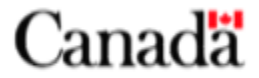


**15 YEARS OF THE HCCH WASHINGTON
DECLARATION –
PROGRESS AND PERSPECTIVES
ON INTERNATIONAL FAMILY RELOCATION**

Mr Justice Stephen Cobb

England & Wales



“PROGRESS” AND “PERSPECTIVES” SINCE WASHINGTON DECLARATION 2010

- **PROGRESS**

- Context
- Payne v Payne [2001]... regrets... ‘guidance’ ... the ‘dial’ turns away...
- K v K [2011] & Re F [2015]
- Section 1(2A) CA 1989
- Impact of ECHR: ‘Holistic evaluation’ and ‘proportionality’
- Domestic Abuse

- **PERSPECTIVES**

- Access to justice
- Public funds
- Principles of the Washington Declaration
- Time frame
- Success rate
- Reform
- Recognition, enforcement, compliance

CONTEXT

POEL V POEL [1970]

Pre-eminence attached to the plans of the parent with 'custody'

- “This court **should not lightly interfere** with such reasonable way of life as is selected by that parent to whom custody has been rightly given.
- Any such interference may produce considerable strains which would not only be **unfair to the parent whose way of life is interfered with** but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child.
- The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is **one of those things** which the parent who has not been given custody **may well have to bear**, even though one has every sympathy with the latter on some of the result”.
- Sachs LJ

CONTEXT

PAYNE V PAYNE [2001]

- [40] Thorpe LJ proposed a set of questions to be asked in international relocation cases... focused on the motivations and realism of the applicant parent, the impact on the applicant parent of refusal ... and the motives of the 'left-behind parent'... under an overlay of welfare....

- [41] “In suggesting such a discipline, I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor”.

- Thorpe LJ

CONTEXT

RE B & S [2003]

- “If the court frustrates the **natural emigration** [mother with new partner] it jeopardises the prospects of the new family's survival or **blights** its potential for fulfilment and happiness. That is manifestly **contrary to the welfare** of any child of that family.
- Often there will be a **price to be paid** in welfare terms by the diminution of the children's contact with their father and his extended family.
- These are the **tides of chance and life** and in the exercise of its paternalistic jurisdiction it is important that the court should recognise the force of these movements **and not frustrate them** unless they are shown to be contrary to the welfare of the child”.

Thorpe LJ @ [12]

Of PAYNE v PAYNE [2001]...

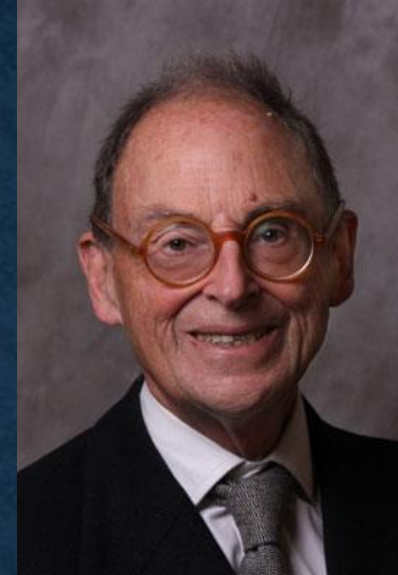
“... as recently as [nine] years ago, I was delivering the lead judgement in the case of *Payne*, which again upheld the principles in *Poel*.

Would I do so again now in 2010?

Exposing my heart, I have to say that I do not think that I would, and that is because the movement in the international market has demonstrated how isolated we have become in our stated and applied principles.”



2010



Rt Hon Sir Mathew Thorpe

Head of International Family
Justice 2005-2013

Washington DC [2010]



CASELAW LIBRARY

Poel v Poel [1970]

Payne v Payne [2001]

K v K [2011]

Re F [2012]

Re F [2015]

“PROGRESS”

**THE DIAL
TURNS AWAY
FROM PAYNE**



- *Payne v Payne* offers “guidance not ...rigid principle ... in a sphere of law where the facts of individual cases are so infinitely variable...”
- “When a relocation application falls to be determined, all of the facts need to be considered”.

Black LJ: *K v K* [2011]

“PROGRESS”

**... AWAY
FROM PAYNE**

- “... the circumstances in which such decisions have to be made vary infinitely and the judge in each case has to be **free to decide whatever is in the best interests of the child**, such guidance should not be applied rigidly as if it contains principles from which no departure were permitted”.

Moore-Bick LJ: K v K @ [86]



“PROGRESS”

**... AWAY
FROM PAYNE**



- “There can be no presumptions in a case governed by s 1 of the Children Act 1989. From the beginning to the end the child's welfare is paramount and the evaluation of where the child's interests truly lie is to be determined having regard to the ‘welfare checklist’ in section 1(3)”.

Munby LJ: Re F [2012] @ [37]

“PROGRESS”
... AWAY
FROM PAYNE



- Statutory changes
 - Section 1(2A) Children Act 1989
[Amendment: 2014]
“... unless the contrary is shown, ... involvement of [both] parents in the life of the child concerned will further the child's welfare”
- Imports from ‘public law’ and Domestic Abuse caselaw
 - Re G (Care Proceedings: Welfare Evaluation) [\[2013\] EWCA Civ 965](#)
 - Re B-S (Children) [\[2013\] EWCA Civ 1146](#)
- Impact of Human Rights Convention
 - ECHR

“PROGRESS”

... AWAY FROM PAYNE



- “... 'a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.”

McFarlane LJ: Re G [2013]

- “The judicial task is to evaluate all the options, undertaking a global, holistic and ... multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option”.

Sir James Munby P: Re B-S [2013]

- “Where there is more than one proposal before the court, a welfare analysis of each proposal will be necessary.... it is ... necessary to consider the options side by side in a comparative evaluation.”

Ryder LJ: Re F [2015]

“PROGRESS”

**... AWAY
FROM PAYNE**

- International relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [ECHR].
- Both parents' plans must be “scrutinised and evaluated by reference to the proportionality of the same”.

Ryder LJ: Re F [2015] @ [31]



“PROGRESS” DOMESTIC ABUSE & RELOCATION



- PD12J Family Procedure Rules 2010 (revised 2017)

“The court should determine as soon as possible whether it is necessary to conduct a fact-finding hearing in relation to any disputed allegation of domestic abuse ...” [16] (“a step-by-step template”: Re H-N)
- [Assessing Risk of Harm to Children and Parents in Private Law Children Cases](#) [2020]

“... an understanding of how effectively the family courts identify and respond to allegations of domestic abuse and other serious offences...”
- Re H-N & o’rs [2021] [Court of Appeal]
 - “At least 40% of private law children cases now involve allegations of domestic abuse”
 - Discussion about *coercive and controlling* behaviour, and *patterns* of abusive behaviour
- Domestic Abuse Act 2021

“... to make provision for the granting of measures to assist individuals in certain circumstances to give evidence or otherwise participate in civil proceedings...”
- K v K [2022] [Court of Appeal]

“... the duty on the court is limited to determining only those factual matters which are likely to be relevant to deciding whether to make a child arrangements order and, if so, in what terms”.

“PERSPECTIVES” INTERNATIONAL RELOCATION CASES



Access to Justice



Public funding
& Self-Representation



Washington
principles



Domestic abuse

“PERSPECTIVES” INTERNATIONAL RELOCATION CASES



Time-frame

Avg c.40-45 weeks



Success rate



Recognition and
Enforcement



Reform

2010 DECLARATION



- Rarely specifically referenced in judgments in the England/Wales caselaw...

Para 4 of the Washington Declaration 2010 does not include the impact of grant / refusal on the parent who is seeking permission to relocate... the courts of E&W may consider this to be relevant insofar as it impacts on the welfare of the child.

- ... but the principles of the Washington Declaration 2010 are embedded in the common law of England & Wales, and followed.

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