

Chapter 9: International Relocation and Child Abduction

Question One

'Payne v Payne has attracted considerable criticism from judges, practitioners, and academics' (Gilmore and Glennon, 2016, Hayes and Williams' *Family Law*, p.552).

Critically analyse the decision of the Court of Appeal in *Payne v Payne* [2001] 1 FCR 425 in the light of the statement above.

Answer Guidance

This essay question requires students to evaluate the decision of the Court of Appeal in *Payne v Payne*, which concerned an application for permission to relocate overseas. Candidates should appreciate that an application may be made under s.13(1)(b) of the Children Act 1989 if a child arrangements order is in force or under s.8. The parent with whom the child lives may apply for a specific issue order, while the non-resident parent may apply for a prohibited steps order. In all cases the welfare principle (s.1(1)), no delay principle (s.1(2)), no order principle, (s.1(5)), presumption of parental involvement (s.1(2A)) and welfare checklist (s.1(3)) apply. The answer should explain the facts of *Payne v Payne* and the guidance given by the Court of Appeal i.e. the court should consider whether the proposed relocation is genuine and realistic; the motives that the non-resident parent has to oppose the move; the impact of refusal on the resident parent and the impact of granting permission on the non-resident parent. The results of these appraisals should 'be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate (Thorpe LJ, para 40). The answer should discuss the criticisms of the decision e.g. that it seems to prioritise the impact of refusal on the resident parent over other factors (see Wall LJ in *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50). It should also consider whether the criticisms are justified given that Thorpe LJ clearly stated the welfare of the child is paramount and that all other factors merely contribute to the analysis of what is in the child's best interests.

Question Two

Oliver and Pamela have been living together for fifteen years: they have never married. They have two children: Quaid, aged 14 and Rhian aged, 9. Pamela gave up her full time job when Quaid was born and now works two days a week as a receptionist in Rhian's school. Pamela has recently discovered that Oliver has been having an affair with a colleague, Sally. Last week Oliver moved in with Sally. Pamela has told Oliver that she wants to return to Australia, where she was born, and wants to take the children with her. She says that the children will have a better life in Australia, where Pamela's parents and siblings live. Oliver objects to the children moving away.

Advise Oliver as to whether Pamela can move to Australia with the children and whether he can prevent it from happening.

Answer Guidance

This problem question concerns a dispute between parents and focuses on international relocation. First, students should consider whether Oliver can do anything to prevent Pamela relocating with the children. It should be noted that Pamela requires Oliver's permission or the consent of the court to relocate if Oliver has parental responsibility for the children. Pamela may apply to the court under s.13(1)(b) of the Children Act 1989 if a child arrangements order is in force or under s.8 (specific issue order). If she relocates without the required permission, a criminal offence is committed under the Child Abduction Act 1984. The Hague Convention on Civil Aspects of International Child Abduction 1980 can be mentioned, but should not be discussed in depth. Students should point out that Pamela does not require the consent of Oliver or the court if he does not have parental responsibility, which is possible given that the couple never married. However, Oliver can apply for a prohibited steps order under s. 8 to prevent relocation and should be advised to apply for a parental responsibility order at the same time, under s.4. The answer should explain that the welfare principle (s.1(1)), no delay principle (s.1(2)), no order principle, (s.1(5)), presumption of parental involvement (s.1(2A)) and welfare checklist (s.1(3)) apply. Key cases on relocation, in particular, *Payne v Payne* [2001] 1 FCR 425 should be considered.

Question Three

Critically analyse the provisions that can be utilised to prevent a child from being abducted overseas by one of his or her parents.

Answer Guidance

This essay question requires an evaluation of the provisions that can be utilised to prevent a child from being abducted. First, candidates should consider the steps that can be taken in an emergency situation. Removing a child from the jurisdiction without the required consent is a criminal offence under the Child Abduction Act 1984: the police can therefore be contacted. Students should point out that the Border Agency will be informed and the 'All Ports Warning System' can be activated. The advantages and disadvantages of these provisions should be considered. If the removal is not imminent, an order can be made under s.8 of the Children Act 1989 (i.e. prohibited steps order) or wardship may be sought. Again, the advantages and disadvantages should be discussed e.g. the court can require the child's passport to be deposited with the court, which will usually prevent abduction from taking place, but not if the abductor obtains a false passport. Students should also point out that a father without parental responsibility should apply for a parental responsibility order under s.4 of the Children Act 1989 in order to ensure that his consent to relocation is required and to gain the protection of the Hague Convention on Civil Aspects of International Child Abduction in case prevention is unsuccessful.

Question Four

How should the English courts deal with cases of international child abduction from countries that have not ratified the Hague Convention on Civil Aspects of International Child Abduction 1980 ?

Answer Guidance

The Hague Convention on Civil Aspects of International Child Abduction 1980 was adopted to secure the prompt return of children who have been wrongfully removed to or retained in a contracting state. Although 93 countries have ratified the Convention many have not done so. This question invites students to consider how the English courts should deal with cases involving children who have been brought to this jurisdiction from countries that have not ratified the Hague Convention. First, the answer should identify the proceedings which will be initiated in the English courts i.e. wardship, inherent jurisdiction without invoking wardship and Children Act 1989 proceedings. Secondly, the answer should identify and evaluate the approaches that could be utilised i.e. apply the provisions of Hague even though the child was not resident in a contracting state, in the interests of comity, or make a decision based on the best interests of the child. Key cases should be discussed e.g. *Re S (Minors)(Abduction)* [1994] 1 FLR 297, where it was suggested that international comity had become a legal principle and *Re J (Child Returned Abroad: Convention Rights)* [2005] UKHL 40, where the House of Lords confirmed that the welfare principle applies and that there is no presumption that returning a child will be in the child's best interests. The essay should conclude with a recommendation as to which approach should be favoured.