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FAMILY DIVISION

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IS THE FAMILY JUSTICE SYSTEM IN NEED OF REVIEW?

FAMILIES NEED FATHERS, COVENTRY

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1. As phrased there can, of course, be only one answer to the question posed as the title to this paper. No system is immune from the need for review. I have no doubt that there would be those both within and without who would say that Families Need Fathers is in need of review. The art is realistically to recognise both the weaknesses and the strengths of any institution: to build on the latter and to improve the former. Very few organisations are wholly good or wholly bad, and the Family Justice System is no exception.

2. The best thing about the Family Justice System, in my view, is the people who work in it. Most of them, in my experience, are decent, honest and hardworking. They are not in it for the money, but do the work because they believe in it. This may not be a view you share. You may tell me that your experience is different. But it is always a mistake, I think, automatically to attack the good faith of the professionals with whom you deal. If they go wrong, they need to be told, and will be told. I could easily spend the rest of this paper giving you examples of the occasions in which I have been critical of circuit judges, social workers and CAFCASS officers.

3. The impression I have gained so far is that the government is likely to invest heavily in the outcome of the Family Justice Review currently underway. Be under no illusions. The recommendations are likely to be radical.

There are no sacred cows. I have no idea what the final recommendations will be, but you do not need a crystal ball to see that legal aid for private law proceedings is likely to be further diminished if not abolished: that long and protracted contact and residence disputes will become things of the past, and that out of court mediation and conciliation will be encouraged.

4. I propose this morning to identify and to address three specific areas in which the Family Justice System has been criticised. They are (1) shared residence and contact; (2) *Payne v Payne*; (3) *McKenzie* friends All three are, I think, relevant to what you think and do. But before I turn to each in turn, I need to make some preliminary points.

5. Let us go back to basics for a moment. Where disputes arise between former sexual partners relating either to their property or over their children, there has to be a system for the resolution of those disputes. In the first instance, this is usually discussion or negotiation directly between the parties. But we all know that not all parties are equal, and that not all parties either negotiate in good faith or stick to the bargains they have made.

6. So stage two is (usually) negotiation with the assistance of intermediaries, either lay or professional. But the difficulty here – as with negotiation between the parties – is that there is no sanction. If one party negotiates an agreement and then resiles from it, there is nothing that the other party can do to enforce the agreement. So there has to be a person – or body – which has the power to impose its decisions on an unwilling third party. That body, in family proceedings in England and Wales, is the court.

7. Note at once, please, that the court does not impose its own criteria. Its powers are given to it by Parliament, and the court can only do what Parliament permits it to do. The court's "inherent jurisdiction" to act in what is perceives to be the best interests of a child or patient is reserved for highly unusual situations, and does not form part of most litigation. So the courts can only do what Parliament allows them to do.

8. This is an important point, because although Parliament allows the courts a wide discretion to do what the court believes to be in the best interests of the child, that discretion must be exercised judicially and within the constraints which Parliament has laid down.

Thus – to take one example – section 10 of the Children Act 1989 empowers the court to make section 8 orders, including "an order settling the arrangements to be made as to the person with whom a child is to live" (a residence order). Thus if shared parenting – i.e. a child living at different times with each parent was to become the norm (departure from which would only be permitted in given circumstances) then it would have to be Parliament which imposed the change. Under our system of democracy, judges and magistrates interpret and implement the will of Parliament and do not impose their own values on individuals.

9. In my view, this limitation on the judges' powers is right and proper. Judges and magistrates are appointed, not elected: it is for Parliament to make the laws, and to change the laws. In English law, Parliament is sovereign. The function of judges and magistrates is to implement the laws which Parliament enacts. This is worth remembering when it is suggested that judges should do so and so, or impose a norm which others should follow.

10. There is, of course, judge-made law. Historically, English civil judge-made law (what lawyers call "the common law") is based on the premise that the law permits what is reasonable. Over the centuries, judges have had to decide what that word means in different contexts. The common law is, however, built upon what the hypothetical reasonable man or woman would do in given circumstances.

11. There is, however, a second strand which is important for what I want to say today, namely that English law (both civil and criminal) has grown up around that proposition that a judge decides a case between two parties. Each party has to set out its case fully, and each party is entitled to know the allegations which the other party is making. The judge decides between them. This is known as the "adversarial" system.

12. It does not take much thought to realise how the adversarial system permeates our national life. Parliament is based on it. There is government and opposition. Debates are conducted by means of proposition and opposition. Cases are described as *X against Y.* Newspapers thrive on it. Black is black and white is white. Something is nearly always somebody's fault. I could easily multiply examples.

13. Family law does not fit easily into either concept.

Separating parents rarely behave reasonably, although they always believe that they are doing so, and that the other party is behaving unreasonably. If both parties are acting reasonably, they usually do not need a court to resolve their differences.

14. In addition, the Family Justice System has been grafted on to the common law. One party wants a divorce, or residence or contact: the other opposes it. One party makes an application, the other resists. The adversarial system is engrained.

15. The first and critical change which, therefore, needs to be made is to make the system less adversarial. This is not as easy as it sounds. Issue of fact arise which have to be resolved (particularly where domestic abuse is alleged.) Furthermore, disputes over contact between absent parents and their former partners (married or otherwise) are rarely about the children concerned. Far more often, the parties are fighting over again the battles of the relationship, and the children are both the battlefield the ammunition. Often the mother, who finds herself caring for the children, is able to use her power over them to deny the father contact. It is very easy for one party to say that he or she is acting in the best interests of the child concerned, and that the other party is not; it is quite another to understand that both think they are and often that neither is.

16. Parents, in my experience, often find it difficult to understand that children both love and have a loyalty to both parents. There is nothing worse, for most children, than for their parents to denigrate each other. To use the trite phrase, each parent represents 50% of the child's gene pool. If a child's mother makes it clear to the child that his or her father is worthless – and vice versa – the child's sense of self-worth can be irredeemably damaged. Parents simply do not realise the damage they do to their children by the battles they wage over them.

17. It was this fact which led me to quote Philip Larkin's poem in a judgment. This does not mean, of course, to say that you should not seek contact with or the residence / shared residence of your children. But if you do, remember that what ultimately matters is how your child turns out as an adult, and your long-term relationship with that child in adulthood. Many parents cannot see beyond the importance (to them) of the next contact.

18. The court, needless to say, finds these cases very difficult – and so they are. There is a myth that decisions in family law are easy. They are not. From the absent parent's point of view, of course, nothing could be simpler. You are the child's parent. You and the child have a right to each other's company. Any opposition to that proposition cannot be in the child's interests. Therefore, the court should order contact, and if that contact is obstructed, the court should enforce its order by punishing the obstructive parent, if need be by sending (him or her) to prison.

19. Would it were that simple! Why isn't it? Well, there are several reasons. The first, of course, is that the view I have just set out is a very adult view, and the task to the judge is to make an order which is in the best interests of the child. But assuming that contact is in the best interests of the child, the approach ignores all the other factors which come into play. A child is not a piece of property which can be parcelled up and moved around at will. Children have ECHR Article 8 rights as well as their parents. Parliament has not only given them those rights, but also requires the court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding": (see section 1(3)(a) of the Children Act 1989, the first item in the so-called welfare check list).

20. So before making a contact or residence order the court has a wealth of factors to take into account. But let me be quite clear. The courts are not anti-father and pro mother. The courts recognise the important role which any non-resident parent should play in the lives of his children. The rule which has developed is that contact with the absent parent is nearly always in the interests of the child, and there has to be a compelling reason for contact to be refused. Once again, I could easily spend the rest of this lectures citing to you cases in which this has been said.

21. So why do we have these endless disputes, and why is the court so reluctant to enforce its orders?

22. Let me deal first of all with what I regard as a legitimate criticism of the Family Justice System and tell you how it is being addressed. Sitting in the Court of Appeal, I still came across cases in which as many as nine or ten judges had all dealt with the same case. Each had had to read the papers: each had had to make a decision and, inevitably, the decisions are sometimes inconsistent. In short, there was a total lack of judicial continuity.

23. I am the first to acknowledge that judicial continuity in both public and private law is essential. For a number of judges all to have to read the same bundle of papers is not only a waste of valuable judicial time: it is inefficient and leads to inconsistency.

24. The difficulty, of course, is that the busy circuit or district judge rarely if ever sits exclusively in the family jurisdiction. Thus judge A makes an order, and then goes to sit in the Crown Court to hear crime. He or she is simply not available when the case comes back – sometimes as an emergency – so judge B has to deal with the case. Then judge B (who may be temporary) goes away, and the case comes before Judge C and so on.

25. In my judgment, this is a case management issue. When I sat at first instance (as indeed I do now) I always tried to ensure that if a case had to come back I time-tabled it to a date on which I was available. I am currently able to do this because my list is more flexible than those of my colleagues. The High Court judges go on circuit, they sit in the Administrative Court and in the Court of Appeal. Other judges visit the Principal Registry of the Family Division for a few months before going back to their home court, which may well be out of the geographical range of the litigants in the case.

26. So the problem is not an easy one. However, it must be addressed. In the Private Law Programme (as published in its revised form on 1 April 2010) judicial continuity and the avoidance of delay are specifically identified as being matters which the court must consider at the first appointment – see paragraph 2.2. The first appointment in a private law case is, of course, designed as a FHDRA – that is to say a First Hearing Dispute Resolution Appointment. But if agreement cannot be reached, the court has to manage the case, and, once again, judicial continuity features in paragraph 5.6(d).

27. So, if you go to a FHDRA and agreement is not possible, so that further hearings are required, do please raise the question of judicial continuity, and cite the relevant paragraphs of the Private Law Programme to the judge.

Enforcement

28. This leads me to enforcement. Why are judges so reluctant to enforce contact orders by committal for breach? One again, there is no simple or single answer. Firstly, it is well established that committal to prison is an order of last resort in the Family Division. There is abundant authority for that proposition.

29. Secondly, of course, judge rarely think it in the interests of children for their residential parent to be sent to prison. They take the view that such an order is likely to alienate children from the parent who has caused the residential parent to be imprisoned.

30. Thirdly, of course, and in the light of what I have already said, the family justice system grew up on the back of the common law system. And the only way the common law system could punish disobedience was by means of contempt of court - and that meant either fining the person in contempt (the contemnor) of sending them to prison. These were remedies which we inherited.

31. In the 1990s I chaired a group which looked into this issue, and which reached the conclusion that what was required was education and instruction rather than punishment. A residential parent who obstructs contact is, in my experience, storing up substantial problems for him or herself when the child becomes an adult, seeks out the non-residential parent and realises that she or she is not the ogre which has been described. Under section 11A to P of the Children Act 1989, and introduced by the Children and Adoption Act 2006, judges now have the power to make contact activity directions,. A "contact activity direction" is defined as a "direction requiring an individual to take part in an activity that promotes contact" It includes programmes, classes and counselling or guidance sessions of a kind "that may assist a person as regards establishing, maintaining or improving contact".

32. It is, of course, early days. Quite what programmes will be available in the current economic climate – and whether the state will be prepared to fund them - are both open questions. But the structure is there.

33. Let me go back to the questions I asked a few minutes ago. Why do we have these endless disputes? The judicial answer is, I think, quite clear. It is because separating parents who are unable to resolve issues between themselves rarely act reasonably. People think that post separation parenting is easy – in fact, it is exceedingly difficult, and as a rule of thumb my experience is that the more intelligent the parent, the more intractable the dispute. So on the one hand there is parental unreasonableness: on the other a system which is simply not designed to address the issues which it is being asked to decide. These problems are best resolved outside the courtroom not in it.

34. And add to this the fact that the court's methods of controlling human behaviour are almost by definition, both limited and crude. The court cannot educate: it can make orders and in some circumstances it will enforce them. But, ultimately, it cannot control how a party behaves, or what one party says to a child, except in a very crude sense.

35. So are there any other ways – apart from those I have described to ensure satisfactory contact through the court? I have not said much about out of court mediation. Hitherto, mediation has been voluntary. Thus, if one party refused to mediate, mediation simply could not take place. That is not the current government's position. The current position, as I understand it, is that parties (whether publicly funded or not) will be required to attend a mediation information and assessment meeting as a precondition for instituting proceedings. In other words, before a party can institute proceedings he or she will have to show that mediation has been attempted and has failed.

36. Much of the detail of this remains to be worked out, including, of course, who conducts the mediation and how that person is paid. Furthermore, if one party, for example, alleges serious domestic violence against the other, mediation may simply be impossible. But in the vast majority of case involving children mediation will become an imperative.

37. The Private Law Programme" (the PLP) was initiated by Baroness Butler-Sloss when she was President of the Division and carried forward by my immediate predecessor, Sir Mark Potter. In its latest form (as at 1 April 2010) you will find it reported at [2010] 2 FCR 496. As the law currently stands, the best we can do, I think, is proactive judicial case management and judicial continuity.

Shared Residence

38. I now turn to the three topics which I have identified. I begin with shared residence. This is a very difficult topic. The Children Act of 1989, entitles the court to make "residence" orders, which settle the arrangements to be made as to the person with whom a child is to live. The critical question, in my judgment, is not so much the division of the children's time between their parents as ensuring that the role of each parent in a child's life is given its proper importance.

39. I make it clear that my own view is very simple. In the same way as it takes two human beings to create a child, and since most children learn their attitudes about the world in general and the opposite sex in particular from their parents, the best upbringing for most children is in a household where there are two loving parents, who mutually support and respect each other; each of whom can show to the child their joint and individual standards, and each of whom can teach the child how to treat other people.

40. By definition, of course, we are not dealing with such a situation when we are dealing with separated parents. However, I remain of the view that the separated parent's role in the lives of his or her children retains the same degree of importance as when the parents were living together, even if the opportunities to manifest the qualities which an absent parent can bring to his children may be limited.

41. In my judgment, there is a limit to the value of the labels which a court can put on any relationship. What matters is what actually happens. Separation is, of itself, a serious failure of parenting. Mutual recrimination post separation rarely achieves anything. What matters is the enduring relationships. Many parents make matters worse by their disputes over their children. They forget the loyalty children have to each party. Because they think they are right, they think that the child must agree with them and their view of the other parent.

42. Shared residence orders are not a panacea. Whilst agreement between parents is eminently desirable, court imposed solutions rarely satisfy anybody. As I have already made clear, if shared parenting is to be the norm, the change must be made by Parliament, not the courts. Judge are divided on the issue. Some make shared residence orders more readily than others in order to underline the importance of both parents in the child's life. Others taken the view that it is better for children to have one home and to live with one parent.

43. All the courts can do is to impose a shared residence order where the facts of the case justify it. But whether or not it is successful depends upon factors over which, ultimately, the court has very little control.

44. I repeat: if shared parenting orders as a concept are to become the norm, the initiative, in my view, must come from Parliament.

Payne v Payne

45. I recently had to decide an application for permission to appeal in a "relocation" case. The case did not involve Australia or New Zealand, but what used to be called Eastern Europe, and in my view, the application for permission to appeal had to be refused. The father who argued it, however, launched a root and branch attack on *Payne v Payne* and I reserved judgment so that I could consider his arguments carefully.

46. It is important when considering *Payne v Payne* to bear in mind two points in particular. The first is that relocation cases are usually highly fact specific. The English Court of Appeal nearly always defers to the lower court on questions of fact, and usually only departs from what the lower court has found if there was no proper basis for the judge to make the findings he or she did. The reason for this is simple. The judge sees and hears the witnesses: the Court of Appeal does not. It is the job of the trial judge to assess credibility and decide any disputes of fact. In particular, it is the judge's job to decide whether or not the relocating parent is genuine and has made properly thought-out out plans.

47. The second thing to bear in mind about *Payne v Payne* is the doctrine of precedent. *Payne v Payne* is a decision of the Court of Appeal. This means, quite simply, that judges at first instances who will hear such cases are bound by – and thus obliged to follow – decisions of the Court of Appeal and what is now the Supreme Court) relating to the same subject matter. Furthermore, the Court of Appeal is itself bound by its own previous decisions.

48 In Family Law the doctrine of precedent is perhaps less rigidly applied than in other areas of the law for two main reasons. The first is that the facts of family cases vary very widely, and it is often possible to "distinguish" a decision of the Court of Appeal or the Supreme Court – and thus to decline follow it – on the grounds that the facts are very different from the case being decided. The second reason is that family judges, in deciding the paramountcy of welfare principle under section 1 of the Children Act 1989 exercise a very wide discretion, with which the appellate court will not interfere unless it can be demonstrated that the judge was "plainly wrong" – see the decision of the House of Lords in *G v G* [1985] 1 WLR 645.

49 Thus in "relocation" cases, the judge at first instance is duty bound to follow the guidance given in *Payne v Payne* and the principles and guidelines in *Payne v Payne* can only be altered in one of two ways. The first is by legislation: the second is by it being overruled by a decision of the Supreme Court.

50 As I have already explained, Parliament is supreme and sovereign. It can, in theory, do whatever it likes. As I have also explained, the task of the courts is to implement the will of Parliament. So, if Parliament altered the Children Act 1989 or introduced separate legislation dealing with relocation cases, courts at every level, including the Supreme Court, would be bound by what Parliament had enacted.

Payne v Payne itself

51. It is, I think, worth looking at the case itself. It is undoubtedly the leading case on subject of relocation. It was decided by a constitution comprising the then President of the Family Division, Dame Elizabeth Butler-Sloss, Thorpe and Robert Walker LJJ. This was what lawyers call "a powerful / strong court". The first two of its members were family specialists. The third, Robert Walker LJ now sits in the Supreme Court as Lord Walker of Gestingthorpe.

52. The mother was from New Zealand. She wished, following the breakdown of her marriage to return to live in New Zealand with the one child of the marriage. The father wished the child to remain living in this country. It is, I think, worth citing from the headnote of the Law Report ([2001] Fam 473) to see what the court decided:-

> .....in relocation cases, as in all cases affecting the future of children, the welfare of the child was paramount; that neither domestic case law nor section 13(1)(b) of the 1989 Act created any presumption in favour of the applicant parent; that, while the rights of the parties had to be balanced under article 8 and any interference had to be both justified and proportionate, the implementation of the Convention did not affect the principles of domestic law to be applied in such cases; that, although all relevant factors, including the reasonable proposals and motivation of a parent wishing to relocate, the effects on the child of seriously interfering with the life of a custodial parent and the denial of contact with the absent parent, had to be considered and weighed in the balance, the welfare of the child remained the paramount consideration; and that, since the judge had clearly balanced all those factors and made the child's welfare the paramount consideration, there were no ground on which to set aside his order.

53. Three points, I think, stand out from this summary. The first, of course, is the paramountcy of the child or children's welfare; the second is that fact that the court plainly considered the rights of the parties and the child to respect for their private and family lives under article 8 of the European Convention on Human Rights and Fundamental Freedoms (the Convention); the third is the reference to section 13(1)(b) of the children Act 1989. For completeness, section 13(1) reads:-

> (1) Where a residence order is in force with respect to a child, no person may—
>
> > (b) remove him from the United Kingdom;
> >
> > without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (2) Subsection (1)(*b*) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.
>
> (3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(*b*), either generally or for specified purposes

54. It is often thought that *Payne v Payne* was decided by Thorpe LJ. It was not. It was decided by three judges and, in my view, the best summary of the approach which judges are required to take to these difficult decisions is contained in the judgment of the President, Dame Elizabeth Butler-Sloss in *Payne v Payne* at paragraphs 85 to 88. Both she and Thorpe LJ had conducted an exhaustive review of the earlier case law, and Robert Walker LJ agreed with both of them. Dame Elizabeth said the following:-

> *Summary*
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> [85] In summary I would suggest that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases. They are not and could not be exclusive of the other important matters which arise in the individual case to be decided. All the relevant factors need to be considered, including the points I make below, so far as they are relevant, and weighed in the balance. The points I make are obvious but in

view of the arguments presented to us in this case, it may be worthwhile to repeat them.

(a) The welfare of the child is always paramount.

(b) There is no presumption created by s 13(1)(b) in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant.

[86] All the above observations have been made on the premise that the question of residence is not a live issue. If, however, there is a real dispute as to which parent should be granted a residence order, and the decision as to which parent is the more suitable is finely balanced, the future plans of each parent for the child are clearly relevant. If one parent intends to set up home in another country and remove the child from school, surroundings and the other parent and his family, it may in some cases be an important factor to weigh in the balance. But in a case where the decision as to residence is clear as the judge in this case clearly thought it was, the plans for removal from the jurisdiction would not be likely to be significant in the decision over residence. The mother in this case already had a residence

order and the judge's decision on residence was not an issue before this court.

The appeal

[87] In the present case the judge in a careful and excellent judgment dealt with all the relevant considerations which arose in this case. He did not rely on any presumption and clearly made the welfare of the little girl the paramount consideration. The mother's reasons for her desire to return to New Zealand were appropriate and entirely understandable. Her situation in England was not a happy one. The judge found that the effect of her being forced to stay in England would be devastating. He found that her unhappiness, sense of isolation and depression would be exacerbated to a degree that could well be damaging to the child. The father who has had a close relationship with his daughter would be able to afford to visit her or have her visit him two or three times a year which mitigated the loss to the child and to him. I can see no fault in the approach of the judge to this difficult case and no grounds to set aside the order which he made.

55. In the particular case with which I had to deal, I came to the clear conclusion that the judge had given a conscientious and careful judgment, which made no error of law, and which reached a result which was plainly open to the judge. However, I went on to deal with whether or not there was a "compelling reason" for the Court of Appeal to hear the case

There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done to children by a permanent breach of the relationship which children have with the left behind parent.

As I say, this is a perfectly respectable argument, and would, I have no doubt, in the right case constitute a "compelling reason" for an appeal to be heard. The question, to my mind, is twofold: (1) has the time come to reconsider *Payne v Payne*; and (2) is this the right case? I propose to concentrate on the latter question, since in my judgment both have to answer "yes" if permission to appeal on this ground is to be granted.

In my judgment, this case is not the right case for a challenge to *Payne v Payne.* In the first place, on the facts, the respondent makes a powerful case for relocation. Secondly, there is currently no legislation requiring a different approach in place, with the consequence that were this case to go the Supreme Court it is probable that – were the Supreme Court to take the view that insufficient consideration had been given to the harm likely to be suffered by the children by relocation and alteration of their current way of life – the Supreme Court would order a re-trial, rather than saying that the judge, in the exercise of her discretion, was plainly wrong. In my judgment, it is contrary to the interests of the children to impose a fourth hearing on this family.

56. All in all, therefore, I was entirely satisfied that whilst the argument is a respectable one; (a) it was fully considered by the judge; and (b) this was not the case for a reconsideration of the principles in *Payne v Payne.*

57. There are several footnotes which are worthy of consideration. An international judicial conference was held in Washington in March 2010 under the aegis of (inter alia) the Hague Conference. That conference resulted in a declaration designed to bring about uniformity in such applications. I will attach the declaration as an Appendix to this paper, so that those who do not have it and wish to read it may do so. It will be noted that some of the factors – eg the paramountcy of the welfare of the child – are identical to *Payne*. However, as Thorpe LJ commented in *Family Law* for June 2010 (p 565) :-

> Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our courts have applied consistently since....1970. The case for such a shift is not difficult to articulate. The principles ...... were substantially founded on the concept of the custodial parent. Furthermore, there is an emerging body of significant research in various jurisdictions to be brought into account.

58. There was also a conference in July 2010 in London, the principal organiser of which was Professor Marilyn Freeman of the Centre for Family Law and Practice in London, who had conducted a one year qualitative research project into the question of relocation commencing in June 2008.

I was unfortunately unable to go to the conference, but I have read an article published by Professor Freeman in the journal *International Family Law*, which is based on the paper she gave to an earlier conference in South Africa.

59. It is, I think, interesting that Professor Freeman asks the direct question: Is Relocation in Children's Best Interests? And the short answer which she gives is : "we don't know". She concludes with these words: -

> So we have much work to do. We need to know, firstly, what impact relocation has on the relocated child and, in particular, about children's resiliency in these circumstances. From here, we will need to have the basis for international law to do what it says on the tin: to work in the best interests of the children the law seeks to serve.

60. Nobody, I think, could disagree with that. But please remember that these cases are not easy and are not all one way. There will be cases where relocation will be in the interests of the child or children concerned: there will be cases in which it will be wrong. There is no simple answer, and it is wrong to assume that there is.

61. Finally, in the most recent case, Mostyn J declined to allow a mother to relocate to France on the grounds that it was in the best interests of the child to continue to live in England, with a shared residence arrangement whereby (see paragraph 30 of the judgment) he spent 5 out of every 14 days with his father. I very much doubt if Mostyn J's decision will be appealed, or if it is, that it will be reversed.

62. I myself have decided relocation cases both ways, depending on what I perceived to be in the best interests of the child. Sometimes I have agreed that a child should re-located: sometimes I have refused. And not all re-location cases are international. Look at *Re L (Shared Residence Order)* [2009] EWCA Civ 20, [2009]1 FLR 1157. In that case, the mother wanted to move firstly to Israel (that was refused) and then from North London to Somerset. The judge refused and the Court of Appeal (Aikens LJ, Bennett J and myself) supported him on the ground that the mother's motivation was to undermine the father's relationship with the child.

63. Note also from that case that the judge dismissed the father's application for an equal division of the child's time, and that everyone agreed that the fact that there was in that case a shared residence order was itself not a bar to relocations or a "trump card" which prevented it.

McKenzie Friends

64. There are elements of misunderstanding here, which I hope I can dispel. Let me start by going back to the case from which it all started: the divorce case of *McKenzie v. Mckenzie*, which was decided as long ago as 12 June 1970 in the days of the defended divorce.

65. Mr and Mrs McKenzie were engaged in open court contested divorce proceedings. Sitting next to Mr. McKenzie was a Mr. Hanger, who was an Australian barrister, but who attended the trial voluntarily in order to assist Mr. McKenzie. The judge took the view that Mr. Hanger could not take any part in the proceedings, and as a result, Mr. Hanger withdrew and did not reappear.

66. Mr. McKenzie appealed against the judge's dismissal of his claim that Mrs. McKenzie had committed adultery, and the Court of Appeal ordered a new trial of that issue. All three judges agreed that the judge had been wrong to exclude Mr. Hanger, and Davies LJ cited an old case in which the judge had said: -

> Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice: but no one can demand to take part in the proceedings as an advocate ……

67. This is the origin of the *McKenzie* friend. It is important to note that Mr. Hanger was not Mr. McKenzie's advocate. A *McKenzie* friend does not have rights of audience. The role of the *McKenzie* friend, as the latest guidance makes clear, is to provide moral support, to take notes, to help with the papers and quietly to give advice on any aspect of the conduct of the case.

68. In *R v Bow County Court ex parte Pelling*, Lord Woolf, at that point the head of the Court of Appeal stated the modern rule, when he said:-

> 1. In relation to proceedings in public, a litigant in person should be allowed to have the assistance of a McKenzie friend unless the judge is satisfied that fairness and the interests of justice do not require a litigant in person to have the assistance of a McKenzie friend.
>
> 2. The position is the same where the proceedings are in chambers unless the proceedings are in private.
>
> 3. Where the proceedings are in private then the nature of the proceedings which make it appropriate for them to be heard in private may make it undesirable in the interests of justice for a McKenzie friend to assist.
>
> 4. A judge should give reasons for refusing to allow a litigant in person the assistance of a McKenzie friend.
>
> 5. The assistance of a McKenzie friend is available for the benefit of the litigant in person and whether or not a McKenzie friend is paid or unpaid for his services he has no right to provide those services; the court is solely concerned with the interests of the litigant in person.

69. In the cases of Mr O'Connell, Mr Whelan and Mr Watson, which you will find on *Bailii* at [2005] EWCA Civ 479, the Court of Appeal (Thorpe LJ and myself) was highly critical of two circuit judges who had refused a litigant in person the assistance of a *McKenzie* friend. With the increasing dearth of legal aid, the courts are likely to be faced with an increasing number of litigants in person and the increasing use of *McKenzie* friends. They are, as we pointed out in 2005 here to stay. The latest guidance seeks to clarify the position. In my view, it does so.

70. There is a very substantial difference between the role of the *McKenzie* friend and the role of the advocate. The right to conduct proceedings is regulated by Parliament, and entrusted to bodies who have regulations and sanctions. Thus those who have the right to conduct litigation owe specific duties to the court and are liable to sanctions if they break the rules. They can be sued for negligence by the litigant. None of this applies to a *McKenzie* friend.

71. The *Guidance* makes it clear that there are circumstances in which the *McKenzie* friends will be given a right of audience - i.e. will be allowed to address the court – see paragraphs 20 and 21. Certainly in family proceedings, where the litigant is highly emotional or simply not capable to expressing him or herself clearly, I have allowed the *McKenzie* friend to address the court. I hope this is general practice. But I have to say that, much as I personally welcome *McKenzie* friends, I would take a great deal of persuading to allow such a friend to conduct litigation on the litigant's behalf.

72. Time simply does not allow me to go further into the problem, but I will do my best to say more if I am asked questions about it.

Nicholas Wall
September 2010.

Appendix: The Washington declaration

Availability of Legal Procedures Concerning International Relocation

1. States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally.

Reasonable Notice of International Relocation

2. The person who intends to apply for international relocation with the child should, in the best interests of the child, provide reasonable notice of his or her intention before commencing proceedings or, where proceedings are unnecessary, before relocation occurs.

Factors Relevant to Decisions on International Relocation

3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.

4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case:

i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;

ii) the views of the child having regard to the child's age and maturity;

iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;

v) any history of family violence or abuse, whether physical or psychological;

vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

vii) pre-existing custody and access determinations;

viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge.

5. While these factors may have application to domestic relocation they are primarily directed to international relocation and thus generally involve considerations of international family law.

6. The factors reflect research findings concerning children's needs and development in the context of relocation.

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