MK V CK*: THE RETREAT FROM *PAYNE

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On 7/7/11 the Court of Appeal handed down reserved judgements in *MK v CK* [2011] EWCA Civ 793. All three members of the court – Thorpe, Moore-Bick and Black LJJ – gave full judgements. All agreed that the appeal should be allowed and the case remitted for a rehearing unless agreement could be reached in mediation.

MK is a classic relocation case. A Canadian mother of children aged 4 and 2 wished to return home to Canada after the breakdown of her marriage. Since that breakdown the father had played a major role in the children's lives: five days in a 14 day cycle or 35.7% of the time. The CAFCASS report recognised that the mother felt isolated and lonely in England but recommended on balance that the application should be refused: the damage to the children arising from the inevitable reduction in their relationship with their father if the application was allowed outweighed the damage arising from the distress to the mother if the application was refused.

The trial was before a Circuit Judge, recently retired, who was an experienced family practitioner and Judge. She heard evidence from the parents, the CAFCASS reporter, and from the mother's GP about the level of the mother's distress. She reserved judgement for a few days and then gave a short judgement allowing the application to relocate.

Regrettably the judgement was inadequate. The Judge's plain wish to smooth the path towards relocation led to a failure to make the findings necessary to justify her decision; all the more so since that decision was contrary to the recommendation in the CAFCASS report. She completely failed to explain why she was departing from that recommendation and indeed scarcely dealt with the father's case at all.

The inadequacies of the judgement were the basis of the Court of Appeal's decision and the reason why the matter is to be remitted for rehearing – even though Thorpe LJ accepted that "*neither parent can afford further litigation and neither parent is presently fit to litigate at a retrial*" (#61).

The Court could have dealt with the appeal quite briefly on that basis, and the sections of the judgements which deal with that point are of interest. The minimum requirements for a

judgement are not straightforward. There are authorities which suggest that Judges (especially experienced Judges) should be given the benefit of quite a lot of doubt: see per Lord Hoffman in *Piglowska v Piglowski* [1999] 2 FLR 763 and per Thorpe LJ in *Re B (Appeal: Lack of Reasons)* [2003] 2 FLR 1035. However, at #92 in *MK* Moore-Bick LJ said that "*those who read the judgement are entitled to regard it as containing a full description of the Judge's intellectual process*". No benefit of the doubt there.

The Court acceded to the invitation by the father's counsel to revisit *Payne*, particularly in the context of shared care cases. Each of the judgements treads the familiar path from *Poel v Poel* [1970] 1 WLR 1970 through *Payne v Payne* [2001] 1 FLR 1052 to more recent decisions including *Re* Y [2004] 2 FLR 330; Re *G (Leave to Remove)* [2007] EWCA Civ 1497, [2008] 1 FLR 1587; *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50, [2010] 2 FLR 1605; *Re H (Leave to Remove)* [2010] EWCA Civ 915, [2010] 2 FLR 1875; and *Re W* [2011] EWCA Civ 345.

Until *MK* there has been a widespread understanding that *Payne* was unassailable in the Court of Appeal and that sooner rather than later it would be considered by the Supreme Court. This view flowed from *Re G* and *Re D* where attempts to revisit *Payne* were rejected and its authority was reasserted. However, in *MK* both Moore-Bick LJ (at #79 – 80) and Black LJ (at #129) took the point that both these decisions were unsuccessful applications for leave to appeal and thus (strictly speaking) should not be cited – though both are fully reported and have in fact been widely cited.

Thorpe LJ's approach to *Payne* was different. He distinguished *Payne* on the basis that "*the guidance in <u>Payne</u> is posited on the premise that the applicant is the primary carer. It says so in terms*" (#41). It was pointed out in argument in *MK* that in *Payne* the children spent 41% of their time with the father: a greater amount than in *MK*. However, Thorpe LJ was adamant that the shared care point had not been taken in *Payne* (#45). Even if that is the case (and that is not the recollection of counsel who represented the father) it can hardly have escaped the attention of the Court that *Payne* was a shared care case.

In any event all three members of the court felt free to revisit *Payne*: but in different ways. At #57 Thorpe LJ said:-

"Where each [parent] *is providing a more or less equal proportion* [of care] *and one seeks to relocate externally then I am satisfied that the approach which I suggested in <u>Payne v Payne</u> should not be utilised. The Judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in section 1(3) of the Children Act 1989.*"

The distinction which Thorpe LJ makes between following the *Payne* guidelines (in primary care cases) and following the welfare checklist (in shared care cases) sits very uneasily with the approach taken by the other members of the court. Moore-Bick LJ followed Wilson LJ in *Re H* in

stressing the distinction between the ratio of *Payne* (which is simply the paramount nature of welfare); and the guidance in *Payne* (#81-6). Wilson LJ had warned against endorsing a parody of the decision in *Payne* and Moore-Bick LJ echoed this.

Although both Moore-Bick and Black LJJ paid tribute to the guidance in Payne, their judgements in practice devalue it. At #84 Moore-Bick LJ approved the judgement of Eleanor King J in *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam) in which she emphasised that the effect on the mother of refusal is only one component in a wider exercise.

At #86 he said "*Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted.*" Black LJ agreed with this at #140-2 and went on to say at #143 that "*the effect of the guidance must not be overstated*". These two judgements taken as a whole amount to a barely coded invitation to first instance Judges to ignore the guidance in *Payne* in so far as it elevates likely distress to the mother from refusal of permission to relocate over other aspects of the welfare checklist.

At #96 Black LJ said that her approach diverged from that of Thorpe LJ in relation to the distinction between primary carer cases and shared care cases. At #145 she expresses a hope that cases will not be bogged down with arguments about the amount of time spent with each parent and whether a case should be treated as a *Payne* case or a shared care case. If there is a distinction between shared care cases and primary carer cases, that is a very real concern. And it goes further than that: a mother who is contemplating a relocation application at some future point would have an incentive to minimise the time her children spend with their father so as to reduce the risk of falling into the shared care category.

At #59 Thorpe LJ suggested that his preferred approach (following that of Hedley J in *Re Y*) was unlikely to affect many orders. He cited recent research showing the proportion of equal shared care arrangements at 3.1% of the total. However, at #57 he makes it clear that his category of shared care arrangements includes any 'more or less equal' care arrangement. There can be no clear line as to what that means, but if *MK* (where the arrangement was 65 / 35) falls within the parameter of 'more or less equal', the percentage of families which would be treated as having shared care arrangements is surely far higher than 3%. Arrangements where children spend between 25% and 40% of their time with their father are increasingly the norm.

However at #58 Thorpe LJ also stressed the importance of applying the welfare checklist. He gave particular praise to the decision of Theis J (not yet reported) in *C v D* [2011] EWHC 335 (Fam) where a welfare checklist approach was followed rigorously; the children were spending one third of their time with the father. The outcome was that the mother's application was refused even though the Judge accepted that the effect would be devastating for her. The same outcome (with the same corollary) had been reached by Hedley J in *Re Y*.

I suggest that *MK v CK* is the most important relocation case since *Payne*. Its consequences will or should be that:-

- It marks the end of the *Payne* approach – at least in so far as the 'guidance' in *Payne* has been treated as more than guidance, which it often has been.
- The approach of Moore-Bick and Black LJJ should be followed rather than that of Thorpe LJ, whose proposed distinction between shared care cases and primary carer cases has no basis in principle and would have undesirable practical consequences.
- The proper approach in every relocation case is to apply the welfare checklist. An application to relocate is not conceptually different to any other application under S8 Children Act. Why should it be treated differently?
- The real value in the guidance in *Payne* is to remind Judges (if they need reminding) that the distress which a mother is likely to feel if her reasonable application to relocate is refused is likely to be one important factor in the overall balance. However, there are cases where relocation will be refused even if the effect on the mother is devastating.
- The greater the part the father is playing in the children's lives, the greater will be the damage caused by allowing the relocation. There are not separate categories of case, but a spectrum which takes into account the quality as well as the quantity of time spent with the father.

If these are the consequences of *MK* there hardly seems to be any need to take the relocation issue to the Supreme Court. We are back to the welfare checklist. What more could those who have criticised *Payne* ask for? And what more could the Supreme Court say? The unbalanced approach which has in practice been brought about by the guidance in *Payne* has been re-calibrated.

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