INTERNAL RELOCATION CASES AND SHARED RESIDENCE

Sarah Passemard, a Partner and Helen Cort, a Solicitor at Paris Smith LLP examine the Court of Appeal's decision in **Re: F (Children: Internal Relocation) [2010] ALL ER (D) 263** and whether it marks a change in the court's approach to internal relocation cases.

In an ever more mobile society, family law practitioners are increasingly faced with cases where the issue is whether children should move to a new location. This is true not only of cases where it is being proposed that the children should move abroad, but whether children be allowed to move within the jurisdiction.

These cases are not only becoming more numerous but also more complex. It is now very common for both parents to continue to work after the birth of children, and correspondingly it is more likely that one or both might wish to move in order to further their career. There is a trend towards more shared care of children during a relationship as well as after separation, and joint residence orders are more common. The case can be further complicated where a new partner needs to relocate, or the applicant has children from the original relationship and a child with the new partner.

The recent case of **Re: F** is an example of the difficult balancing of competing factors by the court.

The facts of Re F

The mother applied to relocate from a town in the north-east to the Orkney Isles with the four children; three boys aged 14, 13 and 9, and a girl aged 11. The second child, known as G, was dyspraxic and mildly autistic. The parents separated in 2003 and divorced in 2005, the mother remained the primary carer of the children but the father had regular and successful contact. It was stated that the daughter, R, had in the recent past visited her father only rarely.

After their divorce, both parents remarried and continued to live in the same town. However the mother had substantial connections with the Orkney Isles and had long wanted to live there. She and her new husband accepted a job-share on the island and applied to relocate with the four children. Her proposed schedule of contact was that the children should make seven return trips each year to see their father. There were four possible routes, the shortest of which was 9 hours and the longest 19 hours, each involving at least two methods of transport and some an overnight stay on the return journey. The daughter wished to relocate with her mother, the three boys were against it, for different reasons, G stating that he would not go.

The judge at first instance in refusing the mother's application held that the case was "truly exceptional", that the proposed move was very close to a removal from the jurisdiction and that the move would cause the children "emotional harm".

On dismissing the mother's appeal, the Court of Appeal confirmed the exceptional nature of the circumstances, citing the following factors:-

(i) the strong links with the town where the children had lived all their lives;

(ii) the importance (at least for the three boys) of the frequent contact with the father;

(iii) the sustainability of contact, given the difficulty of the journey if they relocated;

(iv) the strong views of all the children, and that fact that allowing the appeal would impose living arrangements which were contrary to the wishes to a greater or lesser extent of all three boys, especially G, whose particular needs had to be taken into account;

(v) the likelihood as a result of emotional strain and harm to the children.

1 Principles applied to internal relocation

It has been settled law since **Re E (Residence: Imposition of conditions) [1997] 2 FLR 638** that the welfare principle and checklist applies to any application for internal relocation. The test set out in **Payne v Payne [2001] EWCA Civ 166,** does not, as confirmed by cases including **Re B (Prohibited Steps Order) [2007] EWCA Civ 1055** which involved a proposed relocation to Northern Ireland. The case law has instead focussed on the application of the checklist in internal relocation cases.

In **Re S (A Child) (Residence order: Condition) [2002] EWCA Civ 1795** which came before the Court of Appeal on two occasions, the mother wished to move from London to Cornwall with the child, who had Down's Syndrome. On the second occasion the court led by Lady Butler-Sloss having reviewed the facts of the case concluded that the circumstances in this case were "exceptional" based on the child's disability and medical problems, the limits of her understanding, her shortened life expectancy and the practicalities of travel between London and Cornwall and upheld the first instance refusal of the mother's application.

Lady Butler-Sloss said that "the general principle is clear that a suitable parent entrusted with the primary care of a child by way of a residence order should be able to choose where she/he live and with whom".

On the first occasion that the case was before the Court of Appeal Lord Justice Thorpe was clear that whilst the test in **Payne** did not apply to internal relocation cases, logically the test applied to a case for "purely local relocation" would be less stringent than in a case where the application was for a move outside the United Kingdom.

This was further clarified by the Court of Appeal in **Re F** that the test applied to an applicant must be more stringent based on the distance proposed. In that case it was not just the distance but the difficulty of the journey involved.

2 Imposition of conditions on residence

In **Re E (Residence: imposition of Conditions) [1997) 2FLR 638** the mother wished to relocate from London to Blackpool with the two children. At first instance the judge granted a residence order to the mother but imposed a condition under section 11(7) of the Children Act that the children should continue to reside at a particular address.

The Court of Appeal made it clear that s 11(7) of the Children Act 1989 applied to all section 8 orders, including prohibited steps and specific issues; the court therefore had the power to either prohibit relocation by the applicant parent or to impose a condition with the same result. However, Lady Butler-Sloss also said that as Parliament had not contemplated that there should be a general imposition of conditions on the resident parent where that parent was entirely suitable and that it would be an "unwarranted imposition" upon the right of that parent to choose where she would live in the UK . She considered however that there might be "exceptional cases" where for instance the court had concerns about the ability of the parent to care for the child which might warrant invoking section 11(7) but in general , "the correct approach is to look at the issue of where the children will live as one of the relevant factors" .

The case of ***Re D (Minors)*** **(Residence: Imposition of conditions) [1996] 2 FLR 281** considered whether a mother should be subject to a condition on her residence order. In this instance it related to preventing her from bringing the children into contact with her cohabitee but applies equally to the question of conditions regarding relocation. Ward LJ 's view was:-
" The court was not in a position to overrule (the mother's) decision to live her life as she chose. What was before the court was the issue of whether she should have the children living with her."

Subsequent cases such as **B v B (Residence: Condition limiting Geographical Area) [2004] 2 FLR 979** as well as **Re F** have referred to a finding of "exceptional circumstances" in imposing conditions which would effectively prevent a relocation by the child and primary carer. It is notable however that in B v B the exceptional circumstances appeared to be that the mother's hostility to contact, evidenced by past conduct including two failed applications to move to Australia. The court found that in the light of this contact would be unlikely to succeed if she was allowed to move from London to Newcastle, especially as she appeared to have no specific reason for the move.

The Court of Appeal however in **Re F** appeared to be retreating from a requirement that circumstances should be exceptional to justify a condition on residence, saying that whilst settled authority suggests that the welfare test should be applied to establish whether circumstances were "exceptional", this constitutes a gloss on the test not required or mandated by s 1 (1) or 1(3) of the Children Act.

3 Shared Residence

The question of how far a shared residence order affects the situation was considered by the Court of Appeal in n **Re L (internal relocation; shared residence order) [2009] EWCA Civ 20 .**

The facts of Re L (shared residence)

The mother sought to relocate from London to Somerset with the child, a girl aged 4. There was a shared residence order with the father and he was said to play a "substantial part" in the child's life. The mother had been made redundant and contended that the only suitable employment that she had been able to find was in Somerset -in fact, she had been commuting daily to Somerset from North London for some time by the time that the case was heard by the Court of Appeal.

The Court of Appeal held that whilst a shared residence order is an important factor, it is not a " trump card" which will determine the outcome; the normal welfare principle applies. A feature of this case was that the mother had already unilaterally moved from south to north London and had made an unsuccessful application to relocate to Israel. In the latter case the judge had made a finding that part of the mother's motivation to relocate was to diminish the relationship between the father and the child.

In the High Court case of **Re H (Agreed joint residence : mediation) [2004] EWHC 2064 (Fam)** the parties agreed that there should be a joint residence order. The father wished to relocate from London to Devon to ensure his earning capacity and employment security. There was an agreed schedule of contact for the parent who was not to be the main carer; the issue was with which parent the child should have his main home. The court recognised that the child would face disruption which ever parent he was with, and that the correct course was to apply the welfare checklist, in this case granting the father's application.

In cases where a question of relocation is being considered at the same time that residence is being decided for the first time, **Re E** indicates that where the children should live will be one of the relevant factors in deciding cross applications for residence and this could be a decisive factor in a finely balanced case. The parties therefore will have to consider their proposed arrangements for the children carefully. In the case of the parent seeking to relocate, details such as schooling, housing and contact proposals will need to be set out in much the same way as an applicant for relocation abroad who needs to fulfil the requirements of **Payne.**

Conclusion

To summarise the guidance for practitioners arising from case law :-

(i) The welfare checklist applies

(ii) Consider whether there are any factors which would make this an exceptional case which might lead to the making of a condition -such as the disability of a child, sustainability of contact, motivation of the applicant.

(iii) Shared residence is not a trump card but is an important factor, possibly a decisive one in finely balanced cases

(iv) - the test in *Payne* does not apply but: in finely balanced cases, the proposals of the applicant will be subject to detailed scrutiny in the same way as in external relocation cases; the proposals for contact may involve similar considerations if a significant distance is involved; and the applicant's motives may be a factor .

Where the recent decision in **Re F** marks a departure from earlier case law is that the Court of Appeal appears to be adopting a more cautious approach in suggesting that cases should be decided on the basis of the welfare checklist and that the line of cases finding " exceptional circumstances" has taken the authorities in a direction not intended by Parliament. It could be argued that the circumstances in **Re F** were to a certain extent typical of many similar cases, rather than exceptional. Potentially this could pave the way for more respondents to a relocation application successfully arguing that their case fell within the "exceptional circumstances" test.