

Re F (A Child) (International Relocation Cases) sub nom DF v N B-F (2015)

[2015] EWCA Civ 882

06/08/2015

Barristers

Henry Setright KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

On an application for permission to remove a child from the jurisdiction under the Children Act 1989 s.13, the court was required to conduct a welfare analysis of the competing proposals on their individual merits, and side-by-side in a comparative evaluation. A judgment that focused on the four questions identified in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam. 473 was likely to be wholly wrong.

Facts

The appellant English father appealed against a decision granting the respondent German mother permission to take their 12-year-old daughter out of the jurisdiction.

After their divorce the father had applied for a child arrangements order. Shortly before the hearing the mother applied for permission under the Children Act 1989 s.13 to take the daughter to live in Germany. An interim order for visiting and staying contact was granted to the father. A different judge heard the s.13 application and, after considering the four questions identified in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam. 473, she granted permission to remove the child to Germany. The issues were (i) the correct approach to an application for international child relocation under s.13; (ii) whether the judge had applied the correct approach.

Held

(1) The law to be applied in an international child relocation case was set out in *K v K* (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793, [2012] Fam. 134 and *F (A Child)* (Permission to Relocate), *Re* [2012] EWCA Civ 1364, [2013] 1 F.L.R. 645, *K v K* and *Re F* followed. *Payne* was to be read in the context of those authorities and not in substitution for, or in priority over, them, *Payne* considered. Selective or partial citation from *Payne* without any wider legal analysis was likely to be regarded as an error of law. In particular, a judgment that not only focused solely on *Payne*, but also compounded that error by referring to the four-point “discipline” set out in *Payne*, was likely to be wholly wrong. The appropriate approach was an holistic evaluative analysis, which was neither a new approach,

nor an option, W (A Child) (Care Proceedings: Welfare Evaluation: Functions of Local Authority), Re [2013] EWCA Civ 1227, [2014] 1 W.L.R. 1611 and B-S (Children) (Adoption: Leave to Oppose), Re [2013] EWCA Civ 1146, [2014] 1 W.L.R. 563 applied. The child's welfare was the paramount consideration. Where there was more than one proposal before the court, a welfare analysis of each proposal would be necessary. The sophistication of that analysis would depend on the facts. Each realistic option for the child's welfare should be validly considered on its own individual merits. Not only was it necessary to consider both parents' proposals on their own merits and by reference to the child's views, but it was also necessary to consider the options side-by-side in a comparative evaluation. A proposal that might have some but no particular merit on its own might still be better than the only other alternative. International child relocation applications under s.13 might require a proportionality evaluation because of the likelihood of severing the relationship between the child and one of her parents. That evaluation would focus on the welfare analysis of each of the realistic options and might amount to no more than an acknowledgement that one option was better than another and that the preferred option represented a proportionate interference with the ECHR art.8 rights of those involved (see paras 20, 27-32 of judgment). (2) The judge had attached too great an importance to the four-point discipline in Payne, and there was no clear identification of any overall welfare analysis. She had taken no account of the erosion in the quality of the daughter's relationship with the father if she was to move to Germany. High on the list of important questions should have been an evaluation of the harm to the daughter of leave being refused, as against the harm that would result from separation from her father. There had been no proportionality cross-check. A rehearing was ordered before a different judge (paras 37-38, 42).

Permission

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