



Neutral Citation Number: [2010] EWCA Civ 50

Case No: B4/2009/2393

**COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM**

**Her Honour Judge Corbett sitting in the Luton County Court on 13 October 2009**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/02/2010

**Before :**

**LORD JUSTICE WALL**

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**Between :**

**BD**

**- and -**

**AID**

**D (Children)**

**Appellant**

**Respondent**

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**Mr D attended with his MacKenzie Friend**  
**No one attended for the Respondent**

Hearing date: 20th January 2010  
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**Approved Judgment**

## Lord Justice Wall :

1. This is an application by Mr. BD (the applicant) for permission to appeal against an order made by Her Honour Judge Corbett sitting in the Luton County Court on 13 October 2009. The principal aspect of the order which the applicant seeks to challenge gives the applicant's former wife AID (the respondent) permission to remove the parties' two sons, D, who is rising 10 and N, who is rising 7, permanently from the jurisdiction of England and Wales to reside with her in Slovakia. The judge also made a shared residence order relating to the two children in favour of the applicant and the respondent and divided the children's time between them. This is, accordingly, a "relocation" case.
2. I heard oral argument from the applicant in person (assisted by his *McKenzie* friend) on 20 January 2010. The applicant read to me a detailed submission which he had prepared, and produced a substantial bundle of documents which, in the time available to me, I had not had the opportunity to read. I therefore decided that the fairest way of dealing with the application was to reserve judgment, both in order to reflect carefully on the case and to give myself time to read all the material which the applicant had provided. This I have now done.
3. In addition to the material provided to me at the hearing, I have since received a letter from the respondent's solicitors addressed to the Civil Appeals Office enclosing amendments made by the judge to her extempore judgment. These are dated 21 January 2010. Also attached to the letter were Emails dated 22 December 2009 and 11 January 2010 from the applicant addressed to the judge together with an Email from a representative of the respondent's solicitors, Ms AMB to the applicant dated 13 January 2010 and an extract from the note of the extempore judgment which the judge gave on 18 September 2009. The latter documents go to discrepancies between the "corrected" judgment and Ms. AMB's note. I make it clear that I have worked from the corrected judgment, and, like the judge, I fully accept Ms. AMB's explanation for the differences between her note and the corrected judgment.
4. There are, of course, only two bases upon which permission to appeal can be granted. They are both contained in Civil Procedure Rule (CPR) 52.3(6), which reads as follows:-
  - (6) Permission to appeal may be given only where -
    - (a) the court consider that the appeal would have a real prospect of success; or
    - (b) there is some other compelling reason why the appeal should be heard.
5. I propose to address each of these headings in turn. Before I do so. However, it is necessary; (1) that I explain to the applicant (who is not a lawyer) one feature of the English Legal System which is relevant to both limbs of the rule, namely the doctrine of precedent; and (2) that I explain how the doctrine of precedent impacts on the present case.

6. The doctrine of precedent means that judges at first instances, such as Judge Corbett, are bound by – and thus obliged to follow – decisions of the Court of Appeal and the House of Lords (now, of course, the Supreme Court) relating to the same subject matter as the case which the first instance judge is hearing. Furthermore, the Court of Appeal is itself bound by its own previous decisions.
7. There is also authority for the proposition that Circuit Judges such as Judge Corbett are bound by the decisions of High Court Judges:- see the decision of the Court of appeal in *Gloucestershire County Council v P. and others* [2000] Fam 1 at 3B-C, 8C-D and 12G.
8. 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 House of Lords – 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 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.
9. However, where a superior court – be it the House of Lords or the Court of Appeal – has either stated a principle or given guidelines to be followed by judges hearing particular categories of case, the judge at first instance has to follow that principle or those guidelines.
10. Thus in “relocation” cases, the judge at first instance is duty bound to follow the guidance given in *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473 and other cases of the Court of Appeal on the same point.
11. The principles and guideline in a decision of the Court of Appeal in a case such as *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.
12. In English law, Parliament is supreme and sovereign. It can, in theory, do whatever it likes. 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.
13. Permission is, of course, required for an appeal from the Court of Appeal to the Supreme Court. In some circumstances, a case can “leap-frog” where the outcome in the Court of Appeal is a foregone conclusion. The normal practice, however, is for the Court of Appeal to refuse permission to appeal from its decisions, so that the Supreme Court can itself decide whether or not it wishes to hear the particular case. However, one rule is clear. If the Court of Appeal, at or after an oral hearing, refuses permission to appeal from a first instance judge to the Court of Appeal, that is the end of the matter. The disappointed litigant cannot appeal to the Supreme Court from such a refusal. To put the matter in concrete terms: - if I refuse the applicant’s application in the present case, the domestic appeal process will come to an end. The applicant will

not be able to appeal my refusal to the Supreme Court: - see paragraph 4.8 of the *Practice Direction* to Part 52 of CPR, which reads: -

There is no appeal from a decision of the appeal court to allow or refuse permission to appeal to that court.

14. Paragraph 4.8 is given statutory force by section 54 of the Access to Justice Act 1999, which I need not set out.

*Payne v Payne*

15. This 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 LJ. This was what lawyers call “a powerful / strong court”. Two of its members were family specialists. The third, Robert Walker LJ now sits in the Supreme Court at Lord Walker of Gestingthorpe.
16. 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.

17. Three points 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, I will set out the relevant part of section 13(1):-

(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

18. In my judgment, 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*

**[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.

[88] I agree with the judgment of Thorpe LJ and with his reasons for dismissing the appeal.

19. The applicant must understand that Judge Corbett was duty bound to apply the considerations identified by Dame Elizabeth Butler-Sloss to the facts of the case before her. If she did so properly, there is no basis upon which this court can interfere with her decision.
20. With this somewhat lengthy introduction, I turn to the criteria which I have to apply.

*The first limb of CPR 52.3(6)*

21. The judge heard evidence and submissions over 4 days. She gave an immediate, *ex tempore* judgment due to the delay which there had been in the case. As she herself put it, she had "thought of little else" for most of the week during which the case was heard. I note that the time estimate for the case was two days. I am satisfied, therefore, that the judge gave the case her full attention, and conscientiously strove to do what she perceived to be best for the two boys.
22. She begins her judgment by reciting the history, including the unfortunate hearing before the district judge. She records the fact that, after she had given judgment on 8 May 2009, the applicant wished her to take the re-hearing, and explains how it came about that she did so.
23. The judge then turns to the law. She correctly directs herself to section 1 of the Children Act 1989 which, as she says, requires her to consider the boys' welfare as

her paramount consideration. She goes on, again correctly, to direct herself that in addition to the welfare checklist and the welfare paramountcy principle, she has to consider *Payne v Payne* and the more recent decision of this court in *Re G (Leave to remove)* [2007] EWCA Civ 1497. [2008] 1 FLR 1587 (*Re G*).

24. In paragraph 12 of her judgment the judge refers to the doctrine of precedent, and states that a judgment of a High Court Judge (McFarlane J) in *Re A (Leave to Remove: Cultural and Religious Consideration)* [2006] EWHC 421 (Fam), [2008] 2 FLR 572 (*Re A*) is “highly persuasive” as opposed to “binding” upon her. In this, of course, she is not strictly correct since, as I pointed out in paragraph 7 above, a circuit judge is bound by a decision of a High Court Judge if the case is, as the lawyers put it, “on all fours” with the High Court’s decision. In this case, however, it seems to me that nothing turns on the point, since; (a) the judge’s view, albeit wrong, is favourable to the applicant; and (b) McFarlane J in *Re A* in any event regarded *Payne v Payne* as “the key decision (see paragraph 54 of his judgment).
25. The judge also reminded herself (again correctly) about Articles 6 and 8 of the Convention. She then sets out the position which each party adopted. She records the applicant’s evidence that if the respondent was given permission to relocate to Slovakia, he would himself go and live in that country. She also records watching a DVD of the father and the children together and finds that the applicant and the children have and for some time have had a close relationship.
26. The judge then turns to the evidence of the CAFCASS offer, Mrs. Blackwood. She reminds herself (again correctly) that a trial judge such as herself “is able to go against a clear recommendation from a CAFCASS officer if there is good reason to do so” and considers whether or not she should adjourn in order to obtain a psychological assessment as advised by Mrs. Blackwood. After a full discussion, she concludes in paragraph 42 of her judgment that she should only adjourn for an assessment of either child and / or either parent if she felt that the evidence thereby obtained was necessary. After further discussion, she concludes that a psychological assessment is unnecessary. This conclusion seems to me correct: it is certainly not plainly wrong. It is a discretionary conclusion carefully reached and fully reasoned. It is not one which this court would criticise, or with which this court would interfere.
27. In paragraph 48, the judge begins to set the scene for her analysis of the facts. In the following paragraphs, she cites the more recent decision of the Court of Appeal in *Re G* (in which I myself gave a judgment). She does not say so, but the argument advanced in that case by leading counsel for the mother (that *Payme v Payne* was being misunderstood by the judiciary) was manifestly unsustainable, as the trial judge (HH Judge Collins) had referred in terms to, and followed, the guidance given by Butler-Sloss P in the paragraphs which I have set out above.
28. As importantly, for present purposes, the judge refers in terms in paragraph 50 to the argument advanced to her by the applicant, namely that “the central tenet of *Payne v Payne* is defunct”. She sets out the applicant’s argument with care but in paragraph 52 rightly reminds herself that “it is not open to me, as a Circuit judge, to do anything other than apply the principles in *Payne v. Payne* to the facts that I have before me”.
29. That is what she then proceeds to do, having in the forefront of her mind the fact that the applicant was a litigant in person. She makes full and very careful assessments of

the mother and her motivation: she deals fully and equally carefully with the wishes and feeling of the children. Her judgment, in all runs to 122 paragraphs, and took some two and a half hours to deliver. Her thinking is clearly revealed in paragraph 113 of the judgment:

These are incredibly difficult decisions, one party is inevitable devastated by my granting or refusing of leave, and I have, I can assure the parents, been very conscious throughout this week, of the importance of my decision on the children's minority, and without exaggerating it, their lives. However, I am entirely satisfied that the mother has provided and I have found reasonable, sensible and genuine plans and arrangements in Slovakia. I have found that she has an extremely genuine motive for wanting to go to Slovakia. I have indicated in some detail my findings about the potential impact on her if the application were refused, and I am entirely satisfied that the contact arrangements, were the father to remain in the United Kingdom, are in the children's best interest, and living in Slovakia would not affect the quality of that contact, and I have indicated I accepted from the CADCASS officer, that the good relationship they have with the children now cannot be taken away.

30. On the face of it, therefore, this is a conscientious and careful judgment, which makes no error of law, and which reaches a result which was plainly open to the judge.
31. Much of the applicant's attack on the judgment in his grounds of appeal goes essentially to what I will call the second limb of CPR rules 52.3(6). In so far as he criticises the refusal to order a psychological assessment or submits that the judge omitted important material (for example the network of friends the mother had made in the United Kingdom) it seems to me that none of the points he makes dents the judge's essential assessment of the mother as genuine. Equally, it does not seem to me that the applicant can begin to claim that the hearing was in any way in breach of Article 6 of the Convention. Leaving on one side the fact that he chose not to be represented, it is plain from the judgment (I have in mind in particular paragraphs 54 to 56) the that judge went out of her way to be fair to the applicant, and I am entirely satisfied that the fact that the respondent was legally representation whereas the applicant was not did not affect the result.
32. All in all, therefore, it seems to me that the judgment is fireproof on the first limb of CPR 52.3(6) and that an appeal against the judge's decision would stand no reasonable prospect of success.

***CPR rule 52.3(6)(b)***

33. During the course of argument on 20 January 2010. I indicated to the applicant that I thought this was the stronger limb of his argument. 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 of children by a permanent breach of the relationship which children have with the left behind parent.
34. 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.

35. 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.
36. It is, of course, possible for the Supreme Court to disagree with a judge on what is in the best interests of children: - see, for example, the recent case of *RE B (a child) (residence order)* [2009] UKSC 5, [2010 1 FCR 1. But given that Judge Corbett was conscientiously following mandatory guidance, it seems to me almost inevitable that the Supreme Court – assuming it allowed the appeal, which it might not - would be bound to order a re-trial on the fresh criteria. This might well, of course, lead to the same result.
37. All in all, therefore, I am entirely satisfied that whilst the argument is a respectable one; (a) it was fully considered by the judge; and (b) this is not the case for a reconsideration of the principles in *Payne v Payne*.
38. The applicant’s application for permission to appeal will, therefore, be refused.
39. By way of postscript, I wish to make it clear that I have reached my decision without reference to the additional material to which I referred in paragraph 3 of this judgment. If it is the case, however, that the applicant has told the children that they are going to live in Slovakia, this is a human factor which weighs heavily against an appeal.