

## Judicial Approach to Child Relocation

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The issue of relocation of children is mainly one of the by-products of the break down of the institution of marriage. Little do the “Romeos and Juliets” know that their mutual discord may land the star creation of their union of love in Court and the issues of custody or relocation of the poor child would be left to be decided by the judges, social scientists and psychologists. ‘The prominence of the issue stems from a variety of factors including the increasing numbers of working parents subject to employment – related transfer, the greater mobility of our society with far – flung families, and the rising numbers of custody disputes occurring within burgeoning variety of family structures’.<sup>46</sup> In attempting to strike a right balance between multiple and conflicting judiciaries all over the globe have found these cases to be tough, worrisome and challenging. No wonder, it has been a focal point among international family law judges, practitioners and academicians.

Broadly there have been three approaches/trends in relocation jurisdictions. These are:

- (i) raising presumption in favour of custodial parent;
- (ii) favour ongoing contact between the child and non-custodial parent; and
- (iii) focusing on ‘best interests’ factors and other relevant considerations.

The first trend raises a presumption in favour of the custodial parent who seeks to relocate. This is by and large the practice in courts of United Kingdom. The most often cited case is *Payne v. Payne* (2001) 1 FLR 1052. ‘Under *Payne* the primary carer seeking to relocate with their child or children must first establish that the move is realistic and not motivated by selfish reasons, that is, a desire to exclude the father from the child or children’s life. Likewise, so must the motives of the contesting parents be examined’.<sup>47</sup>

Assuming the proposed relocation is motivated by good faith, the parent must then establish the proposed relocation is reasonable. When considering the reasonableness of the proposed relocation the court will examine the logistics of the move, for example, carer opportunities, education, availability of housing and distance from current residence. The court will also consider the child’s relationship with the primary care and the present and future contact arrangements with the non-primary care giver and the impact of the future arrangements on their relationship. The child’s wishes will be taken into account where appropriate depending on age and maturity.<sup>48</sup>

Once the court is satisfied that the relocation is reasonable, the court will allow the parent to relocate with the child unless it is clearly demonstrated that the relocation would be detrimental to the child’s welfare.<sup>49</sup>

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<sup>46</sup> Gary A. Debele (1998) A children’s right approach to relocation: A meaningful best interest’s standard, *Children’s Rights* Vol.15.

<sup>47</sup> *Payne v. Payne* (2001) 1 FLR 1052 at 99.

<sup>48</sup> *Ibid* at 109.

<sup>49</sup> See Annex 2 for a diagram summarising the approach embodied in the *Payne* decision.

Although there is neither a presumption for or against relocation in England and Wales, in practice it is rare for the court not to allow relocation by the requesting parent.<sup>50</sup> A rationale for the importance, if not deference, the court affords to the requesting parent's desire to relocate is the belief that a primary carer's emotional and psychological well being is directly linked to their child's emotional and psychological well being.. Thus Thorpe LJ stressed the crucial task of the judge in relocation cases in assessing the potential effect the refusal of an application to relocate will have on the primary carer his or herself and in turn the quality of life for the child.<sup>51</sup>

In United States, the family law is not a federal subject but a state subject. There are 50 States and the State law and the precedent case law reflect all the three approaches to child relocation to which reference has been made above. 'Quite simply, the difference can be boiled down to states that generally do not favour relocation, states that generally do favour relocation, and those that 'favour' neither and instead adhere to a case-by-case analysis on each occasion. Different considerations include the right of the primary carer and relocator to move freely, the right of the non-primary and non-relocating carer to maintain meaningful contact, and a state duty to protect the best interest of the child.<sup>52</sup>

In some cases the constitutional right to travel has also been invoked by a custodial parent seeking relocation. But the other aspect is that the left behind parent, who loses access to child, may be denied the fundamental right to parenting. In such a conflict of two constitutional rights, the courts have decided the issue of relocation by keeping the best interests of child in mind. A typical case of this kind is the one decided by the Maryland Court of Appeal where it was held that, "neither parent has a superior claim to the exercise of this right to provide, 'care, custody and control' of the children.....effectively, then, each fit parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply these type of custody decisions".<sup>53</sup>

In cases of international relocation of a parent with a child, the U.S. courts like other countries (70 in number) follow the Hague Convention. The Convention enshrines the principle to be applied internationally to ensure swift return of abducted children. Under this Convention, it is for the courts in the child 's "habitual residence", before the removal took place, to decide the question of relocation. The courts in jurisdiction to which the child has been removed are mandated to return the child to those courts for the appropriate custody determination.<sup>54</sup>

In Australia the law and the courts do not raise presumption in favour of the custodial parent. The most celebrated and frequently cited case on child relocation is that of *U v.U* (2002) 191 ALR 289. The High Court dismissed mother's appeal and concluded that 'a court is not bound by the proposals of the parties and the child's best interests were to be treated as paramount consideration in relocation cases. However, the High

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<sup>50</sup> R. Spon-Smith, (2004)'Relocation Revisited' Family Law 191 at 193

<sup>51</sup> Lowe at 99

<sup>52</sup> Thomas Foley (1980) 'International child relocation: Varying Approaches among member States to the 1980 Hague Convention on Child Abduction' Page 14.

<sup>53</sup> Relocation of Children: Law and Practice in the United States by Judge Peter J. Messitte, U.S. District Court for the District of Maryland, the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions Windsor, England, August, 2009.

<sup>54</sup> As at F.N.8.

Court further concluded that the best interest of the child should not be treated, or elevated, as the sole factor for consideration. The High Court noted the need to consider the requesting parent's economic, cultural and psychological well being if permission to relocate were granted or refused. The rationale being that the welfare of the parent has a direct impact on the welfare of the child'.<sup>55</sup>

The Family Law Amendment (Shared Parental Responsibility) Act 2006 introduced yet another guideline which underpins the importance of shared responsibility. It is now, 'widely considered that in cases where both parents have a close relationship with the child, and there are no countervailing issues of violence and abuse, it is more difficult to justify a relocation than it was before the Family Law Amendment (Shared Parental Responsibility) Act 2006 came into effect'.<sup>56</sup>

In South Africa, the Courts have attempted to strike a balance between the right of the custodial parent and the best interests of the child as mandated by a South African constitutional provision i.e. section 28(2). The leading case from the said jurisdiction is that of *Jackson* in which Justice Scott JA who authored the majority opinion held:

"It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonable and genuinely taken. Indeed, one case well imagines that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token, care should be taken not to elevate to rules of law, the dicta of judges made in the context of the peculiar facts and circumstances with which they were concerned. (emphasis is added)."<sup>57</sup>

In Canada the questions of relocation are decided under the Divorce Act and the leading judgement in this regard is that of *Gordon v. Goertz* (1996) 2 S.C.R. 27. In the said case, the mother sought relocation of the child as she wanted to move to Australia and she pleaded the presumptive deference approach. The Court by a majority of seven to two rejected the application and held that the sole governing principle was the best

<sup>55</sup> A. Worwood, 'International Relocation – The Debate'. (2005) Family Law 621 at 623.

<sup>56</sup> See, eg, *Eltham and Eltham* (2007) 213 FLR 272; (2007) FamCA 657 at (346) per Cronin J: 'If ... equal time or substantial and significant time is in the best interests of the child and practicable, a relocation which departs significantly from those sharing arrangements, becomes harder to permit.' See also *M and K* (2007) FMCAfam 26; BC200701779 at (35) per Altobelli FM; *BJZ and KEM* (2007) FMCAfam 86; BC200703059 at (47) and (48) per Lindsay FM; *Treloar and Treloar* (No.2) (2007) FamCA 1127 at (69) per Strickland J.

<sup>57</sup> *Jackson v. Jackson* 2002 (2) SA 303 (SCA) para 2 at 318E-1.

interests of the child which should be determined by considering all relevant factors without the application of any presumptions.

In New Zealand the precedent case law is mostly against relocation and the issue is decided under the Guardianship Act wherein the paramount consideration is welfare of the child. In a leading case which still holds the field is *Stadniczenko v. Standniczenko* (1995) NZFLR 493 (CA). The Court held that, “the only principle which governs is that of the best interests of the child. That test cannot be implemented by the devising of a code of substantive rules or of procedural or evidential rules embodying presumptions and onuses.”

In the preceding paragraph, I have given an overview of the law in practice in the Common Law countries. In the civil law countries, the approach is slightly distinct. For instance, in France, the Court trend favours a joint parental authority model. The view is that the decisions concerning the child must be jointly made by both the parents regardless of whether the parents are married, unmarried or divorced.<sup>58</sup>

Similarly in Germany, a similar approach is followed and when a parent wishes to relocate with their child, that parent must obtain the other parent’s consent or permission from the Court.<sup>59</sup>

In Pakistan the cases of relocation or custody of child are decided in accord with the Guardians and Wards Act, 1890 wherein paramount consideration is the welfare of the child. Although under the Islamic law, mother has a preferential right to retain the custody which include relocation for a minor girl till the age of 12 and for the minor boy till the age of 07 with visitation rights of the non-custodial parent, yet this is not an inflexible rule and mostly the courts have kept in view the welfare of the child as a guiding principle. In several cases, the courts have decided in favour of the custodial parent who invariably is a mother although the baby boy had crossed the threshold age of 12 years.<sup>60</sup> If the Court has passed a custody order in favour of a parent, relocation within the country is not an issue. In a case where the mother of the child had died when the baby boy was hardly 15 days old, the real sister of the deceased mother, on request of minor’s father brought up the baby on an undertaking in writing that he would not demand his custody later. However, when the child grew up and came of age, the father sought his custody and moved the Court. The trial Court, the Appellate Court and the High Court decided the matter in favour of the father, inter alia, on the ground that under the Islamic law when a boy attains the age of 07 years, the father has a right of custody. However, the Supreme Court reversed the three concurrent findings of the courts below, mainly on the ground, that the welfare of the child in the facts of that particular case should weigh with the Court while deciding the question of custody or relocation. The Court held as under:

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<sup>58</sup> Worwood at 627 as quoted in *International Child Relocation: Varying approaches among Member States to the 1980 Hague Convention on Child Abduction* by Thomas Foley.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Mst. Razia Bibi v. Riaz Ahmad* (2004 SCMR 821) and *Muhammad Tahir v. Mst. Raeesa Fatimah* (2003 SCMR 1344).

“It would, thus be seen that welfare of the minor is the paramount consideration in determining the custody of a minor. The custody of a minor can be delivered by the court only in the interest and welfare of the minor and not the interest of the parents. It is true that a Muhammadan father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor. The right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case. In this case, the respondent-father, who sought custody of the minor, neglected the child since his birth. The minor had admittedly been under the care of the appellant since the death of his mother. Thus, visualized the mere fact that the minor has attained the age of seven years, would not ipso facto, entitle the respondent-father to the custody of the minor as of right.”<sup>61</sup>

So far as the cases which involve transnational child abduction or relocation are concerned, Pakistan is a non-Hague country but such cases are decided keeping in view the best interests of the child. In 1993 Pakistan judiciary signed a protocol with U.K. judiciary on child abduction. The said Protocol, *inter alia*, stipulates that if the question of relocation or custody of the child is being regulated by a court in the country of child’s habitual residence, the court in the jurisdiction to which the child has been abducted or taken shall return the child to the country of origin so that the matter is decided there.

A brief overview of the case law from Pakistan jurisdiction would be in order.

In Sara Palmer’s case (1992)<sup>62</sup> the petitioner mother moved a divorce petition in England and also sought custody of three youngest children, the elder two were already residing with her, the High Court of Justice Family Division directed that till their majority or until further orders, those children would remain as ward of the Court and shall not be removed from England and Wales without the leave of the said court. The respondent father in utter disobedience to the Court orders left UK along with the afore-referred minor children, she followed him and filed a Habeas Corpus petition in the Lahore High court, Lahore, the court gave the interim custody to the mother but put a clog that order of interim custody would be valid as long as she remained in Pakistan.

In Hiroku Muhammad’s case (1994)<sup>63</sup> petitioner mother, who was a Japanese national, married the respondent father in the country of her origin after being converted to Islam, gave birth to a baby boy, came to Pakistan, developed differences, respondent – father retained the custody of the minor son who by then was six years old, the respondent – father filed an application before the learned guardian judge for an interim custody of the child, petitioner-mother moved a Habeas Corpus petition before the High Court and the issues mooted were whether the High Court could interfere in Habeas Corpus proceedings, during the pendency of an application before the Guardian Judge? Could the petitioner-mother be granted the interim custody notwithstanding the serious allegation leveled against her impugning her character and the apprehension that she might flee to country of her origin i.e. Japan, the High Court decided the matter in petitioner’s favour and held as under:

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<sup>61</sup> Mst Nighat Firdous v. Khadim Hussain (1998 SCMR 1593).

<sup>62</sup> Sara Palmer v. Muhammad Aslam (1992 MLD 520).

<sup>63</sup> Hiroku Muhammad v. Muhammad Latif (1994 MLD 1682)

“....As regards nationality, it is to be seen that the minor was born in Japan and is, therefore, a Japanese National though he also carried nationality of his father. The respondent had himself gone to Japan and married the petitioner, Japanese lady with open eyes. He cannot, therefore, be heard to criticize her for being Japanese”.

In Aya Sasaki’s case (1999)<sup>64</sup> the court granted custody to the custodial parent (mother) on the grounds that a Court in Singapore had already passed an order entrusting the custody of the minor to the petitioner and the said order had to be honored unless the same was unjust or improper and second that the petitioner mother had a preferential right to have the custody of the minor.

Again in ms. Lousie Anne Failey’s case (2007)<sup>65</sup> which was decided after the UK-Pak Protocol was signed, the Court decided the matter in favour of the custodial parent (mother) mainly because the custodial parent had a custody order from a Court in Scotland and the child had been abducted by her father from England to Pakistan. The father took up the plea of Islamic injunctions and his desire to rear his daughter under the Islamic laws but the Lahore High Court held that let even this question be decided by the Scottish Court.

Miss Christine Brass’s case (1981)<sup>66</sup> is the only reported exception in which the custody of abducted minors was refused to the mother despite a custody order from the court of the country of minor’s habitual place of residence on grounds of religion. Petitioner (mother) who had a domicile of Canada, got married to respondent (father) in Ontario (Canada), four children were born out of the wedlock, the petitioner along with those children shifted to Washington, spouses fell apart culminating in dissolution of marriage by a court order and the custody of daughter and the youngest son was granted to her whereas the custody of the other two children (a son and a daughter) was awarded to the respondent (father) but the latter left Canada for Pakistan along with four children, petitioner (mother) followed him and filed a Habeas Corpus petition in the Peshawar High Court. The mother continued to be Christian notwithstanding the marriage. The questions which came up for consideration before the Peshawar High Court, inter alia, were: could the petitioner (mother), who was a Canadian Christian, be granted the custody of minor children notwithstanding the Muslim Personal Law? Could a foreign judgment be enforced in writ jurisdiction? And where would the welfare of the minor lie in the afore-referred circumstances? The Court dismissed the petition and held as under: “....As indicated above under the personal law of the respondent i.e. Muhammadan Law, he alone is the natural and legal guardian of his minor children and even during the period of Hizanat, the constructive custody of the children remains with the father....Therefore, it will be against the intention of law if the minor children residing in Pakistan under a Muslim father are entrusted to the petitioner who is a Christian and who is living outside Pakistan, to be taken to Canada.”

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<sup>64</sup> Aya Sasaki v. Zarina Akhtar (1999 CLC 1202).

<sup>65</sup> Ms. Lousie Anne Failey v. Sajjad Ahmed Rana (PLD 2007 Lahore 293).

<sup>66</sup> Miss Christine Brass v. Dr. Javed Iqbal (PLD 1981 Peshawar 110).

This perhaps is the only case from Pakistan jurisdiction in which the custodial parent was denied the custody on religious considerations. I am not aware of any reported case in which this judgment from Peshawar High Court was ever followed.

One of the crucial issues which has engaged the jurists, academics, practitioners and judges is to evolve a principle of general application which can be globally enforced. Such a uniformity in this shrunken world would help to decide such matters. Thomas Folley warns that, “the absence of a common international approach to relocation may dilute any achievements gained in relation to trans-frontier access/contact.”<sup>67</sup>

Gary A. Debele canvases a child centered approach and believes that, “regardless of the weight to be given to the child’s desires, the child must be involved and represented independently in the process. Making these determinations will of course require a sensitive and well-educated judicial officer, experienced attorneys conversant in child development as well as substantive family law, and well trained guardians ad litem, social workers, and child psychologists.”<sup>68</sup>

Justice Dennis Duggan from U.S. regards, “*welfare test*” to be too vague to be of any guide. He favors a “system which encourages, empowers and commands parents to reach joint decisions, making suggestions which include the use of mediation and legislative bright line rules which add predictability to the issue of relocation,”<sup>69</sup> While concurring with the view that the welfare test is vague, some academics have suggested amendments in the relevant law to make the “welfare checklist” more comprehensive and modeled on the Australian system. In New Zealand law as well there are provisions which provide for these considerations to be taken into account. These academics advocate a “process change, which involves a more active role for practitioners in helping the parent parties in a potential relocation case to make informed choices.”<sup>70</sup>

Dr. Marilyn Freeman in her instructive research paper on relocation highlights the need, “(a) for research to be urgently undertaken specially into the outcomes of relocation and the effects of relocation on children .....(b) an amendment to the welfare checklist in the Children Act 1989 (U.K).....(c) a process change which enables informed decisions to be taken by parents involved in relocation issues which may include a combination of mediation, education programmes and practitioner information sessions.....(d) the appointment of a guardian in relocation cases.” According to her, this is essential “in case involving very young children, where the relocation has the potential to threaten the heart of the relationship-building in which a young child engages with its parents and wider family”.<sup>71</sup>

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<sup>67</sup> International Child Relocation: Varying Approaches among member States to the 1980 Hague Convention on Child Abduction.

<sup>68</sup> A Children’s Rights Approach to Relocation: A Meaningful Best Interests Standard by Gary A. Debele, Children’s Rights Vol. 15, 1998.

<sup>69</sup> A judicial rule that helps resolve ambiguous issues by setting a base standard that clarifies the ambiguity and establishes a simple response <http://legal-dictionary.thefreedictionary.com/Bright-line+rule> as quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

<sup>70</sup> Prkinson, “The realities of relocation: Messages from judicial decisions” (2008) 22 Australian Journal of Family Law, pp 35-55 at 55. As quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

<sup>71</sup> At their fn 97 they cite Parkinson and Cashmore who suggest from preliminary findings of a research project about relocation disputes that the high level of conflict between the parents in their sample may relate to the

The foregoing analysis would demonstrate that there are many factors which weigh with the courts while deciding issues of relocation. Some factors can be statutory, some reflected in the precedent case law and others may be general canvassed by psychologists or evaluators. Laying down a uniform list of factors which a Family Judge should consider may remain illusive because each case has its own distinct features; the social context from which the case originates the capacities of both the custodial parent and the one left behind and the level of child's intimacy with each. The issue of welfare of the child shall have to be resolved in the light of these considerations. No inflexible rule therefore can be laid down and each case has to be examined on its own merits. But to decide which factor or consideration or approach may weigh with the Court in a particular case, would require certain ability, and a conduct on the part of a judge. He should proceed with an open mind because "a judge who is called upon to decide such cases should not have any bias in one direction or the other most of times."<sup>72</sup> He should not only be well versed in the relevant law but should also have some understanding of child psychology, should be able to visualize the effect of the order that he proposes to pass on the child as also on the custodial parent, should be creative in offering more than one alternative solutions keeping the best interest of the child in mind and be persuasive to make the parties agree for a settlement through ADR or mediation. Such an approach, I believe, is the one which the judges both from Common Law and Civil Jurisdiction may follow.

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effect of litigation driving people into corners compounded by the crippling cost of litigation and the cost of funding contact at a distance.

NB Patrick Parkinson has suggested that guidance is also required on how judges should apply the terms of the welfare checklist regarding the requirement to maintain contact with both parents. He states that: In determining whether a parent's proposed change of location is in the best interests of the child in cases where: (i) their parents have or will have equal shared parental responsibility (ii) the child has been consistently spending time on a frequent basis with both parents, and (iii) the child will benefit from maintaining a meaningful relationship with both parents, an outcome that allows the child to continue to form and maintain strong attachments to both parents, and to spend time on a frequent basis with both parents, even if it is not as frequent as before, shall be preferred to one that does not." Freedom of Movement in an Era of Shared Parenting: The Difference in Judicial Approaches to Relocation [http://papers.cfm?abstract\\_id=1181442](http://papers.cfm?abstract_id=1181442).

<sup>72</sup> Avoiding Bias in Relocation Cases by Philip M. Stahl