

Overcoming the legal hurdles of relocation

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Family analysis: What complications arise when relocating children to a non-convention state? Alex Verdan QC, head of chambers at 4 Paper Buildings, examines the Court of Appeal's evaluation in Re B (Children).

Original news

Re B (Children) (Relocation to UAE: Enforceability of charge over property and issues of wardship) [2015] EWCA Civ 1302, [2015] All ER (D) 227 (Dec)

The Court of Appeal, Civil Division, dismissed a father's appeal against an order permitting his former partner to relocate to Abu Dhabi with their two children. The court confirmed that the law on penalties did not apply to stipulations for payment of money upon the happening of a specified event other than a breach of a contractual duty owed by the contemplated payer to the contemplated payee. Therefore, a charge over the mother's husband's property in favour of the father, to be triggered in the event of breach of the court order, would not be unenforceable. Further, wardship, in the circumstances, was inappropriate and would be replaced by a child arrangements order.

What were the key issues in this appeal?

This appeal by a father sought to challenge the order of the circuit judge allowing the mother to relocate the two children from England to live in Abu Dhabi where her husband worked.

The children were 13 and 11 and their care was shared by their parents, who had never married.

The case had a long history and the parental relationship was acrimonious, albeit that it was accepted that:

- o the mother had never prevented the children from seeing their father
- o the children had thrived, and
- o their relationship with him was very positive

The case was particularly difficult given the:

- o substantial amount of time the children spent with the father
- o adverse findings made by the court about the mother's honesty
- o mother's negative mind-set towards the father, and
- o lack of recognition of the rights of unmarried fathers in the United Arab Emirates (UAE)

The case raised two issues of wider interest. Namely, the:

- o use of wardship as a means of supporting the court's orders for contact in a case where the children would become habitually resident in a non-convention state, and
- o legality of the practice of seeking compliance with a relocation order by the provision of financial security

Does the case change the law on relocation?

The Court of Appeal reaffirmed the law as set out in *K v K (children) (removal from jurisdiction)* [2011] EWCA Civ 793, [2011] All ER (D) 67 (Jul) and *F (a child) (permission to relocate), Re* [2012] EWCA Civ 1364, [2012] All ER (D) 261 (Oct), namely that the paramount consideration of the court was the welfare of each of the children, but that the guidance in *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FCR 425 could, depending on the case, still be relevant to the court's overall welfare evaluation.

What was the significance of the children's wishes and feelings in this case?

Both the children strongly wanted to relocate. They knew the UAE and had been there many times. They wanted to live with their mother and her husband. Their views had been consistent over time and stated firmly and clearly to the father. They were ready to move and prepared for it and the delay in the determination of the case was adversely affecting them. The Court of Appeal concluded that the court at first instance had thus been fully entitled to see how the relocation could be achieved in light of the legal hurdles. The children's wishes were of additional importance because of the very strong attachment they had with their father and their clear desire to maintain a strong relationship with him despite the move. In the circumstances the Court of Appeal concluded that the judge had been fully entitled to attribute substantial weight to the children's wishes.

What was the approach to the issue of wardship?

The court at first instance considered that the children's habitual residence would change on relocation and accepted the argument that making the children wards of the court would increase the court's range of powers in the event of a need to enforce the court orders. The Court of Appeal considered that the use of wardship in such circumstances should be approached with 'extreme circumspection' as it could create 'jurisdictional ambiguity'. The Court of Appeal did not consider that the facts of this case were exceptional, so as to justify wardship, when it added nothing to the court's powers under the Children Act 1989. The mere existence of an English order would provide the necessary structure, and a powerful incentive, for compliance. The wardship part of the order was thus replaced.

What was the approach to the issue of the charge?

The court had directed that the relocation was conditional on the mother's husband arranging for a charge in the sum of £250,000 in favour of the father on the husband's London property, to be enforceable in the event of any of the term of the relocation order being breached. It was accepted that all procedural steps required for this charge to be enforceable had been taken. The Court of Appeal was satisfied that the charge was a suitable means of securing adherence to the terms of the order, and that its purpose was to secure compliance given that the husband had agreed to its terms after taking independent legal advice. The only variation the Court of Appeal made to the original order in this respect was that the determination of any potential breach should come before a court if there was a dispute about whether the charge was realisable.

What expert evidence was relied on?

The case was complicated by the fact the jointly instructed expert in Middle Eastern law initially advised the court that, despite the fact that the parties had not been married, the father's parental rights would be respected in the UAE and any rights he had under an English order could be enforced by him in that state. The court at first instance had partly based its decision to allow the relocation on this advice. After the father unilaterally sought legal advice from a different expert, who said exactly the opposite, the case was fixed for a further final hearing. At the eleventh hour, the first expert was forced to accept that unmarried fathers had no rights under Sharia law. The case highlights the court's reliance on expert evidence in such cases and the need for such evidence to be accurate.

Any further points of interest?

The Court of Appeal reminded us again of the significant advantage a trial judge has of ‘face-to-face, bench-to-witness-box acquaintanceship’ and the difficulty in appealing a comprehensive and carefully constructed welfare evaluation where there has been no error of law.

Alex Verdan QC has been in practice for over 25 years and he specialises in complex and serious children cases—both private law and public law. Alex regularly advises local authorities on policy issues and also advises the media in relation to various aspects of family law. In Re B he was counsel for the respondent mother.

Interviewed by Kate Beaumont.

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