

J v S (2010)

[2011]1 FLR 1694; [2010] EWHC 2098 (Fam)

02/07/2010

Barristers

Private: Marcus Scott-Manderson QC

Court

Family Division

Practice Areas

International Children Law

Summary

When considering an application by a foreign national primary carer for leave to remove children permanently from the jurisdiction following divorce, the court was bound to follow the principles in *Payne v Payne* (2001) EWCA Civ 166, (2001) Fam 473. The impact of a refusal on the primary carer was only one component of the welfare assessment; the welfare of the child continued to be the paramount consideration.

Facts

The applicant mother (M), a Japanese national, applied for leave to permanently remove the two children of her marriage to the respondent (F) from the jurisdiction to live in Japan. The children, aged 10 and 8, had been born and brought up in England but spoke both Japanese and English. After M and F divorced, the children lived with M in England and had regular contact with F on alternate weekends and in school holidays. M complained of feeling increasingly isolated and unhappy in England, and stated that those feelings were exacerbated by the inability of the maternal grandmother to continue spending up to eight months a year in England, as she had previously been doing. M also had a recognised serious medical condition which was associated with stress and depression and which would worsen if she remained in her current situation but would improve if she were allowed to relocate to Japan with the children. F objected to the application on the basis that he would lose regular contact with the children. The CAFCASS officer made no recommendation but expressed concerns about the impact of relocation on the children's relationship with F.

Held

The case had to be decided on the basis of the principles expounded in *Payne v Payne* (2001) EWCA Civ 166, (2001) Fam 473, notwithstanding a growing tide of opinion that those principles, which placed emphasis on the wishes of the primary carer, were outdated in times when joint and shared residence orders were commonplace. The central principle in *Payne* was to give paramount consideration to the welfare of the children and it was under that rule that the necessary balancing exercise should be conducted, *Payne* followed. The impact of a refusal on M was only one component of the welfare

assessment (see paras 81-82 of judgment). (2) Applying Payne, it could be concluded that (a) M's application was realistic and genuine in that it was not motivated by a selfish desire to exclude F from the children's lives. The family had sufficient wealth to enable M to rehouse herself and the children in Japan without a mortgage. M also had savings to support her and the children. M had always given the children's education absolute priority and had applied a diligent and conscientious approach to selecting an appropriate school in Japan (paras 82, 84, 86); (b) F's objections were undoubtedly genuine and it was undeniable that his relationship with the children would change if they moved to Japan. The loss of day-to-day contact was not offset by the advantage that they would gain by consolidating relationships with their extended family in Japan (paras 89-90); (c) the impact on M as a single mother of a refusal of permission to relocate was that she would suffer long-term ill health, requiring medical treatment and clinical support, with the possibility that she would also need psychiatric treatment. Consequently, her quality of life would be poor (paras 90-92); (d) applying the statutory welfare checklist, the refusal of M's application would lead to health consequences for her which would ultimately be detrimental to her ability to care for the children, especially as they approached adolescence. M was unquestionably the primary carer and the children's welfare demanded that she continued to be so. Although in some cases the loss of frequent informal contact between father and child would be too high a price to pay to accede to the primary carer's desire to relocate, the court had to take litigants as it found them and in the instant case it was clear that M could not make a life for herself in England. Given the extreme and specific facts of the case, it was in the children's best interests to relocate to Japan with M; that conclusion would have been the same even if the Payne guidance had never been given and the welfare principle was the sole consideration (paras 92, 99, 100-102). The court was satisfied that M would enable the relationship between F and the children to be nurtured, and that she would maintain a flexible approach in Japan so as to allow F as much contact as he was able to arrange (para.104).

Permission

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