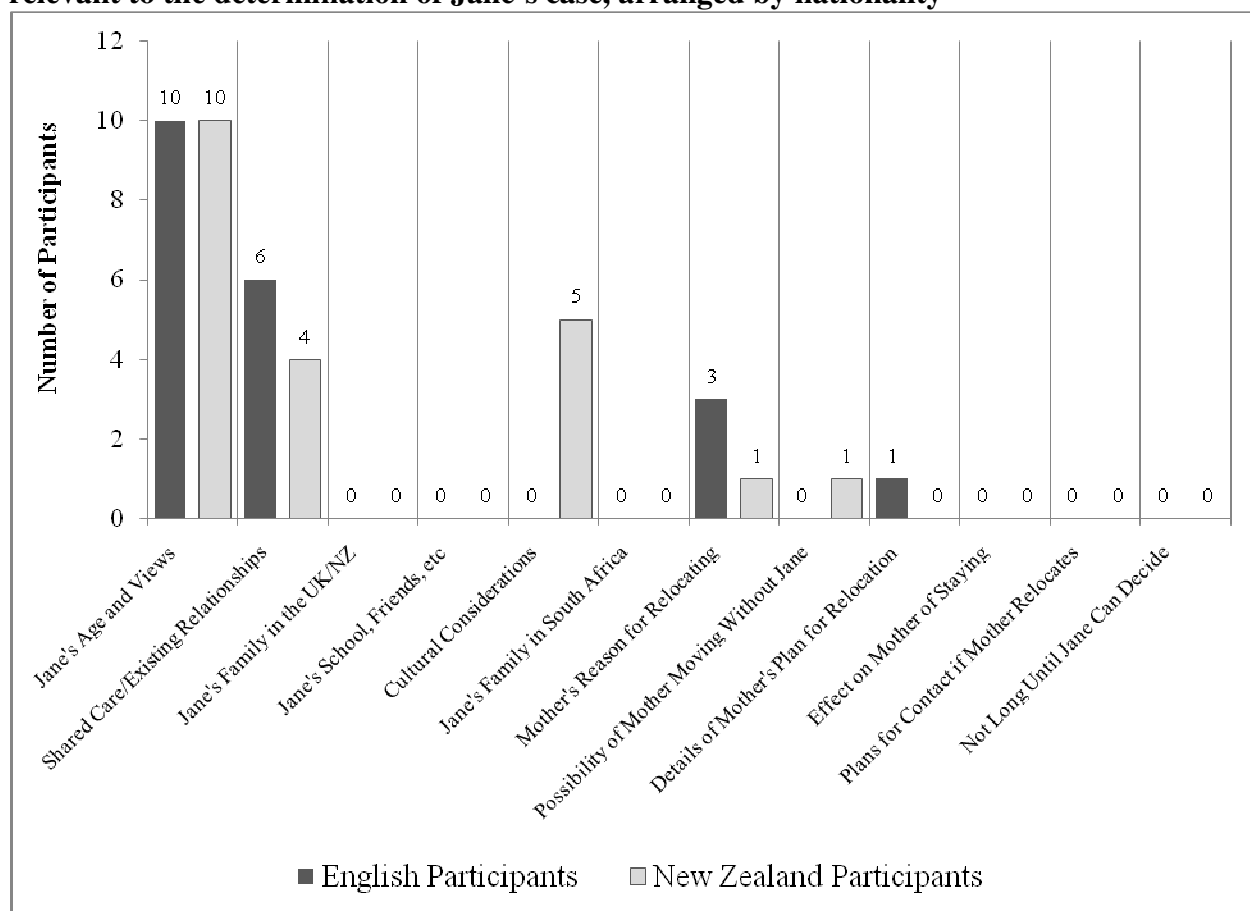
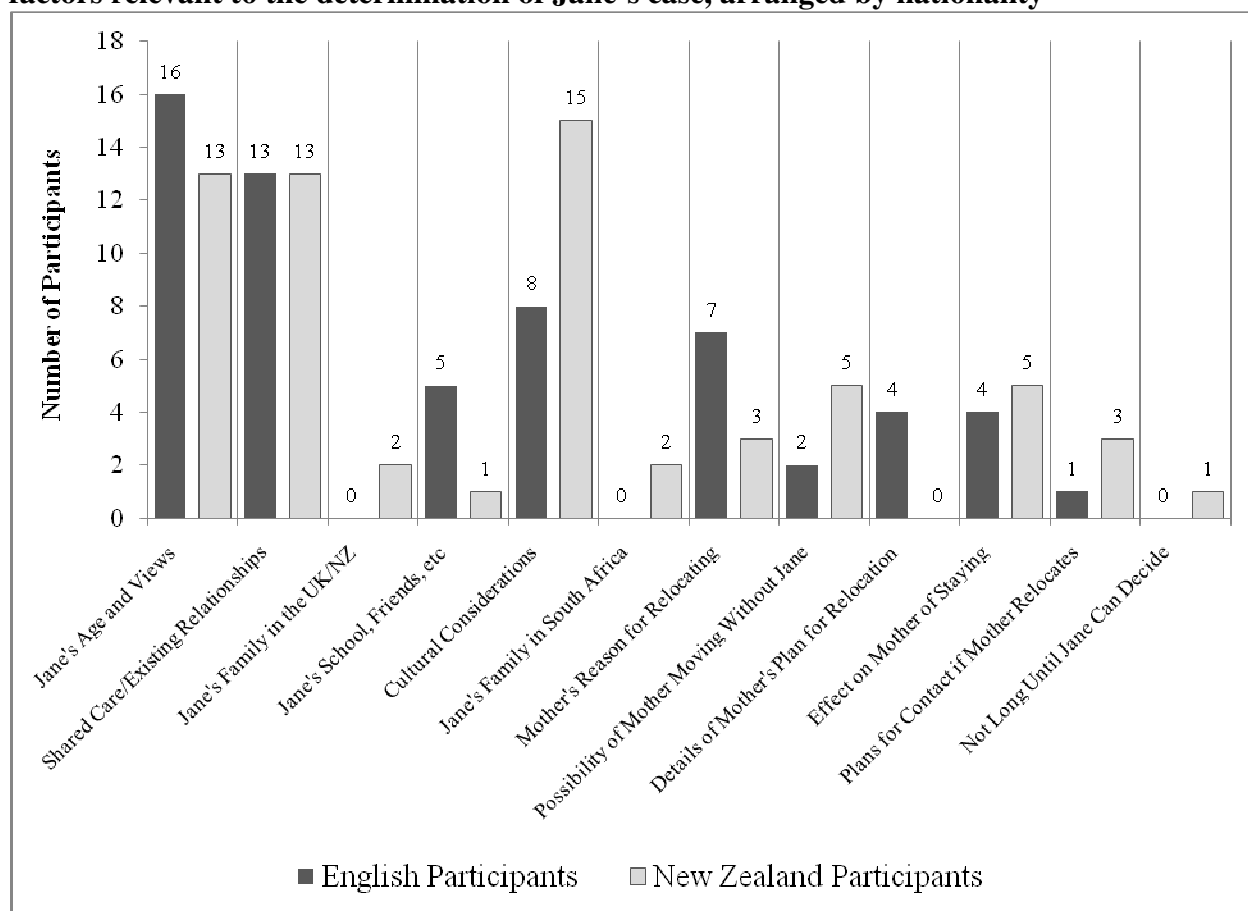


Figure 4.6 illustrates participants’ first choice factors in Jane’s case. The factor which dominates both English and New Zealand responses is Jane’s age and views, listed first by 10 participants in each group. The next factor for the English was the shared care and Jane’s relationship with her parents (six participants), followed by Jane’s mother’s reasons for relocating (three participants). For New Zealanders, after Jane’s age and views came her bicultural heritage (five participants), and then the shared care (four participants).

Figure 4.7 – Graph showing the distribution of participants’ first three choices of factors relevant to the determination of Jane’s case, arranged by nationality



Turning to Figure 4.7, which incorporates the first three factors listed by participants, a similar pattern is seen. For the English, Jane’s age and views continued to lead (16 participants), followed by the shared care (13 participants). Eight English participants listed cultural considerations in their first three factors, and seven listed the mother’s reasons for relocating. Other factors which featured in the English responses were Jane’s education and social life (five participants), the effect on the mother of staying in Wales (four participants), and the details of her plans for relocation (three participants).

While all of these factors were mentioned by New Zealand participants, their focus was different. Figure 4.7 shows that cultural considerations were mentioned most frequently by New Zealanders (15 participants), followed by Jane’s age and views, and the current care

arrangements (13 participants each).⁷⁰ Other factors trailed some way behind, with the issue of whether the mother will move without Jane, and the effect on the mother of remaining in New Zealand next (five participants each), then the mother's reasons for relocating and arrangements for contact (three participants each).

While the differences between the English and New Zealanders are less pronounced than in Tom's case, there are two points of divergence. The first is cultural considerations, which were more prevalent in New Zealand analyses; conversely, the mother's reasons for relocating featured more in English analyses. Participants were, however, agreed about the significance of Jane's age and views, and her current shared care arrangement.

The themes which emerge about Jane's case, reflecting the preceding discussion, are as follows:

- Jane's existing shared care arrangement;
- Jane's age and views;
- the possibility of the mother moving without Jane, and her psychological well-being;
- and
- cultural considerations.

While Jane's views were probably the single most significant factor, the current shared care arrangement is discussed first since, to some extent, it underpins Jane's views.

Participants were told in the vignette that Jane's parents had an amicable relationship and,

⁷⁰ It is interesting that more English participants started with Jane's views than did New Zealanders, since New Zealand law gives children's views great significance: COCA, s 6. It may be that some New Zealanders considered this factor so obvious as to be not worth mentioning: many who did not list it, or who came to it later, did much of their work as Lawyer for Child (COCA, s 7), representing children in court.

‘by flexible and informal arrangement, Jane normally spends three nights a week with her father and the rest with her mother’.

English participants saw this split of Jane’s care as ‘most unusual’ (EJ1), reflecting ‘an unusually close father-child relationship’ (EJ6). Because the English courts allow an arrangement to be called ‘shared residence’ where the child splits their time substantially unequally between two homes,⁷¹ English participants needed to specify that this was ‘shared care *stricto sensu*’ (EJ1) or ‘a real shared care arrangement’ (EB6). The effect of such an order on relocation is not entirely clear,⁷² but the current approach seems to be that ‘many of the factors to which the court drew attention in *Payne* ... whilst relevant may carry less weight’ in shared care cases.⁷³

Some English participants thought that the law required them ‘to ask, almost as a preliminary question, “who is the residential parent?”’ (EJ1).⁷⁴ These participants may have been particularly concerned to decide ‘where ... Jane’s main base [is] going to be’ (EB1) because of the mother’s indication that she might move even if she was not allowed to take Jane with her. This meant that shared care was likely to end either way, and so Jane would need to have one main carer to a greater extent than at present. In other words, the question was, ‘which parent could she more easily lose?’ (EJ2). However, given that ‘both parents ... are perfectly capable of looking after the child’ (EB3), most English participants agreed that,

⁷¹ See, eg, *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397; *Re A (Joint Residence: Parental Responsibility)* [2008] EWCA Civ 867, [2008] 2 FLR 1593.

⁷² See Chapter 3, text from n 150.

⁷³ *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC), [14].

⁷⁴ See also Chapter 5, text from n 52.

other things being equal, ‘the balance would fall in favour of the child going to live with her father and her mother leaving the country, rather than going to live with her mother and leaving the country’ (EB5).

In many ways, New Zealanders agreed about the effect of the shared care. There were, however, two differences. The first related to Jane’s split care itself. New Zealand relocation law places little weight on a parent’s role as primary carer, and does not adopt different approaches to sole and shared care cases.⁷⁵ However, in practice, most New Zealanders agreed that ‘the closer to shared care you are, the harder it is to move, because the child is losing more’ (NS4). That was not to say that Jane’s mother had no chance of success. Indeed, ‘the fact that [the mother has] actually promoted this relationship is going to assist [her] in some ways’ (NB6) because she was not open to a charge of trying to terminate Jane’s relationship with the father.⁷⁶

While the English saw Jane’s care as unusual, New Zealanders made no particular comment on it, other than to say, for example, that ‘they have both been responsible parents who have been actively parenting the child’ (NB4). Indeed, the setup in Jane’s case fitted the New Zealand trend towards shared parenting,⁷⁷ ‘whether it is week-about, or whether it is 2:5:5:2, or whether it is 4:4:3:3’ (NS4).

⁷⁵ See, eg, *EM v B* [2003] NZFLR 337 (NZFC), equal time; *Brown v Argyll* [2006] NZFLR 705 (NZHC), 9:5 split; *EE v ML* (FC, FAM-2005-261, 26 July 2006), equal time.

⁷⁶ Cf Tom’s mother, whose ‘history of indifference’ to contact meant that she was ‘sunk before she starts’ in seeking to relocate (NS3): above, text after n 56.

⁷⁷ See generally M Henaghan, ‘Legally Rearranging Families: Parents and Children After Break-Up’ in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington: 2007), 325-333.

The second difference, consequent in part on the normality of shared care in New Zealand, was that the English desire to nominate a primary carer was not mirrored by New Zealanders. New Zealanders said that ‘the father is as able to look after Jane as the mother’ (NJ2), and that ‘dad is in a position to assume full-time care’ (NB1). Although two participants asked about ‘[Jane’s] relationship with her mother and the implications of her mother leaving’ (NJ1; and similarly NB6), most thought that ‘the longevity of arrangements [and] the equality of ability of both parents [mean] there is no the need for Jane to go ... with her mother, and it is less critical ... whether she goes with mum or stays with dad’ (NJ2).

So, while English and New Zealand participants agreed that shared care was ‘not necessarily a bar to removal, because it depends on the circumstances’ (EB6), the split of care in Jane’s case was thought to make the mother’s application more difficult. This was especially so given Jane’s own desire for shared care to continue.

At the start of this section, Jane’s age and views were considered together because so many participants linked the two, particularly in explaining why Jane’s views were especially important. At this point, though, the two need to be separated, since practitioners’ discussions were more nuanced than can be shown by keeping the two factors together. So, while Jane’s age – 12 years old – was considered relevant for several reasons, we start with its relevance to her views.

Participants in both countries thought that Jane’s views were a powerful factor, with some going so far as to say that her views were ‘pretty much going to carry the day’ (ES4). Precisely what Jane’s views were, though, was unclear. According to the vignette, ‘Jane says

she wants the present arrangement of shared care to continue, but also that she wants her parents to be happy', with this second point relating to the mother's unhappiness, which was the cause of her desire to relocate. Participants had various interpretations of Jane's views.

One perspective was that Jane probably did not want to make the decision. As one English solicitor said, 'she does what all children do: she wants everyone to be happy, and really she wants her parents to get back together and live happily ever after' (ES3).

A second view, which often overlapped with the first, was that 'Jane is going to be pinned down somewhat more' (ES4) and required to give more of a preference. A number of participants said that they 'would be surprised if a 12-year-old didn't have some view about such a move' (EJ3).

The third perspective, which was most commonly held, was that, although Jane had expressed separate and somewhat inconsistent views, her desire for the shared care to continue was her main view. Many participants indicated adherence to this perspective tacitly, summarising Jane's position as 'want[ing] ... things to go on being as they are' (NS5). However, some participants explained why they focused on this aspect:

EB3: ...the girl's wishes are that ... she just wants the current arrangements to continue. She says she also wants the parents to be happy, but ... that is an add-on, and she is saying it second. It is "and also", and that is a less firmly expressed wish than "I want the current arrangements to continue".

For most New Zealanders, Jane's views were one of many factors pointing against relocation, and they were connected to those other considerations by many participants. One judge, for example, saw Jane's views as 'based on continuity of relationships' (NJ1), and so

connected to broader concepts of children's welfare in New Zealand law.⁷⁸

Many English practitioners saw Jane's case as relatively borderline, and Jane's views were taken to be a way of deciding what was otherwise a finely balanced case. Two English judges explicitly took this approach:

EJ6: If [Jane] is saying anything, it is that she doesn't want any change. ... [I]f one were looking for a [deciding] factor – because this is a very nicely balanced case – ... her apparent wish might be it, against the application.

EJ7: Jane's views are important because of her age, and she wants the present arrangement [to continue]. ... Well, that would give me ground for refusing [relocation], wouldn't it?

Aside from the strength that it lent to her views, Jane's age raised three considerations. One, seen more in English responses, was that, by the age of 12, Jane would be 'very embedded in her community, and so she is not at an age where it is so easy for her to make the move' (EJ2). Most participants who raised this point (nine English, six New Zealanders) saw Jane's age as a reason to oppose relocation because of her established school and social life; but there was some recognition that this was not the only view. When thinking about how a judge would see the issue, an English barrister highlighted two positions:

EB4: One [judge] could say, "well, a child of 12, children move schools, still quite adaptable", but [another judge] could also say, "by that time you are quite settled with friends and it is quite hard to move". There are two sides of the coin.

Only one participant, a New Zealand judge (NJ1), took the view that Jane was at an age

⁷⁸ COCA, s 5(b).

when she could readily move, the majority being concerned about disrupting her schooling and friendships.

Another aspect of Jane's age was that it was not long until she would be grown up. This fact led some participants to have less sympathy for the mother, because it was 'not that many years [for her] to hang on' (EB6): 'the mum only has to spend three or four more years being here and then she will be free to do as she wishes ... so that is not too much to ask, I think' (NS5).

The final aspect of Jane's age was noted by only three participants, all of whom came to this point in contrast to what they had said about Tom, namely that 'at 12, a child could hold onto a relationship with the other parent at a distance' (NB2). While this fact in itself neither favours nor disfavours relocation, those participants who mentioned it saw it as a reason for calling the mother's bluff about relocating without Jane. As one English barrister put it, 'I wouldn't expect the mother to find it so impossible to go back [to South Africa] and yet maintain a good relationship with her daughter' (EB7).

This brings us to the mother's suggestion that she will relocate whether the court allows Jane to go or not. According to the vignette, Jane's mother 'has suggested that she might go [to South Africa] even if leave to take Jane is refused because she feels so trapped and unhappy'. This issue was raised by around half of participants (12 English, 11 New Zealanders), though some questioned whether the mother really meant it (EB4, NS4).

Many English participants connected the mother's intentions to the fact that shared care was unlikely to continue in any event. One solicitor thought that the mother's best

strategy was to say that she was going anyway, since ‘if she just says, “no, I’ll just carry on living here”, I don’t think she is going to go’ (ES2). Only one English participant explicitly drew any adverse inference against the mother for her position, with one judge wondering whether it ‘indicat[ed] that the emotional impact of going without the child perhaps isn’t as great as it would be for some other parents’ (EJ3).

New Zealand practitioners, on the other hand, criticised the mother’s suggestion of moving anyway, seeing it as a form of ‘blackmail’ (NS1). One New Zealand barrister referred to a case ‘where the Court of Appeal basically said, “don’t you threaten us like that”,^[79] so I tend to say to clients, “don’t issue that threat”’ (NB5). Most New Zealanders were unimpressed with the mother’s attitude, describing her as ‘bloody-minded’ (NC1) and as ‘thinking more of herself than of the child’ (NJ6). As one lawyer put it, ‘if the mum will go anyway, well, then she is not worth it’ (NS5).

Only one New Zealander specifically linked the mother’s willingness to leave Jane behind to her psychological state (NB5), and even this barrister was unconvinced that it would matter, because ‘I can just hear a judge saying ... “well, where is your psychological evidence?”, so you would really have to call [expert] evidence’ (NB5). Many New Zealand participants thought that they would require medical evidence of the mother’s claimed unhappiness, which reflects recent authority on the point.⁸⁰ One judge said that ‘if [the mother] has got medical reports and is able to back [her claims] up, I would have a look at that’ (NJ4), while other participants noted that there was no indication that the mother had

⁷⁹ Possibly *D v S*, where the mother had decided to return to Ireland regardless of the outcome, though the point in question is not apparent from the judgments.

⁸⁰ *B v B [Relocation]* [2008] NZFLR 1083 (NZHC).

such evidence. This dismissive approach fitted the concerns of one lawyer, who was critical of the New Zealand law's attitude to parental well-being, and who said that '[t]he real factor is [the mother's] health and happiness, and the court is simply going to give it no traction' (NS2).⁸¹

While some English participants similarly questioned 'the extent to which [the mother] really is as isolated as is suggested' (EJ4) – with one barrister reflecting New Zealanders' desire for 'some kind of medical evidence' (EB4) – most tended to accept the mother's claim at face value. Participants said they 'would imagine that she is very isolated in Wales' (EC3), and 'she doesn't need to prove that she is psychiatrically ill' (EJ6). The English approach – seeing 'the big factor in the mother's favour [as being] the unhappiness that she would feel at being here' (EJ7) – fits with *Payne*'s instruction to attach 'great weight' to the emotional and psychological well-being of a primary carer.⁸²

It can be seen, therefore, that the English were generally more willing to accept the mother's claim to be feeling trapped and unhappy, and also more willing to ascribe weight to this factor. Given the contrast seen in Chapter 3 between the two countries on this issue,⁸³ such a difference is not surprising.

The significance accorded to Jane's bicultural heritage by New Zealanders is also unsurprising, given the role of Māori culture in New Zealand legal policy-making in the last

⁸¹ See Chapter 6, text from n 83.

⁸² *Payne*, [41].

⁸³ See Chapter 3, text from n 233.

25 years or so,⁸⁴ reflected in the statutory instruction that ‘the child’s identity (including ... culture [and] language ...) should be preserved and strengthened’.⁸⁵ It was seen earlier that culture was the most frequently listed issue among New Zealand participants’ first three factors when looking at Jane’s case.⁸⁶ Indeed, only one New Zealand participant did not mention culture at all. English participants tended to see Jane’s culture as less significant (though one barrister suggested that, ‘as the case would be tried in Wales, that might actually play more part in it’: EB5).

For the English,⁸⁷ Jane’s Welshness provoked mixed responses. Some thought it to be an ‘important heritage’ (ES2) which would likely be lost if she moved to South Africa, despite her mother’s best efforts to preserve it (EJ5, EB3, EB6, ES1). Other participants said that they ‘wouldn’t get too steamed up about the Welsh cultural aspect of it’ (EB5): it was ‘something to weigh in the balance’, but ‘not a determinative factor’ (EJ3; EJ7 used almost identical words).

Two English participants linked their dismissal of the Welsh heritage issue to the fact that ‘one has to assume that [Jane] has a South African heritage as well’ (ES3); at the moment, ‘the child is not experiencing her South African cultural roots’ (EB5). The fact that ‘the cultural thing ... works both ways’ (NS1), and that Jane ‘has two competing cultures’

⁸⁴ See, eg, J Ruru, ‘Indigenous Peoples and Family Law: Issues in Aotearoa / New Zealand’ (2005) 19 *IJLPF* 327; J Metge and J Ruru, ‘Kua Tutū Te Puehu, Kia Mau: Māori Aspirations and Family Law Policy’ in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington: 2007).

⁸⁵ COCA, s 5(f).

⁸⁶ Above, text after n 69.

⁸⁷ Note that ‘English’ participants might be Welsh, since ‘English’ is shorthand for ‘English and Welsh’; at least one participant was, in fact, Welsh.

(NJ1), was also picked up by New Zealand participants. However, most New Zealanders preferred, nonetheless, to focus on Jane's Māori heritage.

Three reasons were advanced for this preference, two related directly to New Zealand legal provisions. First, 'the principle of continuity of arrangements in section 5 might tend to weigh more heavily in favour of her Māori identity being maintained' (NJ1).⁸⁸ Second, 'we have principles in the Care of Children Act about children having access to their culture and having that preserved' (NS4).⁸⁹ Finally, several participants referred to Jane's wider family, known in Māori culture (and New Zealand generally) as 'whānau':⁹⁰ 'being part of the whānau is very important... In Māori culture, the child is very much part of the wider family' (NJ6).

A small number of New Zealand participants wondered whether the cultural issue would turn out to be that significant. As one senior barrister put it, the cultural concerns 'might have more headline impact than substantive impact' (NB7). One judge wanted a cultural report,⁹¹ because 'it may just not be an issue ... or it may be that it is a real issue' (NJ4). Another judge was also 'not particularly convinced about the Māori heritage... It is important to her dad, but ... what is important to Jane? ... [H]er interest in Māoritanga^[92] may come much later in life, or it may already be important to her' (NJ5).

⁸⁸ COCA, s 5(b).

⁸⁹ COCA, s 5(f).

⁹⁰ See generally C Cunningham, B Stevenson and N Tassell, *Analysis of the Characteristics of Whānau in Aotearoa* (Report prepared for the Ministry of Education, Massey University, Wellington: 2005).

⁹¹ COCA, s 133.

⁹² Māori culture.

In general, though, culture was far more dominant in New Zealanders' analyses of Jane's case than it was in English discussions. Moreover, like most aspects of the case, New Zealanders saw this element as being more strongly opposed to Jane's relocation than did their English colleagues. As we come to predictions of the likely outcome of Jane's case, therefore, it will not be surprising that New Zealanders generally saw the case against relocation as being stronger than the English.

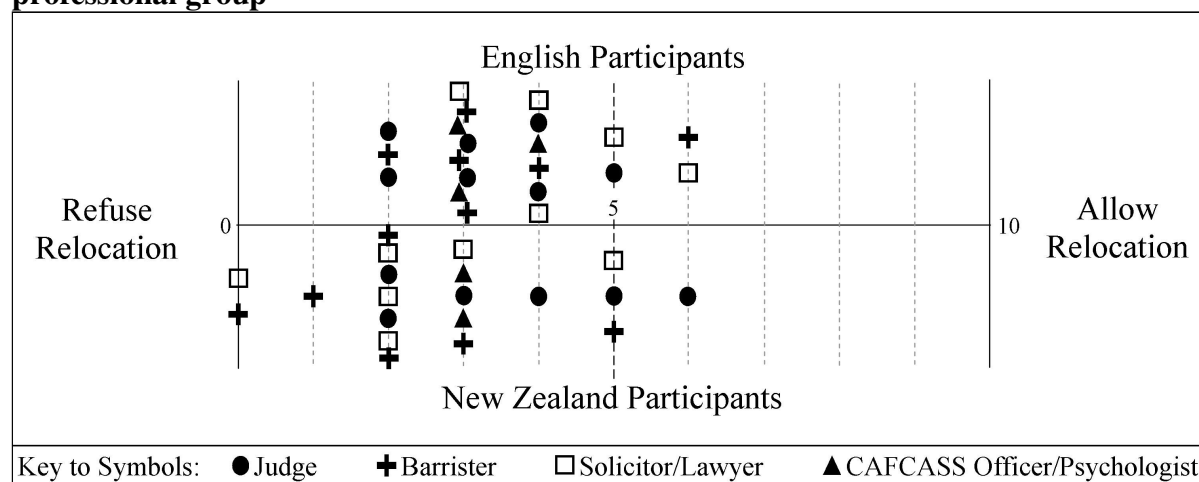
Participants' predictions of the likelihood of relocation are contained in Table 4.5, and are illustrated in Figure 4.8.⁹³ There is far more similarity between the two national groups in Jane's case than was seen in Tom's case: a clear majority in both counties thought the mother's application likely to fail, with only three participants (two English and one New Zealander) giving her a more than a five out of ten chance of success. Five participants (two English and three New Zealanders) thought the case 'too close to call' (NB6), or dependent entirely on Jane's evidence.

Table 4.5 – Table showing numerical representation of participants' views on the likely outcome of Jane's case, on a scale from 0 to 10 where 10 is most likely to allow relocation, arranged by nationality and professional group

Relocation, arranged by nationality and professional group								
	ENGLISH PARTICIPANTS				NEW ZEALAND PARTICIPANTS			
	EJ	EB	ES	EC	NJ	NB	NS	NC
1	3	6	4	3	3	3	5	-
2	5	-	3	3	2	2	0	3
3	2	3	6	4	4	-	2	3
4	3	3	5		6	0	3	
5	2	2	4		5	1	2	
6	4	3			2	5	2	
7	4	4					2	
Average	3.60				2.75			

⁹³ On methodology, see Chapter 2, text from n 53.

Figure 4.8 – Illustration of participants’ views on the likely outcome of Jane’s case on a scale of 0 to 10 where 10 is most likely to allow relocation, arranged by nationality and professional group



However, although a majority in both countries thought the mother’s application likely to fail, New Zealanders were more definite in this prediction. More New Zealand participants put the mother’s chances between zero and two out of ten (ten New Zealanders, three English), and more English put the mother’s chances at three or four out of ten (14 English, six New Zealanders). The average for New Zealanders was 2.75, whereas for English participants it was 3.60.⁹⁴

While the difference between the two countries is much less than in Tom’s case, the significance of Jane’s case is that the two jurisdictions are applying a similar legal test and yet still producing divergent results. The English are unable to apply *Payne* to Jane’s case, and so are left to assess welfare without any ‘gloss on the welfare principle’⁹⁵ – which is what *D v S* demands of New Zealanders in every case. Yet even with *Payne*’s ‘discipline’

⁹⁴ Note that due to the small sample size, it is impossible to assess the statistical significance of this difference.

⁹⁵ M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351, 362.

removed, English practitioners continue to look more favourably on relocation than do New Zealanders.⁹⁶

Mark and Hannah's Case

The final vignette, Mark and Hannah's case,⁹⁷ was described by a number of participants as 'a very different case altogether' (NJ5). Unlike the previous two vignettes, the proposed relocation in Mark and Hannah's case was not international, but was, rather, within the country. The children live with their father and have fortnightly contact with their mother, who works long hours in a City job and has an alcohol problem. The father wants to move from a big city (London or Auckland) to a rural, coastal area about four to five hours' drive away (Cornwall or Whakatane).⁹⁸ Figure 4.9 contains the full vignette in Mark and Hannah's case, as given to participants, and Figure 4.10 shows the relevant locations on maps of New Zealand and the United Kingdom.

⁹⁶ As an English judge who was strongly critical of *Payne* said, 'we are all so conditioned by the current law that it will take time to move out of that mode' (EJ1); for English participants' views on *Payne*, see Chapter 5.

⁹⁷ Mark and Hannah's case was based loosely on *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277.

⁹⁸ Whakatane is about 190 miles (300km) south-east of Auckland, and takes just over four hours to drive in good traffic conditions. There is an airport in Whakatane, with three or four flights to and from Auckland per day. Cornwall is about 220 miles (360km) south-west of London, but, because the roads are better, also takes just over four hours to drive in good traffic conditions. There are airports in Plymouth and Newquay, with several flights each day to and from London airports.

Figure 4.9 – Mark and Hannah’s case, as given to participants

Mark and Hannah, aged 10 and 7, have been living near [London/Auckland] with their father for 4 years since their mother left the family to pursue a City career. The father has dedicated himself to being Mark and Hannah’s primary carer, giving up his own career to care for them. The mother has maintained regular contact with the children, seeing them at least fortnightly and often more frequently. However, she finds her job very stressful, works long hours, and drinks heavily. At an earlier hearing, a judge suggested that the mother would be generally more suited to being the children’s primary carer because of her warmer character, but concluded that her alcohol use and long hours precluded her from having the day-to-day care of Mark and Hannah. The father has announced his intention of moving from [London/Auckland] to [Cornwall/Whakatane]. The father has close friends in [Cornwall/Whakatane], and has visited many times. He says that the children would have a better quality of life and that living costs would be lower in that region. The mother opposes the move and seeks a court order imposing conditions on Mark and Hannah’s place of residence. A report from a [welfare officer/psychologist] suggests that the father is “strong minded, determined, and possibly obstinate in character”, while the mother, although warm, shows no signs of being able to control her alcohol use. It is suggested that the absence of the children from the mother’s normal routine may cause her to lose what control she has over her drinking, and put at risk her ability to support the children financially. The father has been offered part-time work by his friends if the move goes ahead, and he says that contact with the mother could be maintained on a reasonably regular basis. The [welfare officer/ psychologist] is concerned that the children may react badly to losing regular contact with the mother, but makes no specific recommendation.

Starting with the factors which participants considered relevant to the determination of the case, 12 aspects were selected by participants. Table 4.6 lists these factors, and shows the order in which each participant put them.⁹⁹ The table also includes the total number of participants in each country who listed each factor as their first choice, the number of participants who listed each factor amongst their first three choices, and the total number who listed each factor.¹⁰⁰ These data are illustrated in the figures which follow: Figure 4.11 illustrates participants’ first-choice factors; Figure 4.12 shows their first three listed factors.

⁹⁹ The 41 participants who discussed Mark and Hannah’s case listed between three and eight factors, with the average being 4.7 factors.

¹⁰⁰ On methodology, see Chapter 2, text above n 53.

Figure 4.10 – Maps of northern New Zealand showing the locations of Auckland and Whakatane, and of southern Britain showing the locations of London and Cornwall

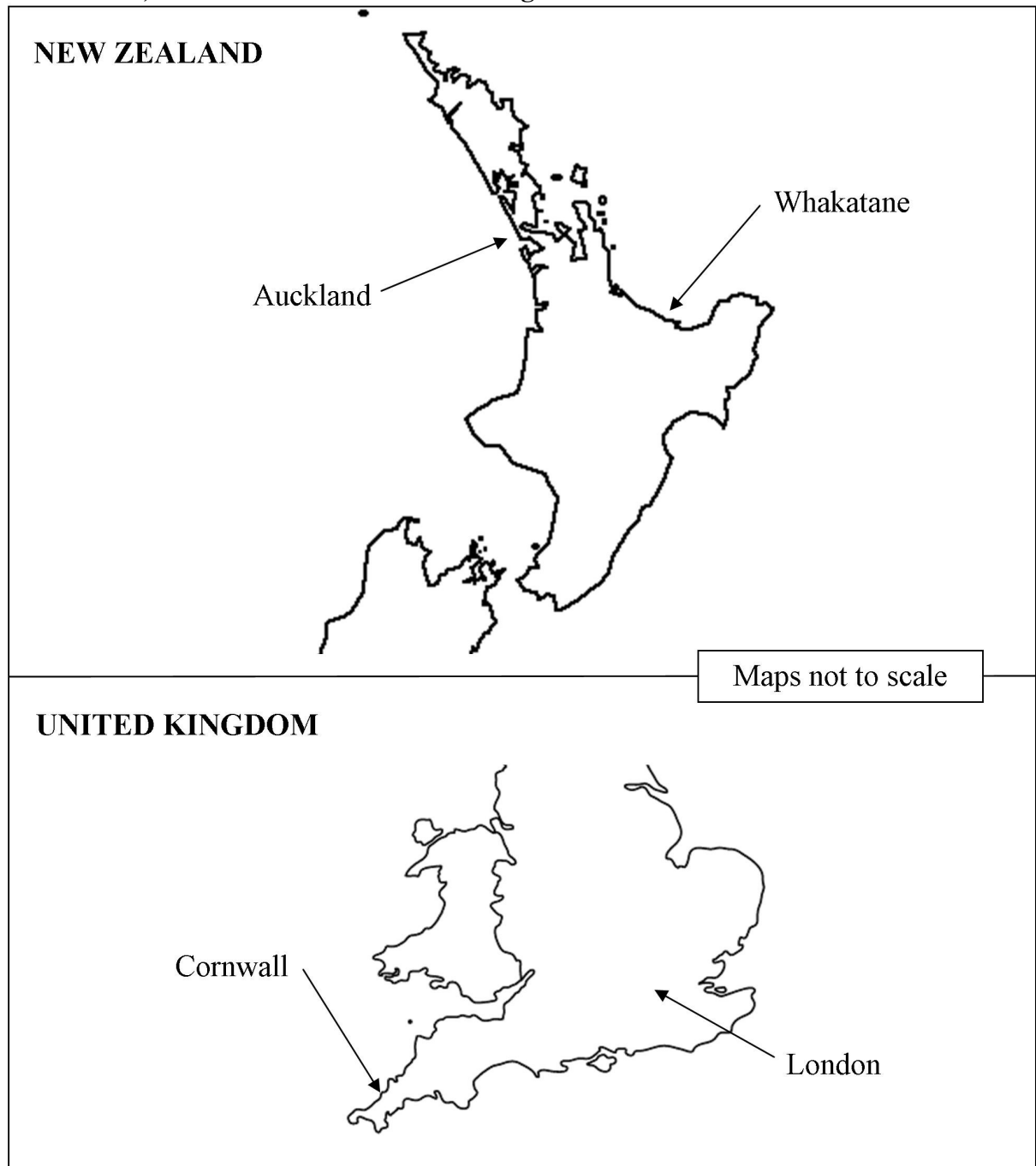
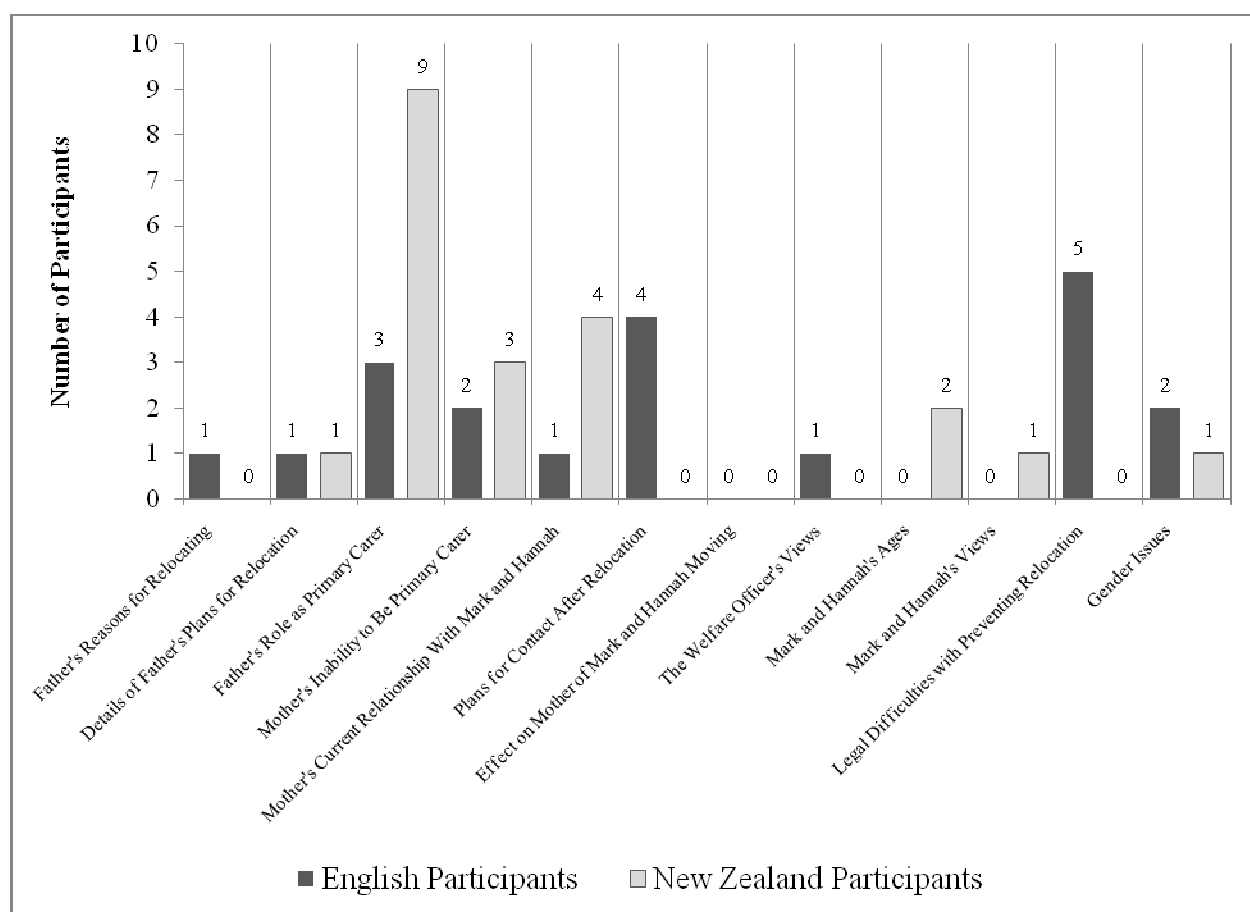


Table 4.6 – Table showing participants’ choices of factors relevant to the determination of Mark and Hannah’ case, in rank order, together with the total number of participants who listed each factor first, in their first three choices, and in total, separated by nationality

	EJ1	EJ2	EJ3	EJ4	EJ5	EJ6	EJ7	EB1	EB3	EB4	EB5	EB6	EB7	ES1	ES2	ES3	ES4	ES5		EC1	EC2	EC3	No. first	No. first three	No. total
	NJ1	NJ2	NJ3	NJ4	NJ5	NJ6		NB1	NB2	NB4	NB5	NB6	NB7	NS1	NS2	NS3	NS4	NS5	NS6	NC1	NC2	NC3			
F’s reasons for relocating	3	1			2	3	2		4	6		3		2	3								1	8	10
	3	4	2	4	5	4		4	7	3	4	4	3	2			5	4		4	3	4	0	6	18
Details of F’s plans			3	1		2	3			7				4	8						3	2	1	6	8
			1	2										4		3	6		4				1	3	6
F’s role as primary carer		2		4	3	4		2	1	3	2		3		1	1	3					3	3	11	12
	1	1				1		1	8	1	1						2	1	1	2	2	1	9	12	13
M’s inability to be primary carer		3	2			5		3	3	2			2		2	2				2	1	1	2	11	12
	2	2			3	2		2	5	2	2	1				1	3	3	2	1		3	3	14	15
M’s relationship with children	2			1					2	4		4			6	5					2	5	1	4	9
			3	1				5	1			3	4	1	4						1		4	6	9
Plans for contact after relocation	1	5		2	4	1		5	5	5	4	1	4	3	5	3	2			1		4	4	8	17
	4		4	3	4	3		3	6	4	3	5	2	3	2	2	4		3		4	2	0	10	18
Effect on M of children moving	4											2			4								0	1	3
	5							3						5									0	1	3
The welfare officer’s views				5		1																	1	1	2
																							0	0	0
Children’s Ages				3																3			0	2	2
	7	3			1			2					5				1	2					2	5	7
Children’s Views																							0	0	0
	6				2							6	1		3		7		5	3			1	4	8
Legal Difficulties		4	1			6		4	6	1	3		1	1		4	1						5	6	11
																							0	0	0
Gender Issues								1			1				7								2	2	3
					6				4			2			1								1	2	4

Figure 4.11 – Graph showing the distribution of participants’ first choices of factors relevant to the determination of Mark and Hannah’s case, arranged by nationality



Looking at Figure 4.11, no one factor stands out amongst the English participants as it did in both Tom and Jane’s cases. The factors most often mentioned first related to the issue of whether the law allowed the father to be stopped from relocating (five participants), plans for contact after relocation (four participants), and the father’s role as primary carer (three participants). For New Zealanders, on the other hand, the father’s role as primary carer stands out (nine participants), followed by the mother’s current relationship with the children (four participants) and her inability to be their primary carer because of her work and alcohol abuse (three participants).

Figure 4.12 – Graph showing the distribution of participants’ first three choices of factors relevant to the determination of Mark and Hannah’s case, arranged by nationality

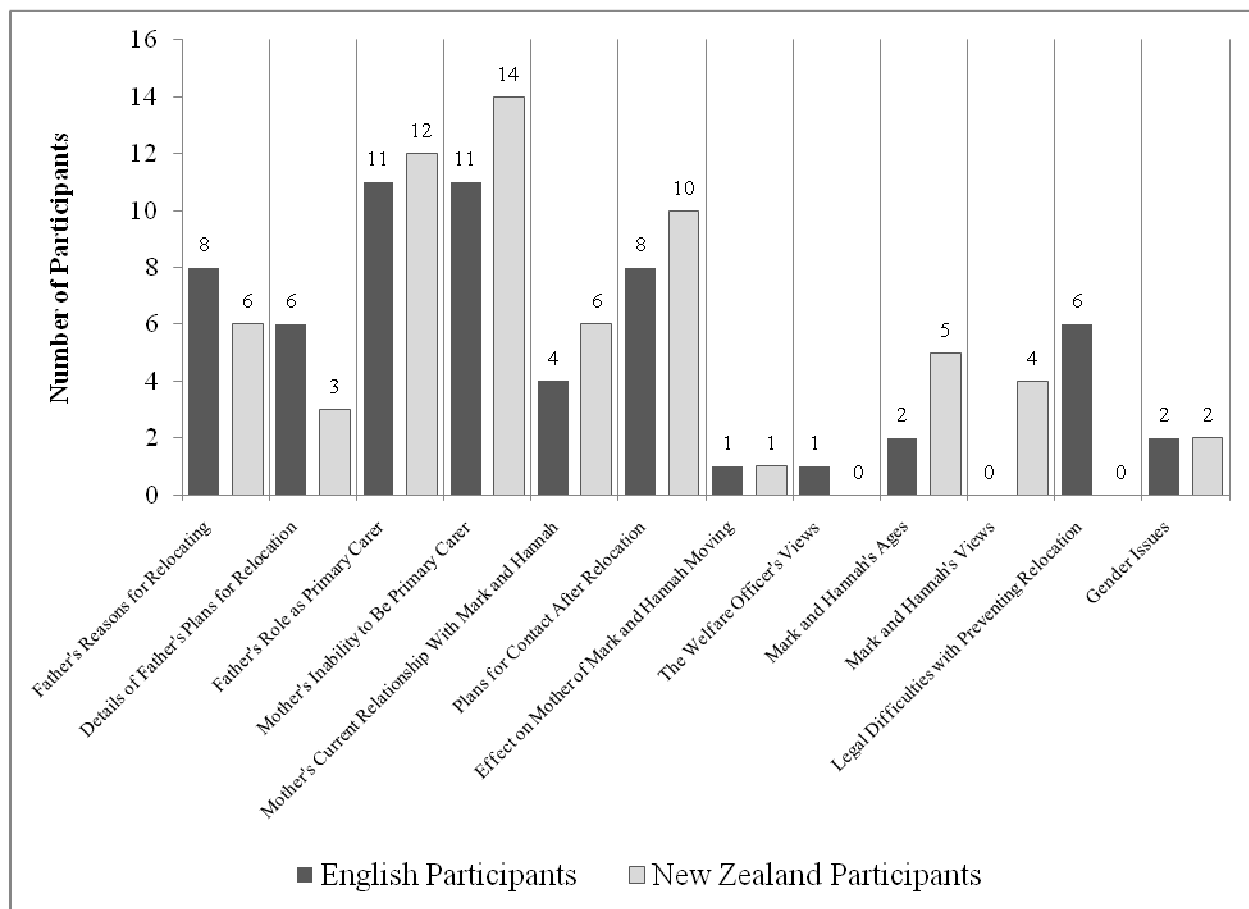


Figure 4.12, which incorporates participants’ first three choices, has marked differences. The English interest in the legal difficulties has dropped to fifth position (six participants), while the joint first factors are the father’s role as primary carer and the mother’s inability to perform this role (11 participants each). Next come the father’s reasons for relocating and the plans for post-relocation contact (eight participants each), and then the legal issues and details of the father’s plans (six participants each).

A similar change in priorities can be seen amongst New Zealand participants. Like the English, the leading factors are the mother’s inability to be the primary carer (14 participants) and the father’s performance of this role (12 participants). Next comes the

plans for contact after relocation (10 participants) and then the reasons for the relocation and the mother's current relationship with the children (each six participants). Two factors which feature for New Zealanders but are all but ignored by the English are the children's ages (five New Zealanders, two English) and views (four New Zealanders, no English).

Finally, there is cause to look back briefly at Table 4.6, where there are two aspects to note which do not appear from these Figures. First, the concern about the law listed by five English participants as their first factor can be seen on Table 4.6 to be listed in total by 11 English practitioners. This factor was crucial for those who listed it, and so the fact that some built up to it, rather than starting with it, should not be given too much weight.

The second factor apparent from Table 4.6 relates to the children's ages and views. It can be seen that Mark and Hannah's ages (ten and seven) are mentioned by only two English participants, and that no English participants mentioned their views. By contrast, four New Zealanders referred to both factors, and a further seven New Zealand participants mentioned one or the other.

Overall, the data taken from Table 4.6 suggest a large degree of similarity between the two national groups. Both sets of participants focused on the existing care arrangements, the reasons for moving, and the prospects for continuing contact after relocation. However, the key differences relate to the English concern about what their legal system permits in terms of restrictions on geographic movement within the country, and the New Zealand interest in the children's ages and views. Turning to the detail of participants' discussions of Mark and Hannah's case, these two key points of divergence are taken first, followed by the issues on which there was greater consistency.

New Zealand participants made no comment about the legal provisions relevant to Mark and Hannah's case; but since New Zealand law does not distinguish between internal and international moves,¹⁰¹ this omission is unsurprising. By contrast, 11 English participants raised concerns about the law itself, five of them as the first thing they said. English authorities suggest that, at least where there is a clear primary carer,¹⁰² making a restriction on that parent's geographic place of residence is 'a truly exceptional order',¹⁰³ and 'an unwarranted imposition upon the right of the parent to choose where he/she will live within the UK'.¹⁰⁴

The English participants who raised this point knew these cases:

EJ3: On the basis of the authorities, I can't see that this is a case where the court would have the power to impose a geographic condition. ... I think the law stands in the way of doing that.

Two barristers explained that, as a result, the court was not going to *allow* the father to relocate, but rather it had little power to *stop* him:

EB4: I'm not sure how [the father] could be stopped from going... It is not that anyone would say, "yes, you can [relocate]", ... but [rather], "we can't really prevent you...".

¹⁰¹ *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (NZCA), internal relocation; *D v S*, international relocation.

¹⁰² The same approach may apply to shared care (*Re L (Internal Relocation: Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157), but the matter is not clear: R George, 'Re L (Internal Relocation: Shared Residence Order) [2009] EWCA Civ 20, [2009] 1 FLR 1157' (casenote) [2010] *JSWFL* 71.

¹⁰³ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

¹⁰⁴ *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA), 642.

EB5: The decision was that the father would be the primary carer, and ... once that has happened ... the exceptionality test would apply,^[105] and there are plainly no exceptional features whatever in this case, and so the mother's claim ... would be bound to fail.

While English participants who raised the legal point did, nonetheless, consider the factors they thought relevant, they had a different purpose from other English participants (and from New Zealand participants). Whereas the latter group examined the facts to decide, overall, whether relocation should be allowed or not, the former were assessing whether the case was 'exceptional' (as the quotation from EB5 above shows). Once the legal test of exceptionality was identified, even participants who admitted to being 'lacking in sympathy for father' thought that only 'a brave judge who wasn't overly concerned about his track record on appeals might say ... dad should stay' (EJ3).

English participants' knowledge of this aspect of the law was therefore significant to the way in which they assessed Mark and Hannah's case.¹⁰⁶ For those who explicitly incorporated the legal test into their reasoning, the 'truly exceptional' nature of restrictions on internal relocation was the dominant factor. This fact should be borne in mind as the remainder of the analysis unfolds since, as stated above, it affected the basis on which other factors were discussed.

Turning to the second point of divergence between the two national groups – Mark and Hannah's ages and views – it is the New Zealanders this time who raised the issues and the English who largely ignored them. The mandatory obligation in the Care of Children Act

¹⁰⁵ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613.

¹⁰⁶ For discussion of English participants' views on the law related to internal relocation in general, see Chapter 5, text from n 42.

2004 to give a child ‘reasonable opportunities to express views’ which then ‘must be taken into account’,¹⁰⁷ coupled with the High Court’s criticism of judges and lawyers who fall short in meeting these requirements,¹⁰⁸ make it unsurprising that New Zealand participants frequently discussed Mark and Hannah’s views. That said, English law also includes reference to children’s ‘ascertainable wishes and feelings’,¹⁰⁹ and in other contexts children of ages similar to Mark and Hannah have had their views given significant weight.¹¹⁰

No English participant expressly referred to Mark and Hannah’s views, though one welfare officer suggested that ‘the ten-year-old may have some idea of the implications’ of the move (EC1). There were only two other references to the children’s ages or views from English participants. This same welfare officer suggested that, since Mark was probably shortly to start secondary school, it ‘might be a good time, if they are going to move’ (EC1); and an English judge pointed out that the children were nearly old enough to ‘be able to make the journey to London by themselves’ (EJ4), thus making post-relocation contact easier.

By contrast, many New Zealanders were concerned to know the children’s views, because ‘a lot would depend on what the kids want’ (NS2). As one psychologist said, there were many unanswered questions about Mark and Hannah’s views:

¹⁰⁷ COCA, s 6.

¹⁰⁸ See, eg, *C v S [Parenting Orders]* [2006] NZFLR 745 (NZHC).

¹⁰⁹ Children Act 1989, s 1(3)(a).

¹¹⁰ See, eg, *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961: in a Hague Convention case, a seven-year-old should have had his views considered.

NC1: What do the kids want here? ... Do they find it easy to make friends...? Do they feel part of the Auckland community...? Do they feel like fish out of water in Whakatane? ... What do the kids feel about their quality of life?

Indeed, so crucial were the children's views that some participants found the vignette 'a difficult one [to analyse] because that is such a glaring absence from the case' (NB7).

Having noted these two points on which the English and New Zealanders diverged, the uniformity of the remainder of the analysis is noteworthy. As we turn to look at various aspects of the children's relationships with their parents, and at the father's plans for relocation, it will be seen that participants were not in total agreement with one another, but that the variance was seen equally between the national groups.¹¹¹

A brief preliminary issue relates to the genders of the parties, with a primary carer father and a working mother. Several participants commented on this arrangement. Some stated explicitly that they would cross-check their conclusions 'by reversing the roles: you have always got to think about what you would do if the mother had been in the same position' (EB5).

Despite this attempt to disregard gender, many thought that, in practice, it might make a difference. One English solicitor, for example, had earlier said that she 'fear[ed] that the loss of contact with a mother may be seen to be more significant than the loss of contact with a father', and thought that this bias might affect Mark and Hannah's case: 'I think that the fact that [the mother] is an alcoholic is not really the end of the story in this case,

¹¹¹ Indeed, there is no pattern to the variance at all, whether of nationality, profession, age/experience or gender.

whereas it might have been if it was the other way around' (ES2). An English barrister agreed: 'if it was the mother who was going [to Cornwall] and the alcoholic father, I don't think we would be having the same debate that we are. ... [T]here is an unspoken sexism' (EB1). Most participants who raised this point therefore thought that the father was likely to face more difficulty than a mother in his position would.¹¹²

The next point is the children's current care arrangements. Participants were told that the father had been the primary carer for four years, from which several people calculated that the children had been with the father from ages three and six – in other words, 'for a very large chunk of their middle childhood' (NS5). There were two views taken of the father.

A small minority of participants (three New Zealanders and one English) thought that 'he is not the greatest father' (NB2) and 'is not a nice guy' (NJ2). These participants relied on the expert report which said that the father was 'strong minded, determined and possibly obstinate in character', and the judgment in earlier proceedings that 'the mother would be generally more suited to being the children's primary carer because of her warmer character'. However, even these participants conceded that, although they were 'probably not going to like him', the father 'is actually the most functional parent' (NJ2).¹¹³

¹¹² Cf NS2, who thought that an alcoholic father who was having contact would have better chances of stopping the relocation, because Mark and Hannah's contact mother would be perceived to be 'a bad mother'; see generally S Kielty, 'Mothers Are Non-Resident Parents Too: A Consideration of Mother's Perspectives on Non-Residential Parenthood' (2005) 27 *JSWFL* 1; J Wallbank, 'Getting Tough on Mothers: Regulating Residence and Contact' (2007) 15 *Feminist Legal Studies* 189.

¹¹³ The English barrister who took this view thought that 'you have got to derive the best of each of the parents, because each of them has some limitation on their capacity as parents' (NB6).

The majority of participants tended to disregard the evidence relied on by the minority. Most were ‘not that interested in [what] the judge suggested’ (NJ1), because it had little practical bearing on the situation now. As an English judge explained, ‘what an earlier judge said I would interpret as what we all try to do when we are making a decision against one party, which is to let them down lightly’ (EJ6).¹¹⁴ These participants thought that the parents’ characters were ‘by the by – parents have all sorts of characters’ (NB6):

EC1: ...most of us, at times, can be described as “strong minded, determined and obstinate” and also ... as having “a warmer character”. How either of those makes either parent more capable of meeting the needs of their children is a matter for discussion and debate.

Moreover, these participants not only dismissed the criticisms of the father, but were positive in their remarks about him. These comments ranged from acknowledging that ‘the care he is providing is good-enough care’ (ES3) to more effusive praise:

NC2: The father has been child-focused. ... The fact is, this father is very steady. They have been with him four years, ... so he can demonstrably deliver the parenting.

EC3: ...he is the one who has provided them with consistency and stability. He has already shown his commitment to them.

By contrast, most participants criticised the mother, who ‘clearly is not able to be the primary carer – the problem with alcohol stands in the way’ (EJ3). One or two participants diplomatically said that ‘the mother, while in her way a good parent, has not proved herself

¹¹⁴ Other participants were less sympathetic to the earlier judge: ‘Where are you coming from? Bloody anti-father judge!’ (NC1); ‘First thought: have the judge shot’ (EC2).

so capable' (EJ6),¹¹⁵ but a more common reaction was to worry about 'a safety risk to the children with her alcohol use' (NJ5). One English judge spoke for almost all participants in saying that 'I don't think that anyone could possibly take the risk of the children living with her' (EJ2).¹¹⁶

Overall, participants were content that 'the dad's dedication and the fact that the children have been with him four years' were the key aspects (NS5), while the mother 'doesn't seem to be seeking more involvement – she is pretty occupied with the drinking and her career' (NB6). Having thus concluded that the mother could not take over the children's care even if she wanted to, the question was whether her existing relationship with the children could be maintained if the father relocated.

Again, participants in each country were split on this issue, but the clear majority in both countries took the same view. That majority view looked at the existing relationship between the mother and the children, and at the distance involved in the relocation, and concluded that '[s]he has at least fortnightly contact ... but she would still be able to have that at that distance' (NB1).

New Zealanders were slightly more optimistic in their estimates of the frequency of contact that could be arranged after relocation to Whakatane. The journey to Whakatane 'can be a

¹¹⁵ This was the judge who commented that parties should be 'let down gently' when decisions go against them.

¹¹⁶ One New Zealand lawyer, while supporting the relocation, wanted to 'build [the mother] into the children's lives on an increasing basis' (NS2), while a New Zealand judge, who opposed the relocation, was 'looking to improve the mother's relationship with the children, ... moving more to a shared care arrangement' (NJ3). One English barrister wanted to call the arrangement 'shared residence' so as 'to emphasise the importance of the children's time in London' (EB5), but he was not envisaging shared care in practice.

bit tricky' (NJ1) and 'is getting to the point where it is uncomfortable for regular travel' (NS2), but was thought by most to be 'not so far from Auckland that it would impede on regular contact' (NB4).¹¹⁷

English participants similarly commented that although 'Cornwall is a long drive' (EJ6), contact could be fairly regular; but many thought that 'it is probably going to be once a month, rather than once a fortnight' (EJ2). However, they thought this reduced frequency of contact could be compensated by longer visits during holidays.

The minority of participants in each country who took a different view had two concerns. One stemmed from scepticism about the realities of post-relocation contact, as one New Zealand barrister explained:

NB7: [There is currently] a system that works. The kids ... are able to have a relationship with a hard-working, hard-drinking mother, [and that] might be put in jeopardy even though [the move] is only five hours. It really precludes weekend contact ... [and anyway] at ten and seven the kids aren't going to want to have their weekends disrupted. ... Five hours is a bit further than [would be comfortable], or the kids at the end of a long school week are going to be bunged on a plane and then whisked back on the Sunday – it's all hopeless.

Other participants were similarly concerned about the relationship between the children and the mother being 'reduced to snatched weekends every four, five or six weeks' (EJ1), which ran the risk of 'distance just finish[ing] the relationship' (NB2).

The second concern related to the impact of the loss of contact on the mother, and so

¹¹⁷ Two New Zealanders suggested that the mother 'should look at a shift [to Whakatane] herself' (NS2; and similarly NB6).

consequently on the children. Most participants who addressed this point either thought it immaterial to their child-based decision,¹¹⁸ or thought that, since they hoped to sort out contact which was just as good as at present, ‘that would take care of that’ (NS2). For the minority, however, this aspect was significant, because ‘if the family finances are grinding to a halt because this is the straw that broke the mother’s back, that is something you have got to look at’ (EB6; and similarly ES2). This potential problem over finances combined with the fact that ‘not only would [Mark and Hannah] lose regular contact ..., but if the mother then reacts adversely as well then they have lost more than that’ (EB6).¹¹⁹ These participants therefore began to see relocation as increasingly problematic.

The same participants tended also to be unimpressed by the father’s reasons for wanting to relocate, though in this they were not in such a small minority. Again, both national groups were split in their view of this factor, though many of the English who looked unfavourably on the father’s reasons also pointed out that, for internal moves, the law did not require them to ask about motivation, so long as the move was not designed to end contact with the mother.¹²⁰

For some participants, the father’s motivation ‘doesn’t really amount to much more than a lifestyle choice’ (EB6). In other words, ‘dad’s wish to move doesn’t have massive

¹¹⁸ For example, one New Zealand barrister said that he ‘wouldn’t regard that as of great significance at all: that is an adult issue, not a child issue’ (NB7).

¹¹⁹ In *Re H (Children) (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277 (on which Mark and Hannah’s case was based), the effect of loss of contact on the mother was highly significant. Thorpe LJ, upholding the trial judge’s decision to prevent internal relocation, said (at [26]) that, if relocation occurred, ‘the effect upon the mother would be devastating. The [trial] judge noted that to devastate the mother would be to indirectly devastate the children’.

¹²⁰ See, eg, *Re L (Internal Relocation: Shared Residence Order)* [2009] EWCA Civ 20, [2009] 1 FLR 1157.

imperatives in it at all – he kind of fancies the move’ (NB7). However, a few of those who took this view nonetheless thought that relocation might be in the children’s interests:

EJ6: He doesn’t have to go, but it is a reasonable aspiration which seems practical and ... [gives] the children the prospect of living in a much more agreeable place, which will be in their interests.

EB4: ...dad’s plan may not be the best, and you may think, “why is he doing it?”, [but] mum’s plan isn’t any better and could be worse.

Other participants thought that the father had ‘good reasons for wanting to move – that is, both for personal support and for work’ (NJ1). As an English barrister put it, ‘it is a very, very plausible, reasonable plan’ (EB3).

These three issues – the father’s motivation, the existing care arrangements, and the prospects for maintaining contact after relocation – tended to line up in participants’ accounts. Those who queried the father’s parenting ability also doubted whether contact with the mother could be maintained if the children relocated, and found the father’s motivation unconvincing.¹²¹ Conversely, participants who praised the father’s care of the children tended also to think that the mother’s role in the children’s lives could be preserved via contact after relocation, and thought the father’s motivations either laudable or irrelevant.¹²²

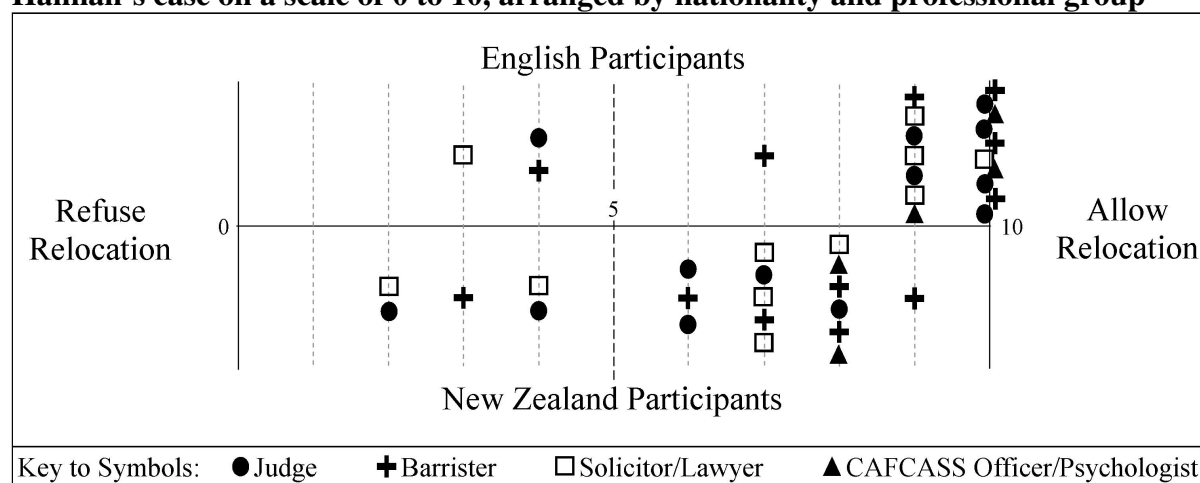
¹²¹ EB6 and NB2 are the best examples, along with EJ1, ES2, NJ3 and NB7.

¹²² EJ6 and NB1 may be the best examples, though most participants fell into this category.

Table 4.7 – Table showing numerical representation of participants’ views on the likely outcome of Mark and Hannah’s case, on a scale from 0 to 10 where 10 is most likely to allow relocation, arranged by nationality and professional group, together with averages for each national group

Averages for each national group								
	ENGLISH PARTICIPANTS				NEW ZEALAND PARTICIPANTS			
	EJ	EB	ES	EC	NJ	NB	NS	NC
1	4	7	9	10	8	9	2	-
2	9	-	3	10	6	6	7	8
3	10	9	9	9	2	-	7	8
4	10	10	10		4	8	8	
5	10	10	9		6	8	7	
6	10	4			7	7	4	
7	9	10					3	
Average	8.62				6.25			

Figure 4.13 – Illustration of participants’ views on the likely outcome of Mark and Hannah’s case on a scale of 0 to 10, arranged by nationality and professional group



Turning to the outcome of Mark and Hannah’s case, Table 4.7 contains the numerical representations of participants’ predictions of the likely result.¹²³ These predictions are illustrated in Figure 4.13, which shows that a clear majority of participants in both countries thought the relocation likely to be permitted. Three English participants and five New

¹²³ On methodology, see Chapter 2, text from n 53.

Zealanders thought relocation would be refused, though some said only ‘by a narrow margin’ (EJ1). However, although the majority in each country agreed that the relocation would be allowed, Figure 4.13 shows that New Zealanders saw the case as being more borderline than did the English. Looking at Table 4.7, which contains the data which inform Figure 4.13, it can be seen that the average for all New Zealand participants was 6.25, whereas for the English it was 8.62. If participants who would refuse the relocation are excluded, the average for the remaining New Zealanders was 7.33, and for the English was 9.44.

It is tempting to think that part of the reason for this disparity was identified at the start of this section, namely, that many English participants based their analysis on an understanding that the law makes restrictions on relocation within the United Kingdom ‘truly exceptional’.¹²⁴ However, looking at the 18 English participants who would have allowed the relocation,¹²⁵ there is no significant difference between those who focused on the legal test and those who did not: those who did averaged 9.36,¹²⁶ while those who did not averaged 9.57.

It may be, therefore, that Mark and Hannah’s father fared better in England regardless of any advantage given to him by the law, rather than because of it. Although the headline result of the case is the same in both countries – the father being allowed to relocate – his

¹²⁴ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

¹²⁵ The three participants who would have refused the relocation did not specifically refer to the legal test when discussing Mark and Hannah’s case, though all three had said earlier in their interviews that *Payne* did not apply to internal relocation, and that internal relocation was easier to achieve than international relocation. See generally Chapter 5, text from n 42.

¹²⁶ Removing EB1 who, at 7 out of 10, is an outlier in this group, the average becomes 9.60, which is almost identical to those who did not mention the ‘exceptionality test’ at all.

case was considerably stronger in England than in New Zealand.

Overall, Mark and Hannah's case supports the findings of the earlier vignettes. While the English law favours internal relocation, not all English practitioners were aware of this approach. However, those who did not know the detail of the caselaw applied a quasi-*Payne* approach, leading to much the same result. Whichever test was being applied, English participants were more likely to allow the relocation.

Conclusions

This chapter has sought to look at whether there might be differences in the analysis of relocation cases caused by the different legal approaches of England and New Zealand. To do this, we took three hypothetical relocation disputes, presented in the form of 350-word vignettes, and analysed English and New Zealand participants' assessments of the facts and likely outcomes of each case.

Tom's case was a 'typical' English relocation dispute, with a clear primary carer who wished to relocate to her new partner's home country. English participants, applying *Payne*, focused on the mother's well-being and the effect of refusal on her relationship with her new partner, and uniformly thought that the move would be permitted. New Zealanders, by contrast, were concerned at the existing relationship between Tom and his father, which they thought needed to be strengthened; since relocation was seen as likely to have the opposite effect, New Zealanders uniformly thought that the move would be refused.

Jane was an older child with a mixed culture and an equal shared care arrangement, whose mother wanted to return to her native South Africa. The analyses of Jane's case were less varied than those of Tom's, in part because English participants were unable to apply *Payne* and had, instead, to assess all the factors without guidance (which is what New Zealand law always requires). The majority of participants in both countries thought that Jane would not be allowed to relocate, though New Zealanders were more certain of this result than the English.

Mark and Hannah's case also fell outside the purview of *Payne*, since it involved relocation within the jurisdiction, but the English caselaw strongly favours relocation. Such cases are relatively rare in England, and many English participants were consequently less certain of the legal principles which they should apply. (Internal relocation cases are common in New Zealand, and involve the same legal principles as international moves.) The majority of participants in both countries agreed as to the outcome of Mark and Hannah's case, thinking relocation likely to be permitted. However, where the English saw this outcome as being nearly certain, New Zealanders thought it more borderline.

The analysis of these three vignettes suggests a number of conclusions. The first point is that in two of the three cases, participants in the two countries agreed about the likely outcomes – that Jane would not relocate and that Mark and Hannah would. Only in Tom's case were the two national groups in disagreement.

However, this headline finding belies two significant points. One is that, even in the two cases where English and New Zealand practitioners agreed, the English were more pro-relocation than the New Zealanders. Mark and Hannah's relocation was all but certain for

the English (8.6), but more borderline for New Zealanders (6.25); and the refusal in Jane's case was very likely for New Zealanders (2.75), but less clear for the English (3.6).

The second point is that both Jane's case and Mark and Hannah's case were unusual for English practitioners. Tom's case, which so divided the two national groups, reflects the core facts of the vast majority of English relocation disputes. The shared care arrangement in Jane's case required English participants to assess the issues without *Payne*, while the internal relocation in Mark and Hannah's case introduced a different line of cases (though the effect may be similar to *Payne*). For New Zealanders, all three cases were reasonably typical.

The analysis of these three vignettes therefore suggests, consistently with the conclusions of Chapter 3, that English practitioners are more inclined to think that relocation applications will be allowed than are their New Zealand counterparts. Participants in the two countries tended to deploy different reasoning and to focus on different aspects of the vignettes, which resulted in a different prioritisation of factors when making the final decision about relocation. In one case, that process led to variation in the outcomes between the two countries; in the other two, the outcomes were the same but the English nonetheless looked more favourably on relocation. These differences might cause us to start to speculate about the likelihood of finding a common approach to relocation across the international community in the near future.¹²⁷

With these conclusions in mind, the next two chapters examine English and New

¹²⁷ See Chapter 7.

Zealand participants' understandings and critiques of the detail of relocation law. This analysis starts in Chapter 5 with English participants and the leading case of *Payne v Payne* which, it will be seen, provoked mixed reactions from English participants. The analysis then turns, in Chapter 6, to New Zealand law, looking at New Zealand practitioners' experiences of a legal system that rejected *Payne*.

Chapter 5

Practitioners' Views on English Relocation Law

In Chapter 3, we followed ‘the line of cases which begins with *Poel v Poel* ... and finds its most recent expression of principle in *Payne v Payne*’,¹ and which makes up the core of English relocation law. *Payne* sits alongside two subsidiary lines of authority which apply, respectively, to international moves in shared residence cases,² and to internal relocation.³ However, despite the Court of Appeal’s firm defence of *Payne*,⁴ the English approach to relocation has been subjected to significant criticism by academics and practitioners.⁵ To give one example, Mary Hayes suggests that the English approach is ‘focused on too narrow a range of questions’, with judges ‘dis-empowered in the proper exercise of their statute-

¹ *E v E (Shared Residence: Financial Relief: Yardstick of Equality)* [2006] EWCA Civ 843, [2006] 2 FLR 1228, [32], citing *Poel v Poel* [1970] 1 WLR 1469 (EWCA) and *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, ‘*Payne*’).

² *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC).

³ *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA).

⁴ See, eg, *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [13]-[18].

⁵ See, eg, J Herring and R Taylor, ‘Relocating Relocation’ [2006] *CFLQ* 517; P Pressdee, ‘Relocation, Relocation, Relocation: Rigorous Scrutiny Revisited’ [2008] *Fam Law* 220; C Geekie, ‘Relocation and Shared Residence: One Route or Two?’ [2008] *Fam Law* 446; R George, ‘The Shifting Law: Relocation Disputes in New Zealand and England’ (2009) 12 *The Otago Law Review* 107; M Freeman, ‘Relocation: The Reunite Research’ (Reunite, London: 2009); F Judd and R George, ‘International Relocation: Do We Stand Alone?’ [2010] *Fam Law* 63; *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131 (Mostyn J).

based discretion'.⁶ A similar conclusion was reached by the New Zealand courts, rejecting *Payne* because its 'presumptive or *a priori* weighing [of factors] is inconsistent with the wider all-factor child-centred approach required under New Zealand law'.⁷

Given these criticisms and the differences in legal approach being prescribed by the courts in England and New Zealand, Chapter 4 explored whether there might also be differences in the analysis which practitioners would undertake when assessing cases. When analysing three hypothetical cases, English practitioners thought that applicants were likely to fare better than did New Zealanders.

This Chapter considers practitioners' views on English relocation law in practice. Drawing on interviews with 22 English practitioners, this Chapter examines participants' discussions of what the law is and how it is applied 'on the ground' (ie in day-to-day cases, rather than those of special difficulty or interest which reach the law reports), before turning to ask how practitioners evaluate and critique the law. It will be seen that the story which English practitioners tell is of a coherent and well-understood approach to relocation disputes, but one which divides practitioners and causes significant discomfort for many who work with it. In particular, there was a widely-held concern that 'the welfare principle is being compromised' by *Payne* (as EB3 put it), which may raise questions about our understandings of welfare more generally.⁸

⁶ M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351, 351, 352.

⁷ *D v S* [2002] NZFLR 116 (NZCA), [47].

⁸ On the welfare principle in the relocation context, see Chapter 7.

After a reminder of the participants in this research, this Chapter provides a brief discussion of practitioners' accounts of what the law is. We then look at practitioners' evaluations of the law, at its strengths and weaknesses, and at their suggestions for reform of relocation law.

Methodology:

The methodology for the empirical research was set out in Chapter 2. There are 44 participants, but this Chapter is concerned only with the 22 English participants. Table 5.1 lists these participants according to their professional group, their sex, the length of time they had been in practice and the approximate number of relocation trials they dealt with each year, and shows the identifying tags by which they are referred to in the text. There were seven judges (two of whom were High Court judges), seven barristers (three of whom were QCs), five solicitors and three court welfare officers. There were 13 men and nine women amongst the English participants. Identifying tags indicate nationality⁹ and professional group,¹⁰ such that, for example, EJ3 is an English judge, and ES5 is an English solicitor.

⁹ In this Chapter, all participants are English, and so identifying tags start with 'E'.

¹⁰ 'J' for judges, 'B' for barristers, 'S' for solicitors and 'C' for court welfare reporters.

Table 5.1 – List of English participants by identifying tag, showing nationality, professional group, sex,¹¹ time in practice,¹² and approximate number of relocation trials per year

Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year
EJ1	Judge	-	-	4
EJ2		-	-	1
EJ3		-	-	2
EJ4		-	-	3
EJ5		-	-	2/3
EJ6		-	-	3/4
EJ7		-	-	2/3
EB1	Barrister	M	7	1
EB2		M	18	2/3
EB3		M	19	2/3
EB4		F	8	1
EB5	Barrister, QC	M	30	2/3
EB6		F	24	5/6
EB7		F	24	1/2
ES1	Solicitor	M	28	1
ES2		F	9	1/2
ES3		M	15	2
ES4		F	18	1/2
ES5		M	12	6-8
EC1	Court Welfare Officer	F	20	1/2
EC2		M	25	3/4
EC3		F	33	1/2

Practitioners' Experiences of the Practice of English Relocation Law:

Before looking at practitioners' comments on relocation law, we should remind ourselves of one or two points relating to the context in which relocation disputes are being considered in England. A particularly significant aspect of the English context is that the care of children after parental separation tends still to involve a primary carer (usually the mother):¹³ Joan

¹¹ In the interests of preserving anonymity, the sex of judges is not included in the table. There were five men and two women amongst the English judges.

¹² In the interests of preserving anonymity, the time that judges had been on the bench is not included in the table; the average time sitting full time was 9.5 years.

¹³ Chapter 3, text from n 259.

Hunt's summary of research in 2004 suggested that over 80 percent of children 'live exclusively or mainly with their mother' after separation.¹⁴ However, although truly shared *care* remains relatively unusual, shared *residence* is increasingly used as a label to stress 'that both parents are equal in the eyes of the law, and that they have equal duties and responsibilities as parents'.¹⁵

Another important aspect is the family court structure in England.¹⁶ Relocation cases can be brought either in the county court or the High Court,¹⁷ depending on their complexity.¹⁸ Judges in the Family Division of the High Court are specialist family judges; but in the county court, '[v]ery often the trial takes place before a circuit judge who may not be a specialist in international family law and may have nothing but a private law ticket to equip him for the task'.¹⁹ Appeals from both courts are heard in the Court of Appeal.

With these points in mind, we turn to practitioners' comments on the law itself. Consistently with the findings of Chapter 3, and with the themes explored in Chapter 4, practitioners' discussions suggest that English relocation law has three strands. The main

¹⁴ J Hunt and C Roberts, *Child Contact With Non-Resident Parents* (University of Oxford, Oxford: 2004), 1.

¹⁵ *Re P (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 2 FLR 347, [22].

¹⁶ Chapter 3, text from n 14.

¹⁷ Unless the proposed relocation is to a country which is not a signatory of the Hague Convention on the Civil Aspects of International Child Abduction 1980, when the case must be tried by a High Court judge (though in practice many such cases are heard by circuit judges sitting as High Court judges under s 9 of the Supreme Court Act 1981).

¹⁸ According to participants, the allocation of relocation cases is 'rather random' (EB6). Although some had seen full trials done by district judges (which they thought was inappropriate, given their complexity), relocation cases should normally be tried by High Court judges or circuit judges: *Re D (Children)* [2009] EWCA Civ 957, unreported, [3].

¹⁹ *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [18].

strand is represented by *Payne v Payne*, covering international relocation disputes in most cases. The second covers those international moves to which *Payne* does not – or, at least, might not – apply, namely cases involving children whose parents share their care to a significant extent. The third involves moves which are within the United Kingdom, generally known as ‘internal relocation’ cases. However, the story told by practitioners shows the dominance of *Payne*, the influence of which extends across all three strands of relocation law.

Given that there are these three strands to English law, a key point for practitioners was to decide under which strand a case fell. As between international and internal moves, the straightforward issue is whether the proposed destination is within the UK or not. As between the two lines of authority on international moves, the question was whether the child could be said to have a clear primary carer or not. As a senior barrister explained, ‘the *Payne* analysis ... places a great deal of weight on who is and is not the primary carer’ (EB5). Consequently, it was necessary ‘to ask, almost as a preliminary question, “who is the residential parent?”’ (EJ1), and practitioners suggest that only in cases where there is no clear answer will the secondary line of cases on shared care relocation apply.²⁰

Given that *Payne* is the leading case, we start with practitioners’ assessments of that line of authority. The centrality of *Payne* was apparent from the detailed way in which practitioners discussed its requirements, especially Thorpe LJ’s ‘discipline’, which is set out below. However, while recognising the importance of Thorpe LJ’s judgment, several

²⁰ See similarly F Judd and R George, ‘International Relocation: Do We Stand Alone?’ [2010] *Fam Law* 63, 67: it is only where ‘the child can live equally happily with either parent, and ... either parent could act as “primary carer”’ that *Payne* does not govern the decision.

participants expressed a preference for Butler-Sloss P's summary.²¹ These participants thought that key aspects were 'sometimes lost within *Payne* because of Lord Justice Thorpe's guidelines ... [with the approach] more easily expressed in the judgment of the President' (EJ2). As one barrister put it, 'what has happened with *Payne* is that everyone goes to paragraphs 40 to 43 and says, "there it is, that's the test", but they need to read on from that and ... read the decision of Butler-Sloss... She does it completely differently from Thorpe' (EB6).²²

Despite this criticism, Thorpe LJ's judgment was central to participants' discussions, and it is worth reminding ourselves of it:

To guard against the risk of too perfunctory an investigation resulting from too ready an assumption that the mother's proposals are necessarily compatible with the child's welfare I would suggest the following discipline as a prelude to conclusion:

- (a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life? Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.
- (b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

²¹ *Payne*, [85]-[88]; see Chapter 3, text at n 121.

²² Wall LJ has recently said that 'the best summary of the approach which judges are required to take to these difficult decisions is contained in the judgment of the President, Dame Elizabeth Butler-Sloss in *Payne*': *Re D (Children)* [2010] EWCA Civ 50, [2010] 2 FLR, forthcoming, [18].

- (c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? [Where the mother cares for the child or proposes to care for the child within a new family, the impact of refusal on the new family and on the stepfather or prospective stepfather must also be carefully calculated.]
- (d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.²³

The importance of this guidance for practitioners was clear. As one barrister explained, 'you always quote it: every time you do a skeleton argument, *Payne v Payne* is always there' (EB7). Having a single case which is central to the decision-making in a particular context is not especially unusual. A similar example might be the approach when domestic violence is alleged in a contact application, where the Court of Appeal decision in *Re L, V, M and H (Contact: Domestic Violence)*²⁴ is 'the seminal decision ... and it is wholly unacceptable for [a] judge ... to make no reference to it'.²⁵ However, there may also be some difference with relocation. In most areas, including contact and domestic violence, the guidance focuses on the procedure to be followed; in relocation, on the other hand, the effect of the discipline is, at least arguably, to guide judges as to the outcome they should

²³ *Payne*, [40]-[41], as amended by Thorpe LJ in *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [11].

²⁴ [2000] 2 FLR 334 (EWCA).

²⁵ *Re H (Contact: Domestic Violence)* [2005] EWCA Civ 1404, [2006] 1 FLR 943, [76]; see similarly *Re K and S (Children) (Contact: Domestic Violence)* [2005] EWCA Civ 1660, [2006] 1 FCR 316, [25].

reach.²⁶

Practitioners were asked how they would summarise relocation law to a client. The link between Thorpe LJ's 'discipline' and those summaries is striking, as these examples show:

EB3: I would say that, firstly, the principle that guides the court is that the welfare of the child is the paramount consideration – that is section 1 of the Children Act. Secondly, it is incumbent on any applicant seeking to take a child abroad to put forward as detailed a set of proposals as possible, and the court will scrutinise them very carefully. Thirdly, the court will scrutinise very carefully the relationship between the parent who is staying behind and the child. And fourthly, I would say that, normally, if a child is being cared for by a parent, and that parent comes up with a reasonable plan to go abroad, there is almost a presumption that that will happen. It is difficult to resist these applications if the caring parent has got a carefully thought out plan for relocation.

ES3: I would say that it is a two-hurdle test, really. If you can show that your plans are reasonable and realistic, then [the burden] moves to the other side and it is for the staying-behind parent to show that it is not in the best interests of the child to go... [T]here is the bit in *Payne* about what the effect is going to be on the children if the primary carer can't have what they want, compared to the effect on the non-primary carer if they can't have what they want. There is always the emotional part that you put in [your application] about how upset and devastated you would be if you couldn't go. So that is how I would say it to them, which is why I would say, "look, we have got to show that your plans are good, and then they have got to show that it is not right for the child to stay with you or that you shouldn't have the freedom to do this", and if the plans are reasonable and realistic it is hard to argue that it is not in the interests of the child to stay with the primary carer.

In other words, practitioners knew *Payne* well and were able to summarise its key aspects.

²⁶ M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351; C Geekie, 'Relocation and Shared Residence: One Route or Two?' [2008] *Fam Law* 446; for participants' views, see below, text from n 116.

Taking Thorpe LJ's points in turn, participants first picked out the necessity to ask 'whether the application is genuine, whether it is realistic' (ES2), and were clear that the court would scrutinise the plan with care.²⁷ As to the requirement that the application be genuine, participants stressed that they were 'on the *qui vive* for applicants who are wanting ... simply ... to get the child away ... from the respondent, and the basic motivation is to pick those cases out and refuse them' (EJ1). In terms of showing their plans to be realistic, applicants 'prepare an entire lever arch file that will deal with health, education, travel, other family members, socialisation in that country, friends and ... contact with the absent parent' (EB2).

Secondly, participants thought that the child's relationship with the respondent was important, but that once the applicant had shown her proposals to be genuine and realistic, the respondent would need to explain why he opposed the relocation.²⁸ Moreover, given the importance attached to the effect on the applicant of refusing relocation,²⁹ the child's relationship with the respondent was unlikely to stop the relocation 'unless the result [of relocation] is going to be a very deleterious effect on what has become a very important relationship with the respondent' (EJ1).³⁰

²⁷ *Payne*, [40](a).

²⁸ *Payne*, [40](b).

²⁹ *Payne*, [40](c), [41]; *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043.

³⁰ *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, [24](9), (10).

Finally, participants addressed plans for contact after relocation,³¹ which they thought to be ‘crucial’ (EB2). The applicant would need to be putting forward ‘a package of contact, direct and indirect, and possibly some deal about the funding of transport’ (ES1).³²

It is notable that most summaries of the law either started or concluded with a remark about it being ‘hard to argue’ against relocation (ES3), about there being ‘almost a presumption’ in favour of the applicant (EB3). Another solicitor, asked how she would summarise the law to a client, said with a wry laugh, ‘I would put it to them that there is a tendency in this country for applications which are made by primary carers ... to be successful’ (ES2). Similar summaries of the law – that ‘sensible, determined proposals to relocate which are sincerely meant and well researched tend to get through’ (EB5) – were typical, and caused considerable concern to many practitioners, as will be seen later.³³

By contrast with this detailed understanding of *Payne*, practitioners were less certain of the other two strands of relocation law. Given the comparative rarity of shared care international relocation cases and internal relocation cases,³⁴ it is not surprising that most practitioners were less familiar with the law. One solicitor spoke for many when he said that ‘there are a couple of cases, but I’d need to look them up to be sure what they said’ (ES1).

³¹ The point is more apparent from Butler-Sloss P’s judgment: *Payne*, [85](g). Thorpe LJ’s only comment on the matter is part of [40](b), asking about ‘the extent of the detriment to [the respondent] and his future relationship with the child were the application granted’.

³² Cf English practitioners’ focus on this point when addressing Tom’s case, the vignette which fell directly under *Payne*: Chapter 4, text from n 50.

³³ Below, text from n 106.

³⁴ The former because truly shared care is quite rare, the latter because the courts do not allow restrictions on relocation other than in ‘truly exceptional’ circumstances, meaning that few cases are brought: see Chapter 3, text from n 150.

Turning first to international relocation in shared care cases, there is little authority directly on point.³⁵ Some cases explicitly take a different approach,³⁶ while others apply *Payne* or a close approximation.³⁷

Participants had mixed views on these cases. Some thought that shared care simply added a step at the beginning of the enquiry, determining which parent was better placed to become primary carer,³⁸ though, as several participants pointed out, ‘sometimes it is quite hard to tell’ (EB5). Two participants explained this approach particularly clearly:

EJ2: There is a series of cases which says [shared care] doesn’t make any difference, and if one of the parents needs to [relocate] then you need to make a decision as to who is going to be the primary carer, and those are very difficult cases.

ES2: If you don’t have a primary carer ... then *Payne* isn’t the starting point. You’re really going back to strict welfare principles ... and establishing who is the best person to be the primary carer, in a way, before you even get to the relocation.

For these participants, the aim was to make findings about the child’s relationship with each parent so as to identify a primary carer and, assuming that to be the applicant parent, then to apply *Payne*.

³⁵ Chapter 3, text from n 150.

³⁶ *Re C and M (Children)* 30 July 1999, unreported (EWCA); *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC); *Re D (Leave to Remove: Shared Residence)* [2006] EWHC 1794 (Fam), [2006] Fam Law 1006; *Re H (A Child)* [2010] EWCA Civ 789, unreported.

³⁷ *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [13]; *Re TG (Relocation)* [2009] EWHC 3122 (Fam), unreported.

³⁸ Cf some practitioners’ approach to Jane’s case, the vignette involving shared care: Chapter 4, text from n 71.

Other participants thought *Payne* ‘not quite so adequate’ (EB4) in shared care cases, because the approach in that case would be ‘much harder to apply in that situation’ (ES3). These participants tended to be more tentative in their explanations, but one solicitor put it like this:

ES4: [When there is shared care], you are then looking at it all in the round. So, when considering, “what are the alternatives [to relocation]?”, there is actually a realistic alternative... Where you have got shared residence, ... you’ve actually got a perfectly feasible option.

This description of the approach as being to look at the case ‘all in the round’ (ES4) fits well with *Re Y (Leave to Remove from Jurisdiction)*,³⁹ which Frances Judd QC and I describe as deciding relocation ‘by the old fashioned method – by reference to s 1 [of the Children Act 1989] and the welfare checklist’.⁴⁰

These comments suggest that the precise role of *Payne* in shared care cases is unclear. *Payne* remains highly influential in practitioners’ thinking about shared care relocation cases, despite Butler-Sloss P’s comment that it applied only when ‘the question of residence is not a live issue’⁴¹ and reported authority saying that ‘many of the factors to which the court drew attention in *Payne* ... whilst relevant may carry less weight than otherwise they commonly do’.⁴²

The final strand of English relocation law covers internal relocation cases – that is,

³⁹ [2004] 2 FLR 330 (EWHC).

⁴⁰ F Judd and R George, ‘International Relocation: Do We Stand Alone?’ [2010] *Fam Law* 63, 67.

⁴¹ *Payne*, [86].

⁴² *Re Y (Leave to Remove from Jurisdiction)* [2004] 2 FLR 330 (EWHC), [14].

moves within the United Kingdom. Most English participants reported never having seen a case where internal relocation was restricted, though two barristers said that applications were increasing (EB2, EB4).

The infrequency of internal relocation cases meant, again, that there was some uncertainty about the law. While participants knew that *Payne* did not apply directly, some thought that its guidance might be relevant, if perhaps with less vigour given that the move was within the country.⁴³ These participants pointed out that ‘one is still looking at similar considerations’ (EJ5) for moves within the UK, and therefore that many of the points raised in *Payne* were still relevant: as one barrister put it, ‘*Payne* is a guidance, [but] not a governance of internal relocation’ (EB2).

The more dominant view, though, was that *Payne* had no relevance to internal relocation. This view was expressed clearly by one judge, who said that ‘although ... *Payne* ... was later interpreted as applying with full vigour to [internal relocation], it doesn’t really, or not in normal circumstances’ (EJ6). These participants were aware of other cases,⁴⁴ the effect of which was that ‘you don’t stop people moving [within the UK] unless there are exceptional grounds for doing so’ (EB5). In other words, ‘removal of children within the UK ... is something that a residential parent ... is quite free to do’ (EB3).

⁴³ Cf *E v E (Shared Residence: Financial Relief: Yardstick of Equality)* [2006] EWCA Civ 843, [2006] 2 FLR 1228, [32], where Wall LJ said that applications to relocate internally should be ‘tested by taking an analogy with ... *Payne*’. This decision led one practitioner text to state that ‘the *Payne* approach should be adopted in cases of relocation within England and Wales although a less stringent test than ... external relocations’: D Hodson, *A Practical Guide to International Family Law* (Jordan Publishing, London: 2008), 320.

⁴⁴ See, eg, *Re E (Residence: Imposition of Conditions)* [1997] 2 FLR 638 (EWCA); *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613.

That said, three participants described ‘a back door way of approaching internal relocation’ (EB6). Since direct restrictions were difficult to obtain, the way to approach such cases was, according to these participants, to apply for a *specific issue order* preventing a change of the child’s school.⁴⁵ As one barrister put it, ‘the battle isn’t about where you live, it’s about the school change. You can’t stop someone moving within the UK – what you can do is stop them changing the school the child goes to’ (EB1).⁴⁶ In other words, ‘it tends to turn on a specific issue [application] in relation to education, which is artificial and is a code for, “should this parent be allowed to move?”’ (EB6).⁴⁷ This secondary approach to internal relocation was the only aspect where *Payne* was entirely absent.

To summarise, English practitioners knew *Payne* well. Moreover, its requirements are influential on almost all aspects of relocation law, whether the conditions underpinning the *Payne* approach are strictly present or not. However, Chapter 3 showed that *Payne*’s approach to relocation was subject to significant criticism, both within the jurisdiction and abroad.⁴⁸ Given these criticisms, coupled with the analysis in Chapter 4 which showed how differently relocation disputes are analysed under English law as compared with New Zealand law, we now ask how English practitioners evaluate their legal approach. While some consideration is given to internal relocation cases and shared care international relocation cases, the focus is on *Payne*: *Payne* not only governs the vast majority of English

⁴⁵ Children Act 1989, s 8.

⁴⁶ See also EJ2: ‘save in exceptional circumstances, you can’t prevent people moving inside the jurisdiction. ... Of course, you can prevent the children’s school being changed, so if you have got school-aged children, that is a way of preventing children being removed’.

⁴⁷ See, eg, *Re G (Contact)* [2006] EWCA Civ 1507, [2007] 1 FLR 1663.

⁴⁸ Chapter 3, text from n 128, summarised above, text at nn 5-7.

relocation cases, but is also highly influential on the remaining cases, despite being merely ‘a guidance, not a governance’ (EB2).

Practitioners’ Evaluations of the Practice of English Relocation Law:

Participants were asked about their views on the advantages and disadvantages of the English approach to relocation law; about the ways in which it was helpful to them and about the problems it created in practice; and about whether there were aspects of the law which they thought could be improved.⁴⁹ Some participants had relatively little to say on these aspects: as one judge explained, ‘I have never thought about it much in a principled way’ (EJ5). Other participants had evidently given considerable thought to the law, either in general⁵⁰ or in preparation for the interview.⁵¹ Before turning to *Payne*, we start with a brief discussion of the other aspects of relocation law.

Cases not decided under Payne

The two categories of relocation dispute which do not strictly come within *Payne*’s scope are international relocations in cases of shared care, and relocations within the United

⁴⁹ The interview schedule is contained in Appendix 1.

⁵⁰ For example, EB7 said that she knew that *Payne* provoked mixed views because the barristers in her chambers ‘all chat and banter about it’.

⁵¹ Some participants had made notes; others raised particular points, saying afterwards that ‘I wanted to get that off my chest’ (EJ1).

Kingdom. We take these cases in turn.

In terms of shared care international relocation, participants made only a few comments. The first highlighted the need to distinguish between shared residence as a label and shared care as a reality.⁵² One participant was unable to remember ‘the last time the court made a sole residence order without there being some very good reason, eg some incapacity on the part of one parent, like an alcohol problem’ (EB6),⁵³ which meant that it was necessary to ask ‘whether you’re using shared residence as a label in order to pacify everyone ... or whether it really is a true shared care arrangement’ (EB6).⁵⁴

The law distinguishes between cases where care is split equally (or nearly equally), and all other cases.⁵⁵ However, participants pointed out that there was a spectrum of arrangements between equally split shared care and what one participant described as ‘a usual-ish, normal-ish [arrangement with staying contact] one night in the week and every other weekend’ (ES2). In many of these cases, trying to identify a main carer would be a difficult exercise:

EB5: An arrangement whereby a fortnight in term is divided 9:5 is very common; an arrangement whereby the holidays are divided equally ... is almost standard. ... [O]n those sorts of facts, it would be very

⁵² See Chapter 3, text from nn 150 and 262.

⁵³ See also *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [7].

⁵⁴ On the use of shared residence orders ‘to pacify everyone’, as EB6 put it, see P Harris and R George, ‘Parental Responsibility and Shared Residence Orders: Parliamentary Intentions and Judicial Interpretations’ [2010] *CFLQ* 151.

⁵⁵ ‘[E]qual shared care arrangements as between parents are still fairly unusual ... [and] “two thirds/one third” arrangements ... appear to fall within *Payne*. What seems to be required to escape *Payne* is that the child can live equally happily with either parent, and that either parent could act as “primary carer”’: F Judd and R George, ‘International Relocation: Do We Stand Alone?’ [2010] *Fam Law* 63, 67.

hard from the child's point of view to say whom they regarded as being their primary carer.

A similar point was made by one judge, who thought that looking at the care arrangements in their own right, without applying such labels, would be more helpful:

EJ1: One of ... the features of the present law is to ask, almost as a preliminary question, "who is the residential parent?". I am not sure that in my ideal jurisprudential world I would want necessarily to ask that question, as it were, in advance. I am not saying that the present [care] arrangements are not relevant – they clearly are...

Many participants therefore thought that differentiating between sole and shared care was 'an artificial distinction' (EJ2), and did not favour applying different legal principles to relocation based on this distinction. A better approach, some thought, was to ask, in every case, 'what are the alternatives [to relocation]?', taking into account that in a real shared care case 'there is actually a realistic alternative' (ES4). In other words, if the child could realistically live with either parent, the options available were different, which might justify a different analysis.⁵⁶

In terms of relocation within the United Kingdom, participants were more divided in their views. Some saw the law, which makes restrictions on internal relocation 'truly exceptional',⁵⁷ as both correct in principle and as the only practical approach. These participants described restrictions on relocation within the country as 'a major invasion of somebody's liberty' (EB3). They thought that the (relative) practical ease of on-going

⁵⁶ See similarly R George, 'Re L (Internal Relocation: Shared Residence Order) [2009] EWCA Civ 20, [2009] 1 FLR 1157' (casenote) [2010] *JSWFL* 71.

⁵⁷ *Re B (Prohibited Steps Order)* [2007] EWCA Civ 1055, [2008] 1 FLR 613, [7].

contact, coupled with certainty about the enforceability of court orders, reduced the concerns which applied to international moves.

Participants were also worried about the wisdom of making orders stopping internal relocation. As one judge explained:

EJ6: I've got reservations about [stopping internal relocations] because there is no point imposing a condition which you can't enforce, or which is simply something for one party to beat the other's head with...

However, other participants questioned whether the law had adopted the right approach. Several thought that internal relocation disputes should be explored in more detail, rather than saying that moves could only be stopped in exceptional cases. As one judge said, 'I do wonder sometimes if we are quite as careful as we should be about these' (EJ4). The reason for this concern was that 'the effect of moving a child [within the country] can be very striking' (EB5); in such cases, 'you may be talking about only a one-hour or two-hour journey, but they are still equally destructive' of the relationship between the child and the other parent (ES5).

Echoing these concerns, and explaining that fighting an internal relocation was difficult because of the way the law required judges to think about the issues, one barrister explained how he would try to make the court see the case differently:

EB2: You have to make these judges alive to the seriousness of the decision they are about to make. You need to elevate the judge's mind from [thinking], "this is a Children Act case and these are disputing parents who can't co-parent and I need to determine, on

balance, who is probably putting the interests of the children before their own and therefore...” – well no, you need to go much further than that, judge. You need to actually look at this much more carefully and say, “if I make this decision to [allow the mother to] relocate internally, miles away from the birth father, what is the medium- to long-term effect of that? Is it going to be reasonable for the dad to have fortnightly contact?” Often [it is] not, if the distance is vast and it involves huge amounts of driving.

These concerns are supported by research evidence. For example, a 30-year longitudinal study in the USA found that non-resident parents living within a 75-mile radius of their children are more likely to have frequent contact than those further away.⁵⁸ In England, Mavis Maclean and John Eekelaar noted apparent differences in both the amount and the type of contact once parents lived just ten miles apart.⁵⁹

Because of such concerns, these participants tended to consider the current approach unsatisfactory. One judge thought that the law prevented judges from deciding cases about internal relocation based purely on the child’s welfare: ‘if the welfare analysis suggested that it would be best for the welfare of the children for them to stay, ... the court should have the power to make that happen’ (EJ3).

In terms of internal relocation, therefore, participants were divided. Some thought that it was impractical and, in any case, inappropriate to stop parents from moving within the United Kingdom, while others thought that such cases needed to be investigated in more depth and that the court should be free to conclude that a child’s welfare would be better served by preventing relocation, whether the facts were ‘exceptional’ or not. As we turn, in

⁵⁸ M Hetherington and J Kelly, *For Better or For Worse: Divorce Reconsidered* (Norton, New York: 2002), 134.

⁵⁹ M Maclean and J Eekelaar, *The Parental Obligation: A Study of Parenthood Across Households* (Hart, Oxford: 1997), 73, 97 and 122.

the remainder of this section, to look at the core of relocation law – that is, cases following *Payne* – a similar variation in views will be seen.

Cases decided under Payne

Looking at *Payne*, practitioners tended to take one of three positions. Some practitioners defended *Payne*, both in principle and in practice; some took no particular view on the principle, but found *Payne* to work reasonably well in practice; and others rejected the principle underpinning *Payne*, regardless of their views on its practical application. In addition, all participants identified particular aspects of the practice of the law which worked well, along with aspects which they found problematic. The following sections start with those practitioners who made a principled defence of *Payne*. We then turn to particular aspects which practitioners praised, followed by the more problematic elements. Finally, the views of those who made principled criticisms of *Payne* are explored before, in the final part of this Chapter, we look at practitioners' suggestions of what relocation law should look like. It will be seen that practitioners were aware of many of the difficulties identified by academics,⁶⁰ and many expressed significant discomfort with both the practice and the principle of the current law.

⁶⁰ In particular, the similarity between practitioners' discussions and Mary Hayes' work is notable: see M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351.

Before starting this analysis, however, it is worth pausing to note two points. The first is an apparent gender split amongst participants in their views on the law.⁶¹ The participants who defended *Payne* most strongly – a judge, two barristers and a solicitor – were all women, while those who were most critical of it – two judges, four barristers and three solicitors – were all men, with the exception of one of the solicitors. A number of caveats need to be stated here. First, this study of 22 practitioners is too small to draw any definite conclusions about the relationship between gender and views on the law. Second, the relative sizes of the groups (four supporters, nine opponents) should be treated with caution: men tended to oppose *Payne*, and there were more male participants in this study (13 men, nine women).

Bearing these concerns in mind, it may nonetheless be interesting to wonder whether English relocation law is more appealing to women than to men. One reason for this might be that women may (subconsciously) place more importance on the well-being of primary carers – usually mothers – and on their freedom of movement, whereas men may (subconsciously) place more importance on children's relationships with non-resident parents – usually fathers. It is also possible that a gendered response to relocation law reflects different normative conceptions, exemplified by Carol Gilligan's work on the ethic of justice (typically favoured by men) and the ethic of care (typically favoured by women).⁶² Perhaps men's greater focus on 'justice' causes them to object to what is seen as one-sided

⁶¹ To ensure anonymity when discussing participants' gender, the identifying tags of judges are omitted in the following sections; 'EJx' is used to identify the two female judges, 'EJy' for the five male judges.

⁶² See C Gilligan, *In A Different Voice* (Harvard University Press, London: 1982). This work attracts a degree of controversy in its link between gender and the ethics of justice and care. Citing work by O Hankivsky, *Social Policy and the Ethic of Care* (University of British Columbia Press, Vancouver: 2005), it has been said that 'the "second generation" of care ethicists have tended to downplay the argument that the ethic of care is a female way of thought': S Choudhry and J Herring, *European Human Rights and Family Law* (Hart, Oxford: 2010), 125.

reasoning in *Payne*,⁶³ whereas women's greater focus on 'care' makes them more inclined to prioritise care relationships and case outcomes. It could be that, in this respect, relocation law typifies family law as a whole. Carol Smart has suggested, for example, that 'in recent decades, English family law has been more concerned with the welfare of children, and also the importance of caring relationships, than it has been about justice or equality between spouses or adults'.⁶⁴

The second point to note relates to the group who took no strong view on the principle of the English law. The interesting aspect of this group is not gender (there were five men and four women), but rather the professional groups: four of the nine participants were judges and three were welfare officers.⁶⁵ It will be remembered that this group, taking no strong view on whether *Payne* was right or not, focused on the fact that it worked well in practice.⁶⁶ It might be that, given their jobs, trial judges and welfare officers are most likely to 'look at the law and follow it rather uncritically' (EJx). The benefits of having 'a fairly clear template to follow' (EJy) may be more important for practitioners whose job it is to apply the law than it is for advocates.⁶⁷ The Court of Appeal is not slow to criticise trial judges⁶⁸ and welfare officers⁶⁹ who misunderstand or misapply the law; giving judges 'quite

⁶³ Below, text after n 106.

⁶⁴ C Smart, 'The Ethic of Justice Strikes Back: Changing Narratives of Fatherhood' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, Abingdon: 2007), 123.

⁶⁵ A barrister and a solicitor were also in this group.

⁶⁶ That is not to say that they did not identify aspects which caused them difficulty, as will be seen.

⁶⁷ That said, some advocates made similar points: below, text at n 73.

⁶⁸ See, eg, *Re S (Children: Application for Removal from Jurisdiction)* [2004] EWCA Civ 1724, [2005] 1 FCR 471; *Re M-K (A Child) (Relocation Outside the Jurisdiction)* [2006] EWCA Civ 1013, [2007] 1 FLR 432.

⁶⁹ See, eg, *Re W (Leave to Remove)* [2008] EWCA Civ 538, [2008] 2 FLR 1170.

an easy case to apply' (EJy), and helping welfare officers 'to focus on what the court is going to be focused on' (EC2), may therefore be particularly important for these professional groups.

Supporters of the Payne approach

A group of four participants, all female,⁷⁰ put up a strong defence of the English approach to relocation.⁷¹ Looking at these defences of *Payne*, one judge explained clearly why she supported the Court of Appeal's approach. These were difficult cases, she said, but the crucial assessment was the effect on the child's main carer:

EJx I think you have to have a starting point, and I think that the starting point of *Payne* is a good discipline, providing that you don't just say, "oh, [the applicant] is crying a bit, she ought to go". You have really got to see what the true impact on mother is going to be if she is not permitted to go... I do think it has to be recognised that the impact on the children of removal, and removal from the other parent, can be very profound, and you shouldn't just rubber-stamp these decisions – but I don't accept that the position in the Court of Appeal is one of not examining the facts and not examining the realities of the people who are before them. The question which has to be asked ... is the impact on the primary carer, if there is one, of a refusal of her plans to relocate, and I think if you regard that as something that needs to be examined rigorously rather than just ... taken at face value, then I do not see anything wrong with the test. ... I don't think that there is a problem with having a starting point in relation to leave to remove, providing that you treat these applications seriously...

In other words, so long as the questions asked by *Payne* were pursued seriously, the basic

⁷⁰ Note again, though, that with such a small sample size, the gender split may be coincidental.

⁷¹ As will be seen, even these participants identified elements of *Payne* with which they had difficulty.

approach was appropriate. A barrister took much the same view, saying that ‘the courts have been repeatedly reminding us that the checklist in *Payne* has to be looked at very carefully and applied very rigorously, and the [trial] courts have got that’ (EB6). Since this barrister’s experience was that the courts were scrutinising applications carefully, she thought that ‘the *Payne* framework, with the supplementary caselaw and guidance from the Court of Appeal, is fine’ (EB6).

A female solicitor agreed, and disputed the suggestion that the English courts place presumptive weight on the applicant’s well-being:

ES4: I don’t think the English courts think that factor is more significant than others. I think it has had to be pointed out as a significant factor because it gets ignored, so that, for some reason, the English courts have had to remind themselves that, actually, that is one of the factors.

The group that broadly supported *Payne* was, numerically, in a minority amongst participants in this study. However, given that the group comprised only female practitioners, and given that women made up only nine of the 22 English participants, it is impossible to say that the size of the group is significant.

Particular benefits of Payne

Turning away from this general support of the English law, many participants praised

individual aspects of *Payne* and the supplementary guidance,⁷² whether they generally agreed with *Payne* or not. Three aspects were noted as being particularly important.

The first was that *Payne* highlighted the need to look at the medium- and long-term consequences of allowing or refusing relocation, as well as the short-term ones. One senior barrister, who criticised *Payne* generally, identified this as one of its benefits:

EB5: ...presumably out of worry ... about short-termism, *Payne* has thought it necessary to emphasise that one should take the medium to long-term view of the situation. ... I can understand why the Court of Appeal would want to make those points. ... *Payne* does have the effect of stopping short-termism.

This argument links to the reason that some participants supported *Payne*, recognising the importance of the primary carer's well-being in promoting the child's welfare. Many who were critical of *Payne* nonetheless praised its success in highlighting the long-term consequences of preventing relocation.

The second benefit of *Payne* was that it provided a significant degree of certainty.⁷³ As one barrister explained, 'compared to a lot of areas of ... family law, at least you know what is going to happen... I think there is a big thing to be said for that' (EB1). In other words, *Payne* performed an important function by 'set[ting] out a fairly clear template to follow' (EJy), with practitioners able to offer clear advice and help their clients to prepare their cases.

⁷² *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066 and *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043 were mentioned frequently.

⁷³ For reasons why some practitioners may see certainty as particularly beneficial, see above, text at n 66.

One particular example which came through from several participants was that the Court of Appeal had made it clear that, as one barrister put it, ‘quite a significant level of planning and detail [needs] to be there’ (EB3). As Piers Pressdee explains:

...the well-advised would-be relocater ordinarily packs the trial bundle with all that the court would want to know about the proposed relocation country and area, details of proposed housing, employment and likely income, as well as details of the children’s likely schooling and other facilities and opportunities open to them.⁷⁴

Not everyone thought this aspect entirely beneficial. One judge, asked if there was anything that would improve the law, suggested reducing the number of documents:

EJ2: You could generate them from a computer: they are all exactly the same. All those vast bundles of documents proving what there is available in the country to which the children are going to be moved, which is almost like going through some ritual, and nobody ever looks at the documents once they have been filed – but of course people do lose sometimes on the “insufficiently formulated plan/lack of information” ground.

The importance of this information, therefore, related mainly to the risk of being refused leave because of inadequately researched plans.⁷⁵

A final aspect of *Payne* which was praised compared it to internal relocation. Given that the law did not readily allow restrictions on relocation within the UK, and given that many parts of the UK take longer to travel between than some international destinations, some practitioners thought it sensible to look reasonably favourably on international

⁷⁴ P Pressdee, ‘Relocation, Relocation, Relocation: Rigorous Scrutiny Revisited’ [2008] *Fam Law* 220, 221.

⁷⁵ See, eg, *H v F (Refusal of Leave to Remove a Child from the Jurisdiction)* [2005] EWHC 2705 (Fam), [2006] 1 FLR 776.

relocation. As one barrister said, *Payne* is ‘consistent with the thinking about internal relocation ... [and] reduces the differences between somebody who wants to move to Newcastle and somebody who wants to move to Brussels’ (EB5). This similarity was particularly significant for European Union countries, because ‘we can’t go back to a stage where people are imprisoned within one EU country as opposed to another EU country – that’s clearly not the drift of history’ (EB5).⁷⁶ However, given that some of these participants (including EB5, quoted above) were critical of the approach to internal relocation,⁷⁷ this comparison was perhaps not entirely positive.

The benefits of *Payne* which participants identified were, therefore, that it prevented a focus on short-term consequences, and made clear that applications must be thoroughly researched. Some practitioners also thought, as we saw in the previous section, that the law had adopted the correct general approach. As this Chapter moves to look at specific and general criticisms of the English law, this broad support of *Payne* by some participants should not be forgotten.

Criticisms of the discipline in Payne

As we look at detailed criticisms of *Payne*, it is worth noting that many of the points made here come from participants who supported the Court of Appeal’s approach. In other words,

⁷⁶ Several participants made similar points with particular regard to Council Regulation (EC) No 2201/2003, Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (the so-called Brussels II (revised) Regulation); see also Chapter 7, text from n 166.

⁷⁷ Above, text from n 56.

these criticisms are not necessarily inconsistent with *Payne* (though many who criticised details of *Payne* also disagreed with it more generally). To structure participants' comments, it is helpful to return to Thorpe LJ's 'discipline' and address each element in turn.

The first of Thorpe LJ's points asks whether the application is 'genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life', and 'realistic', meaning 'founded on practical proposals both well researched and investigated'.⁷⁸ One barrister described these as the 'two hurdles under *Payne* that if you fall, you do not get back up from' (EB2). However, several participants (including this barrister) doubted whether failing these tests was necessarily fatal to an applicant. Several participants reported cases relating to both aspects.

As to 'genuineness', a series of cases that one judge had done while at the bar gave an interesting insight:

EJ2: I won one [for the father] where the mother was so poisonous about the father that the judge thought that it wasn't right to let the children go at that stage ... but she got to go three years later. [Then] I did one where the mother made false accusations of sex abuse against the father, but she got to go three years later.

In other words, a finding that the applicant was 'motivated by some selfish desire to exclude the father from the child's life' might serve only to delay relocation, not to prevent it altogether.

⁷⁸ *Payne*, [40](a).

Participants had similar experiences of the ‘realisticness’ criterion:

EB1: ...you might succeed [in opposing an application] if you can show that they haven’t thought about the consequences [of the move], but then the problem with that is that someone can apply again... [T]hey can come back in a year’s time.

EB2: Once you have attacked the plan, you have attacked the plan, but usually the plan can be repaired.

Q: So, if that is the ground that you win on, it may only be a matter of time?

EB2: Of time, yes, you’re absolutely right.

Practitioners therefore thought that challenging an application on the first stage of *Payne*’s discipline might be a short-lived victory, even if the respondent succeeded.⁷⁹

Participants were also aware that ‘the bar as to practicalities that must be jumped by the relocation applicant is set at a wide variety of heights depending on the facts and circumstances of the case’.⁸⁰ Several had experience of relocation applications succeeding despite the plan being ‘so vague, so non-specific, so full of holes that [the respondent argued] that [the application] didn’t even get into the first criterion of the guidelines in *Payne*’ (EB3).

Thorpe LJ’s discipline then asks whether the respondent is ‘motivated by genuine

⁷⁹ By the time the final English interviews took place, *Re W (Relocation: Contact)* [2009] EWCA Civ 160, [2009] All ER (D) 120 (May) had been decided, in which Thorpe LJ acknowledged that a refusal of leave ‘does not preclude another application in years to come if the circumstances support or impel renewed litigation’ (para [26]). One solicitor commented on this point: ‘It is terribly unfair that “once gone, gone”, but if the [respondent] succeeds ... then you can have the [applicant] mother come back and say she wants a second go. I found that encouragement [of re-applying] disgusting’ (ES5).

⁸⁰ *Re F and H (Children: Relocation)* [2007] EWCA Civ 692, [2008] 2 FLR 1667, [9].

concern for the future of the child's welfare or is ... driven by some ulterior motive'.⁸¹ As one judge said, this dichotomy 'leaves out of account what most fathers' objections are based on, which is the objection that the severance between father and child is going to cause detriment to the child's welfare, which does seem to be left out of the equation in this formulation' (EJ2). According to this judge, Thorpe LJ's formulation left fathers with a choice between, on the one hand, concern about the child's safety or the mother's parenting ability,⁸² or, on the other, an ulterior motivation, meaning '[g]eneral hostility towards the mother and obstructiveness' (EJ2).

The next limb of *Payne* (which to some extent might answer EJ2's concern) looks at 'the extent of the detriment to [the respondent] and his future relationship with the child were the application granted'.⁸³ Many participants thought this point more clearly expressed in Butler-Sloss P's judgment:⁸⁴ '[t]he effect upon the child of the denial of contact ... is very important',⁸⁵ and '[t]he opportunity for continuing contact ... may be very significant'.⁸⁶ However, although participants were clear that contact was 'incredibly important' and thought that 'the courts really do take that seriously' (EB7), the focus was on contact *after* relocation. As one barrister explained, in terms of *stopping* a relocation, 'general [arguments] about ... not ... hav[ing] as much contact don't carry much sway' (EB1). Most participants reflected Charles J's view, that '*Payne* indicates that usually the harm that is

⁸¹ *Payne*, [40](b).

⁸² EJ2 gave the example of a case tried by another judge who refused leave 'because he thought the risk of [the mother] going back to cocaine use [after moving] was too high'.

⁸³ *Payne*, [40](b).

⁸⁴ See also above, text at nn 20-21.

⁸⁵ *Payne*, [85](f).

⁸⁶ *Payne*, [85](g).

likely to flow from a reduction in contact will not found a conclusion that the welfare of the child would be best promoted by refusing an application by the primary or custodial parent to take the child abroad'.⁸⁷

The third stage of Thorpe LJ's discipline addresses the effect on the applicant (and her new partner, if she has one) of refusing leave,⁸⁸ guided by Thorpe LJ's instruction that 'the emotional and psychological well-being of the primary carer [is a] consideration [to which] great weight must be given'.⁸⁹ The points raised in relation to this aspect reflect broader concerns about English relocation law, addressed in the following section.⁹⁰

Briefly, the concern that many participants expressed was that this point appeared to be 'saying that all [applicants] will be equally distressed' by a refusal of leave (ES5). The particular concern to be addressed here relates not to the general principle, but rather to one particular aspect, namely the approach to so-called 'lifestyle cases'.⁹¹ These are applications to move to a country with which the applicant has no pre-existing connection, as opposed to cases where the applicant wishes to return to her home country or go to her partner's home country, or where there is a new connection, such as a job transfer. Participants were aware that the Court of Appeal has said there are no 'sub-classes of case to which some different

⁸⁷ *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam), [2003] 1 FLR 1066, [24](10).

⁸⁸ *Payne*, [40](c); see also *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043; *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

⁸⁹ *Payne*, [41].

⁹⁰ Below, text from n 106, esp at nn 119-124.

⁹¹ The categorisation of cases can 'sometimes [be] in the eye of the beholder' (EJ2), as was demonstrated by the fact that EB7 *contrasted* lifestyle cases with moves for job opportunities, whereas ES1 thought that most moves for job opportunities *were* lifestyle cases.

approach or principle would be applied’;⁹² in other words, ‘even if this had been a pure lifestyle choice case, it does not follow that the principles that were stated in *Payne v Payne* cease to apply’.⁹³

However, some participants were unconvinced. Not only did practitioners think that, as a matter of fact, ‘lifestyle choice cases are the hardest to get home’ (EB6), but many also thought that there ought to be a formal distinction. As one senior barrister said in relation to a case she had fought, the applicant ‘was making a decision out of a lifestyle choice. ... I know the courts say they don’t make a distinction, [but] I think they should’ (EB7). The reason that participants thought that lifestyle cases should be treated less favourably was that ‘in cases where [the applicant says], “I want to move to Australia because I like the idea of living somewhere sunny”, ... you’re hardly going to be devastated if you aren’t allowed to move – you’ll be disappointed’ (EB1). As a judge explained:

EJ2: [The Court of Appeal has] said, “it is not appropriate to characterise them as ‘lifestyle’ as though it were just a whim”, [but] you have actually got to look at what the impact is of saying they can’t go. There are cases where someone does wish to go just on a whim, and it is really not going to make much real difference to them if they are forced to stay behind, [and] then I think judges are justified in subjecting the reasons for going to a very high degree of scrutiny.

In other words, most participants thought that they should be more sceptical of claims that the applicant’s well-being was at stake in lifestyle cases, and that ‘you need to scrutinise [the

⁹² *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239, [16].

⁹³ *Re S (Children: Application for Removal from Jurisdiction)* [2004] EWCA Civ 1724, [2005] 1 FCR 471, [17].

application] in more detail, and I think you need to get away from the emotional side of it' (ES3).

In the final part of Thorpe LJ's discipline, the previous considerations come together in 'an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate'.⁹⁴ Again, many participants' comments regarding this 'overriding review' of welfare raised broad concerns about the approach of the English law, addressed below.⁹⁵ First, however, we look at two connected points which participants thought could have been accommodated within the discipline.

One related to the fact that, despite *Payne*'s explicit reference to the *welfare checklist*,⁹⁶ the Court of Appeal had said that 'technically an application brought under s 13(1) is not subject to the welfare checklist'.⁹⁷ In an article published just before interviews started, I argued that this view was based on a mis-reading of the statute.⁹⁸ It is true that the Children Act does not make 'section 13 applications' subject to the welfare checklist, but I suggested that the reason is that section 13 merely prohibits international relocation without parental consent or court leave; the application for such leave ought to be under section 8,⁹⁹ to which the checklist does apply.¹⁰⁰

⁹⁴ *Payne*, [40](d).

⁹⁵ Text from n 106.

⁹⁶ Children Act 1989, s 1(3).

⁹⁷ *Payne*, [33].

⁹⁸ R George, 'Changing Names, Changing Places: Reconsidering Section 13 of the Children Act 1989' [2008] *Fam Law* 1121.

⁹⁹ Cf *Re M (Leave to Remove Child from Jurisdiction)* [1999] 2 FLR 334 (EWHC) (Hale J).

¹⁰⁰ Children Act 1989, s 1(4).

Several participants expressed agreement with this argument. As one senior barrister said, ‘I am sure ... that you are right and that section 1(3) applies to relocation cases, and any thought that it doesn’t seems to me, with all respect to whatever the decision was that said otherwise, ridiculous’ (EB5). In practice, however, participants thought that the factors on the checklist were given little attention. As one barrister said, disputes about children’s upbringing are supposed to be decided ‘using the welfare checklist, but I don’t think that’s applied [to relocation], basically’ (EB1).

Participants’ second point falls within the first, and relates to what was seen as inadequate attention given to children’s own views.¹⁰¹ It was not that children’s wishes and feelings were entirely ignored in relocation cases,¹⁰² but that they were given insufficient weight.

Participants accepted that ‘younger children will have very little idea what [relocation] really means’ (EB5), so the court should address ‘wishes and feelings using the caveats that the Children Act uses, which is, “considered in the light of the child’s age and understanding”’ (EC1). However, the dominant view was that more attention needed to be given to the child’s views. The most common suggestion was for the automatic appointment of a *guardian ad litem* to represent the child.¹⁰³ Two participants explained why separate

¹⁰¹ Children Act 1989, s 1(3)(a): ‘the ascertainable wishes and feelings of the child involved’.

¹⁰² Several participants thought that CAFCASS’s most important function in relocation disputes was ‘as a conduit through which the child’s views are passed’ (EJ7).

¹⁰³ Family Proceedings Rules 1991, r 9(5). For general discussion, see, eg, District Judge C Bellamy and District Judge G Lord, ‘Reflections on Family Proceedings Rule 9(5)’ [2003] *Fam Law* 265 and Judge C Bellamy, ‘Rule 9(5) - Further Reflections’ [2006] *Fam Law* 298; G Douglas *et al*, *Research into the Operation of Rule 9(5) of the Family Proceedings Rules 1991* (Dept for Constitutional Affairs, London: 2006).

representation was important in relocation cases:

EB2: [The law] doesn't appropriately balance the child's wishes and feelings... It's still not regular that one has a 9(5) guardian in [relocation] cases, but ... can there be any more important decision in a child's life than the determination of where it is going to spend its childhood, vis-à-vis its relationship with its parents? How can it be right that there shouldn't be an independent view voiced [about] the effect on the child...?

ES2: In abduction cases ... there is much more focus on the child's wishes being brought into account,^[104] and while that does happen in relocation cases, it probably doesn't happen to the extent that it needs to happen. ... I think that separate representation is a good thing, because I think the child gets carried along at the moment with what is best for the [applicant].

In other words, participants thought that the decision was so important, with potential for the child's perspective to be significantly different from either parent's, that separate representation was appropriate. While not all participants were sure about this change (particularly considering the resource implications), many wanted to 'consider very hard whether a child should automatically be represented in relocation cases and ... to consult on that issue' (EB2).

It has been seen, therefore, that participants had detailed criticisms of almost all aspects of *Payne*, and even participants who supported the English law identified parts which they wanted reconsidered. However, in addition to these criticisms, a significant dissatisfaction was expressed by many practitioners about the entire approach being taken. As we look at these broader criticisms, it is important to remember the support for *Payne*

¹⁰⁴ See, eg, *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 FLR 961.

which was seen earlier, and to bear in mind that the following discussion does not represent the view of all participants in this study.

Criticisms of the Payne approach itself

Amongst the participants who were unhappy with *Payne*, there was one clear concern, namely that ‘the welfare principle is being compromised in these cases’ (EB3). These participants – eight men and a woman¹⁰⁵ – agreed with Mary Hayes that *Payne* amounts to ‘a gloss on the welfare principle’ which is ‘weighted towards one party’.¹⁰⁶ There were three connected aspects to these participants’ views.

The first was that the current reasoning was ‘old-fashioned’ (EB3), relying inappropriately on principles which were formulated 40 years ago ‘in a completely different world’ (EB5). The second was that this focus inappropriately prioritised factors in the welfare analysis, over-emphasising the applicant parent’s well-being and under-emphasising the importance of the child’s relationship with the other parent. Thirdly, this prioritisation led the law, in effect, towards a presumption in favour of relocation; moreover, the Court of Appeal was ‘very willing to step in and ... defend’ this presumption (EB1). This presumptive and interventionist approach, which participants thought was driven especially by one judge, raised concerns about whether trial judges’ discretion was being over-ridden

¹⁰⁵ Again, to ensure anonymity when discussing participants’ gender, the identifying tags of judges are omitted in this section: ‘EJx’ is used to identify the two female judges, ‘EJy’ for the five male judges.

¹⁰⁶ M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351, 362. Participants were given a summary of Hayes’ argument and asked whether it fitted their experience.

too readily. Several participants compared the approach in relocation appeals with that in international child abduction. As one senior barrister explained:

EB7: ...the House of Lords hasn't taken on *Payne v Payne*, whereas on the non-Hague Convention [abduction] cases you can see that Baroness Hale ... said, very tellingly I think, ... "if people think that appeals will always be determined one way rather than another, it gives an impression of bias".

In the case cited by EB7, Baroness Hale said that, '[t]oo ready an interference by the appellate court, particularly if it always seems to be in the direction of one result rather than the other, risks robbing the trial judge of the discretion entrusted to him by the law'.¹⁰⁷ Many participants thought similar concerns applied to relocation.

To explore this argument, we start with the connection between *Payne* and *Poel v Poel*.¹⁰⁸ The historical origins of *Payne* were commented on by several participants, usually with a mixture of concern and disbelief.¹⁰⁹ As one barrister said, *Payne* 'doesn't say anything very different from what *Poel* said 30 years previously, and that was in a completely different world' (EB5). Several participants spoke at length about this development, as this quotation shows:

¹⁰⁷ *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, [2005] 2 FLR 802, [12]; see Chapter 3, text from n 138.

¹⁰⁸ [1970] 1 WLR 1469 (EWCA).

¹⁰⁹ Some participants also commented that this precedent meant that *Payne* 'was building on strong ground' (EB5).

EJy: *Payne v Payne* reaches back to jurisprudence which was first developed in the Court of Appeal in *Poel v Poel*.^[110] I remember that case, and I remember it, about 10 years later, possibly being thought to have been overtaken by a general consideration of welfare, and then, in the late 70s, early 80s, it was explicitly reaffirmed by the Court of Appeal. I have in mind an old case called *Chamberlain v de la Mare*,^[111] but there were three or four decisions at that time which brought it back into the forefront.^[112] Again, I remember thinking as the 80s passed and as the 90s came, that perhaps that jurisprudence was becoming antiquated, particularly when, in 1991, the Children Act with its welfare criterion and its checklist came in. Nevertheless, in *Payne v Payne* there was an explicit reaffirmation of the jurisprudence which had begun in 1970 and been specifically reaffirmed in the late 70s, early 80s. What troubles me is that in 1970, and in the late 70s, early 80s, contact with the non-residential parent ... was not regarded as having the importance which it is now regarded as having. ... Contact ... was seen as something entirely secondary, and I think that that view was an important factor in the decision in *Poel* ... and then in its reaffirmation in the late 70s, early 80s ... because if you don't regard contact with the non-residential parent as particularly important, the arguments in favour of the relocation of the residential parent, wherever she would wish to go and be happy in going, seem almost overwhelming.

Put another way, family relationships after parental separation are conducted (and viewed by the law) differently from 40 years ago.¹¹³ As a male barrister put it, 'there were different social norms, where children were generally brought up by their mothers and fathers generally worked ... [but] now you have got a different type of society' (EB1). The difficulty with *Payne*, therefore, was that 'the approach has [not] really changed in what is

¹¹⁰ [1970] 1 WLR 1469 (EWCA).

¹¹¹ (1983) 4 FLR 434 (EWCA).

¹¹² See, eg, *Moodey v Field* 13 Feb 1981, unreported (EWCA); *Lonslow v Hennig* (Formerly *Lonslow*) [1986] 2 FLR 378 (EWCA).

¹¹³ See Chapter 3, text from n 259, and Chapter 7, text from n 115. Cf Thorpe LJ's view that contact with non-residential parents was not given less importance by the courts in previous times: *Payne*, [29].

now almost 40 years' (EJy), meaning that the law had fallen behind social norms.¹¹⁴

The main concern expressed was that the 'old-fashioned' way of thinking about relocation law (EB3) led to an inappropriate prioritisation of factors in the welfare equation. As one solicitor put it, the problem was 'the sort of hierarchy of factors on the list' within *Payne* (ES2).

This is the criticism made by both English academics and foreign courts. The New Zealand Court of Appeal described the English approach as 'marked by the emphasis on guidelines ... and by the allocation of particular weight' to particular factors,¹¹⁵ while Mary Hayes suggests that the effect of *Payne* is 'that a judge ... does not start his investigation with an open mind'.¹¹⁶ These points were put to participants, and provoked mixed responses. Participants who supported the English law tended to reject these criticisms, saying, for example, that 'I think the criticism of the New Zealand court is misconceived: I don't think it has quite understood where we are' (EB6). Other participants, though, thought that these views constituted 'a very valid criticism' (ES3): 'it is that concern which is loudest made ... [and] I agree, generally, with that concern' (EB2).

The concern had two levels. One was the imposition of any hierarchy of factors over

¹¹⁴ It is difficult to think of any other case from the same period which directly underpins current child law thinking in such a way. One example could be the interpretation of the welfare principle in *J v C* [1970] AC 668 (HL), though that approach was reconsidered and approved in the late 1980s: see Law Commission, 'Review of Child Law: Guardianship and Custody' (Law Com No 172, HC 594: HMSO, 1988), [3.12]; Children Act 1989, s 1.

¹¹⁵ *D v S* [2002] NZFLR 116 (NZCA), [46].

¹¹⁶ M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351, 364.

what the Children Act specifies; the other focused on the details of the particular hierarchy in *Payne*, which linked back to the law being out of step with current social norms.

Starting with the general concern about the imposition of a hierarchy of factors, two participants put the point particularly clearly:

EB5: I think [*Payne*] takes the code in the welfare checklist and replaces it with a code of its own, for which there is no particular warrant... There is nothing at all in section 1 [of the Children Act 1989] that is inadequate to deal with relocation cases.

EJy: I find it curious that we are dispatching every other child case by reference simply to the criteria of the Children Act, but nevertheless in this one compartment of child cases we are instructed to apply a different regime. ... Thorpe LJ in his judgment [in *Payne*] says in terms, “first the judge should do this, then the judge should move to this, then thirdly the judge should consider this”, and I am puzzled as to how that has crept into this compartment [of cases], when there is total fluidity – governed, of course, by the paramountcy of the welfare of the child – in all other determinations relating to the optimum future of a child.

In other words, these participants were unsure why the Court of Appeal had imposed any particular ‘gloss on the welfare principle’,¹¹⁷ rather than leaving judges to determine the best outcome by reference to the Children Act’s usual criteria.¹¹⁸

It should be noted, however, that there were differences of opinion on this point. While some thought that introducing a hierarchy of considerations meant that ‘the welfare principle is being compromised in these cases’ (EB3), others thought that this misunderstood

¹¹⁷ Ibid, 362.

¹¹⁸ Children Act 1989, s 1.

what welfare meant. As one judge said, ‘if you say, “the test is welfare and should always be welfare”, don’t you ask the question, “yes, but what aspects of welfare?”’ (EJx). In other words, some elements might indeed be more important than others when assessing welfare, and these participants saw no difficulty with the Court of Appeal saying so.

Aside from the debate about the appropriateness of *any* hierarchy, a second concern highlighted the particular factors which some participants thought to be over- and under-emphasised by *Payne*, namely the lack of weight placed on the child’s relationship with the respondent and the significance attached to the effect on the applicant of refusing leave to relocate. As one barrister put it, ‘the emphasis on the effect on the “primary carer” creates the risk that you don’t look closely enough at other matters’ (EB5). In other words, ‘too much importance is placed on the mother and the effect on her if she wasn’t to be successful ... and ... the loss of contact with the father is too low down’ (ES2).

These participants were not suggesting that the applicant parent’s well-being was not important.¹¹⁹ Rather, they thought that the analysis ‘needs to be ... all on a level to be considered as an all-factor approach’ (ES2), without giving any factor presumptive priority. Indeed, participants were clear that they were ‘not saying that you shouldn’t look very closely at [the effect of refusal on the applicant]’ (EB5); they considered that ‘in many cases it is ... a perfectly proper factor to highlight, among others’ (EB2). The problem for these participants was that the weight given to this factor was being treated as ‘a general principle – and it is at the moment a general principle’ – when they thought it a question of fact (EB2).

¹¹⁹ It is sometimes suggested that a parent’s well-being should be separated entirely from the assessment of the child’s welfare, but no participants appeared to ascribe to this view.

Some participants spoke in detail about the so-called ‘distress argument’, namely that the distress caused by refusing the applicant leave to relocate will be the most significant factor in the welfare equation.¹²⁰ Several participants were unhappy with what they saw as three presumptions hidden within this argument: the presumptive effect on the applicant parent of refusal of leave; the presumptive effect on the child of that effect on the parent; and the presumption that this effect on the child would be more detrimental to the child’s welfare than the loss of relationship with the respondent.

Starting with the effect of refusal, many participants thought that the court too readily accepted the ‘distress’ which would be suffered. We saw earlier that this concern was particularly expressed in relation to lifestyle cases.¹²¹ However, there was also a more general concern that ‘the [appellate] judges are saying that all women will be equally distressed’ (ES5), whereas participants thought that trial judges ought to be able to conclude that ‘underneath it all [the applicant] is probably a sensible woman who would get on with life and deal with the ... unhappiness’ (ES1).

There were two problems raised. One was that the distress might not be a result of the refusal of leave, but could have other underlying causes, and relocation would not always improve the situation. As one solicitor put it:

ES5: ...a lot of depression is caused by issues which don’t simply go away. [The court] should be looking at the source of her depression. Is it simply caused by not being in the country that [she] wants to be in, or is it actually unrelated and therefore subject to influences which

¹²⁰ Chapter 3, text at n 125.

¹²¹ Above, text at nn 90-94.

will be with the parent wherever they live?

The other concern was that participants were unconvinced that refusal of leave would always cause distress.¹²² Participants, aware of the authorities on this point,¹²³ noted that in an application ‘there is always the emotional part ... about how upset and devastated you would be if you couldn’t go’ (ES3). Participants thought that there was ‘a fine line between exaggerated upsettedness and genuine distress’ (EB4), but the difficulty was in telling the difference:

EB1: When one of the issues is, “how is [refusal of leave] going to affect you?”, it is very easy to say, “I am going to be devastated” ... but it is very easy to say you’ll be devastated, and much harder to challenge it. ... [I]f someone says, “I’m going to be devastated”, apart from saying, “well, is that really a reasonable response?”, how do you challenge it?

In other words, many participants questioned whether applicants would be distressed if they did not relocate, and whether any distress that was present was caused by the refusal of leave, rather than by underlying factors.

Participants also disputed the Court of Appeal’s view that ‘almost inevitable is the transference of unhappiness from primary carer to child’.¹²⁴ One solicitor thought this approach gave applicants little credit for their ability as parents:

¹²² One judge’s approach was to ‘start off on the basis that there isn’t necessarily going to be a devastating effect on the mother if she can’t go’ (EJx).

¹²³ *Payne*, [41]; *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043; *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

¹²⁴ *Re G (Removal from Jurisdiction)* [2005] EWCA Civ 170, [2005] 2 FLR 166, [24].

ES3: [In general, applicants] are intelligent people who have put up with good and bad things in their lives the whole way through, and I think the assumption that if there's a primary carer [who] says, "I will be distraught if I can't go", that that is going to have a knock-on effect on their ability to care for the child, I think patronises the primary carer... You are going to be very cross and upset about it, but somehow you have to protect your child from it, and that is what parents do.

Finally, participants queried the view that this (presumed) impact on the child of the (presumed) impact on the mother of refusal would always be worse for the child than the loss of relationship with the other parent. Again, the problem was that the answer was presumed, rather than being assessed on the facts of each case:

ES3: Why all this emphasis on the effect on the applicant of a refusal to let them go? Where is the equal [emphasis] on the other side, which is the effect on the respondent to an application of a granting of leave to go? That doesn't seem to feature anywhere in the thinking.

EB1: [The primary carer's happiness] is important, but is it more important than the child's family [life] with the other parent in this country? ... It's judge-led precedent ... without any data to back it up.

This final point, about the lack of research, was the crux of the argument for some.¹²⁵

Not only were the answers to these three questions presumed, but

EB1: ...there is no research to back it up. They are just saying, "if a parent is devastated it is going to adversely affect the child; that is worse than the child being removed from the current environment and having less contact [with the other parent]". Where is the research?

¹²⁵ EB1, EB2 and ES5 were the strongest proponents of this view. Cf M Freeman, 'Relocation: The Reunite Research' (Reunite, London: 2009), 3-4: '[Child psychologist Dr Mark Berelowitz] also noted the paucity of research into this subject and emphasised that the consequences on the child of a mother being distressed in the sense of sub-threshold depression (distress, rather than clinical depression) had not been researched in any detail.'

A solicitor made a similar point: '[t]here are problems with psychological and psychiatric reports in Children Act cases anyway, but simply not to have [those] two sorts of ... report is bizarre' (ES5). Participants compared the approach to domestic violence (EB1, ES5) and criminal law (EJy), where expert evidence plays a significant role in guiding judicial thinking.

Some participants put these considerations together – the 'old-fashioned' thinking, the 'hierarchy' of considerations, and the prioritisation of the applicant's well-being within that hierarchy – and concluded that English law amounted to a presumption in favour of relocation. Some months before interviews took place, Charles Geekie QC published an article suggesting that *Payne* 'is commonly perceived as walking and talking like a presumption',¹²⁶ which offered a useful point for discussion with participants.

Participants who supported *Payne* rejected Geekie's argument. One barrister thought that Geekie's view was 'out of date':

EB6: I think he's wrong. I think there might have been a time when he was right. ... [F]ive years ago that may have been right, but I think the discipline in relation to leave to remove is now very much more rigorous.

Several participants agreed that while there might once have been a presumption, now it was less clear. As one judge said, 'at one stage, *Payne v Payne* appeared to say, "A + B + C always equals relocation", ... [but] there's been just a bit of a change in the wind' (EJy). Another judge similarly said that 'although the test hasn't changed, the rigour with which the

¹²⁶ C Geekie, 'Relocation and Shared Residence: One Route or Two?' [2008] *Fam Law* 446, 151-152.

criteria are being examined has become much more marked' (EJx).

Other participants disagreed, thinking that Geekie was correct: 'I definitely would [agree] and I'd stick my neck out and say that I think there are few of my contemporary children law counsel who would say otherwise' (EB2). Many participants took the view that *Payne* was 'a presumption in all but name' (EB3), and thought this conclusion clear from the Court of Appeal authorities:

EJy: I think [Geekie's view] is a fair characterisation of the Court of Appeal decisions... I would be very surprised if [Thorpe LJ] were to go so far as to say that there was a presumption in favour of relocation, though I think most people would interpret his words as meaning exactly that.

A solicitor similarly said that 'the courts have been very careful to say there is no presumption, but I think to the outside world it is a presumption' (ES2). However, one senior barrister, although agreeing with the sentiment, was unhappy with the word 'presumption':

EB5: I think it would be putting it too high to say that there is a presumption in favour of relocation, but I think that the well-organised, sincere attempt at relocation has the wind in its back, and I think that a well-organised, sincere opposition to relocation has the wind in its face.

It may be interesting to wonder here whether 'having the wind in [your] back' (EB5), 'start[ing] ten points ahead' (EB2), or having 'the cards ... stacked ... in favour of ... the removing [parent]' (ES2) amounts to a presumption or not. A similar situation may exist in relation to contact applications where, although there is no legal presumption in favour of

contact,¹²⁷ research suggested that, in the trial courts, there was ‘a strong rebuttable presumption in favour of contact with the non-resident parent’.¹²⁸ The current position regarding contact is put well by Nigel Lowe and Gillian Douglas: ‘it would be wrong to say *as a matter of law* that there is a presumption that a parent should be permitted contact. Nevertheless, the *de facto* position is that the courts are predisposed to maintaining contact with both parents’.¹²⁹ From practitioners’ comments, it may be that a similar conclusion could be reached regarding relocation. Most agreed ‘that generally the Court of Appeal has tended to favour these applications’ (EJy) and that, as a result, ‘generally [the law] is thought to have gone a bit too far and to be unfair on the opposing parent’ (EJy).

Perhaps surprisingly, many participants who were so critical of *Payne* nonetheless stressed that they were ‘not about to say that leave to relocate is too easily given – I don’t have a strong view about that’ (EB5). Participants were mixed in their views about the *outcomes* of relocation cases – some thought leave was too readily given, others did not – but what united them was dissatisfaction with the *process* which *Payne* required. It may be that some would have agreed with Baroness Hale’s comment, in a different context, that balancing all the factors ‘may well mean that [a particular outcome is reached] in the great

¹²⁷ See, eg, *Re L (Contact: Domestic Violence)*; *Re V (Contact: Domestic Violence)*; *Re M (Contact: Domestic Violence)*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (EWCA).

¹²⁸ R Bailey-Harris, J Barron and J Pearce, ‘From Utility to Rights? The Presumption of Contact in Practice’ 1999 (13) *IJLPF* 111, 114. Cf *Re C (Child)* 29 July 1999, unreported (EWCA), [5], which said that in most cases ‘it is wrong to deprive the non-residential parent of contact without there being cogent reason for doing so. If it is wished to call that a presumption, then it is there in the practice of the courts’.

¹²⁹ N Lowe and G Douglas, *Bromley’s Family Law* (10th edn, OUP, Oxford: 2007), 597 (emphasis in original, footnotes omitted). Cf R Probert, *Cretney’s Family Law* (6th edn, Sweet and Maxwell, London: 2006), 258: ‘there is certainly a *perception* that there is a presumption in favour of contact’ (emphasis in original), though Probert puts the point differently in the latest edition, saying ‘there is a widespread assumption among the judiciary that [contact] is generally in the interests of a child’: R Probert, *Cretney and Probert’s Family Law* (7th edn, Sweet and Maxwell, London: 2009), 285.

majority of cases, but that is a result and not a presumption or even a starting point'.¹³⁰

The final point to consider in relation to these criticisms of the perceived presumptive approach of *Payne* relates to the role of the Court of Appeal – and, in particular, of Thorpe LJ¹³¹ – in setting and holding the line taken by the English law.¹³² Most participants thought that relocation law constituted ‘a presumption in all but name’ (EB3), and linked this presumption to the fact that ‘the Court of Appeal is being quite prescriptive’ (EB3). Participants accepted that the Court of Appeal should give guidance, which was important ‘so that [judges are not] reinventing the wheel every time ... and also so that there should be some conformity of practice’ (EB5). However, the concern was that ‘the guidance which is being offered in relocation cases is probably too directive’ (EB5).

A number of participants linked this trend to the role of Thorpe LJ, who, they noted, hears virtually all international relocation appeals:¹³³

EB7: I know the other judges haven't stepped in to change it, but it really is Lord Justice Thorpe. ... I think in relocation cases ... [the other judges] may not absolutely agree with him, but they let him get on with it. ... The general view [at the bar] is that when an appeal goes in from a relocation case, Lord Justice Thorpe will be the one who

¹³⁰ *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485, [22].

¹³¹ A senior barrister, who was clear that guidance from the Court of Appeal was generally beneficial, said that ‘the current [approach] is in part due to clear, consistent thinking from Lord Justice Thorpe’ (EB5), while another participant noted Thorpe LJ’s ‘extraordinary influence on family law’ (EJy). One text has approvingly described Thorpe LJ’s role in international family law as ‘almost Denningesque’: D Hodson, *A Practical Guide to International Family Law* (Jordan Publishing, London: 2008), v.

¹³² These points mirror closely those made by M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351, 369-371; see Chapter 3, text from n 132.

¹³³ Thorpe LJ himself noted that he ‘see[s] almost all those cases’: *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [18].

has a look at it. He controls what comes into the Court of Appeal, ... and he will make sure he is sitting in particular cases.

EJy: The system, satisfactory or otherwise, is that in effect all relocation cases are listed in front of Lord Justice Thorpe, who is Head of International Family Law and is thus regarded as the guru ... of international relocation.¹³⁴

EB1: Generally, if you're fighting a relocation case [in the Court of Appeal], you'll find that Lord Justice Thorpe is one of the judges, and he has very strong views about [relocation] and he doesn't apologise for it.

In other words, the Court of Appeal took a particular line on relocation cases (which many practitioners characterised as a presumption favouring of relocation), and practitioners thought this was primarily driven by Thorpe LJ.¹³⁵

Practitioners were particularly concerned that, in addition to providing strong guidance on relocation, the Court of Appeal appeared willing to interfere with trial judges' decisions in relocation cases. Outside the relocation context, participants thought that judges had 'such wide discretion that if you really want to appeal a Children Act case you have got to be raving mad' (ES3). Such an approach fits with repeated rulings from the House of Lords about the appellate function in family law appeals: 'the appellate court should only interfere when they consider that the judge of first instance ... has exceeded the generous ambit

¹³⁴ Thorpe LJ became Head of International Family Law in 2005, but was highly influential in international relocation cases before that: between his Lordship's appointment to the Court of Appeal in October 1995 and becoming Head of International Family Law in April 2005, there have been only three reported international relocation cases in which Thorpe LJ did not sit: *Re K (Residence Order: Securing Contact)* [1999] 1 FLR 583 (EWCA) and *Re A (Permission to Remove Child from Jurisdiction: Human Rights)* [2000] 2 FLR 225 (EWCA); *Re H (A Child)* [2010] EWCA Civ 915, unreported.

¹³⁵ Several participants noted that Thorpe LJ was not alone in this approach, which was 'no more than the thinking that came from Lord Justice Ormrod beforehand' (EB5)

within which reasonable disagreement is possible'.¹³⁶

However, many participants thought that this general approach was not followed in relocation cases. When asked how much respect the Court of Appeal gave judges' discretion in most children cases, one solicitor laughed and said, '[m]ore than in relocation cases, I think is the answer!' (ES2). She went on:

ES2: And if you compare [relocation], not only with other children cases, but if you compare it to ancillary relief cases, ... [the Court of Appeal says] it might not have been a decision that [they] would have made, but it was within [the trial judge's] discretion. That doesn't seem to apply in relocation cases.

One barrister made this point with reference to a case he had read:¹³⁷

EB3: There is a very interesting case where a judge at first instance refused the [mother] leave to go abroad ... and the Court of Appeal said that there was a factor in the case which the judge had not properly taken into consideration, and it was a sentence in the court welfare report ... about the effect on the mother if the court refused leave, and ... on that issue – because they could find no other reason to criticise the judgment – they let her go, and I thought that there was a sort of bogusness about it, because they picked up on one sentence of text ... and the Court of Appeal used this almost as a ruse, I felt, to justify [their decision]. ... I just remember reading it at the time and thinking, "that's a bit of a stitch-up, really".

This approach should be compared with *Piglowska v Piglowski*, warning that appellate judges 'should not substitute their own discretion for that of the judge by a narrow textual

¹³⁶ *G v G (Minors: Custody Appeal)* [1985] FLR 894 (HL), 899; see also *Piglowska v Piglowski* [1999] 2 FLR 763 (HL); *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, [2005] 2 FLR 802.

¹³⁷ Probably *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

analysis which enables them to claim that he misdirected himself”.¹³⁸ As another participant put it, appellate judges

ES5: ...don't have the advantage of seeing these individuals in the witness box ... It might be that the judge was picking up ... something implicit ... which wasn't [made] explicit within the judgment, perhaps for good reasons, [such as] because they didn't want to upset the person.

The link between the Court of Appeal's 'strong views' about how relocation cases should be decided, its interventionism in relocation appeals, and the role of Thorpe LJ, was made by one senior barrister. As she put it, '[a]lmost all [child law] appeals fail ... although with Lord Justice Thorpe people did think he was often allowing appeals [in relocation cases] despite that, which he wouldn't have allowed if they had gone the other way' (EB7).

In summary, participants' evaluations of English relocation law were somewhat varied. One group of practitioners in this study defended *Payne*, arguing that it provided a good discipline for relocation disputes, so long as the questions posed were treated rigorously. However, almost all participants (including those who supported *Payne*) identified aspects which they thought could be improved, and many were unconvinced that *Payne* represented the right approach at all. In taking this view, these participants relied on a combination of three considerations: first, that the law continued to base itself on principles which no longer reflected prevailing norms; that these principles inappropriately prioritised one factor above others; and that the effect, reinforced by a directive and interventionist Court of Appeal, was 'a presumption in all but name' in favour of relocation (EB3).

¹³⁸ *Piglowska v Piglowski* [1999] 2 FLR 763 (HL), 748; see also Chapter 3, text from n 129.

With these conclusions in mind, we come to the final section of this Chapter, which asks how practitioners would re-write relocation law if they were in a position to do so. It will not be surprising, given the variation seen in this section, that participants were split in their views on what the law should look like.

Practitioners' Views on What Relocation Law Should Look Like:

In asking what relocation law should look like, English practitioners in this study divided into two groups. One took the view that the core of the English approach to relocation law was correct,¹³⁹ and any changes they would make were minor amendments rather than wholesale reform.¹⁴⁰ One judge, who we saw earlier supported the *Payne* approach,¹⁴¹ said:

EJx: The problem with relocation cases is that, in most relocation cases, each parent has an equally valid position, but they are very stark decisions, and I think you have to have a starting point, and I think the starting point of *Payne* is a good discipline... I do not think it would make things better all round to have a different test, because I think a different test would just create more heartache in a different direction.

A senior barrister, asked whether she would change the law, said similarly, 'no, I think the *Payne* test ... with the supplementary caselaw and guidance from the Court of Appeal is fine.

¹³⁹ Some actively supported *Payne*; others went only so far as to say that 'I can't think of anything at the moment that I would change particularly' (EJx).

¹⁴⁰ Some of these points have been mentioned already, such as the suggestion of automatic representation of children (above, at nn 101-104) and that 'lifestyle' cases should be treated more sceptically than other cases (above, at nn 90-94).

¹⁴¹ Above, esp at n 71.

... *Payne* plus ... *B and S* plus the two recent ones are probably fine' (EB6).¹⁴²

Amongst the group of participants who supported *Payne*, there was an acceptance that this was 'not everybody's view' (EJx), and several commented that 'there is a general impression at the bar that the Lords are dying to get this issue' (EB6).¹⁴³ These participants did not, themselves, seek an appeal because they saw no need to revise the law, but others were hopeful that 'a relocation case ... is bound to arise quite soon' (EB5). Some who favoured an appeal had clear views that *Payne* was wrong, and sought change; others said that 'it is not necessarily even that the Court of Appeal has got it wrong, but ... there is now enough debate around the subject of our relocation law that it is time for it to go to the [Supreme Court]' (EB5).

Some participants were unsure what would happen if a relocation appeal was heard: 'would [they] be endorsing *Payne* or what ... and if they did come up with something new, would those opinions be joined-up thinking...?' (EB6). Other participants had clearer ideas about how the Supreme Court would, or should, decide the case.

In general, these participants wanted to remove what they saw as the pre-emptive guidance of *Payne* and to leave all factors to be balanced at trial, thus allowing 'competent judges to make decisions about relocation with rather more light-handed guidance' (EB5).

¹⁴² Citing *Payne*; *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043 and, probably, *Re W (Leave to Remove)* [2008] EWCA Civ 538, [2008] 2 FLR 1170 and *Re B (Leave to Remove)* [2008] EWCA Civ 1034, [2008] 2 FLR 2059.

¹⁴³ EB6 said that she did not know whether the Lords really did want to hear a relocation appeal or not. One judge, who agreed that 'there is a general feeling that it is time to look at it again', said that 'it is difficult to say that this vague aspiration for looking at the test again stands any real chance of turning into something beneficial and concrete' (EJy).

One solicitor said simply that she wanted to see ‘a checklist without there being any order in the checklist’ (ES2); a barrister similarly said he ‘would demote the *Payne* factor of the likely emotional effect on the residential parent’ (EB2) to make the enquiry more balanced.

Many practitioners who sought a change in the law thought that the Children Act provided adequate tools for disposing of relocation disputes: ‘obviously you have got the welfare checklist under the Children Act ... and I think [using] that would be better’ (ES2).¹⁴⁴ One barrister, who agreed that ‘there is nothing at all in section 1 [of the Children Act] that is inadequate to deal with relocation cases’ (EB5), thought that the Supreme Court would take the same approach:¹⁴⁵

EB5: I wouldn’t be surprised if the [Supreme Court] ... were to say ... “let’s go back to what the statute says”. ... The change would be, rather like a picture restorer, ... to take off some of the varnish. ... So I wouldn’t be surprised if there wasn’t, not the addition but rather the stripping away of some of the considerations that have been put forward.

This view fitted with the ‘ideal jurisprudential world’ of one judge:

EJy: Of course, the welfare of the child should be paramount, should direct the outcome, and in the assessment of welfare there has to be the most sensitive consideration of the rival detriments to granting and refusing [leave to relocate] – the effect on the applicant of refusal and the effect of grant on the [child’s] relationship with the respondent.

Q: So, does that amount to a section 1 plus 1(3) welfare decision, but with those two factors highlighted as needing to be assessed and

¹⁴⁴ Children Act 1989, s 1(3).

¹⁴⁵ However, he also raised the possibility that the Supreme Court ‘may very well ... replace [*Payne*] with something which will be equally controversial’ (EB5).

balanced by the judge?

EJy: Quite.

A similar outcome was sought by EB3 who, worried that the Supreme Court might ‘fudge the issue’, thought he might

EB3: ...seek to consider a new section 13, or section 13A, of the Children Act, with certain factors that ought to be considered when [deciding] a relocation case, one of them being the effect on both the applicant and the respondent of either the granting ... or the refusing of an application, and the attendant effect thereby on the child.

These comments fit with these practitioners’ concerns about *Payne* and its perceived presumption in favour of relocation, stemming from an over-emphasis on the applicant’s well-being and an under-emphasis on the child’s relationship with the respondent. The aim was to examine all factors as they appeared from the evidence and, taking into account both long-term and short-term consequences, to decide which option was best for the child without pre-determining the issues.¹⁴⁶

It will be recalled, however, that participants were not all in agreement about what the welfare principle called for in relocation cases,¹⁴⁷ and some rejected the suggestion ‘that the English courts have isolated one factor at the expense of welfare’ (EB7). They saw *Payne* as guiding judges to the welfare solution, and saw no incompatibility between *Payne* and the statutory obligation to make the child’s welfare the paramount consideration.¹⁴⁸ We return

¹⁴⁶ Cf Munby J’s suggested approach in *Re X and Y (Leave to Remove from Jurisdiction: No Order Principle)* [2001] 2 FLR 118 (EWHC), discussed in Chapter 3, text from n 85.

¹⁴⁷ Above, text from n 117.

¹⁴⁸ Children Act 1989, s 1(1).

more generally to relocation law and the welfare principle in Chapter 7.

Conclusions:

This Chapter has explored English practitioners' experiences of relocation law in practice. Practitioners' understandings fit with the findings of Chapter 3, suggesting that the practice in the trial courts conforms with the approach set by the Court of Appeal.¹⁴⁹ Practitioners' summaries of the law closely matched Thorpe LJ's suggested 'discipline',¹⁵⁰ the influence of which extended through categories of relocation disputes to which it does not strictly apply.¹⁵¹

However, while the law was well understood, there were varied views when evaluating that law. One group of participants was, in general, supportive of *Payne*, seeing it as a good approach to a difficult area. This group, comprising four female participants, identified particular aspects of *Payne* which they would change, but thought generally that the Court of Appeal had identified the correct approach. Other participants disagreed, and were uncomfortable with the reasoning which underpinned *Payne*. This group, dominated by male participants, thought that *Payne* unjustifiably promoted the applicant's well-being over other factors, while simultaneously under-valuing the child's relationship with the respondent.

¹⁴⁹ Cf Thorpe LJ's view, expressed about a year prior to interviews: 'I certainly have no impression that the principles in *Payne* are being misunderstood [or] misapplied': *Re G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587, [18].

¹⁵⁰ *Payne*, [40]-[41].

¹⁵¹ That is, international relocation cases involving truly shared care, and internal relocation cases.

There were, in particular, questions raised about the connection between the current law and the welfare principle. Some thought that *Payne* marked an application of the welfare principle, identifying particular aspects of welfare which were relevant to relocation; others thought this approach was ‘compromising’ the welfare principle (EB3).

It followed from this divergence of views that some participants saw little that needed changing in the law, while others sought to reconsider the entire approach to relocation, with a Supreme Court decision being the favoured solution. The change which these participants hoped to achieve was a return to ‘the welfare principle ... with a small amount of underlining and emphasis – I don’t particularly see the need to impose a code on top of it’ (EB5). Whereas they thought that *Payne* involved ‘a very strong principle ... [which] the Court of Appeal is very willing to step in and ... defend’ (EB1), these participants favoured highlighting certain factors but then leaving ‘competent judges to make decisions about relocation with rather more light-handed guidance’ (EB5). (Those who supported *Payne* thought that removing its guidance risked missing important long-term considerations.)

The small size of this study makes it impossible to know whether the gendered division of views is representative or not, and certainly there were individual participants who did not fit the general pattern.¹⁵² If there is a difference, it is interesting to wonder what its cause might be. One possibility is that men are more sympathetic to arguments favouring contact with non-resident parents (typically fathers), while women favour arguments promoting resident parents’ autonomy (such parents being mainly mothers). Another possibility is that

¹⁵² For instance, a female solicitor was strongly critical of *Payne* (ES2), and several male participants did not seek changes to the law (though they tended not to defend the current approach in principle, supporting instead its practical utility).

men's greater focus on 'justice' makes them dissatisfied with a process which they consider biased, whereas women's greater focus on 'care' allows them to see past these procedural questions and focus on case outcomes.

Those English practitioners who were unhappy with the current authorities on relocation favoured instead an approach which bears considerable resemblance to the New Zealand law. The criticisms made of *Payne* made by many English practitioners reflect those of the New Zealand courts, in particular that *Payne* involves 'presumptive or *a priori* weighing' of factors;¹⁵³ as one New Zealand case put it:

...*Payne* ... effectively constricts the welfare test by assuming too readily that the enhanced happiness of the custodial parent who is allowed to relocate will necessarily enhance the welfare of the child to a greater degree than the child's continuing regular contact with the other parent. In some cases, that may be true, but as a generality its validity and logic are surely open to question.¹⁵⁴

We saw in Chapter 4 that, when applied to hypothetical cases, the New Zealand approach appeared markedly different from the English law, and seemed less favourable to relocation. Given that many English practitioners considered that an approach broadly similar to the New Zealand law would be better than *Payne*, it is worth looking at how New Zealand practitioners view that law in practice. In order to assess whether the grass truly is greener in New Zealand, it is necessary to ask whether New Zealand practitioners are more satisfied with the application of that law than are English practitioners with the application of *Payne*. The New Zealand experience may also tell us something about potential pitfalls

¹⁵³ *D v S* [2002] NZFLR 116 (NZCA), [47].

¹⁵⁴ *Gray v McGill* [2001] NZFLR 782 (NZFC), [6].

which accompany the kind of reforms which some English practitioners sought. It is to these questions that we turn in Chapter 6.

Chapter 6

Practitioners' Views on New Zealand Relocation Law

New Zealand's courts, as we saw in Chapter 3, rejected the English approach to relocation,¹ which was said to be 'marked by the emphasis on guidelines ... and by the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer'.² Instead, New Zealand courts were to apply a 'wider all-factor child-centred approach',³ though there may be some degree of prioritisation within the statutory principles applicable to relocation cases.⁴

In Chapter 4, we suggested (based on practitioners' responses to three hypothetical cases) that the application of the New Zealand approach might lead to relocation applications being treated less favourably than they would be under the English law. We then saw, in Chapter 5, that many English practitioners were uncomfortable with the current

¹ *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, '*Payne*').

² *D v S* [2002] NZFLR 116 (NZCA) (hereafter, '*D v S*'), [46].

³ *Ibid*, [47].

⁴ Care of Children Act 2004 (hereafter, '*COCA*'); *Bashir v Kacem* [2010] NZCA 96, unreported; but note that this case was heard on appeal in the Supreme Court on 12 August 2010, with judgment pending at time of writing.

approach in England. Although some English practitioners strongly defended *Payne*, a significant group favoured changing the law to ‘take off some of the varnish’ and leave judges ‘to make decisions about relocation with rather more light-handed guidance’ (as one English barrister put it: EB5).⁵ It was suggested that this approach might be similar to that adopted in New Zealand, and that the question was whether New Zealand practitioners were more content with their law than were many English practitioners.⁶ We also asked whether adopting a relocation law more akin to New Zealand’s might involve any pitfalls of which English practitioners should be aware.

In this chapter, therefore, we explore the views of the 22 New Zealand practitioners who participated in this research. We examine practitioners’ experiences of how relocation law is applied ‘on the ground’ in New Zealand (that is, in day-to-day cases, rather than those of special difficulty or interest which reach the law reports),⁷ and ask how practitioners evaluate or critique the law. It will be seen that the story which New Zealanders tell is in many ways very different from the English story in Chapter 5. New Zealanders had a clear understanding of the law but, unlike the English, there was little dissatisfaction with the approach set out by the higher courts. However, while practitioners agreed that the New Zealand Court of Appeal had set out the appropriate approach to relocation disputes, there was a concern amongst many that the law in practice was deviating from that approach.

⁵ Chapter 5, text from n 143.

⁶ Chapter 5, text from n 153.

⁷ Note, however, that a higher proportion of first instance decisions from the Family Court are reported in the New Zealand Family Law Reports than reach England’s specialist reports.

Methodology:

The methodology for the empirical research was set out in Chapter 2. There are 44 participants in total, but this chapter is concerned only with the 22 New Zealand participants. Table 6.1 lists these participants according to their professional group, their sex, the length of time they had been in practice and the approximate number of relocation trials they dealt with each year, and shows the identifying tags by which they are referred to in the text. There were six judges (all Family Court judges), seven specialist barristers (referred to as ‘barristers’), six lawyers who worked as solicitors and barristers (referred to as ‘solicitors’) and three psychologists who were experienced in working as expert advisors to the Family Court. There were nine men and 13 women. Identifying tags indicate nationality⁸ and professional group,⁹ such that, for example, NB4 is an New Zealand barrister, and NC2 is New Zealand psychologist who works as a court advisor.

It is important to note that New Zealand interviews took place in February and March 2009, prior to the Court of Appeal decision in *Bashir v Kacem*.¹⁰ Practitioners’ comments therefore relate to the law as it was in early 2009, though *Bashir* does not appear to have marked a significant change from the position in 2009.¹¹

⁸ In this Chapter, all participants are New Zealanders, and so identifying tags start with ‘N’.

⁹ ‘J’ for judges, ‘B’ for specialist barristers, ‘S’ for lawyers who are both solicitors and barristers, and ‘C’ for psychologists who work as court advisors.

¹⁰ [2010] NZCA 96, unreported; the case went to the Supreme Court on 12 August 2010, with judgment not given at time of writing.

¹¹ This view was confirmed by recent communication with four participants: NJ4, NB6, NB7, NS2.

Table 6.1 – List of New Zealand participants by identifying tag, showing nationality, professional group, sex,¹² time in practice,¹³ and approximate number of relocation trials per year

Identifying Tag	Professional Group	Sex	Time in Practice (Years)	Approximate Number of Relocation Trials Per Year
NJ1	Judge	-	-	9-14
NJ2		-	-	5/6
NJ3		-	-	3/4
NJ4		-	-	5/6
NJ5		-	-	5/6
NJ6		-	-	10-12
NB1	Barrister	F	23	2/3
NB2		M	25	1/2
NB3		F	15	1/2
NB4		M	40	3/4
NB5		F	35	3/4
NB6		F	21	3
NB7		M	25	1/2
NS1	Solicitor/ Barrister	M	23	2/3
NS2		F	30	1/2
NS3		F	22	3
NS4		F	18	2/3
NS5		F	19	2/3
NS6		F	31	1
NC1	Court Advisor (Psychologist)	M	25	7/8
NC2		F	25	12
NC3		M	13	6

Practitioners' Experiences of the Practice of New Zealand Relocation

Law:

Before turning to practitioners' comments on the law, it is worth reminding ourselves of one or two points about the context in which relocation disputes are decided in New Zealand. A particularly significant aspect is the increase in shared care after parental separation seen in

¹² In the interests of preserving anonymity, the sex of judges is not included in the table. There were three men and three women amongst the New Zealand judges.

¹³ In the interests of preserving anonymity, the time that judges had been on the bench is not included in the table; the average time sitting full time was 8.5 years.

recent years.¹⁴ New Zealand legislation provides for day-to-day care (the equivalent of residence in England) and for contact.¹⁵ The Principal Family Court Judge has said that he assumes that parents will share day-to-day care though not necessarily equally; but if a parent seeks equal time, he will make that order unless there are specific reasons not to.¹⁶ Although there is no legal presumption of equal sharing, participants thought that the practice of the courts had ‘moved absolutely towards a 50:50 regime’ (NB5). This trend, they thought, had been reinforced by the 2004 legislation, but ‘before the Care of Children Act the courts were already moving towards shared care being the norm’ (NS4).¹⁷

The other point to note is the family court structure in New Zealand.¹⁸ Relocation cases are heard in the specialist Family Court. Appeals are heard in the High Court, which is a generalist court with the power to overturn the Family Court on the simple basis that it disagrees with the decision made.¹⁹ Further appeals are possible to the Court of Appeal and Supreme Court on points of law.

With these points in mind, we turn to practitioners’ experiences of the practice of relocation law in New Zealand. Consistently with what we saw in Chapter 3, participants were clear that there was only one legal approach to relocation in New Zealand – that is, the

¹⁴ Chapter 3, text from n 259.

¹⁵ COCA, s 48.

¹⁶ Judge Peter Boshier, quoted in F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009), 73.

¹⁷ See, eg, *W v C* [2000] NZFLR 1057 (NZFC).

¹⁸ Chapter 3, text from n 18.

¹⁹ See, eg, *B v B [Relocation]* [2008] NZFLR 1083 (NZHC).

approach under *D v S* – unlike the three distinct approaches seen in England.²⁰ Because the law takes an ‘all-factor child-centred approach’,²¹ all relocation disputes come within the same analytical structure, since different background facts (care arrangements, proposed destination, etc) are taken simply to be relevant factors.

Before turning to practitioners’ discussions of *D v S*, it is worth reminding ourselves of the key aspects of that decision. The Court of Appeal emphasised seven points; to summarise, those points were:

1. Although the child’s welfare was ‘not the only consideration’ (because, for example, ‘freedom of movement is an important value in a mobile community’), it was paramount, meaning that it ‘rules upon or determines the course to be followed’.²²
2. ‘[T]he approach mandated by [the welfare principle] and the emphasis on the parents’ responsibilities for the wellbeing of the child are wholly consistent with the relevant provisions of the United Nations Convention on the Rights of the Child’.²³
3. The court needed to consider all aspects of welfare and ‘weigh all relevant factors in the balance in determining what will be in the best interests of the child. It is necessarily a predictive assessment. It is a decision about the future. It is not a reward

²⁰ Chapter 3, text at nn 149-181.

²¹ *D v S*, [47]

²² *Ibid*, [30], quoting *J v C* [1970] AC 668 (HL), 710-711.

²³ *Ibid*, [31].

for past behaviour. There is no room for *a priori* assumptions'.²⁴

4. There must be no presumptions about which parent will be best suited to being a child's primary carer based on gender.²⁵
5. Decisions about relocation may be affected by 'the nature and duration of the existing custodial arrangements'.²⁶
6. Decisions of foreign courts were of limited use, because even if those courts were applying the welfare principle, 'the social landscape in which it is applied will not replicate our local circumstances.' Two examples of differences were 'the growth and degree of involvement of both parents in family care, and a clear move in Family Court orders, away from ... concepts of sole custody and access, to shared care'.²⁷
7. Relocation cases were difficult and Family Court judges had given anxious thought as to how they should be resolved. It would not be appropriate to give further guidance, because that would interfere with the individualised assessment required in every case.²⁸

In particular, as the court went on to say, the English approach was 'not an appropriate

²⁴ Ibid, [32]-[33].

²⁵ Ibid, [34].

²⁶ Ibid, [35].

²⁷ Ibid, [36].

²⁸ Ibid, [37]-[38].

model for New Zealand Courts. The guideline approach in *Payne v Payne*, with a clear emphasis on one only of the relevant factors to be weighed, is inconsistent with the approach required in New Zealand'.²⁹ It can be seen how similar these criticisms of *Payne*, and the suggested 'appropriate' approach, are to the 'ideal jurisprudential world' (EJ1) sought by many English practitioners.³⁰

New Zealand participants outlined *D v S* in their summaries of the law. As one judge put it, 'we look at all the facts as they are and weigh everything in the balance and come to a decision. So [in] New Zealand ... we have no *a priori* assumptions, and each case is weighed on its own merits' (NJ3). Many participants stressed that the court would engage in 'a multi-factorial analysis' (NB6),³¹ and that 'the court is going to look at this from the point of view of the child' (NB5).

Participants frequently listed relevant questions for a court faced with a relocation case:

NJ6: ...what are the child's needs? How do we meet those needs? What would happen if there was a relocation? How would it impact on this child? ... [P]robably you would look at the nature of the relationship between the child and each of the parents. The parent who would have his or her contact diminished by the relocation, how strong is his or her relationship? How will that relationship be sustained if the relocation goes ahead? Do the parents co-operate? Is it likely that, with relocation, the father (or the mother) is not going to be able to afford to have contact? How will that affect the child? Is the

²⁹ Ibid, [50].

³⁰ Chapter 5, text from n 143.

³¹ For similar phrases in reported cases, see, eg, *NW v MW [Parenting Order]* [2006] NZFLR 485 (NZFC), [10]; *ACCS v AVMB [Parenting Orders]* [2006] NZFLR 986 (NZHC), [55]; *LH v PH [Relocation]* [2007] NZFLR 737 (NZHC), [8]; *S v L [Relocation]* [2008] NZFLR 237 (NZHC), [26].

relocating parent really doing it for the child's benefit, or for his or her own benefit...? That's how I would think about it - always from the child's perspective.

NS1: The ultimate balance for a judge is between, on the one hand, the damage one does to the relationship between the child and ... the father if mum relocates – and so that turns on things like: what is that relationship like? What sort of contact have they had? What is the child hanging around for? – balanced against the cogency of the reasons for mum wanting to relocate and the potential injury to her parenting ability if she is held somewhere that she doesn't want to be.

The *D v S* approach must, to some extent, be read in conjunction with the Care of Children Act 2004. We will see that the Act's effect on relocation was a matter of contention for practitioners,³² but two aspects are significant at this point. One is the introduction of six 'principles relevant to [a] child's welfare and best interests'.³³ The court is obliged to 'take into account' any of the principles which are relevant,³⁴ as well as any other relevant factors.³⁵ Although all the principles might be relevant to a relocation dispute,³⁶ the two which have come to prominence are:

- (b) there should be continuity in arrangements for the child's care, development and upbringing, and the child's relationships with his or her family, family group, whānau, hapu, or iwi,^[37] should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents):

³² Below, text from n 69.

³³ COCA, s 5.

³⁴ COCA, s 4(5).

³⁵ COCA, s 4(6).

³⁶ See Chapter 3, text from n 211.

³⁷ Māori terms, roughly translated as 'family' (broadly conceived), 'sub-tribe' and 'tribe'.

- (d) relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing.³⁸

Practitioners frequently mentioned these 'section 5 imperatives' (NJ5), but there was some divergence of views on whether they marked a practical difference in approach. One judge thought there was some change: 'Pre-COCA, I didn't *have* to take anything into account, [but] now I do: if they are relevant, I *have* to take into account those matters in section 5, so there must be a difference' (NJ5). However, another judge spoke for most participants, explaining that 'although *D v S* was before the Care of Children Act, I think the legislation has codified, in effect, what *D v S* said, and has put it very clearly in terms of the principles that we have to apply, the section 5 principles in the Act' (NJ1). In other words, the section 5 principles were a statutory expression of principles which had already underpinned *D v S*.³⁹ This approach seems broadly in line with the subsequent decision in *Bashir v Kacem*,⁴⁰ though *Bashir* stresses the need to consider all the section 5 principles to determine which are relevant to each decision.

A more substantive modification to all disputes involving children was seen in the next section of the Act, requiring that the child 'must be given reasonable opportunities to express views on matters affecting the child' and that any views expressed 'must be taken into account'.⁴¹ Participants thought that this section placed 'a stronger emphasis on the

³⁸ COCA, s 5(b) and (d).

³⁹ See also The Hon B D Inglis, 'The Care of Children Act and Separated Parents' [2005] NZLJ 233, 234, saying that COCA 'reinforces' the *D v S* approach to child law.

⁴⁰ [2010] NZCA 96, unreported.

⁴¹ COCA, s 6; see Chapter 3, text from n 215.

views of children' (NB2) than the previous legislation had.⁴²

Overall, therefore, participants thought that *D v S* continued to be their guiding authority, albeit supplemented by COCA. However, although participants were clear that there was only one legal approach, that did not mean that it was not possible, looking at the practice of the courts, to categorise relocation cases. Two senior barristers, interviewed together, said they thought that the court's approach depended on the applicant's reason for relocating, though they did not think that this demarcation was explicit:

NB4: Broadly speaking, our courts have adopted a three-tier approach, looking at the purpose of the relocation. If you suddenly decide that you'd like to go and live [somewhere else] because you have always heard that [it] is a lovely place and you think you can get a good job, but you have no family support or anything else, it just seems like a really good idea, the answer is no.

NB5: Or if you're trying to get away from the bastard, the answer will be no.

NB4: At the other end is the person who wants to return to the bosom of the family, who ... has tremendous family support, family ties and all the rest of it – that has got a much greater chance of success. And then you have got the one in the middle, of the person who has separated, has re-partnered, and the new partner is offered a work opportunity, which is completely genuine, [or something like that]. Those are the really difficult cases. ... Those are the ones that we can't generalise about.

A judge agreed that the reason for relocating might be significant:⁴³ 'if you categorise them into return cases and other reasons, return cases had much higher chance of success than

⁴² Guardianship Act 1968, s 23.

⁴³ This judge also thought that the personalities of the parties could be crucial, and referred to 'what I call "the bastard factor", which is an unwritten rule ... – sometimes called "the prick factor" – [that] if you get one party who is a prick, so you come to the conclusion that the child isn't going to get that much out of a relationship with this person – nearly always the man – ... then you would be more inclined to allow the relocation' (NJ3). Cf Chapter 4, n 62: in Tom's case, NJ3 thought that 'unless ... this father was a bit of a prick, I wouldn't think [the mother had] much chance of success'.

other cases, [such as] job reasons or lifestyle. ... [Lifestyle cases] are much harder' (NJ3).⁴⁴

It is also notable that, within the 'all-factor child-centred approach',⁴⁵ participants consistently identified one factor as being particularly significant, namely the child's relationship with the non-relocating parent. This point is addressed in detail below,⁴⁶ but in summary many participants stressed that 'the courts are anxious to ensure that a child has a constructive relationship with both parents, and would not lightly agree to an arrangement that didn't promote that' (NB7).⁴⁷

Two points in relation to the practice of the law can be noted here. These points look at so-called 'unilateral moves' (where a parent moves with the child without first obtaining permission from the other parent or the court), and questions about whether the other parent ought to relocate as well to be near the child. Both points relate to the significance of the child's relationship with the non-relocating parent because both are about keeping the child in the same location as both parents. As we will see, unilateral moves are strongly discouraged and parents frequently ordered to return with the child; conversely, in cases where relocation is being considered, the court often enquires as to whether the other parent might move as well.

⁴⁴ English practitioners similarly thought that lifestyle cases were the most difficult to succeed in bringing: Chapter 5, text after n 91.

⁴⁵ *D v S*, [47].

⁴⁶ Below, text from n 81.

⁴⁷ This approach is supported by principles in COCA, such as s 5(b), that 'in particular the child should have continuing relationships with both ... parents'.

Starting with unilateral moves,⁴⁸ many participants suggested that, in advising a client, ‘[t]he first message is not just to do it, because ... parents have been required to come back’ (NS4). A senior barrister described moving without first obtaining permission as ‘a bad mistake – we never advise clients to do that’ (NB5). There were two reasons why unilateral moves were so inadvisable. The first was simply that such a move ‘would put you on the back foot’ when the court heard your substantive application (NS5). The second, more serious reason, was the very real chance that the court would order the child returned.

Many participants reported direct experience of having children ordered back, either by the parent having to return, or by a change in residence: ‘some judges think so ill of that attitude that they will change [the child’s primary] care’ (NB6). Another barrister’s experience was typical:

NB4: ...without reference to the father, [the mother] relocated [about 90 minutes’ drive away]. The father immediately applied to have the children brought back, ... and at first call [the judge] said, “I give you 24 hours, mother, to bring those children back. If you don’t, custody changes to the father instantaneously... I will not have children removed without the consent of this court.”⁴⁹

There were mixed views about this approach, as we will see in the following section.⁵⁰ It might be noted at this point, though, that there are significant gender issues involved in a legal approach which forces a parent to return to a particular location or lose the care of their

⁴⁸ Cf English law, where this category of case is unknown because relocation within the UK is automatically allowed: see Chapter 3, text from n 168.

⁴⁹ Cf English cases like *Re G (Residence: Same-Sex Parents)* [2006] UKHL 43, [2006] 2 FLR 629, where a unilateral move designed to end contact was barely addressed by the court; see Chapter 3, text from n 176.

⁵⁰ Below, text from n 105.

child.⁵¹ Two aspects are particularly noteworthy. One is that many women migrate internally, sometimes over relatively short distances, to escape domestic violence,⁵² and summarily ordering their return may expose them (and their children) to the risk of significant physical or psychological harm.⁵³ The other is that moves are often motivated by job opportunities, new partners, or to be nearer family and support networks. All these reasons have significant connection to women's capacity to escape or avoid poverty, either by providing money or by providing childcare assistance, thereby enabling additional paid employment to be undertaken.⁵⁴

The other aspect of the New Zealand practice to consider at this point is the possibility that the parent opposing the relocation ought to consider moving to the new location as well.⁵⁵ In one reported case, a Family Court judge said that '[t]he party endeavouring to stop relocation ... has as much an obligation to show why he or she cannot shift to the new place as to why the children should not be allowed to shift'.⁵⁶ Several participants adopted a

⁵¹ See, eg, J Behrens, 'A Feminist Perspective on *B and B* (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65; S Boyd, 'Autonomy for Mothers? Relational Theory and Parenting Apart' (2010) 18 *Feminist Legal Studies* forthcoming; R George, 'Regulating Responsibilities in Relocation Disputes' in J Bridgeman, H Keating and C Lind (eds) *Regulating Family Responsibilities* (Ashgate, Aldershot: 2011), forthcoming.

⁵² See, eg, J Bowermaster, 'Relocation Custody Disputes Involving Domestic Violence' (1998) 46 *U Kansas Law Rev* 433.

⁵³ Cf *BDD v IBG [Relocation]* [2007] NZFLR 1 (NZFC), [53], where serious violence against the mother carried little weight: 'Notwithstanding what I am sure was an abusive relationship with [the father], the fact is that stability existed ... and a long running care arrangement was in place'.

⁵⁴ See, eg, M Hetherington and J Kelly, *For Better or For Worse: Divorce Reconsidered* (Norton, New York: 2002), esp 88 and 165; M Daly and K Rake, *Gender and the Welfare State: Care, Work and Welfare in Europe* (Polity, London: 2003).

⁵⁵ See M Weiner, 'Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation' (2007) 40 *Uni of California Davis LR* 1747.

⁵⁶ *NW v MW [Parenting Order]* [2006] NZFLR 485 (NZFC), [10]; see also *V v F* (HC Wellington, CIV-2006-485-1573, 1 Dec 2006), [131]; *KAR v PWM [Parenting Order and Relocation]* [2009] NZFLR 915 (NZFC), [37].

similar view, usually linking it to gender equality and fairness – that is, since non-residential parents (usually fathers) are free to relocate without the court’s permission, there was a perceived unfairness in imposing restrictions on the movement of resident parents (usually mothers) without at least asking whether both parents might be able to move instead:

NJ2: I am often aware of a double standard that is applied, and I think it is a gender issue really... As between the parents, there is not a lot of justice in it... The aim is to keep both parents within a reasonable radius of the child, so ... why don’t both parents move? ... I do sometimes ask that.

NJ4: I am always open to hearing why somebody wants to move, and a lot of that is based on the fact that the non-custodial parent ... can do what they like: they can up and move and leave and nobody makes them accountable... I really do make sure that there is a lot of cross-examination on whether the father can actually get up and move. ... And ... if these fathers really want to have a relationship with their children, why wouldn’t they follow them around the world?

This final remark was echoed by a senior barrister when he said that long-distance relocation usually means the end of a significant relationship between the left-behind parent and the child ‘unless [that parent is] prepared to relocate – and if their focus was on the child, they should be’ (NB7):

NB7: All these relocation issues could be solved by the relocating parent being allowed to leave and the so-called left behind parent saying, “I’m not going to be left behind, I’m coming too!” So there is another solution. ... It is all about choices, and I do think that is something that needs to be looked at, not from a legal perspective but by standing back and [asking]: “when all this is over, when all the decisions have been taken and the appeals have been lodged and lost, was there another solution?” Yes, there was: let her go, and follow her.

Again, the gender implications here are significant. Participants were aware that the

restrictions on carers (women) are not usually matched by those on non-carers (men),⁵⁷ but thought that the law might go some way towards rectifying that imbalance by enquiring whether the non-resident parent might relocate as well, if his relationship with the child justified considering restrictions on the mother's relocation.⁵⁸

To summarise this section, the story told by New Zealanders shows a strong correlation between *D v S* and the daily practice of relocation law. The New Zealand law looks at all the factors relevant to the child's life when assessing relocation applications, guided in particular by the six statutory principles.⁵⁹ Practitioners' experiences showed that, within this approach, different reasons for relocating were viewed differently by the courts in some respects, and that a significant aim for the law was to preserve relationships between the child and both parents.

With these findings in mind, we look at practitioners' evaluations of relocation law. These evaluations fall into three broad areas: a general assessment of the law as set out by the Court of Appeal; an critique of the law as applied in the trial courts; and a discussion of case outcomes. We will see that practitioners were strongly supportive of the legal approach to relocation, but were concerned that that approach was not always applied appropriately. In particular, some participants thought that the courts were placing too much weight on the

⁵⁷ J Behrens, 'A Feminist Perspective on *B and B* (The Family Court and Mobility)' (1997) 2 *Sister in Law* 65.

⁵⁸ Patrick Parkinson suggests that asking a parent to move is no less an infringement of their liberty than requiring a parent to stay: P Parkinson, 'Freedom of Movement in an Era of Shared Parenting: The Differences in Judicial Approaches to Relocation' (2008) 36 *Federal Law Review* 145. This may be true (though the court can *order* the child – and, in reality, the caring parent – to stay, but can only *ask* a parent to move), but it does not seem to be a reason to prefer one approach over the other. If the court continues to stop resident parents from moving, there is no reason not to enquire whether non-resident parents can move.

⁵⁹ COCA, s 5.

child's relationship with the respondent (non-moving) parent, and too little weight on the well-being of the applicant (moving) parent. Consequently, some participants were worried that the law was, in effect, making it overly difficult to relocate.⁶⁰

Given that the New Zealand approach is similar to that favoured by many English practitioners,⁶¹ the disparity between the law in theory and in practice may be significant. There may be especial interest for those in England who seek reform if New Zealand practitioners think that the law there, in turning away from *Payne*, has led to applicant parents' well-being becoming under-valued and made relocation too difficult to achieve.

Practitioners' Evaluations of New Zealand Relocation Law:

Participants were asked about the advantages and disadvantages of the New Zealand approach to relocation; about the ways in which it was helpful to them and about the problems it created in practice; and about whether there were aspects of the law which they thought could be improved.⁶² As with English practitioners, New Zealanders were mixed in their response. Some directed their responses to their day-to-day experiences,⁶³ while others

⁶⁰ Cf Chapter 4: New Zealand practitioners thought that two of the three vignettes would not succeed, and the one that might (Mark and Hannah's case) was rated at only 6.25 out of 10. By contrast, English practitioners thought that two of the three would succeed; Mark and Hannah's case was rated as 8.65 out of 10, while the case that the English thought would fail (Jane's case) was still rated as 3.6 out of 10, compared to 2.75 for New Zealanders.

⁶¹ Chapter 5, text from n 143.

⁶² The interview schedule is contained in Appendix 1.

⁶³ NJ6, NB1 and NS5 were good examples.

offered more jurisprudential, overarching analyses.⁶⁴ We start by looking at practitioners' views on the principles laid out in *D v S*.

Evaluating New Zealand law in principle

Participants uniformly praised the approach to relocation outlined in *D v S*,⁶⁵ though many thought that it made each case difficult:

NJ5: The principles [in *D v S*] don't help you in your determination at all – far from it! They can tell you where you have gone wrong, but they can't help you to get it right. All I know is, I must take a relevant matter into account and give it such weight as is appropriate on the evidence – but it is still up to me to know what is relevant and make those findings of fact. ... [R]elocations remain some of the hardest [cases] because they are the most finely balanced, often. Truly hard.

Despite this difficulty,⁶⁶ there was very little criticism of the principles themselves.⁶⁷

The judge quoted above, asked whether anything should be changed about relocation law, replied: 'Absolutely not! I wouldn't change the approach in *D v S* at all' (NJ5). The Court of Appeal's approach was described as 'very sensible, very straightforward' (NS3), and was praised in strong terms:

⁶⁴ NJ5, NB7 and NS2 were good examples.

⁶⁵ Cf English participants: in Chapter 5, we saw that many English practitioners did not support the *Payne* approach to relocation, and even those who did were critical of aspects of it.

⁶⁶ Others thought that, although cases might be difficult on their facts, the legal principles were straightforward: 'there is no reason why [relocation] should not be dealt with in the same way as any other parenting case' (NB7).

⁶⁷ For criticisms of its application in practice, see below, text from n 77.

NB6: I think *D v S* has got it very right. ... Many of us in the profession were just applauding *D v S* [when it was decided]. ... I think it is a really very sensible, child-focused approach [and] that is what it should be, as with other parenting matters. It would be ridiculous to do anything other than that.

NJ5: I think we are very lucky in New Zealand to have an unfettered approach to what is in the child's welfare – it is completely unfettered – because each case is so heavily fact-specific, and so subtly fact-specific. ... I don't think that we should change *D v S*, because it actually forces you to think very hard and articulate whatever it is you think.

While some participants identified particular aspects which they thought needed modification,⁶⁸ all participants agreed that the core approach was right. It was with some relief, therefore, that most thought that the Care of Children Act 2004 had not affected the *legal principles* applicable to relocation.

When the Act was passed,⁶⁹ its impact on relocation was unclear.⁷⁰ Some judges said that COCA's focus on continuity of care arrangements and promoting parental cooperation might mean that relocation would become more difficult to achieve,⁷¹ and a few participants took a similar view:

NS3: I thought [COCA] would [make a difference to relocation law], and ... we all believed relocation cases were going to get a lot harder to win because of the Care of Children Act and that compulsion on parents to make parenting arrangements that were going to promote

⁶⁸ Below, text from n 110.

⁶⁹ COCA entered force on 1 July 2005.

⁷⁰ See Chapter 3, text at nn 221-232.

⁷¹ See, eg, Judge Peter Boshier, 'Relocation Cases: An International View from the Bench' (2005) 5 *NZFLJ* 77; *BDD v IBG [Relocation]* [2007] NZFLR 1 (NZFC) (Judge Boshier); *MBF v SRF* (2007) 26 FRNZ 370 (NZFC) (Judge Callinicos).

relationships.

However, other judges disagreed,⁷² and the High Court consistently said that COCA did not mark a change in legal approach.⁷³ Several judicial participants made similar comments, arguing that COCA had not affected *D v S*:

NJ1: ...the law reflects what the Court of Appeal had articulated in *D v S*. ... I said in one of my first cases decided under the Act ... that I didn't consider that the Act had changed the substantive law. ... I don't think the Court of Appeal said anything different in *D v S*. ... I don't think it is a change of approach.

NJ3: In one of my decisions, one of the first issues I had to decide was whether the introduction of sections 4 and 5 [of COCA] actually made a change, and I held that they didn't and that the law as laid out in *D v S* continued.

Participants were also aware of the divergence of views as to the *effect* of COCA, with eight making particular reference to an article published by Judge Boshier.⁷⁴ The general opinion of participants was that the *legal* change predicted by Judge Boshier had not come about;⁷⁵ as one judge put it, 'you can argue it both ways, but it's effectively been decided'

⁷² See, eg, The Hon B D Inglis, 'The Care of Children Act and Separated Parents' [2005] *NZLJ* 233; *C v W [Custody]* [2005] NZFLR 953 (NZFC) (Judge O'Dwyer); *NW v MW [Parenting Order]* [2006] NZFLR 485 (NZFC) (Judge Burns).

⁷³ *ACCS v AVMB [Parenting Orders]* [2006] NZFLR 986 (NZHC) (Panckhurst J); *Brown v Argyll* [2006] NZFLR 705 (NZHC) (Priestley J); *LH v PH [Relocation]* [2007] NZFLR 737 (NZHC) (Winkelmann J); *S v L [Relocation]* [2008] NZFLR 237 (NZHC) (Harrison J); *Downing v Stamford* [2008] NZFLR 678 (NZHC) (Priestley J).

⁷⁴ Judge Peter Boshier, 'Relocation Cases: An International View from the Bench' (2005) 5 *NZFLJ* 77.

⁷⁵ Participants were not all in agreement about whether the change foreseen by Judge Boshier *ought* to have come about as a result of COCA, though.

(NJ3).⁷⁶ Referring to *Brown v Argyll*,⁷⁷ a senior barrister said that ‘Justice Priestley of course is right: nothing really changed in terms of the applicable principles [when COCA entered force]’ (NB7).⁷⁸

However, while participants were strongly supportive of *D v S* and thought those legal principles unaffected by the Care of Children Act 2004, they were less certain when it came to the practical application of the law.

Evaluating New Zealand law in practice

Although participants thought that the 2004 legislation did not change the legal approach to relocation, many nonetheless thought that COCA had marked ‘a toughening up of Family Court judges’ attitudes and a stronger resistance [to relocation]’ (NB7). As one solicitor explained:

NS2: In the last five years, I think that the advice that practitioners have given has changed from being more ready to support a relocation application ... [to] advising [applicants] that their prospects of success are limited.

While participants frequently noted that this change in attitude coincided with the introduction of COCA, many were sceptical as to whether COCA itself was the cause. For

⁷⁶ Three barristers described Judge Boshier’s view as ‘slam-dunked’ (NB3), ‘knocked ... on the head’ (NB6) or ‘slapped back’ (NB7) by *Brown v Argyll* [2006] NZFLR 705 (NZHC).

⁷⁷ [2006] NZFLR 705 (NZHC).

⁷⁸ Whether this conclusion survives *Bashir v Kacem* [2010] NZCA 96, unreported, is not clear; the Supreme Court judgment, when given, may clarify the point.

some, COCA was simply ‘a platform for our Principal Family Court Judge to come out and say, “I think there is going to be a third way”,^{79]} but I think [the change] was happening before that’ (NS2).⁸⁰ This view, of a pre-existing trend of which COCA was merely a ‘re-emphasis’ (NJ1), was found in several accounts:

NB6: The Family Court seems to be quite persuaded by the principles in [COCA], which are about the continuity of care arrangements. I wonder, though, whether it is less a legislative shift ... [and more that] there has been a shift in the approach of the Family Court generally in terms of fathers having more contact with their children, and I think it is an amorphous and difficult-to-quantify shift in perception, far more ephemeral than actual change in the legislative focus. ... [T]hat change has a flow-on effect on relocation, but I think that is far more subtle and not legislative, and that was already there before the new Act.

NJ5: My pip is that it is harder now to relocate after COCA than before, but that might not be about COCA, that might just be about how we grew and developed and thought about family law problems and put more store in guardianship. ... [T]hat is the change, and I could not tell you if it came as a result of COCA [or if it was] coming anyway as a result of changing nuances, psychologists changing their thinking – [and *D v S* was] very much the genesis of it.

There were two practical expressions of this ‘hardening of attitude’ (NB4) to

⁷⁹ According to Judge Boshier’s paper: ‘There is disagreement between those jurisdictions where the welfare of the child is the key consideration in relocation cases. There are two broad approaches. The first is that the [child] is so dependent on the welfare of the primary caregiver, that to restrict the movement of the caregiver, and force them into a life they may not be happy in, will have a detrimental impact on the child. ... The second general approach is the view that the welfare of each child is different and must be assessed on its merits. ... The Care of Children Act may herald the onset of a third approach, where enabling the child to have a relationship with both parents is to be accorded greater weight over any other consideration. This would militate against relocation in many cases’: Judge Peter Boshier, ‘Relocation Cases: An International View from the Bench’ (2005) 5 *NZFLJ* 77, 78.

⁸⁰ Precisely when this trend began is hard to say. Participants thought the change had occurred ‘in the 2000s’ (NS5), citing cases like *W v C* [2000] NZFLR 1057 (NZFC) (NS2) and *D v S* (NJ5).

relocation which participants identified,⁸¹ though they can be seen as two sides of the same coin. One aspect was the increased weight put on maintaining the child's relationship with both parents. Many participants thought that the courts' practice was to 'put a stronger emphasis on the shared parenting role ... and I think there is much greater emphasis on fathers to start off with that equal sharing role' (NS6). Generally, participants thought that fathers were 'more front-and-centre for judges' (NS1). In other words, 'the courts are anxious that a child has a constructive relationship with both parents, and would not lightly agree to an arrangement that didn't promote that' (NB7), because 'the law believe[s] that the on-going involvement of both parents in the child's life is ... a good to be pursued' (NS5).⁸²

The other aspect was a corresponding reduction in the significance accorded to the well-being of applicant parents.⁸³ The relevance of the psychological and emotional well-being of applicants was discussed in *D v S* when the New Zealand court analysed (and rejected) the English case of *Payne*. The Court of Appeal said that *Payne* involved

...the allocation of particular weight to the reasonable proposals and emotional and psychological wellbeing of the primary carer. ... [P]resumptive or *a priori* weighing is inconsistent with ... New Zealand law.⁸⁴

⁸¹ Some participant specifically rejected the suggestion that it had become more difficult to relocate to relocate (eg NJ1), though this difference may be related to the variation in attitude between judges which many participants identified: below, text from n 107.

⁸² One consequence of this approach is that 'the main thing you [as the applicant] need to sort out ... is you need to say what you would do to ensure that the children's relationship with the other parent doesn't deteriorate – and that is an onus on you' (NS4).

⁸³ See Chapter 3, text from n 232.

⁸⁴ *D v S*, [46]–[47].

This position, as seen above,⁸⁵ was strongly supported by participants. However, ‘there is the formal statement of the law, and then there is the reality of it, and they are not on all fours with each other’ (NS2). The development of this disjuncture was explained by one lawyer:

NS1: [The position now marks] an interesting transition from a situation where, 20 years ago, when mum wanted to relocate there would be a sense that mum needed to be where she needed to be ... to a stage where you said, “best interests of the child, but there is no presumption of mum going” – which is really what *D v S* is saying – ... through to a stage where you are then saying, “not only isn’t there a presumption that mum can relocate, but before she can relocate we want to see some real evidence of damage”.

Many participants discussed this trend with reference to *B v B [Relocation]*,⁸⁶ which was the most recent High Court relocation case when interviews took place. In that case, Duffy J said:

Relocation will only be in the child’s best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child.⁸⁷

Participants thought that this view ‘is really over-stating it’ (NS4) and, as a statement of what the law should be, ‘puts it too high’ (NJ2). However, they were less certain as to whether Duffy J’s comment reflected the current practice in the Family Court. Some participants were simply unsure – ‘The short answer is I don’t know if we have got to that

⁸⁵ Text from n 65.

⁸⁶ [2008] NZFLR 1083 (NZHC).

⁸⁷ Ibid, [62].

point' (NJ1) – but many saw *B v B* as fitting their experience in the trial courts:

NB1: That is what I picked up even before [*B v B*]. ... [T]hat is my experience, and perhaps I hadn't elevated it to the extent of clinical depression or anything like that, but ... they need to be seeing a psychologist.

NJ4: [An applicant] has got to actually probably be pretty depressed, and she has got to have doctors' letters and there has got to be a psychological report to the court ... You would probably have a list of reasons [for granting a relocation], and that could be one of them, but I don't think in itself that would be enough nowadays.

This view was also reflected in relation to the strength of the evidence required if a parent was going to seek to relocate based on her own psychological or emotional state:

NS5: Not just [evidence from] your doctor, it would have to be from a psychologist or from a counsellor – but not a wussy counsellor! It would have to be someone of standing...

NB6: If you are going to try and make a relocation application on the basis of, "can't cope, totally depressed, trapped [here]", then you need] psychological evidence. I wouldn't bother with a counsellor. I would get [a client] to be assessed by somebody who was well known and respected within the Family Court system, who is a psychologist...⁸⁸

Others thought that *B v B* was 'not representative of very much at all... [Family Court judges] are not saying [that not] until you are nearly institutionalised will they listen to the evidence properly' (NB5).⁸⁹ Two senior barristers gave the case particularly short shrift, one

⁸⁸ However, as this barrister went on to say, 'it is always a careful balance, because you don't want [the psychologist] going so hard that [your client] looks like a complete loon, but you do want somebody who is expert and is able to say ... "the effect of being able to relocate ... is going to enhance [them] and therefore the children are going to benefit". It is that causative link that is hard to get' (NB6).

⁸⁹ Cf NJ6, who said that *B v B* was 'going a bit far [in implying] that you have got to be a real cot case before the court will let you relocate'.

saying ‘I don’t think legal scholars should pay much heed, to be blunt’ (NB7), the other saying ‘I would just tear it up if I were you’ (NB4).

In assessing these trends, practitioners tended to take one of two positions. However, before turning to examine these positions, it is worth noting an apparent gender split amongst participants. In making this suggestion, it needs to be borne in mind that this was a small and non-representative study of 22 practitioners. Moreover, there were more women than men in the New Zealand sample (13 women, nine men), meaning that caution is required in assessing these findings.

Although most participants made comments relevant to the following discussion, there was a tendency for men and women to focus on different aspects,⁹⁰ though this gender difference was not universal. As we will see, there were two connected but different concerns about the courts’ perceived practice of putting more weight on father-child relationships and less weight on mothers’ well-being. One concern was that this approach undermined *D v S* by interfering with the requirement of an unfettered balancing and an even-handed assessment of factors; those who took this view were mostly men (5 men, 2 women). The other concern related to the particular prioritisation of factors seen, because its effect was to undervalue primary carer relationships and the interests of mothers; those who took this view were mostly women (5 women, 1 man).⁹¹

⁹⁰ To ensure anonymity when discussing participants’ gender, the identifying tags of judges are omitted in the following sections; ‘NJx’ is used to identify the three female judges, ‘NJy’ for the three male judges.

⁹¹ Both ‘groups’ contained a combination of strong and weak adherents to that perspective, and it should be borne in mind that the two views are strongly connected, meaning that any split between these participants was significantly less pronounced than that seen amongst the English practitioners in Chapter 5.

In Chapter 5, we saw a possible gender division amongst English participants in their views on relocation law.⁹² Women tended to support *Payne* because of its focus on care relationships and mothers' well-being, while men tended to criticise it for its perceived presumptive approach. Similar reasoning might be suggested to explain views seen in New Zealand, though the gender split was less absolute than in the English group. In New Zealand, men tended to favour a balanced, non-presumptive approach; they thought *D v S* offered this, and were therefore uncomfortable with any prioritisation of factors, regardless of what those factors were. Women, on the other hand, tended to find the particular hierarchy of factors in the practice of New Zealand law problematic, because it undervalued care relationships and mothers' well-being. If this explanation is correct, it might support the suggestion made in Chapter 5 that practitioners' attitudes to relocation may reflect a trend for men to focus on the ethics of justice and for women to focus on the ethics of care.⁹³

With these points in mind, we look at these two positions, starting with those participants whose focus was on the existence of any hierarchy of factors at all. For these participants, the concern was that *D v S*, which they strongly supported,⁹⁴ stated that *a priori* weighing of factors was inappropriate. The introduction of a de facto hierarchy was therefore problematic. Although more men took this position, the point was particularly well expressed by one of the two female participants who took this approach, when discussing *B v B [Relocation]*:⁹⁵

⁹² Chapter 5, text from n 61.

⁹³ See generally C Gilligan, *In A Different Voice* (Harvard University Press, London: 1982).

⁹⁴ Above, text from n 65.

⁹⁵ [2008] NZFLR 1083 (NZHC).

- Q: In *B v B*, Justice Duffy said that “Relocation will only be in the child’s best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child”.
- NJx: She rather elevates that [point] to a presumptive principle. It is the use of the word “so”, I think, if you read it carefully. I can’t read her ratio any other way... I read that as maybe unfortunate semantics, but the effect is ... rather presumptive.
- Q: Is it the same flaw that the Court of Appeal [in *D v S*] criticised *Payne* for, but [highlighting a factor which pulls] the other way?
- NJx: Yes! Yes, yes, yes, yes!

A male solicitor similarly thought that recent developments were not ‘within the spirit of the Court of Appeal cases’ (NS1). Although these participants commented on the roles of mothers and fathers in children’s lives, the generalised way in which they discussed these points suggests that they would have had a similar reaction regardless of the particular factors which were being prioritised.

For the other group of practitioners, predominantly women, it was less clear that their concerns were general rather than specifically related to the particular prioritisation being seen (though there was also frequent reference to the divergence from *D v S*). One female solicitor was a particularly good exponent of this approach:

- NS2: I think the emphasis on the relationship with the non-relocating parent has been elevated to a position of [there] almost [being] a presumption that that equates with the welfare and best interests of the child, so that it is almost impossible to satisfy the court, based on all the other factors that might be present, that it will be in the welfare and best interests of the child to [relocate]. ... [T]hat is the point we have come to: the mental health and happiness of the mother is so downplayed and so ignored that it is like the contrary *Payne* position. ... In New Zealand, we have got *Payne* being rejected, [and *D v S* said]: “the mental health and happiness of the mother should not be elevated; all factors are the same; no *a priori* weighting; don’t start from any particular position”. Right, okay. And then we have got what is happening, which is that the mental health

and happiness of the mother is absolutely sent out the back door, and shared care relationships, as *being* the welfare and best interests [of the child], are elevated right up there... So we have reintroduced *Payne*, but in a different way and with different factors.

In other words, the worry that these participants had was that *D v S* was being used to justify ignoring the applicant's well-being, when all it said was that this factor should not be given presumptive importance.⁹⁶

One participant, contrasting her own approach of having no presumptions, said that 'you have some judges who just have this view that non-caring parents' rights of guardianship should not be devalued, [that] their children's ability to have regular contact is almost paramount' (NJx).⁹⁷ Another judge, asked about *B v B*, said: 'if we have got to that point [then] it would worry me ... and if we have ... then I think we have gone too far' (NJx).

However, although there were two sources of concern about the apparent trends in the Family Court, there was considerable overlap between the groups, since they shared the same concern about prioritisation of factors being inconsistent with the Court of Appeal's approach. We have seen, therefore, that although New Zealand practitioners were strongly supportive of the legal approach of *D v S*, there was concern that the practice of the law was not 'within the spirit of the Court of Appeal cases' (NS1). Practitioners thought that the Care of Children Act 2004 had been used by the courts to shift their focus in relocation disputes. The main effect of this change of emphasis, in practical terms, was an increased focus on

⁹⁶ See further Chapter 3, text from n 223.

⁹⁷ On judicial variation, see below, text from n 107.

children's relationships with respondent parents, and less weight being given to the emotional and psychological well-being of applicant parents. This *de facto* position, apparently divergent from the clear instruction of the Court of Appeal in *D v S*, may be particularly significant with regard to the reforms proposed by some English practitioners.⁹⁸

Case outcomes under New Zealand law

It was in response to these concerns that some participants worried that 'we have got ourselves into a position where we are seeking, through the court, to stop relocation from happening at all, and that is simply a lack of recognition of the reality of modern life – so we have got to do something about that' (NS2).⁹⁹ As another lawyer put it:

NS6: I think we have gone too far in saying that the relationship between the child and the non-custodial parent has to be maintained at the level it was at... [I]t has gone to that extreme where you are saying to people, "you can't [relocate], there is no point, I am not even going to run that case", because you can see what the outcome will be.

This sense of the difficulty of obtaining leave to relocate, even over fairly short

⁹⁸ Chapter 5, text from n 143.

⁹⁹ This view was not universally held, though, as this exchange with another lawyer shows:

NS4: Can I say that the courts normally get [relocation cases] right? No, I can't honestly say that.

Q: Do you think they normally get them wrong in one direction rather than the other, refusing [relocation] when they should allow or allowing when they should refuse?

NS4: I think it is probably mostly the latter, that they have allowed [relocation] when they should have refused.

distances,¹⁰⁰ was reflected in many interviews. Lawyers ‘generally impress upon people ... the difficulty of it’ (NS5), and ‘make sure, if it is the person who wants to relocate, that they are aware that it is an uphill struggle’ (NS4);¹⁰¹ indeed, some ‘would actually be advising [applicants] that their prospects of success are limited ..., that in New Zealand relocation is militated against’ (NS2). As a senior barrister explained:

NB7: ...you have to make a good case to relocate... There is a task ahead of you, ... it [is] by no means a straightforward process. ... One of the great sadnesses of these cases is often the fact that they have come to trial, because ... if ... you look at them from the outside, you think, “this should never have come to trial: someone should have told somebody where the inevitability of this was going to be”.

That inevitability was almost always that relocation would be refused. Moreover, because relocation was perceived as so difficult to achieve, when leave was granted, practitioners were concerned about the prospect of the decision surviving an appeal:¹⁰²

NB5: A case I had last year, ... the court did allow [the mother] to go back [to her home country]. ... When the decision came out, I said, “get on the plane straight away”, even though she had wanted to do the thing of letting [the father] say goodbye to [the child], but he was going to appeal. He appealed when she was in the sky. I hate stooping to that sort of thing, but that is the reality about these sorts of decisions.

The reason that obtaining permission to relocate was perceived to be so difficult

¹⁰⁰ Many participants had experience of short-distance relocation cases. NB4 was currently running a case where the mother wanted to move ‘about 35 minutes’ drive north’; another barrister spoke of a case where leave was refused to move from Devonport (a coastal suburb of Auckland) to Waiheke Island, which is part of greater Auckland and ‘which you can actually see from the end of Devonport wharf’ (NB7).

¹⁰¹ This phrase was also used by English participants, but in their jurisdiction it was the party opposing the relocation who faced the ‘uphill struggle’ (EJ7, ES1).

¹⁰² Note that Family Court decisions may be overturned simply because the High Court judge takes a different view of the merits: see Chapter 3, text from n 20.

stemmed from the way factors were prioritised within the ‘all-factor child-centred approach’.¹⁰³ That is to say, as we saw in the previous section, promoting the child’s relationship with the non-relocating parent tended to be seen as more important than improving or safeguarding the relocating parent’s well-being.

Another example of this prioritisation of factors was seen from one lawyer who was concerned about the court treating the child’s relationship with the non-relocating parent as ‘almost paramount’:

NS2: Not only are [judges] putting greater weight on [contact], but I sense that they are also starting from the position that the ideal is that there is a shared day-to-day care [arrangement] in place. ... [You can go into court applying for relocation] and end up with a shared day-to-day care arrangement [in a case where] that wasn’t even in place before!

We saw in Chapter 4 that New Zealand participants tended to think that the courts would favour shared care arrangements. The strongest example was Tom’s case: New Zealanders thought relocation would probably be refused but, moreover, several said that a more likely outcome was that Tom would move into an increasingly shared care arrangement.¹⁰⁴ As one judge said in relation to Tom’s case (but with more general applicability):

NJ5: ...if [a child’s] overall interest is to increase [contact], clearly it is not to relocate. Very few practitioners argue it that way, and they should [because] it is a very powerful way to argue it: “Judge, not only am I opposed to relocation, I want shared care”. All of a sudden, you have got a very different analysis.

¹⁰³ *D v S*, [47].

¹⁰⁴ Chapter 4, text from n 51.

Participants had different views on this practice, but several found it concerning that the court would use the opportunity of a relocation application to start shared care. For some, it was another reason to think that ‘the litigation risk is so high’ and that ‘only the very best relocation situations should ever be put to the test’ (NS2).

Similar points about the difficulty of relocation were seen in relation to the courts’ attitude to unilateral moves – that is, cases where the parent moves before obtaining permission, where the application before the court is from the other parent seeking to have the child returned.¹⁰⁵ Participants’ experience was that the courts were strongly critical of such moves, and would often require the child returned immediately so that the issue of relocation could be addressed in the former location. There were mixed views on this approach.

Some participants thought that the damage caused by unilateral moves necessitated a strong response:

NB6: I think the judges are right to be robust about that. ... I don’t think the court should be encouraging people to take matters into their own hands. It is really detrimental to the children, and is an attempt to say “it’s none of the court’s business”, and it is the court’s business because the court has got jurisdiction over what is in the child’s best interests. An attempt to oust the court by doing your own thing is appalling, and not the way civilised societies conduct these sort of proceedings.

Similarly, one judge favoured a presumption of immediate return unless there were

¹⁰⁵ Above, text from n 47.

exceptional circumstances,¹⁰⁶ ‘because it is so debilitating [and difficult] to get ground back once there has been an effective removal – you can’t apply a *D v S* analysis with any degree of equality’ (NJ5).

However, other participants thought that ordering an immediate return ‘is not always in the child’s interests, depending on the facts, [especially] if the kid has been enrolled at a school, or whatever’ (NB5). They thought that the disruption caused by having to return was a significant factor, especially if the court might then permit the relocation after the child had been returned. There was also an awareness that there might be good reasons for moving without waiting for permission: as one psychologist said of a case he was doing, ‘I know that mum was a naughty girl for relocating without the court’s permission. ... On the other hand, I don’t blame her for getting outside of the influence of this controlling and physically violent man’ (NP1).¹⁰⁷

In addition to these aspects which participants thought demonstrated a general opposition to relocation, many thought that different judges took different approaches to relocation, which made cases difficult in practice. As one judge put it, relocation ‘is an area in which different judges use different yardsticks, which is why it is such a vexed area for litigants’ (NJ2). Several participants noted that judges took different views on what distance counted as relocation,¹⁰⁸ as well as whether they looked more or less favourably on

¹⁰⁶ That is, like the Hague Convention on the Civil Aspects of International Child Abduction 1980.

¹⁰⁷ On the gendered implications of the New Zealand law, see above, text at n 50.

¹⁰⁸ Several participants observed that ‘one judge may perceive one side of [town] to the other as relocation, while another may not’ (NB7), or that *Brown v Argyll* [2006] NZFLR 705 (NZHC) involved a move which ‘wasn’t even as far as one side of Auckland to the other’ (NB3). One participant spoke for many in saying that treating such moves as relocations ‘may be understandable, but it is also petty’ (NJ2).

relocation.

One unusual example, where judicial variation worked in favour of the relocating parent, was reported by one barrister, who described

NB7: ...a case that might not have been perceived as particularly hopeful [which] was surprisingly won by the mother... Now, the only real explanation for that was the individual input of the judge, because that was a case that, with a different judge, might well have been crushingly lost.

More typical were comments that there were 'some judges who just do not think that children should relocate, so they will find a way to make sure they can't' (NS4). As another lawyer explained:

NS2: We do get deviation according to which judge is doing it, because they do have their own pre-conceived positions. With some, you wouldn't bother going to court – you would just tell your client, "go away and get a medical certificate, you'd be wasting your time here". With another judge, you'd think, "you'll get a fair hearing here, let's just have a go".

These findings suggest that, although the principles enunciated in *D v S* were strongly supported by practitioners, the practice of the law was often quite different from those principles. Many participants thought that the de facto prioritisation of factors meant that, in practice, 'relocation is militated against rather than militated for' (NS2). We saw in Chapter 5 that *Payne* was perceived by many English practitioners to be a presumption in favour of relocation.¹⁰⁹ It might be that the same perceived presumption exists in practice in New Zealand, albeit in that case a perceived presumption against relocation, rather than in favour

¹⁰⁹ Chapter 5, text from n 126.

of it.

It might also be suggested that proposals from English practitioners to have ‘rather more light-handed guidance’ (EB5) in relocation cases¹¹⁰ risk significant variation between judges because of ‘their own pre-conceived positions’ (NS2);¹¹¹ this aspect may be another point for those who would reform the English law to consider.

Having thus seen New Zealand practitioners’ views on the legal principles and the practice of relocation law, in the next section we look at their assessments of whether there should be any reforms. It will not be surprising to find that there was considerably less call for any reconsideration of the law in New Zealand than we saw in relation to the English law in Chapter 5.

Practitioners’ Views on What Relocation Law Should Look Like:

In keeping with their general praise of *D v S*, most participants did not seek changes to the legal principles governing relocation. Participants said, for example, that ‘the New Zealand approach is a very good approach: it is very balanced and it is entirely child-focused, which is what it should be’ (NB6), and that ‘I wouldn’t change any of the approach in *D v S* at all’ (NJ5). As one barrister explained:

¹¹⁰ Chapter 5, text from n 143; see also M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351.

¹¹¹ Cf Canada: R Thompson, ‘Ten Years After Gordon: No Law, Nowhere’ (2007) 35 *Reports of Family Law* (6th) 307.

NB7: There is a whole lot we could do better in the Family Court as a general proposition, but if the question is, “can we do something to make relocation cases better?”, [the answer is] “no, nothing that we can’t do to improve the Family Court generally”.

It is worth noting the contrast between this opposition to change amongst New Zealand practitioners, and the views of most English practitioners.¹¹² In England, even those who were generally supportive of *Payne* identified aspects that they would amend, and a significant group of practitioners sought a full reconsideration of the legal approach. In New Zealand, on the other hand, the consensus was that the court had found the correct approach, and there was nothing to change in terms of the legal principles.

There was some concern about how to ensure that the practice in the Family Court fully reflected the *D v S* approach, though. Some practitioners thought that the High Court was ‘trying to correct things a bit’ (NB5), though whether this attempt was succeeding or not was unclear. Another practitioner, convinced that the problem was not solved, nonetheless thought that rigorous appeals of flawed Family Court decisions might be a good solution, because ‘that would enable the High Court to correct this trend in the Family Court ... which ... is making it so hard to successfully get a relocation’ (NS2).

Two other practical points were suggested, both designed to help the trial courts to implement *D v S* more effectively. One suggestion was ‘to try to get a list of factors to be taken into account’ by trial judges when deciding a relocation case (NJ3, NJ6). While these

¹¹² Chapter 5, text from n 139.

participants were aware that the High Court had criticised the use of checklists¹¹³ because they could distract from the individualised assessment of the particular child's welfare,¹¹⁴ some thought that 'it may be helpful' nonetheless (NJ6). Proponents of checklists thought they might lend the law greater certainty, because 'on each factor you would have judges making decisions more commonly, so that practitioners could read those decisions and get a better feel for judicial thinking, which may help in predicting the outcome of the case for their particular client' (NJ3).¹¹⁵

However, even those who made this suggestion were cautious, noting that 'by putting in particular provisions, you [risk] overlooking other issues' (NJ6). Other participants specifically rejected using a list of factors, warning that 'a checklist can be a trap – you can find yourself going to the checklist ..., and doing that with respect to every case becomes a burden and unnecessary and can even bring in irrelevancies to that case' (NJ1). As another judge put it, 'I am not a fan of templates because in an individual case there are fewer factors that are really *moving* factors, and the rest kind of fall into line. I see it as being an art rather than a science' (NJ2).

The other practical suggestion was not entirely unconnected, and proposed legislative amendment to attempt to 'normalise relocation' and make clear that relocation should sometimes be allowed (NS2). This participant saw the current trend in the law as 'seeking

¹¹³ *Brown v Argyll* [2006] NZFLR 705 (NZHC), [38]; *S v L [Relocation]* [2008] NZFLR 237 (NZHC), [28]-[30]; but see now *Bashir v Kacem* [2010] NZCA 96, unreported, [50], saying, contra *Brown v Argyll*, that judges should go through the s 5 principles as a form of checklist.

¹¹⁴ COCA, s 4(2).

¹¹⁵ See now *Bashir v Kacem* [2010] NZCA 96, unreported, [52]: 's 5 [of COCA] should assist in achieving some degree of consistency and transparency of decision-making'.

... to stop relocation from happening at all, and that is simply a lack of recognition of the reality of modern life' (NS2). The aim, therefore, was to clarify that allowing relocation should not be an exceptional outcome. To achieve this aim, she suggested amending two sections of COCA:

NS2: [First, there should be a] reintroduction into the Care of Children Act of a section from the Bill that was thrown out, so that in addition to being a guardianship decision, [relocation] becomes an incident of day-to-day care – it is both – so that it doesn't give carte blanche to the care-giving parent to be able to shift without consulting the [other] guardian, but it does presume that shifting is an incident of day-to-day care in a way that isn't at the moment, so that will normalise things. ... [Second,] the section 5(b) principle [should] be amended [so that], where it has got in brackets, "and in particular the child should have a continuing relationship with his or her parents", I don't think it would be difficult to insert after that, "and especially after the relocation of one or both of them", because that is the very time when you have to look at how you are going to keep this relationship alive. You are not looking at how you are going to stop the relocation any more, you are looking at, given that the relocation is going to happen, how do you keep the relationship alive with the other parent?

The idea was to make clear that 'relocation will and can happen as part of everyday life' (NS2). Moreover, promoting and maintaining strong relationships between the child and both parents did not necessitate them being confined to the same geographic location, especially where the proposed move was over a relatively short distance.

In short, although there were suggestions for minor changes, they were intended to compensate for shifts in the practice of the courts, which were seen as deviating from the law as prescribed by *D v S*. The legal approach laid down was strongly supported by New Zealand practitioners, and the few proposed 'changes' suggested were designed to ensure that everyday cases followed that legal approach.

Conclusions:

The three chapters based on empirical interviews with practitioners in England and New Zealand have shown a significant divergence in the approaches of the two countries in practice. In Chapter 4, the analysis of three hypothetical relocation disputes showed differences in both the reasoning and the outcomes reached by the two national groups.

In all three vignettes, the English thought relocation more likely to be allowed than the New Zealanders, even though in two cases the predicted outcome was the same in both systems. Crucially, though, it was Tom's case where the difference in outcome was seen: on the facts which are most prevalent in English cases, New Zealanders thought relocation unlikely to be allowed, while English practitioners considered it a strong case for relocation.

The chapters which followed explored the two legal approaches in more detail. English practitioners were seen, in Chapter 5, to have a clear understanding of the law, but to be mixed in their assessments of it. While some were strongly defensive of the *Payne* approach, others thought that its effect was to 'compromise' the welfare principle (EB3), forcing courts to focus on one factor which might not always be the most important aspect of the child's best interests. Those who offered this criticism favoured an approach which involved less guidance and left judges to assess the child's welfare with fewer strictures.

This chapter has explored New Zealand practitioners' experiences of relocation law which largely represents the approach favoured by many English practitioners. Participants' understandings of the law fit with the conclusions of Chapter 3, with *D v S* continuing to be the leading authority on relocation, with COCA augmenting rather than amending that

approach. Practitioners confirmed that the ‘all-factor child-centred approach’ to relocation was complemented by the principles relevant to children’s best interests set out in COCA.¹¹⁶

However, it was also suggested in Chapter 3 that the practice of New Zealand law might have turned against relocation.¹¹⁷ This chapter has shown that practitioners shared these conclusions. Most practitioners thought that, in general, the courts now favour shared day-to-day care arrangements and place greater weight on a child’s relationship with a non-resident parent. At the same time, the importance of a carer’s emotional and psychological well-being was being seen as a secondary factor when assessing children’s welfare in the relocation context. As a result, there was a general view that ‘in New Zealand relocation is militated against rather than militated for’ (NS2).

There were, in general, two causes of concern about this practice. One (which we saw to be adopted mainly by male participants) saw any deviation from the *D v S* rule against presumptive weighing of factors as inappropriate. The other (put forward by more female participants) considered the particular deviation seen as problematic, because the effect was to give too little attention to the well-being of primary carers which, they thought, was an important factor in promoting the child’s welfare.

In terms of the core legal approach, New Zealand practitioners did not seek changes to the law; indeed, they strongly supported *D v S* and thought that ‘it would be absurd to do anything other than that’ (NB6). There was, however, some suggestion that there needed to

¹¹⁶ *D v S*, [47]; COCA, s 5; see now *Bashir v Kacem* [2010] NZCA 96, unreported, which broadly endorses *D v S* while stressing the need to go through the COCA s 5 principles in analysing all the factors.

¹¹⁷ See Chapter 3, text from n 233.

be a change in the application of the law because, in practice, it was becoming too difficult to achieve relocation. We saw in Chapter 4 that New Zealanders were consistently less likely to predict that relocation would be allowed than were English practitioners when assessing hypothetical cases. Many New Zealanders were unhappy with the outcomes which they predicted in Chapter 4, and that discomfort was mirrored in their general view seen in this chapter that obtaining leave to relocate was ‘an uphill struggle’ (NS4).

We began our analysis of New Zealand practitioners’ experiences by noting that *D v S* bears considerable resemblance to the ‘ideal jurisprudential world’ (EJ1) of many English practitioners.¹¹⁸ We asked whether New Zealand practitioners were more satisfied with their relocation law than were English practitioners, and whether adopting an approach similar to that taken in New Zealand would satisfy the concerns of those English practitioners who criticised *Payne*.

The findings of this chapter suggest that the answers to these questions might be somewhat mixed. On the one hand, the approach set out by *D v S* was strongly supported by practitioners, who thought (as did many English practitioners) that assessing each relocation case on its facts, with no pre-conceived ideas about the importance of any one factor, was the most appropriate way to resolve these difficult problems.

However, the practice of New Zealand law suggests that there are potential pitfalls to leaving trial judges without guidance. In particular, the practical reality of New Zealand law seems to be that a parent’s emotional and psychological well-being is routinely given less

¹¹⁸ Chapter 5, text from n 143.

significance than many practitioners think it deserves. In other words, English practitioners may be right to say that one of the benefits of *Payne* is that it focuses attention on ‘what the true impact on mother is going to be if she is not permitted to go’ (EJ2), and thereby ‘emphasise[s] that one should take the medium to long-term view of the situation. ... *Payne* does have the effect of stopping short-termism’ (EB5).¹¹⁹ While New Zealand practitioners did not express themselves in these terms, it might be that at least some would have agreed that the practice of down-playing a primary carer’s well-being risks ignoring the long-term effect on that parent and, consequently, on the child.

It might be that one lesson which those assessing the English law could learn from the New Zealand experience is that there are perils involved in removing any ‘gloss on the welfare principle’.¹²⁰ When practitioners are as ‘conditioned by the current law’ as the English are by *Payne* (EJ1), not only will it ‘take time to move out of that mode’ (EJ1), but the move itself needs to be done carefully. In moving from a position where factor *x* is considered the most important to a rule which says ‘all factors are equal’, factor *x* is specifically being given less weight than before; the difficulty then is in knowing how much weight to give that factor.

The risk which the New Zealand experience highlights is that factor *x* ends up being given too little weight instead of too much. As one New Zealand practitioner explained, ‘we have actually gone too far – the English are at one end of it and we have got the other’ (NS6). In an effort to shift away from *Payne*, it may have been forgotten that ‘*D v S* intends

¹¹⁹ Chapter 5, text from n 72.

¹²⁰ M Hayes, ‘Relocation Cases: Is the Court of Appeal Applying the Correct Principles?’ [2006] *CFLQ* 351, 362.

only to avoid giving presumptive weight to any one factor; it does not follow that the applicant parent's emotional and psychological wellbeing might not, on the facts, be the decisive factor'.¹²¹

The overarching theme which has emerged from these chapters, though, is one of difference. England and New Zealand, both in the pursuit of the best interests of the child, have adopted significantly different approaches to relocation disputes. Both base their law on the welfare of the children involved, but focus on different aspects in pursuing this aim. In short, English law focuses on the importance to children of stable, functional family units, while New Zealand law stresses the importance to children of beneficial relationships with both parents.

These different approaches raise questions more broadly about the meaning of the welfare principle in a globalised society, which we address in the final chapter in the context of the current debate over harmonising international approaches to relocation disputes.¹²² Given the current divergence between countries as similar as England and New Zealand, we ask in Chapter 7 about the likelihood of a common approach to relocation being found, and about the place of welfare in 'the continuing search for common principles'.¹²³

¹²¹ R George, 'The Shifting Law: Relocation Disputes in New Zealand and England' (2009) 12 *The Otago Law Review* 107, 125.

¹²² See, eg, the Washington Declaration on International Family Relocation 2010.

¹²³ Lord Justice Thorpe, 'The Continuing Search for Common Principles' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Chapter 7

Relocation, Children's Welfare, and the Continuing

Search for Common Principles

Relocation is currently a major area of debate in international family law. Around the world, questions are being asked about how best to resolve these increasingly frequent disputes, and the international community is starting to come together to see if common ground can be found¹ – a process which Lord Justice Thorpe has aptly described as ‘the continuing search for common principles’.²

This final chapter will draw together the findings of the thesis to demonstrate how the research contained herein can inform the international debate which will take place in the coming years. The chapter starts by summarising the findings of the preceding chapters as a reminder of the key themes and conclusions which have emerged. We then look at the

¹ See, eg, the Washington Declaration on International Family Relocation (25 March 2010); for a summary of the judicial conference leading to this declaration, see Lord Justice Thorpe, ‘Relocation Development’ [2010] *Fam Law* 565.

² Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Washington Declaration on International Family Relocation,³ which represents the position so far reached by the international community. Since the Declaration ‘is certainly not intended by anyone to be conclusive but rather [represents] proposals to stimulate an international debate’,⁴ we then discuss ways in which the findings of this thesis might contribute to that debate.

As part of that contribution, two notes of caution might be sounded. One relates to the ability to implement common principles in a diverse international community. Experience with the Hague child abduction convention⁵ suggests that even where countries are agreed about a single clear purpose, the implementation of that policy can vary between signatory states. The second, perhaps more fundamental, question is whether it will prove possible to find common principles on relocation. This thesis has shown that there is significant variation in approaches, even between countries as similar as England and New Zealand. Most countries already agree that the welfare of the children involved in relocation disputes should be the paramount consideration in resolving cases. This is an underlying common principle which we share already. However, this thesis suggests that there may be variation in the way in which even this agreed principle is interpreted; in other words, about the extent to which the welfare principle is capable of being used as a substantive international standard, about ‘how societal norms and legal frameworks affect its application’.⁶ With even this basic principle in doubt, questions will be raised about the likelihood of finding any

³ Hereafter, ‘Washington Declaration’; the full text is available online at www.icmec.org/en_X1/icmec_publications/Washington_Declaration__English_.pdf (last accessed 15 July 2010).

⁴ Lord Justice Thorpe, ‘Relocation Development’ [2010] *Fam Law* 565, 565.

⁵ Hague Convention on the Civil Aspects of International Child Abduction 1980.

⁶ R George, ‘Practitioners’ Approaches to Child Welfare After Parental Separation: An Anglo-French Comparison’ [2007] *CFLQ* 337, 356.

more substantial principles on which widespread agreement is likely in this difficult field.

Summary of Key Themes and Conclusions So Far

In the first chapter, we identified what relocation disputes are and noted the wide range of legal approaches to resolving them in different jurisdictions, with three broad categories: pro-relocation, neutral, and anti-relocation.⁷ The English and New Zealand approaches were selected for in-depth study in part because they represent the two ends of this spectrum in the common law world.

Looking at the existing literature, we saw that English scholars have so far provided excellent doctrinal analyses of the English legal approach. However, a review of the literature in other jurisdictions revealed an increasing trend to supplement doctrinal analysis with empirical research, of which there is very little in England. The empirical research undertaken for this thesis was therefore designed to contribute to filling this empirical information gap, with methodology set out in Chapter 2.

Chapter 3 provided a detailed doctrinal analysis of the development of relocation law in England and New Zealand, explaining how the two jurisdictions came to reach their currently divergent positions. Both countries make the welfare of the child(ren) involved the

⁷ T Foley, 'International Child Relocation: Varying Approaches Among Member States to the 1980 Hague Convention on Child Abduction' (London: 2006), available online at www.family-justice-council.org.uk/docs/International_Child_Relocation_research_paper.pdf.

paramount consideration,⁸ but within this single core principle we saw divergent interpretations of what a child's welfare demands in the relocation context.

The English approach evolved with relatively little variation from the position set out in 1970,⁹ building up to the current leading case of *Payne v Payne*.¹⁰ While all factors are relevant, the English courts have identified 'the emotional and psychological well-being of the primary carer' as a factor to which 'great weight must be given'.¹¹ The effect of refusal of leave on the applicant parent's ability to promote his or her child's welfare is therefore a key determination.¹² The effect of this approach is thought to be that well-considered relocation applications tend to be favoured.¹³

In New Zealand, by contrast, the English approach was rejected in 1995,¹⁴ with the welfare enquiry instead to be 'all-factor [and] child-centred', with no *a priori* weighing of factors.¹⁵ Later statutory change has altered the position so that there is now a degree of prioritisation between the factors relevant to welfare,¹⁶ with the child's safety¹⁷ and his or

⁸ Children Act 1989, s 1(1); Care of Children Act 2004 (hereafter, 'COCA'), s 4.

⁹ *Poel v Poel* [1970] 1 WLR 1469 (EWCA).

¹⁰ [2001] EWCA Civ 166, [2001] 1 FLR 1052 (hereafter, '*Payne*').

¹¹ *Ibid*, [41].

¹² *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043; *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239.

¹³ See, eg, M Hayes, 'Relocation Cases: Is the Court of Appeal Applying the Correct Principles?' [2006] *CFLQ* 351; C Geekie, 'Relocation and Shared Residence: One Route or Two?' [2008] *Fam Law* 446.

¹⁴ *Stadniczenko v Stadniczenko* [1995] NZFLR 493 (NZCA).

¹⁵ *D v S* [2002] NZFLR 116 (NZCA), [47].

¹⁶ *Bashir v Kacem* [2010] NZCA 96, unreported, [51].

¹⁷ COCA, s 5(e).

her relationships with both parents¹⁸ seemingly elevated above other factors.¹⁹ The effect is that relocation is generally perceived as difficult to obtain.²⁰

To test these apparent differences, Chapter 4 turned to empirical research with practitioners in the two jurisdictions. Judges, lawyers and court welfare advisors in England and New Zealand were asked to analyse three hypothetical relocation cases. In all three cases, considerable variation was seen between the two national groups.

Tom's case – involving a six year old boy with a clear primary carer who sought to relocate to her new partner's home country – produced the clearest divergence. The English focused on the well-being of the mother and the effect of refusal of leave on her and her new partner, while New Zealanders thought that preserving and strengthening Tom's relationship with his father was more important. The English therefore thought relocation would be allowed, while New Zealanders thought it would be refused.

Less variance was seen in Jane's case, involving a 12-year-old child of mixed culture in an equal shared care arrangement. With no clear primary carer, Jane's case was harder for the English to fit within *Payne*, though they still gave the applicant mother better chances of relocating than did New Zealanders.

¹⁸ COCA, s 5(b).

¹⁹ This position may yet change, since the Supreme Court judgment on appeal from *Bashir v Kacem* [2010] NZCA 96, unreported, has not been delivered at time of writing.

²⁰ See, eg, F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009); M Henaghan, 'Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question' (*NZFL Conference*, Auckland: 2009).

Mark and Hannah's case, where the primary carer father sought to move within the jurisdiction, also saw the English being more pro-relocation than the New Zealanders. The English thought that relocation in this case was almost certain to be granted, whereas New Zealanders thought it a borderline case, albeit on the side of allowing relocation.

All three cases therefore showed marked divergence between the two countries in terms of the analysis and prioritisation of factors within the welfare enquiry. Although the likely outcomes in two of the cases were the same, the English looked consistently more favourably on relocation. Moreover, the case in which there was a sharp divergence in likely outcomes – Tom's case – was the one which most closely represents a 'typical' relocation dispute, especially in the English context.

In Chapter 5, we explored the views of 22 English practitioners about English relocation law. The story told by those practitioners was of a clear and well-understood law, but in terms of evaluation, participants were split. Some thought that the current approach was the correct one, either because it had identified the right principles, or, more pragmatically, because it made it easier to deal with difficult cases. Others were concerned that the law was overly directive as to how the welfare analysis should be conducted in the relocation context. These participants favoured changes to the law to remove much of the guidance offered by *Payne* and so leave relocation as a 'pure' welfare decision for trial judges.

Since the approach which some English practitioners favoured mirrored, to a large extent, the approach taken to relocation in New Zealand, Chapter 6 examined the views of 22 New Zealand practitioners about the law there. We saw that New Zealand participants

uniformly supported the basic legal approach, thinking this the best way to assess relocation disputes. When it came to the practical application of this approach, however, there was concern that the lack of guidance led to considerable variation between judges, and that in general the courts were looking increasingly disfavourably on relocation. The cause of this perceived trend was thought to be an increased emphasis on the importance of children's relationships with both parents, coupled with a devaluation in the significance accorded to the primary carer's well-being.

A number of important points have arisen from these findings. In particular, as the conclusions to Chapter 6 explained,²¹ the New Zealand experience may offer valuable lessons for those who seek to reform the English law. An approach with no indication of how competing factors should be weighted is apt to lead to high levels of unpredictability and variation between decision-makers.²² Moreover, such an approach risks allowing the factor previously highlighted – here, the applicant's emotional and psychological well-being – to become undervalued. In New Zealand, this element is not only no longer elevated, but has in fact been devalued to the point where it seems generally to be given disproportionately little weight. The lesson for English reformers might therefore be that change, if change there should be, needs to be done carefully.

Leaving that to one side, the focus in this final chapter is on what we might contribute to the 'search for common principles' of relocation law which is currently underway.²³ We

²¹ Chapter 6, text from n 118.

²² Cf Canada: R Thompson, 'Ten Years After Gordon: No Law, Nowhere' (2007) 35 *Reports of Family Law* (6th) 307.

²³ Lord Justice Thorpe, 'The Continuing Search for Common Principles' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

have seen that there is considerable variation in approaches to relocation law even between countries as similar as England and New Zealand, despite the fact that both centre their approaches on the best interests of the child concerned.²⁴ In the next section, we look at the Washington Declaration on International Family Relocation 2010, which marks the first step towards finding a common approach to relocation.²⁵ It will be suggested that the research presented in this thesis may be cause to think that finding a common approach might not prove straightforward.

The Washington Declaration on International Family Relocation 2010

In March 2010, over 50 judges and other experts from 14 countries attended a three-day conference on international relocation in Washington DC. The purpose was ‘to explore the development of common principles to guide the exercise of [judicial] discretion in granting or refusing a relocation’.²⁶

From this conference came a 13-point Declaration, described in the English High Court as an ‘interesting, and potentially momentous, development’.²⁷ For the purposes of this chapter, the crucial aspects, under the heading ‘Factors Relevant to Decisions on International Relocation’, are points 3 to 6:

²⁴ Children Act 1989, s 1(1); COCA, s 4.

²⁵ Lord Justice Thorpe, ‘Relocation Development’ [2010] *Fam Law* 565.

²⁶ *Ibid*, 565.

²⁷ *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [10].

- 3 In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.
- 4 In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:
 - i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
 - ii) the views of the child having regard to the child's age and maturity;
 - iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;
 - iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;
 - v) any history of family violence or abuse, whether physical or psychological;
 - vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;
 - vii) pre-existing custody and access determinations;
 - viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;
 - ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;
 - x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;
 - xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;
 - xii) issues of mobility for family members; and
 - xiii) any other circumstances deemed to be relevant by the judge.
- 5 While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally

involve considerations of international family law.

- 6 The factors reflect research findings concerning children's needs and development in the context of relocation.

The Declaration concludes by calling for more research,²⁸ and for further discussion about the relevant principles and the possibility of embodying them in an international document.²⁹

To contribute to that discussion, three aspects will be discussed. First, we ask about the ability of any international document to produce uniformity of approach, even where common principles are found. Second, we give thought to paragraph 4 of the Declaration. Third, we suggest that it may be worth considering the likelihood of finding common principles capable of supporting a uniform international approach to relocation. There presently exists international agreement that the best interests of the child concerned should be the paramount consideration in resolving relocation disputes, as reflected in paragraph 3 of the Declaration; but this thesis indicates that having welfare as a common principle is no guarantee of a common approach to relocation.

First, then, it may be worth asking about the ability of any international agreement to produce a uniform practice in the way which some envisage could happen with relocation.

²⁸ Washington Declaration, [12].

²⁹ Washington Declaration, [13].

An instructive comparison³⁰ may be made with the Hague Convention on the Civil Aspects of International Child Abduction 1980.³¹ This Convention, ‘widely and rightly regarded as being a most successful international instrument for the protection of children’,³² has clear objectives based on shared aims. The objectives are two-fold:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are respected in other Contracting States.³³

These objectives are based, as Nigel Lowe and colleagues explain:

...upon the firm conviction “that the interests of children are of paramount importance in matters relating to their custody” and upon the desire “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence...”³⁴

³⁰ The Brussels II revised Regulation (Council Regulation (EC) No 2201/2003) would be another example. During our interview, one barrister explained that there was an argument that the English courts ought to look more favourably on relocations to a Brussels II country because of the reciprocal enforceability of contact arrangements: ‘however have a look at cases like [*Re ML and AL (Children) (Contact Order: Brussels II Regulation)*] [2006] EWHC 2285 (Fam), [2007] 1 FLR 475], ... and see how it plays out in reality. That is an authority I rely on now when I’m trying to defend a removal, to say, “well okay, this is a Brussels country, but look what happens”. Different Brussels countries apply different rules, even though the rules are exactly the same. We’ve had exactly the same experience with the Hague [Abduction Convention]. Look at the way Germany applies the Hague and the way that we do’ (EB2).

³¹ Hereafter, ‘Hague Convention’; see generally A-M Hutchinson, R Roberts and H Setright, *International Parental Child Abduction* (Jordan, Bristol: 1998); P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (OUP, Oxford: 1999); N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), chapters 12-18.

³² N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), vii.

³³ Hague Convention, Article 1.

³⁴ N Lowe, M Everall and M Nicholls, *International Movement of Children: Law Practice and Procedure* (Jordan, Bristol: 2004), 198, quoting Hague Convention, Preamble.

However, despite this clear, simple and agreed aim, there is significant variation found between contracting states with regard to their interpretation of various aspects of the Convention and, more particularly, in their application of it.³⁵

In terms of interpretation of the Convention's provisions, Rhona Schuz notes the definitions of 'habitual residence',³⁶ 'rights of custody',³⁷ and 'settlement',³⁸ as being areas of particular variation in interpretation.³⁹ Another example could be the scope of the power of the court hearing the Hague application in the destination state to 'request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention'.⁴⁰ In *Re D (Abduction: Rights of Custody)*,⁴¹ the House of Lords ruled that such requests could relate both to the applicant's rights under domestic law in the state of habitual residence, and also (here departing from earlier English authority⁴²) to the relevance of that answer to the applicant's rights under the Hague Convention. Elsewhere, however, the narrower view remains dominant. A majority of the

³⁵ This view is not universally held, with Lowe, Everall and Nicholls (ibid, 247) suggesting that there is 'a remarkable unanimity of interpretation amongst Contracting States'.

³⁶ Hague Convention, Articles 3 and 4.

³⁷ Hague Convention, Article 5.

³⁸ Hague Convention, Article 12.

³⁹ R Schuz, 'The Influence of the UN Convention on the Rights of the Child on the Implementation of the 1980 Hague Child Abduction Convention' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010); see also R Schuz, 'In Search of a Settled Interpretation of Article 12(2) of the Hague Child Abduction Convention' [2008] *CFLQ* 64.

⁴⁰ Hague Convention, Article 15.

⁴¹ [2006] UKHL 51, [2007] 1 FLR 961.

⁴² *C v S (A Minor) (Abduction)* [1990] 2 FLR 442 (EWCA), 446, aff'd on other grounds [1990] 2 FLR 450 (HL); *Re F (Child: Abduction: Risk if Returned)* [1995] 2 FLR 31 (EWCA), 40; *Hunter v Murrow* [2005] EWCA Civ 976, [2005] 2 FLR 1119, [46]-[47].

New Zealand Court of Appeal, for example, refused to adopt *Re D*, preferring to follow the earlier English authorities.⁴³ In his dissenting judgment, Baragwanath J commented tellingly that '[i]t is a misfortune that the courts of England and New Zealand, which have so much in common, should be unable to agree on this fundamental aspect of an international Convention that should receive a single interpretation'.⁴⁴

In terms of the application of these Convention principles in practice, Marilyn Freeman describes the global position as being 'in a haphazard state'.⁴⁵ With reference to the limited aspects of the Convention which allow courts to engage in a welfare enquiry,⁴⁶ Freeman concludes that there is

...a need for greater consistency in the implementation of the Convention so that the valid, and valuable, opportunities to safeguard the welfare of individual children are not lost in the lottery of abduction that now pervades the operation of the Convention within the signatory states.⁴⁷

The purpose of this detour into child abduction is not to provide a critique of the 1980

⁴³ *Fairfax v Ireton* [2009] NZCA 100, [2009] NZFLR 433, [28]-[30].

⁴⁴ *Ibid*, [149].

⁴⁵ M Freeman, 'In the Best Interests of Internationally Abducted Children? Plural, Singular, Neither or Both?' [2002] *IFL* 77, 79.

⁴⁶ Such as the Art 13(2) defence, that 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.

⁴⁷ M Freeman, 'In the Best Interests of Internationally Abducted Children? Plural, Singular, Neither or Both?' [2002] *IFL* 77, 81; see also Justice Alastair Nicholson, 'Australian Judicial Attitudes to the Convention on the Civil Aspects of International Child Abduction' in N Lowe and G Douglas (eds) *Families Across Frontiers* (Martinus Nijhoff, The Hague: 1996); A-M Hutchinson, 'Developments in Hague Child Abduction Cases' [2009] *IFL* 186; Judge Peter Boshier and J Wademan, 'The Strengths and Weaknesses of the Hague Abduction Convention: A New Zealand Perspective' [2010] *IFL* 4; The Hon Michael Kirby, 'Children Caught in Conflict: The Child Abduction Convention and Australia' (2010) 24 *IJLPF* 95.

Hague Convention,⁴⁸ but simply to suggest that there may be complexities in applying ‘common principles’ in the international family law arena, even in cases where the principles in question are uncontentious and clearly stated. It may be worth bearing this point in mind during ‘the continuing search for common principles’ in relocation law.⁴⁹

We turn, then, to the substance of the Washington Declaration, which marks the first step in the search. An initial point to note is that even attempting to agree substantive principles of family law in an international setting is unusual. The Hague Convention on child abduction does not attempt this, its focus being on determining the appropriate forum for the substantive hearing to be heard, rather than on the resolution of that substantive dispute.⁵⁰ As William Duncan explains:

Hague Conventions do not in general attempt to resolve the conflict between the laws of different systems by establishing uniform domestic laws. They concentrate rather on achieving uniformity in the principles governing jurisdiction, choice of laws and the recognition and enforcement of judgments.⁵¹

This approach, says Duncan, gives recognition and respect to national diversity, and encourages states to ratify the Conventions; but, ‘most importantly, it is a vital element in upholding certain rights and interests of the child. The balance between respect for diversity

⁴⁸ For such critique, see, eg, F Bates, *International Disorder and the Child Abduction Convention: A Discursive Commentary* (VDM, Saarbrücken, Germany: 2008).

⁴⁹ Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

⁵⁰ See, eg, P Beaumont and P McEleavy, *The Hague Convention on International Child Abduction* (OUP, Oxford: 1999), 29-30; *P v Secretary for Justice* [2003] NZFLR 673 (NZHC), [44].

⁵¹ W Duncan, ‘Children’s Rights, Cultural Diversity and Private International Law’ in G Douglas and L Sebba (eds) *Children’s Rights and Traditional Values* (Ashgate, Aldershot: 1998), 42.

and the insistence on certain universal standards needs to be maintained'.⁵² Put shortly, then, the search for common principles of substantive law is both unusual and ambitious.

As we turn to the Declaration itself, it is worth considering Lord Justice Thorpe's comment that 'due consideration must be given to the limitations of committee drafting', which mean that 'the text is not a matter of satisfaction to any individual on the drafting committee'.⁵³ With this point in mind, there are one or two comments which might be made about the substance of the Declaration.

The English Court of Appeal has already noted that the list of 13 relevant considerations in paragraph 4 of the Declaration has one notable omission for those familiar with the English law: the Declaration seems not to mention the effect on the applicant parent, and consequently on the child, of a refusal of leave to relocate. In *Re H (A Child)*,⁵⁴ Wilson LJ commented on this omission:

One finds (does one not?) that it is not squarely addressed at all. The closest to any address of it is to be found in (viii), namely "the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties". ... [T]here is no square address in (viii) of the impact upon the child likely to flow from negative impact upon the applicant of refusal of the application. Indeed the reference to the child's extended family, education and social life, seems almost to draw attention away from such a factor. I wonder whether consideration may need to be given as to whether, if the present law of England and Wales does indeed perhaps place excessive weight upon that factor, paragraph 4 of the

⁵² Ibid, 43.

⁵³ Lord Justice Thorpe, 'Relocation Development' [2010] *Fam Law* 565.

⁵⁴ [2010] EWCA Civ 915, unreported.

declaration, as presently drawn, by contrast places insufficient weight upon it.⁵⁵

This criticism may be contrasted with the only other judicial opinion yet expressed, that of Mostyn J in *Re AR (A Child: Relocation)*.⁵⁶ His Lordship quoted the above comments of Wilson LJ and expressed agreement ‘up to a point’.⁵⁷ While acknowledging that ‘the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less’, Mostyn J was concerned not to over-emphasise this aspect which, he said, ‘appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions’.⁵⁸ His Lordship then explained:

The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward.⁵⁹

Respectfully, there are some who might question this interpretation of the significance of enquiring as to the effect of refusal of leave on the applicant parent. The issue is not about whether the parent is ‘stoical’ or ‘uncontrolled’, but about what effect her state of mind may have on the child.⁶⁰ As one judge interviewed in this study made clear, the effect of refusal of leave is a question of fact ‘that needs to be examined rigorously [and it is not] just

⁵⁵ Ibid, [27].

⁵⁶ [2010] EWHC 1346 (Fam), [2010] 3 FCR 131.

⁵⁷ Ibid, [12].

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ As with all factors, a parent’s state of mind ‘must be assessed and weighed in [its] bearing on the welfare of the child’: *J v C* [1970] AC 668 (HL), 715.

someone expressing their view, expressed and taken at face value' (EJ2). The parent who accepts, or is found by the judge to be able to 'accept the decision, make the most of it, move on', is, as a matter of fact, in a different position from the parent who believes she will, and is believed by the judge to be likely to, 'collapse emotionally and psychologically'. The impact of each state on the child will be different, and this differential impact may appear somewhat sidelined in Mostyn J's adult-centred analysis.

Mostyn J also noted the significance of the *welfare checklist* in deciding relocation cases,⁶¹ and the fact that, like the Declaration, the checklist does not mention the well-being of the primary carer as a separate factor. After setting out the checklist, his Lordship said:

It is noteworthy that while Parliament thought it appropriate to draw particular attention in [s 1(3)](b) to the emotional needs of the child when making or refusing a s 8 order, it did not think it necessary to make an express statement as to the emotional impact on the parent were an order under s 8 to be made or refused. I doubt that this was an oversight. Perhaps this factor is to be read between the lines of (f). In seemingly relegating this factor to a status of minor importance it may be remarked that the drafters of the Declaration are in fact mirroring the Parliamentary hierarchy of emphasis.⁶²

This analysis also requires consideration. First, it might be noted that the welfare checklist is intended to be a value-free list of relevant considerations,⁶³ and does not specify what weight or relevance any of the listed factors may have in a particular case. Although the Law Commission referred to the checklist as 'a clear statement of what society considers

⁶¹ Children Act 1989, s 1(3); the subsection is set out in Chapter 3, text at n 32.

⁶² *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [14].

⁶³ Baroness Hale of Richmond, 'Relocation' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

the most important factors in the welfare of children’,⁶⁴ it was equally clear that the factors which proved to be significant to each case would vary.⁶⁵ One may wonder, therefore, whether it is appropriate to see the checklist as a ‘Parliamentary hierarchy of emphasis’: it may, rather, be designed simply to ‘make it clear to all what, as a minimum, would be considered by the court’.⁶⁶

Second, while Mostyn J is of course correct that the welfare checklist does not mention the effect of making or refusing an order on a parent, such an omission is hardly surprising. The checklist is intended to be broadly stated and applicable to all contested cases, in both private and public law.⁶⁷ Specific considerations were not included because ‘a statutory checklist is only practicable if it is confined to the major points, leaving others to be formulated elsewhere. If a detailed checklist is provided, it cannot be appropriate to all types of decision and thus separate lists would be needed to deal with each issue’.⁶⁸ Mostyn J could equally have noted that the checklist is silent about ‘the impact on ... the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement’, which, by contrast, his Lordship praises the Declaration for requiring the court to give regard.⁶⁹ Consequently, there may be those who take issue with Mostyn J’s

⁶⁴ Law Commission, ‘Review of Child Law: Guardianship and Custody’ (Law Com No 172, HC 594: HMSO, 1988), [3.19].

⁶⁵ Ibid.

⁶⁶ Ibid, [3.18].

⁶⁷ Children Act 1989, s 1(4).

⁶⁸ Law Commission, ‘Review of Child Law: Guardianship and Custody’ (Law Com No 172, HC 594: HMSO, 1988), [3.19].

⁶⁹ *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 3 FCR 131, [11].

characterisation of the Declaration as ‘a more balanced and neutral approach to a relocation application’.⁷⁰

The other aspect of the Declaration’s factors which may be worth mentioning is paragraph 4(iv), namely ‘where relevant to the determination of the outcome, the reasons for seeking or opposing relocation’. The inclusion of reasons for seeking or opposing relocation is interesting. The English courts have consistently held either party’s motivation to be relevant only where there was evidence of *mala fides* – either that the relocation is ‘motivated by some selfish desire to exclude the father from the child’s life’,⁷¹ or that the opposition is ‘driven by some ulterior motive’.⁷² Other than that, motivation is considered irrelevant.⁷³ The Supreme Court of Canada similarly held motivation to be relevant ‘only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child’.⁷⁴

The list of relevant considerations contained in paragraph 4 of the Declaration is therefore of considerable interest, but there may be value in giving further thought to the content of the list.⁷⁵ The list is, as Lord Justice Thorpe has said, ‘certainly not intended ... to

⁷⁰ Ibid.

⁷¹ *Payne*, [40](a).

⁷² *Payne*, [40](b).

⁷³ See, eg, *Re B (Leave to Remove: Impact of Refusal)* [2004] EWCA Civ 956, [2005] 2 FLR 239; *Re H (A Child) (Removal from Jurisdiction)* [2007] EWCA Civ 222, [2007] 2 FLR 317.

⁷⁴ *Gordon v Goertz* [1996] 2 SCR 27 (Supreme Court, Canada), [49](e).

⁷⁵ *Re H (A Child)* [2010] EWCA Civ 915, unreported, [27].

be conclusive’;⁷⁶ in other words, it ‘should not be seen as any kind of full stop but rather “a prelude to conclusion”’.⁷⁷

Children’s Welfare as the Guiding Principle?

It should also be remembered that the list of factors in paragraph 4 of the Declaration is intended as a tool to help guide judges in the exercise of their discretion; and in doing so, the listed factors all contribute to one overriding principle, namely that ‘the best interests of the child should be the paramount (primary) consideration’.⁷⁸ As Frances Judd QC and Piers Pressdee QC have commented, the paramountcy principle thus ‘occupies its own predominant berth, and its unfettered application would ensure that first instance judges would never find themselves driven to a conclusion that, in their judgment, is inconsistent with what they believe to be best for the child in question’.⁷⁹

It is far from surprising to find the welfare principle at the heart of the Washington Declaration. With the paramountcy principle firmly positioned at the centre of international

⁷⁶ Lord Justice Thorpe, ‘Relocation Development’ [2010] *Fam Law* 565.

⁷⁷ F Judd and P Pressdee, ‘Breaking Through the *Payne* Barrier: What Would the Supreme Court Make of International Relocation?’ (*Harcourt Chambers Seminar*, London: 2010), [91], quoting *Payne*, [40].

⁷⁸ Washington Declaration, [3].

⁷⁹ F Judd and P Pressdee, ‘Breaking Through the *Payne* Barrier: What Would the Supreme Court Make of International Relocation?’ (*Harcourt Chambers Seminar*, London: 2010), [71].

documents⁸⁰ and the domestic laws of the countries involved in the drafting process,⁸¹ any other approach was unlikely to find favour.⁸² The question to which we now turn, therefore, is whether ‘the best interests of the child’ is truly a principle which we have in common, and whether we can rely on the welfare principle to underpin a common approach to relocation law.

Since most jurisdictions already decide relocation cases using domestic legislation which makes the welfare of the child the paramount consideration, it could be said that welfare is a key ‘principle’ which we already have in common. However, it is well known that the welfare principle is not without its critics. That entire debate will not be rehearsed here,⁸³ but some key aspects of it will be addressed.

Before we review some of the critiques of the welfare principle, though, it may be worth reminding ourselves of how that principle works. The reason for doing so is that it could be suggested that attacks on the welfare principle by some critics proceed based on a slightly parodied construction of paramountcy as it stands. In most cases, the substance of the critics’ points against the principle are not affected by these constructions, but it is nonetheless important to be clear.

⁸⁰ See, eg, United Nations Convention on the Rights of the Child 1989, Article 3.

⁸¹ See, eg, Children Act 1989, s 1 (England); Care of Children Act 2004, s 4 (New Zealand); Family Law Act (Cth) 1975, s 60CA (Australia); Divorce Act 1985, s 16 (Canada).

⁸² That is, because the Declaration attempts to find common ground on issues of substantive law; cf the Hague Convention which, because of its focus on forum, generally excludes welfare as a consideration, since the concern is to promote the swift return of abducted children so that the substantive issues can be tried in the country of habitual residence.

⁸³ A useful summary can be found in J Herring, ‘Farewell Welfare?’ [2005] *JSWFL* 159, 160-164.

So, for example, Shazia Choudhry and Helen Fenwick describe paramountcy as meaning that ‘the welfare of the child is to be the single deciding factor, that is, paramount over, and in fact displacing, all other considerations’.⁸⁴ Jonathan Herring similarly states that

...the present law’s understanding of the welfare principle is individualistic. By this is meant that the child and his or her welfare are viewed without regard for the welfare of the rest of his or her family and community. The claims of other members of the family and of the community are only relevant to the extent that they directly affect the child’s welfare.⁸⁵

In later work, Herring says that the welfare principle makes the child’s interests the only ones that matter, and mandates the court to do what is best for the child

...regardless of the impact that such a course of action will have on the interests of the child’s parents, any other children, or the wider community. Indeed, the principle appears to require the court to make an order which would very slightly improve the welfare of the child even where that would cause a huge level of harm to others.⁸⁶

From these positions, the critics go on to suggest various solutions to this ‘displacing’ and ‘individualistic’ notion of welfare. However, it might be asked whether it is correct to say that the welfare principle requires us to see the child in such isolation.⁸⁷ Do the child’s

⁸⁴ S Choudhry and H Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act’ (2005) 25 *OJLS* 453, 455.

⁸⁵ J Herring, ‘The Human Rights Act and the Welfare Principle in Family Law: Conflicting or Complementary?’ [1999] *CFLQ* 223, 225.

⁸⁶ J Herring, ‘Farewell Welfare?’ [2005] *JSWFL* 159, 166.

⁸⁷ This approach could be what one New Zealand judge has called “welfare-of-the-child-is-paramount” disease. A myopia can suggest that the child is properly at the centre of the family. Any decision about custody involves the family. The child is raised within a matrix of family relationships. The Court is required to give paramountcy to the welfare of the child when considering custody, but this does not mean that the family should rotate around a child. To do so would be unhealthy for both the child and the adults’: *Giovanoli-Campbell v Boffa* [2000] NZFLR 873 (1998) (NZFC).

interests in fact ‘displace’ those of others?

While the courts frequently assert, for example, that they are ‘concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child’,⁸⁸ that would seem to be a different proposition. The welfare principle does not require us to assess welfare ‘without regard for’ the rights, interests or welfare of others,⁸⁹ but merely instructs us to disregard those factors if they are irrelevant to the child’s welfare. These considerations are not ‘displaced’ by welfare,⁹⁰ but form part of it. And while the welfare principle might, on occasion, require an outcome which did indeed ‘cause a huge level of harm to others’,⁹¹ such a solution will be exceptional, because the harm to others – particularly a parent or other family member – will in itself impact adversely on the child, which will be a significant factor to take into account when deciding what is in the child’s best interests in the first place.

In the seminal case of *J v C*, the House of Lords explained that the welfare principle involved

...a process whereby, when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances *are taken into account and weighed*, the course to be followed will be that which is most in the interests of the child’s welfare as that term has now to be understood. That is the first

⁸⁸ *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 (EWCA), 128.

⁸⁹ J Herring, ‘The Human Rights Act and the Welfare Principle in Family Law: Conflicting or Complementary?’ [1999] *CFLQ* 223, 225.

⁹⁰ S Choudhry and H Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act’ (2005) 25 *OJLS* 453, 455.

⁹¹ J Herring, ‘Farewell Welfare?’ [2005] *JSWFL* 159, 166.

consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.⁹²

The suggestion that the welfare principle requires the child to be viewed in isolation from his or her family and community would seem to ignore the first part of this explanation of the process. Issues like parents' rights are not irrelevant or excluded under the welfare principle; quite the contrary, they may be at the heart of the decision, to be 'taken into account and weighed' so as to be able to determine which course is best for the child.⁹³ There is no mention of such issues being relevant only when they affect the child 'directly', as is sometimes claimed;⁹⁴ only factors which have *no bearing whatever* on the child's welfare need be discounted. Factors which are of indirect relevance should be included, though it may be conceded that, because it is the *relevance* of a factor that matters rather than its mere *existence*, such issues will often be of less importance than issues which directly affect the child.

All of this is not to say that there are not convincing arguments that the English courts currently give inadequate attention to the rights and interests of the parties when determining

⁹² *J v C* [1970] AC 668 (HL), 710-711 (emphasis added).

⁹³ Lord MacDermott's reference to the 'claims and wishes of the parents' in the above passage should be taken to mean the parents' rights and wishes: this is the phrase his Lordship uses elsewhere in his speech, including in point 2 of his somewhat neglected summary, which states that '[i]n applying section 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue': *J v C* [1970] AC 668 (HL), 715.

⁹⁴ See, eg, J Herring, 'The Human Rights Act and the Welfare Principle in Family Law: Conflicting or Complementary?' [1999] *CFLQ* 223, 225.

child law disputes.⁹⁵ The point is simply that we need to be careful in attacking the welfare principle that we attack its reality and not a caricature which fails to do justice to its subtlety.⁹⁶

Turning then to the criticisms themselves, one attack on the welfare principle asserts that it focuses on the child's interests at the expense of others' to too great an extent. This argument, described by John Eekelaar as 'the *lack of fairness* objection',⁹⁷ has taken on a particular significance since the enactment of the Human Rights Act 1998,⁹⁸ though versions of the argument were seen before that. Helen Reece, for instance, argued in 1996 that the welfare principle inhibits debate about which issues and values are important, and allows adults' rights to be subordinated to children's needs too readily.⁹⁹ (In the relocation context, this argument finds expression in Jonathan Herring and Rachel Taylor's work.¹⁰⁰)

⁹⁵ See, for example, the powerful discussions by J Eekelaar, 'Beyond the Welfare Principle' [2002] *CFLQ* 237; S Harris-Short, 'Family Law and the Human Rights Act 1998: Judicial Restraint or Revolution?' [2005] *CFLQ* 329; S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act' (2005) 25 *OJLS* 453; S Choudhry and J Herring, *European Human Rights and Family Law* (Hart, Oxford: 2010).

⁹⁶ For example, in the English context, it is not clear how different Jonathan Herring's idea of 'relational welfare' is from what some might suggest is the current operation of the welfare principle: J Herring, 'The Welfare Principle and the Rights of Parents' in A Bainham, S Day Sclater and M Richards (eds) *What Is a Parent?* (Hart, Oxford: 1999). This objection may be less pronounced in other jurisdictions where the welfare principle is interpreted differently: see, eg, H Rhoades, 'Revising Australia's Parenting Laws: A Plea for a Relational Approach to Children's Best Interests' [2010] *CFLQ* 172.

⁹⁷ J Eekelaar, 'Beyond the Welfare Principle' [2002] *CFLQ* 237, 238.

⁹⁸ See, eg, J Herring, 'The Welfare Principle and the Rights of Parents' in A Bainham, S Day Sclater and M Richards (eds) *What Is a Parent?* (Hart, Oxford: 1999); S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act' (2005) 25 *OJLS* 453.

⁹⁹ H Reece, 'The Paramountcy Principle: Consensus Or Construct?' (1996) 49 *Current Legal Problems* 267.

¹⁰⁰ J Herring and R Taylor, 'Relocating Relocation' [2006] *CFLQ* 517; see discussion in Chapter 1, text from n 166.

A different, and long-standing, complaint about the welfare principle is ‘the inherent indeterminacy of the best interests standard’.¹⁰¹ The leading proponent of this view, Robert Mnookin, highlighted a number of difficulties which combine to cause this indeterminacy: a lack of information; an inability to predict all the possible outcomes of the decision; an equal inability to predict the likelihood of any of those possible outcomes; and, underlying all of these, a lack of consensus about which outcome would be ‘best’.¹⁰²

In his discussion of the welfare principle, Eekelaar points to one method used to determine a child’s best interests, which he terms ‘objectivization’: this approach ‘presuppose[s] various states of affairs the experience of which are thought to have beneficial or adverse results for the child’.¹⁰³ While stressing the possible value of this approach, Eekelaar notes that the reliability of such an assessment is difficult to determine, particularly because it ‘depend[s] on a large measure of consensus over values’.¹⁰⁴ Robert van Krieken later linked this point to the increasing breakdown in this consensus over family values in Western societies during the last several decades: this breakdown, he says, has the effect of ‘making it more difficult to choose between competing interpretations [of best interests], and removing much of the normative basis for the exercise of judicial discretion’.¹⁰⁵

¹⁰¹ R Mnookin, ‘Child-Custody Adjudication: Judicial Functions In The Face Of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226, 229.

¹⁰² Ibid.

¹⁰³ J Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ (1994) 8 *IJLF* 42, 47.

¹⁰⁴ Ibid.

¹⁰⁵ R van Krieken, ‘The “Best Interests of the Child” on Parental Separation: On the “Civilizing of Parents”’ (2005) 68 *MLR* 25, 32.

A connected argument against the welfare principle is described by Eekelaar as ‘the *lack of transparency* objection’.¹⁰⁶ As he explains, the criticism is that the welfare principle ‘might fail to provide sufficient protection to children’s interests because its use conceals the fact that the interests of others, or, perhaps, untested assumptions about what is good for children, actually drive the decision’.¹⁰⁷ Eekelaar goes on to identify relocation cases as illustrating this objection particularly well, since the English law appears to promote the interests of primary carers under the guise of promoting children’s welfare.¹⁰⁸

In addition to these criticisms of the welfare principle in its everyday operation, we can also note that ideas about what will be in a child’s best interests are context specific, in terms of both time and place. Indeed, the welfare principle’s ability to adapt over time to changing social developments was praised in *J v C*, where Lord Upjohn described

...the gradual development of the law and practice in relation to infants. They have developed, are developing and must, and no doubt will, continue to develop by reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children; for after all that is the model which the judge must emulate for ... he must act as the judicial reasonable parent.¹⁰⁹

This point is readily illustrated. For example, for some decades after the first statutory

¹⁰⁶ J Eekelaar, ‘Beyond the Welfare Principle’ [2002] *CFLQ* 237, 237.

¹⁰⁷ Ibid. See also J Herring, ‘The Welfare Principle and the Rights of Parents’ in A Bainham, S Day Sclater and M Richards (eds) *What Is a Parent?* (Hart, Oxford: 1999); C Piper, ‘Assumptions About Children’s Best Interests’ (2000) 22 *JSWFL* 261.

¹⁰⁸ J Eekelaar, ‘Beyond the Welfare Principle’ [2002] *CFLQ* 237, 241-242.

¹⁰⁹ *J v C* [1970] AC 668 (HL), 722-723.

introduction of the paramountcy principle into English law,¹¹⁰ the courts considered adulterous mothers to be unsuitable to have the custody of their children; it was ‘not until the end of World War II [that] it became generally accepted that the fact that a mother had committed adultery was not necessarily inconsistent with her being a good parent’.¹¹¹

Moreover, since we can so readily see that, in the application of the welfare principle, ‘[t]he past is a foreign country’ where things are done differently,¹¹² it is no surprise to find that things are also done differently in different places around the world. Indeed, this variance is noted by Eekelaar, who says that ‘conceptions of children’s best interests are strongly rooted in the self-images of world cultures. These objectivizations of children’s interests will inevitably largely constitute the way the [welfare] “principle” is viewed in these cultures.’¹¹³ Similarly, Philip Alston cautions that any ‘apparent commonality [of the welfare principle] contrasts sharply ... with the very diverse interpretations that may be given to the principle in different settings’.¹¹⁴

A number of explanations of these variations in understandings of the welfare principle at different times and in different places have been advanced. Stephen Parker refers to localised ‘conventions’ which govern the application of best interests;¹¹⁵ and more

¹¹⁰ Guardianship of Infants Act 1925, s 1.

¹¹¹ S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford: 2003), 577.

¹¹² L P Hartley, *The Go-Between* (Penguin, Harmondsworth: 1958), 7.

¹¹³ J Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ (1994) 8 *IJLF* 42, 57; see also J Eekelaar, ‘Children Between Cultures’ (2004) 18 *IJLPF* 178.

¹¹⁴ P Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *IJLF* 1, 5.

¹¹⁵ S Parker, ‘The Best Interests of the Child: Principles and Problems’ (1994) 8 *IJLF* 26.

theoretically, van Krieken discusses the ‘logics’ which underlie our constructions of welfare. The research findings presented in this thesis may offer empirical support for this analytical framework.

In his useful discussion, van Krieken draws on the work of Irène Thèry¹¹⁶ to map a shift from a ‘logic of substitution’ to a ‘logic of durability’ in child law. In short, the ‘logic of substitution’ assumes that ‘both parents will re-partner, the child will gain a step-parent to substitute for the departing parent, who will simply form a new family with their new partner, more or less gradually losing touch with their first children’.¹¹⁷ By contrast, under the ‘logic of durability’, ‘equal care and control by both parents is pursued as a goal, the child is seen as having two households, and both parents subordinate their own needs and desires to the requirements of the model, particularly the necessity for cooperation, agreement and negotiation’.¹¹⁸ The latter part of the twentieth century was, according to van Krieken, marked by a shift from a construction of welfare underpinned by the ‘logic of substitution’ to one informed by the ‘logic of durability’.

There are two links that can be made between this work and relocation law. One is highlighted by Herring’s work on English contact cases, which he contrasts with the approach to relocation.¹¹⁹ Herring suggests that English relocation cases ‘appear to depart

¹¹⁶ I Thèry, ‘“The Interests of the Child” and the Regulation of the Post-Divorce Family’ (1986) 14 *International Journal of the Sociology of Law* 341.

¹¹⁷ R van Krieken, ‘The “Best Interests of the Child” on Parental Separation: On the “Civilizing of Parents”’ (2005) 68 *MLR* 25, 30-31.

¹¹⁸ *Ibid*, 35.

¹¹⁹ J Herring, ‘Connecting Contact: Contact in a Private Law Context’ in A Bainham *et al* (eds) *Children and their Families: Contact, Rights and Welfare* (Hart, Oxford: 2003).

from a straightforward application of the welfare principle' by focusing so much on the welfare of the primary carer.¹²⁰ He suggests that this approach is inconsistent with the courts' attitude to resident parents' well-being in contact cases, where little weight is given to the argument that 'the emotional harm caused to the resident parent of allowing contact is a good reason for denying contact'.¹²¹

One explanation which Herring offers for this apparent disparity¹²² is that the 'emphasis on the importance of the emotional well-being of the resident parent on the welfare of the child [is] an approach which has been overlooked in cases of disputed contact'.¹²³ This argument can be linked to van Krieken's discussion of the underlying 'logics' of welfare,¹²⁴ seeing the difference between contact and relocation as a conflict of 'logics'.

It is certainly correct to say that the English courts currently give little weight to a resident parent's well-being in disputed contact cases, and consider that '[w]hatever the difficulties, however scant the prospects of success, the courts must not relent in the pursuit of the restoration of what had been a natural relationship between father and daughter'.¹²⁵

¹²⁰ Ibid, 102.

¹²¹ Ibid, 103.

¹²² A second which he suggests is that the resident parent's right to free movement is the key consideration, and that this right should be protected unless its exercise would cause the child significant harm.

¹²³ J Herring, 'Connecting Contact: Contact in a Private Law Context' in A Bainham *et al* (eds) *Children and their Families: Contact, Rights and Welfare* (Hart, Oxford: 2003), 103.

¹²⁴ R van Krieken, 'The "Best Interests of the Child" on Parental Separation: On the "Civilizing of Parents"' (2005) 68 *MLR* 25.

¹²⁵ *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279, [46].

However, this prioritisation of factors has not always held sway. Going back, it is not difficult to find cases in which the primary carer's well-being was given more importance than contact.¹²⁶ In one 1981 case, Sir John Arnold P explained that 'stress which would be caused ... to a custodial parent through the children ... having access to the other parent is a matter properly to be taken into consideration in relation to the question of whether access should be granted'.¹²⁷ As recently as 1993, the Court of Appeal declared that 'the implacable hostility of a mother towards access or contact is a factor which is capable ... of supplying a cogent reason for departing from the general principle that a child should grow up in the knowledge of both of his parents'.¹²⁸

The English disregard of the resident parent's well-being in contact cases, combined with a general shift towards equality in parental responsibility¹²⁹ and discharge of parenting functions,¹³⁰ fits with the suggestion of a move towards the 'logic of durability'. However, it is difficult to discern any similar shift in logic in the relocation context, where the English caselaw seems to retain its 'logic of substitution' approach. The fact that the English approach to relocation 'has not evolved or developed in any way since the decision ... in *Poel*'¹³¹ in 1970 would go some way to explaining the continuance of the 'logic of

¹²⁶ See, eg, *B v B (B (An Infant) Intervening)* [1971] 1 WLR 1486 (EWCA); *M v J (Illegitimate Child: Access)* (1982) 3 FLR 19 (decided 1977) (EWHC).

¹²⁷ *B v A (Illegitimate Children: Access)* (1982) 3 FLR 27 (EWHC), 32

¹²⁸ *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1 (EWCA), 7.

¹²⁹ Children Act 1989, s 2; Law Commission, 'Review of Child Law: Guardianship and Custody' (Law Com No 172, HC 594: HMSO, 1988), [2.10], [4.6].

¹³⁰ See, eg, S Gilmore, 'Court Decision-Making in Shared Residence Order Cases: A Critical Examination' [2006] *CFLQ* 478; S Gilmore, 'Disputing Contact: Challenging Some Assumptions' [2008] *CFLQ* 285.

¹³¹ *Re H (Application to Remove from Jurisdiction)* [1998] 1 FLR 848 (EWCA), 853.

substitution', which then dominated family law thinking.¹³² In relocation cases, the 'logic of substitution' is especially evident in the English court's attitude to the 'new family unit' and the 'emphasis on the importance to the children's welfare of a stable and viable family unit in which to grow up'.¹³³

However, it is not clear why relocation cases continue to apply a 'logic of substitution' where other areas of English child law have increasingly moved towards the 'logic of durability'. While Lord Justice Thorpe recently suggested that nobody had yet made the argument that the law's approach to primary carers and contact had changed since relocation law principles were laid down in 1970,¹³⁴ this explanation is difficult to reconcile with the arguments of counsel in *Payne* and, more recently, in *Re G (Leave to Remove)*.¹³⁵ Indeed, this point was addressed squarely in Thorpe LJ's judgment in *Payne*:

Since the direction [of relocation law] has stood for 30 years ... it is perhaps necessary to question whether changing perceptions of child development and welfare in the interim undermine or erode [its] exposition. That exposition ... was very much based on common sense. But even generally accepted perceptions can shift within a generation. The shift upon which Mr Cayford [counsel for the father] relies is in the sphere of contact. He asserts that over the last 30 years the comparative importance of contact between the child and the absent parent has greatly increased. No authority for the proposition is demonstrated. Without some proof of the proposition I would be doubtful of accepting it. Throughout my professional life in this

¹³² R van Krieken, 'The "Best Interests of the Child" on Parental Separation: On the "Civilizing of Parents"' (2005) 68 *MLR* 25, 30.

¹³³ *Re B (Removal from Jurisdiction)*; *Re S (Removal from Jurisdiction)* [2003] EWCA Civ 1149, [2003] 2 FLR 1043, [31].

¹³⁴ Lord Justice Thorpe, 'The Continuing Search for Common Principles' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

¹³⁵ [2007] EWCA Civ 1497, [2008] 1 FLR 1587.

specialist field contact between child and absent parent has always been seen as an important ingredient in any welfare appraisal.¹³⁶

While Thorpe LJ is right that no evidence was presented to support the argument,¹³⁷ it is not clear that such evidence was ever put in contact or residence cases either; certainly there are some who question the evidential basis of the court's present approach.¹³⁸

One possible answer to the apparent difference between contact and relocation in the English law may be that the English acceptance of the 'logic of durability' is not as deep-rooted as it might appear. In contact cases, a surface-level application of the 'logic of durability' is possible with seemingly little cost to the primary carer;¹³⁹ and, indeed, arrangements can be labelled 'shared residence', and so nod towards this logic, without making substantial changes to the arrangements on the ground.¹⁴⁰ However, in cases where the 'logic of durability' would risk the stability of the child's primary home – such as

¹³⁶ *Payne*, [29]. Cf the view of participants in this study, that 'in the late 70s, early 80s, contact with the non-residential parent ... was not regarded as having the importance which it is now regarded as having' (EJ1), and that when *Poel* was decided 'there were different social norms' (EB1): see Chapter 5, text at n 108.

¹³⁷ One online pressure group has published a detailed report claiming to present the evidence which Thorpe LJ said was missing: see M Robinson, 'Relocation and Leave to Remove' (2009), online at www.thecustodyminefield.com.

¹³⁸ See, eg, J Eekelaar, 'Contact: Over the Limit' [2002] *Fam Law* 271; S Gilmore, 'Disputing Contact: Challenging Some Assumptions' [2008] *CFLQ* 285.

¹³⁹ Whether there is in fact little cost is open to debate: see, eg, F Kaganas and S Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' (2004) 12 *Feminist Legal Studies* 1; F Kaganas, 'Domestic Violence, Men's Groups and the Equivalence Argument' in A Diduck and K O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish, Abingdon: 2006); J Wallbank, 'Getting Tough on Mothers: Regulating Residence and Contact' (2007) 15 *Feminist Legal Studies* 189.

¹⁴⁰ *Re F (Shared Residence Order)* [2003] EWCA Civ 592, [2003] 2 FLR 397, [32]; L McCallum, 'Shared Residence: Just A Label?' [2004] *Fam Law* 528; see Chapter 3, text from n 259.

relocation cases, contact cases involving severe violence,¹⁴¹ or obstruction to contact leading to proposals to transfer a child's main residence¹⁴² – the court reverts to the 'logic of substitution' model.

That is not to say that there is not some prospect of change. We have seen earlier in this thesis that there is a significant body of opinion which seeks to change the English approach to relocation law,¹⁴³ and Lord Justice Thorpe has given some indication that the Washington Declaration may yet be the catalyst for change:

Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our court has applied consistently since the decision in *Poel v Poel* in 1970. The case for such a shift is not difficult to articulate. The principles stated in *Poel* were substantially founded on the concept of the custodial parent. Furthermore there is an emerging body of significant research in various jurisdictions that must be brought into account.¹⁴⁴

So, although English relocation law is, at present, reflective of a 'logic of substitution' model of child law, there may yet be a shift in the direction of the 'logic of durability'.

The second link between relocation law and van Krieken's work comes from the

¹⁴¹ See, eg, *Re H (Contact Order) (No 2)* [2002] 1 FLR 22 (EWHC); *Re C (A Child)* [2004] EWCA Civ 1293, unreported; *Re A (Contact: Witness Protection Scheme)* [2005] EWHC 2189 (Fam), [2006] 2 FLR 551; *Re H (Contact: Domestic Violence)* [2005] EWCA Civ 1404, [2006] 1 FLR 943.

¹⁴² See, eg, *Re G (Residence: Same-Sex Parents)* [2006] UKHL 43, [2006] 2 FLR 629; *Re B (A Child) (Residence Order)* [2009] UKSC 5, [2010] 1 FLR 551.

¹⁴³ Chapter 3, text at n 128; Chapter 5, text at n 143.

¹⁴⁴ Lord Justice Thorpe, 'Relocation Development' [2010] *Fam Law* 565.

comparative aspect of this research.¹⁴⁵ We saw that New Zealand relocation law gives less weight to the well-being of the primary carer and more weight to the importance of on-going contact between the child and both parents. It could be that these findings suggest that New Zealand has experienced a more complete acceptance of the ‘logic of durability’ model.¹⁴⁶ When discussing the vignettes in Chapter 4, the equal shared care arrangement in Jane’s case was accepted as normal by New Zealanders but seen as unusual by the English;¹⁴⁷ and similarly, New Zealanders were surprised that Tom was seeing his father only once or twice a fortnight, while the English thought it to be a good contact arrangement.¹⁴⁸

This finding fits with other evidence which suggests that New Zealand is, in general, further along the spectrum towards a ‘logic of durability’ model of child law than England.¹⁴⁹ While New Zealand’s legislation does not promote shared parenting to the extent seen in Australia,¹⁵⁰ there is greater emphasis on children having continuing

¹⁴⁵ It could also be suggested that van Krieken’s analysis offers further insight into the Australian debate seen in the opening chapter: where Juliet Behrens’ work may fit within a ‘logic of substitution’ model, Patrick Parkinson’s ‘indissolubility of parenthood’ is firmly part of the ‘logic of durability’: see Chapter 1, text at nn 180-197.

¹⁴⁶ Note that van Krieken is primarily focused on the Australian position, which is similar to that in New Zealand in terms of the promotion of shared parenting: on Australia, see, eg, B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (OUP, Melbourne: 2008), ch 6; G Monahan and L Young, *Family Law in Australia* (7th edn, Butterworths, Adelaide: 2009), ch 7; J McIntosh and R Chisholm, ‘Shared Care and Children’s Best Interests In Conflicted Separation: A Cautionary Tale from Current Research’ (2008) 20 *Australian Family Lawyer* 1; H Rhoades, ‘The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform’ (2008) 36 *Federal Law Review* 279; R Kaspiew *et al*, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, Melbourne: 2009).

¹⁴⁷ Chapter 4, text at nn 71-77.

¹⁴⁸ Chapter 4, text at nn 47-52.

¹⁴⁹ See generally M Henaghan, ‘Legally Rearranging Families: Parents and Children After Break-Up’ in M Henaghan and W Atkin (eds) *Family Law Policy in New Zealand* (3rd edn, LexisNexis, Wellington: 2007), 326-333.

¹⁵⁰ Family Law Act 1975 (Cth), ss 60CC(2)(a), 61DA and 65DAA; see Chapter 1, text from n 80.

relationships with both parents,¹⁵¹ and a view amongst practitioners that the courts favour equally or substantially shared care.¹⁵²

Moreover, there is little to suggest that the English and New Zealand approaches to relocation are moving towards one another. At a recent conference attended by the leading judges from both countries,¹⁵³ their thinking appeared to be pulling in different directions, though both thought common principles to be desirable. While Lord Justice Thorpe, Head of International Family Law for England and Wales, has accepted that there may be cause to rethink the English approach in the light of changing social norms,¹⁵⁴ his paper at the conference defended the principles of *Payne* as being ‘well founded and consistent with our statutory law’.¹⁵⁵ Meanwhile, Judge Boshier, Principal Family Court Judge of New Zealand, was arguing for ‘the important role that each parent plays’ and stressing the ‘hopelessly difficult situations that arise when relocations are permitted and complex contact arrangements are put in place’, supporting the implication of his title, that the Judge considers that relocation is allowed too easily.¹⁵⁶ Given that, as we have seen throughout this

¹⁵¹ COCA, s 5(b).

¹⁵² Chapter 6, text from n 15; see also F Mackenzie, *Uneasy Trends in Relocation Law* (unpublished LLM Thesis, Victoria University of Wellington: 2009).

¹⁵³ *International Child Abduction, Forced Marriage and Relocation Conference* (London Metropolitan University, 30 June – 2 July 2010).

¹⁵⁴ Lord Justice Thorpe, ‘Relocation Development’ [2010] *Fam Law* 565.

¹⁵⁵ Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010). According to one summary, ‘though [Thorpe LJ] championed the cause of a common approach internationally, his own colours remained plainly pinned to the *Payne v Payne* mast’: F Judd and P Pressdee, ‘Breaking Through the *Payne* Barrier: What Would the Supreme Court Make of International Relocation?’ (*Harcourt Chambers Seminar*, London: 2010), [88].

¹⁵⁶ Judge Peter Boshier, ‘Have Judges Been Missing the Point and Allowing Relocation Too Readily?’ (*International Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010), available online at <http://www.justice.govt.nz/courts/family-court/documents/publications/speeches/Boshier%20-%20Relocation.pdf>.

thesis, relocation cases are allowed much less readily in New Zealand than in England, it might be questioned whether the two countries are, at present, likely to find substantive common ground.

What might this tell us about relocation and the search for common principles? A number of points have arisen. We have seen that there is presently a significant divergence in approaches to relocation, even between common law countries. We have noted that both England and New Zealand are presently guided by the welfare principle, but that this ‘common principle’ does not seem to be producing similar approaches to relocation. However, since the welfare principle is almost certain to be at the heart of any international agreement about relocation, this divergence must cause us to ask about the extent to which welfare is capable of producing consistency of approach.

Such a conclusion is not entirely surprising. When the United Nations Convention on the Rights of the Child 1989 was newly enacted, commentators suggested that best interests standards

...are neither wholly useful nor wholly useless. Their meanings, and the likelihood of any single meaning being adopted by a decision-maker, can depend in large part on localised understandings or conventions. If any of the framers of article 3(1) [of the Convention] expected more of the best interests standard than they were mistaken.¹⁵⁷

In this final chapter, we have discussed the differences between England and New Zealand in terms of the underlying ‘logics’, but much the same point arises. Can we expect

¹⁵⁷ S Parker, ‘The Best Interests of the Child: Principles and Problems’ (1994) 8 *IJLF* 26, 39.

more of the best interests principle in the context of international agreement on relocation? It seems unlikely, unless we can agree more detailed principles about how welfare is to be interpreted in the relocation context.

Baroness Hale has identified three approaches which could be taken to such principles.¹⁵⁸ First, there can be produced a list of relevant factors to be taken into account. This list, she says, should be child-focused, and has the potential to be value-free in the way that the *welfare checklist* in English law is.¹⁵⁹ Hale notes that, although a list of relevant factors is the easiest option, and the one most likely to achieve widespread agreement, many of the causes of the variance we see at present will remain: different decision-makers will rank the factors differently, and there is no reason to think that this tacit ranking will not simply recreate the prioritisation of factors relevant to welfare which we have seen to be the cause of the existing divergence.

Secondly, Hale says, we could seek a list of principles which involve a degree of normative guidance. Such a list will be more difficult to agree, for precisely the reasons we have been exploring here: different countries would favour different principles being on the list, and a different ranking of those principles.

Finally, it would be possible to create a ‘bright-line rule’ about relocation applications, such as (to use Hale’s example) that relocation would never be permitted if it was opposed by another person with parental responsibility. Such a rule would then be subject to limited

¹⁵⁸ Baroness Hale of Richmond, ‘Relocation’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010); a summary is found in [2010] *Fam Law* 877.

¹⁵⁹ Children Act 1989, s 1(3).

exceptions,¹⁶⁰ somewhat similar to the approach taken to international abduction.¹⁶¹ This approach seems least likely to be adopted.¹⁶² It is difficult to conceive that there could be agreement between, say, England and New Zealand about which way such a rule would go. At the same time, there would need to be agreement about the scope of any exceptions; and experience with the Hague Convention suggests that different countries are well able to interpret such exceptions in different ways so as to achieve different aims.¹⁶³

It is because of the current range of approaches to relocation, coupled with the lack of obvious policy answers to the relocation puzzle, that the search for common principles is very much ‘continuing’. It is important, as the Washington Declaration states,¹⁶⁴ that we gather more information from research to help us with the search. We should also look closely at the experience in different countries since, as this thesis has helped to demonstrate, there are lessons which can be learned and pitfalls which can be predicted from such an exercise. The aim must not simply be *a* common approach to relocation – though there is something to be said for the value of common principles *per se* – but, rather, the *right* common approach.

¹⁶⁰ In particular, to take account of domestic violence or child abuse.

¹⁶¹ Hague Convention.

¹⁶² The Washington Declaration specifically disfavours presumptions either in favour of or against relocation: Article 3.

¹⁶³ See above, text from n 35.

¹⁶⁴ Article 12.

Concluding Observations

In keeping with the call of the Washington Declaration,¹⁶⁵ it is worth taking a moment to consider what further research could usefully be carried out next to contribute to our understanding of relocation disputes. Three projects could be particularly timely.

One would involve further exploration of the possible significance of European Union law to English relocation law. As Ruth Lamond has noted,¹⁶⁶ it is possible that having different rules for relocation within the UK and internationally is incompatible with the right of free movement for all European citizens within the Union.¹⁶⁷ This is an issue which could valuably be explored further.

A second project would mirror work being conducted in New Zealand and Australia,¹⁶⁸ involving a longitudinal study of individuals involved in relocation disputes. Ideally, such research would start with families when they seek legal advice, so as to include in the sample both those families who litigate and those who do not. The aim of such research would be to discover more about the people involved in relocation, and about the consequences for all those involved, and especially for the children, of relocation being either allowed or refused.

¹⁶⁵ Article [12].

¹⁶⁶ R Lamond, 'Linking Child Abduction and the Free Movement of Persons in European Union Law' (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

¹⁶⁷ Article 21(1) TFEU.

¹⁶⁸ Chapter 1, text at n 204.

A third project would aim to find out more about what is happening in the trial courts dealing with relocation disputes. In England, we simply have no data about how relocation cases fare in the trial courts – or even how many such cases there are – and so we are unable ‘to analyse trends and outcomes in relocation cases’¹⁶⁹ in the way that happens in other jurisdictions.¹⁷⁰ While an ideal study would involve all trial courts which hear relocation cases – the High Court, the Principal Registry of the Family Division, and all the County Courts – much valuable data could be obtained by taking a sample of courts and analysing all their relocation cases over, say, a twelve month period. From this, we would obtain a snapshot, providing data about the frequency of cases, the individuals involved (age of children, etc), their destinations and reasons for relocating, and of course the outcomes.

England is perceived to be a pro-relocation jurisdiction, but this ‘shadow’ of the law is based on the tiny sample of cases which reach the law reports – mainly Court of Appeal cases – and we currently have no way to know whether these cases are anything like representative of what happens in the trial courts. The research presented in this thesis has offered some first insights into these issues by asking practitioners who work in relocation law about their experiences. However, a more detailed understanding of the work of the trial courts would be valuable in confirming the findings of this study, which suggest that there is significant concordance between the approaches of the appeal court and the trial courts.

Looking ahead to the prospect of finding a uniform international approach to

¹⁶⁹ Washington Declaration, Article 12.

¹⁷⁰ See, eg, M Henaghan, ‘Going, Going... Gone – To Relocate Or Not To Relocate, That Is The Question’ (*NZFL Conference*, Auckland: 2009); P Parkinson, ‘The Realities of Relocation: Messages from Judicial Decisions’ (2008) 22 *Australian Journal of Family Law* 35; R Thompson, ‘Ten Years After Gordon: No Law, Nowhere’ (2007) 35 *Reports of Family Law* (6th) 307.

relocation, Lord Justice Thorpe recently commented that ‘maybe it’s a dream, but it’s no bad thing to dream’.¹⁷¹ The key to making this dream a reality must lie in further research across a range of legal and social contexts. We need more research to help us to understand relocation disputes and their consequences better, and so to help us in formulating a legal response which truly promotes the best interests of the children involved.

¹⁷¹ Lord Justice Thorpe, ‘The Continuing Search for Common Principles’ (*International Child Abduction, Forced Marriage and Relocation Conference*, London Metropolitan University: 2010).

Appendix 1

Empirical Research Materials

The following materials are contained in this appendix:

- A copy of the initial letter sent to practitioners inviting them to participate in this research
- A copy of the informed consent form;
- A copy of the University of Oxford Research Ethics Approval form; and
- The interview schedule.

Letter sent to practitioners inviting them to participate in this research

Dear ...,

Research into relocation cases

I understand from your Chambers' website that you have recent experience of disputes involving relocation of children (or 'leave to remove' cases). I am presently researching this topic as part of my doctoral thesis at Oxford University, and am hoping to interview family law practitioners who have dealt with relocation cases in roughly the last 3 years. The purpose of these interviews is to obtain information about how relocation law is read and applied by those who advise, represent and assess families involved in relocation disputes.

If you have dealt with relocation cases (say, 3 or more cases in the last two years), I wondered if it would be possible to arrange a meeting to discuss, in general terms, your experiences and your views on the operation of the law. This would not involve discussion of particular cases on which you have worked. I enclose a letter which includes more detail about the project and the kinds of questions I would hope to discuss. If you were willing to participate in my research, I would be most grateful. Getting input from practitioners about the 'reality' of the law is immensely valuable.

Participation in this research is entirely anonymous; the research has been approved by the Oxford University Research Ethics Committee, which ensures that adequate procedures are in place to protect participant confidentiality. I would be happy to discuss this, or any other, aspect of the research informally, with no commitment on your part, if you would like.

If you are willing to participate, I would be happy to meet you at your office, or another location convenient for you (such as a local café, court, etc). I would hope to be able to meet in the coming weeks, and I am able to be flexible to fit with your schedule. The interview would last, at most, 45 minutes.

I look forward to hearing from you, and thank you in advance for your time.

Yours sincerely,

Robert George.

Informed consent form

Consent to Participation in Research

Name of Researcher:	Robert George
University of Oxford Research Ethics Approval Code:	SSD/CUREC1/08-216

This research project relates to relationships between children and their parents after the breakdown of the parents' relationship. More specifically, it examines disputes about migration by one of the parents, commonly known as *relocation disputes*. Part of the research involves interviews with professionals who are involved with the family justice system and who have experience of relocation cases in their professional capacity. The aim of these interviews is to obtain information about how relocation law is read and applied by those who advise, represent and assess families involved in relocation disputes.

If you agree to participate, you will be asked a number of general questions about the law and practice related to parent-child relationships, and to relocation in particular. You will not be asked about any specific cases, other than one or two reported cases (such as *Payne v Payne* [2001] 1 FLR 1052). You will then be asked to comment on three hypothetical relocation disputes. When looking at these hypothetical cases, you will be asked to identify the aspects which you consider to be relevant, to consider how you would advise the parties or otherwise assess the case, and to speculate on what a court might do if it were asked to decide the case.

The interview should last no more than 45 minutes, and will be audio recorded. You are free not to answer any particular question(s), or to withdraw entirely from the study. You may withdraw at any time, even after the interview has ended, and all the data collected will be discarded. The recording of the interview will be stored electronically, in a file which does not identify you. Your anonymity is guaranteed at every stage. You will be identified only by your profession (solicitor, barrister, social worker, etc), the country in which you work (because the research is taking place in more than one country), your gender, and an indication of the extent of your family law experience. Anything which you say on the tape which might allow you to be identified will be changed during the transcription to ensure that your identity remains anonymous. This consent form will not be linked to the recording or the transcript of the interview; it will be kept in a secure location, separate from the research data, and will be destroyed when the thesis is submitted.

This work forms part of my doctoral research, undertaken in the Law Faculty at the University of Oxford. The data gathered as part of this research will be used in my thesis, and may later also appear as part of a book or journal article. I may wish to quote directly from the interview. If you would like to check any such quotations prior to submission of the thesis, with the option to veto their use, the relevant sections can be sent to you for approval; please tick the box below if you wish to do this. It is likely that this would occur during 2010.

If you agree to participate, please sign the declaration below:

I agree to participate in the relocation study being conducted by Robert George, as outlined above, and understand that I am free to withdraw at any time if I wish:

Signed: _____ Date: _____

I wish to see any sections of the work containing quotations for my approval: ☐

University of Oxford Research Ethics Approval form

SOCIAL SCIENCES & HUMANITIES
INTER-DIVISIONAL RESEARCH ETHICS COMMITTEE

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Secretary of the SSH IDREC
Social Sciences Divisional Office



Ref. SSD/2/3/IDREC

10 September, 2008

Robert George
Jesus College

Dear Mr George,

Application for research ethics approval

Ref No.: SSD/CUREC1/08 – 216

**Title: Reassessing Relocation: A Comparative Analysis of English and New Zealand Law and Policy
Related to Disputes Over Family Migration After Parental Separation.**

The above application has been considered on behalf of the Social Sciences and Humanities Inter-divisional Research Ethics Committee (IDREC) in accordance with the procedures laid down by the University for ethical approval of all research involving human participants.

I am pleased to inform you that, on the basis of the information provided to the IDREC, the proposed research has been judged as meeting appropriate ethical standards, and accordingly approval has been granted.

Should there be any subsequent changes to the project, which raise ethical issues not covered in the original application, you should submit details to the IDREC for consideration.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jane Dale'.

Jane Dale
Assistant Registrar

cc: Ms Mavis Maclean, Department of Social Policy & Social Work, Barnett House, 32
Wellington Square
Academic Administrator, Law Faculty

JED/CAJB

Interview schedule

Before we start, can you confirm, for the tape, that you have read and signed the informed consent form which we just looked at? And, I'd like to remind you that you do not have to answer any of the questions, and that you can withdraw from the study at any time if you wish to do so. Okay...

1. Preliminaries:

Experience of relocation :

- How long have you been in practice / been at CAFCASS / been a judge?
- How many relocation cases, roughly, do you do each year?

2. Relocation (general):

I'd like to ask a few general questions about relocation cases now. All I'd like you to do is to answer based on your experience – I'm not asking you to try and generalise to the population as a whole! Thinking about the cases which reach you as a solicitor/barrister/judge/cafcass officer:

- Roughly how long has it been, usually, since the parents separated? Do they tend to have just separated, or has it been a few years, or does it vary?
- Roughly how old do the children tend to be, if there is any pattern?
- Have you noticed any changes in why people are wanting to relocate in recent years?
- What kinds of places are people wanting to move to?
- Of the cases which reach you as a solicitor/barrister/cafcass officer/judge, roughly what proportion would you expect to go on to a final hearing, and how many might settle before trial?
 - What characteristics make a case more likely to go to judgment?
 - What kinds of settlement might you reach?
- When you get a client who says they want to relocate, what is the first thing you ask them or tell them? [*may link to next...*]

If you wanted to describe relocation law to a client, how would you summarise it?

3(a). English questions:

To what extent is *Payne* the guiding authority when you go into court?

To what extent would you say that domestic relocation is covered by the same principles as international relocation? Do you have any idea why the principles would be different? Do you think they *should* be different?

Thinking in the abstract – and I realise you wouldn't normally! – how easy is it, in general, to get leave to relocate?

Could we put it on a scale from 1 to 10, 1 being very hard and 10 being very easy?

In an article in Family Law, Charles Geekie QC said that there was effectively a presumption in favour of relocation – do you think that's right?

What kinds of factors work in favour of or against a relocation application? [*may have covered*]

As a practitioner, how helpful is the recent Court of Appeal authority? [*may have covered*]

Does it make it easy to explain to clients what is happening? [*may have covered*]

Does it create any problems? [*may have covered*]

Does joint residence cause particular difficulties, given *Payne's* reference to primary carer?

The law has been subjected to a number of criticisms. I wonder if I could just put a couple of them to you, and for you to consider if any of them is valid...

- The New Zealand Court of Appeal criticised the English court for isolating one factor (ie the primary carer's emotional and psychological wellbeing) and giving it presumptive weight.
- Mary Hayes has said that the *Payne* approach stops judges taking full account of the welfare principle, and is effectively biased in favour of relocation;
- Jonathan Herring and Rachel Taylor think that relocation law pays too little attention to the human rights dimension;
- Charles Geekie, in the article I mentioned earlier, thinks the law takes too little account of increasingly shared care arrangements and, again, involves a presumption in all but name;

Are there other problems, not identified here, that you find as a practitioner?

Would you make any changes to relocation law if you were in a position to do so?

3(b).New Zealand Questions:

Has COCA changed the approach taken to relocation disputes in New Zealand? If so, how?

Boshier – COCA places greater weight on on-going family relationships

Priestley – COCA leaves the child's welfare central, so no real change

Is there any one case that you would usually rely on in preparing a case, or when you go into court?

To what extent would you say that domestic relocation is covered by the same principles as international relocation? Do you think the approaches should be the same?

Thinking in the abstract – and I realise you wouldn't normally! – how easy is it, in general, to get leave to relocate?

Could we put it on a scale from 1 to 10, 1 being very hard and 10 being very easy?

As a practitioner, how helpful do you find the New Zealand law? [*may have covered*]

Does it make it easy to explain to clients what is happening? [*may have covered*]

Does it create any problems? [*may have covered*]

Does shared care cause particular difficulties, greater than cases where there is a main carer?

How often do you have a psychologist or other expert involved in a relocation case? How helpful do you find their reports when they are involved?

The law has been subjected to a number of criticisms. I wonder if I could just put a couple of them to you, and for you to consider if any of them is valid.

The success rate for relocation applications which get to court has dropped from about 50% to about 35% in the last few years – which is a lot lower than some other jurisdictions. Do you think that is problematic?

The Court of Appeal in *D v S* said that no factor should be given any particular weighting in advance, and that everything had to be determined on a case-by-case basis. But in *B v B*, Duffy J said:

“Relocation will only be in the child's best interests if his mother is so harmed by having to remain in New Zealand that her emotional and psychological health will deteriorate to a point where it will impact detrimentally on the child.”

Does this reflect your experience in the Family Court?

Does this approach risk creating a no-win situation for applicant parents, in that if they won't be so devastated by refusal that they will be medically compromised then they won't get leave; but if they are that devastated, they might risk losing the care of their child altogether?

Are there other problems, not identified here, that you find as a practitioner?

Would you make any changes to relocation law if you were in a position to do so?

4. Vignettes:

I sent you in advance three short hypothetical cases. Have you had chance to look at them? It doesn't matter if not... I can't give you any more information about the cases than are on here, though I realise that you would hope to have more than this if it were a real case! Can we look at them and consider for each:

- What are the key factors?
- What advice would you give to each of the parents? [for Cafcass: how would you assess the case?]
- What do you think the likely outcome of the case might be?

5. Contact and Child Law:

As a final section, can we spend just a few minutes talking about contact cases and child law more generally?

How important do you think contact with both parents is in the eyes of the law?

If you have a non-resident parent who has good contact, under what circumstances might the court be persuaded to stop direct contact?

If you had a case where there was good contact, but the resident parent was finding it very stressful and was becoming distressed by the contact, what do you think the court's reaction would be if she asked for direct contact to be stopped?

Now, can we compare that with relocation? Is the law's approach consistent?

Finally, what do you think the Court of Appeal's role is in child law cases?

What kind of guidance does the CA provide? What weight is given to the trial judge's discretion, the benefits of seeing witnesses, etc?

And again, can we compare that with the relocation cases? Is the CA taking the same approach, or are there any differences?

6. Closing:

I think that's all I wanted to ask, but is there anything I missed that you think is important? Or is there anything you would like to ask me?

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