



Sir Mark Potter, President of the Family Division of the Courts and the courts' refusal to consider evidence which contradicts their position

On 7 December 2009, The Custody Minefield published a report setting out how the UK family courts reach their decisions in child relocation cases, why the courts' stance is not only unscientific but ignores social and psychological research, and that child welfare is not the courts' paramount consideration (contrary to the principles set out in the Children Act 1989).

Sir Bob Geldof wrote the foreword to our report, concluding:

This report is important, timely and vital. To accept its findings, which could have and should have, been conducted at any time in the past 30 years, is to accept the awful conclusion that rather than Solomon like resolving our tragically human disputes with understanding, compassion and logical pragmatism the courts have consistently acted against society's interest through the application of prejudice, gender bias and awful impartial cruelty.

This report proves it. May God forgive them. I won't.

Over the Christmas period, we received a copy of Sir Mark's reply to a letter concerning child relocation cases in family law and our campaign research which challenges the courts' position.

You will read our conclusion to Sir Mark Potter's reply further on:

Sir Mark Potter's reply sadly supports the allegation that the courts are unwilling to accept evidence and opinion which directly contradicts their own subjective position. That growing criticism comes from charities, Commonwealth Courts of Appeal, independent think tanks, politicians, welfare campaigners, academics, psychiatric professionals, members of their own profession and the Ministry of Justice's own funded research. His reply confirms that senior members of the judiciary are more intent on defending an indefensible position rather than safeguarding child welfare.

The letter to Sir Mark Potter, and his reply (from page 3) and our observations (highlighted in red) are set out in the following pages. We further highlight why legislative change is needed urgently.

Letter to Sir Mark Potter

I would like to draw your attention to the 'Every Family Matters' report by the Centre for Social Justice, the M.O.J. funded 'Relocation Report' by Reunite and the 'Relocation: Children's Needs and Rights' report by The Custody Minefield, and the arguments therein for removing Payne v Payne as a leading case law precedent in relocation applications.

Generally, decisions regarding relocation in the courts are led by Lord Justice Thorpe who set the leading precedent in 2001 in the case Payne v Payne.

That judgment faces widespread criticism both nationally and internationally, as ranking a resident parent's wishes above their child's needs and rights. Furthermore many professionals involved in the Court process have suggested that the current legal precedents are possibly not representative of the true situation in practical family situations".

I would also like to draw your attention to the following:



1. *The Centre for Social Justice in their report 'Every Family Matters' published in July 2009 stated: "Currently the resident parent has disproportionate 'rights' in this area, with their desire to move away being the sole or primary consideration...This accords with what many see as the outdated notion that the child has one psychological parent, and the continuation of living with them best serves the interests of the child."*
2. *Also in July 2009, the charity REUNITE published their findings in a report entitled 'Relocation' which was funded by the Ministry of Justice. Speaking of the effects on children of relocation, Dr Marilyn Freeman, in the section entitled Systemic Problems, writes 'Generally, it was felt that children are not well served by the current relocation system and that insufficient attention has been paid, to date, to the effects of relocation on the child. At the same time, the over-emphasis on the happiness of the mother means that the system is apparently stacked against fathers, even custodial fathers, who feel that they suffer a serious legal injustice through the relocation system in this country.'*
3. *In December 2009, The Custody Minefield and Sir Bob Geldof released a report highlighting how relocation and separation from a parent can harm a child's psychological, educational and social development.*
4. *I understand that the court's stance on relocation cases was the subject of a debate at The Law Society by Resolution in September 2005 with the motion 'leave to remove is too easily granted'. The motion was carried by 77 votes to 19 with 10 abstentions.*
5. *LJ Thorpe's reasoning for his favouring the mother in relocation cases was set out in his leading case law, Payne v Payne at point 32, 'Thus in most relocation cases the most crucial assessment and finding for the judge is likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability.'*
6. *Early Day Motion 373 calling for greater legislative protection for children's needs and rights in relocation cases before the courts.*

In the Law Society debate in 2005, Dr Mark Berlowitz, a child psychologist, argued that no scientific research exists to support the belief that either distress or depression are assisted by allowing relocation (as detailed in the Reunite Report). Legal precedent seems based on an unqualified, out-of-date, unsubstantiated and gender prejudiced belief which remains resolutely held even when challenged by psychological professionals.

Given the systemic problems and bias in relocation cases, we believe that it is not possible to receive a fair trial, and this is in breach of Article 6 and 8 of the Human Rights Act. I further understand that appealing a judgment in a relocation case, as a father, is a futile exercise.

In relocation cases, the courts' adherence to possibly biased legal precedent over-rides their statutory duty to uphold a child's welfare as the court's paramount consideration. This duty is set out in the Children Act 1989. That the courts fail in this is not simply my opinion, but one shared by the charity REUNITE (whose research was funded by the Ministry of Justice) and by the Centre for Social Justice. Internationally, the Court of Appeal in New Zealand, in the case D v S in 2005 rejected the case law Payne v Payne as a leading precedent on the grounds that it put the mother's needs above the child's (as detailed in the Reunite Report).

It is of great concern to me that the courts continue to ignore widespread and authoritative research which concludes that children suffer both educationally and emotionally when deprived of paternal involvement in their day-to-day lives. This research was not available at the time of LJ Thorpe's judgement in Payne v Payne. Among that research are the following findings:



According to a report by the Department for Education and Skills in 2003 entitled 'The Importance of Parental Involvement in Children's Education' 'Father involvement in children's education at age 7 independently predicts higher educational attainment by age 20, in both boys and girls.' This research came from the Department of Social Policy and Social Work at the University of Oxford, in 2002.

According to a report by the Children's Society in February 2009, 'a child's performance at secondary school, self-esteem and well being as an adult is linked especially to the father's input' and 'children are 40% more likely to suffer mental health problems when separated from their fathers' and 'On average, children are less likely to fail at school or suffer depression the more they see their separated father.'

In Summary

- 1. It would appear the court's current position of upholding a mother's wishes and the basis for this is not supported by scientific evidence and would appear to be contrary to the rights and needs of the child.*
- 2. As a result, there is little opportunity for a fair trial for a father who seeks to prevent his child relocating.*
- 3. The child's best interests are not the paramount consideration of the court and therefore the courts are not properly considering the welfare needs of children.*
- 4. The court's position of upholding a mother's wishes and the basis for this is not supported by scientific evidence and goes contrary to the rights and needs of the child.*
- 5. Relocation applications follow, all too frequently, in the wake of a history of implacable hostility to contact on the part of the parent wishing to relocate. It is an acknowledged fact that contact orders made, even across jurisdictions within the UK, are easily thwarted and all but unenforceable. In short, relocation is used as a trump card by one parent wishing to prevent a child having a meaningful relationship with the other.*
- 6. We believe that in so readily granting these applications, the courts are possibly, in effect, rewarding the hostility of one parent and failing in their duty to act in the best interests of the child.*

I would be grateful for a reply, and your comments as to how you intend to address these matters.

Yours sincerely,

[Redacted signature]



Sir Mark Potter's Reply

(The Custody Minefield's observations concerning Sir Mark Potter's reply are highlighted in red)

Thank you for your letter of 12 December 2009 drawing my attention the three reports mentioned in the first paragraph of your letter. I have for some time been aware of the "Every Family Matters" report and the relocation report of REUNITE. The Custody Minefield report came to my attention less than two weeks ago and I have only now had an opportunity to read it thoroughly.

I have noted all the points which you make to suggest that, in the light of recent research and what you perceive to be the trend in international opinion since Payne v Payne was decided, the English courts are taking decisions in relocation cases which are not in the best interests of the children concerned.

You ask me how I intend to address these matters. I should perhaps make clear that I do not accept the courts, upon whom Payne v Payne constitutes a binding authority, do not treat the child's best interests as the paramount consideration. Payne v Payne clearly required that they should and, for my part, I am not persuaded that the principles propounded in that case require reformulation.

Paragraph 29 of Payne v Payne reads:

Since the direction has stood for thirty years and since its amplification by Ormrod LJ, first in A v A over twenty years ago, it is perhaps necessary to question whether changing perceptions of child development and welfare in the interim undermine or erode his exposition. That exposition, as he himself said, was very much based on common sense. But even generally accepted perceptions can shift within a generation. The shift upon which Mr Cayford (counsel for the father) relies is in the sphere of contact. He asserts that over the last thirty years the comparative importance of contact between the child and the absent parent has greatly increased. No authority for the proposition is demonstrated. Without some proof of the proposition I would be doubtful of accepting it.

The research provided in The Custody Minefield Relocation Report clearly provides such 'proof'. It demonstrates that the level of father involvement in childcare now equals that of mothers and has changed substantially in 30 years. A wide body of research published since the ruling of Payne v Payne in 2001 demonstrates the harm caused to children's psychological, social and educational development from denial of substantive care from both parents. Payne v Payne and subsequent rulings ignore such research.

Even if I were, it is the fact that, unless or until a relocation case is appealed to the level of the Supreme Court on the basis that Payne v Payne misstates those principles, it will remain binding authority in the matter: see Re G (leave to remove) [2008] 1 FLR 1587 at paras [13] – [18].

Many parents simply cannot afford to appeal a judgment. The cost of an application to the Supreme Court and associated legal costs runs to tens of thousands of pounds. Permission to appeal in relocation cases can be – and is – refused by the Court of Appeal prior to a full appeal being heard. Refusal of permission to appeal by the Court of Appeal cannot in itself be appealed to a higher court under the paradoxically entitled Access to Justice Act 1999: see para54 of that Act.

Sir Mark Potter states that even if he did accept that the precedent followed by the courts was not child-centered, it is for an individual parent, rather than the Ministry of Justice or his own office to challenge such a position. Children will be (and are) placed at risk of harm from the existing legal precedent, with children continuing to be put at risk until such time as a parent comes forward who can afford the prohibitive legal fees required to challenge Payne v Payne in the Supreme Court – and then only if permission to appeal is



granted and the judiciary are willing to consider expert research which directly challenges their long-held position, which Sir Mark Potter clearly is not.

Sir Mark mentions the case *Re G*. In that case 'there was a joint residence order and generous contact to the children aged 6 and 9. The CAFCASS officer had stated that the children were strongly bonded to their father and suggested that the mother might have underestimated the effect of relocation. The mother was granted leave to remove to Germany and the father appealed. The Court of Appeal (Thorpe and Wall LJ) deflected the attack on *Payne* by deciding that there was no social shift which required *Payne* to be reconsidered and that the guidelines in *Payne* were helpful' [source Clare Renton, 29 Bedford Chambers].

That there has been a social shift is clearly set out in The Custody Minefield Report (and others), and more importantly, our own report provides the expert research detailing how child development is likely to be impaired by relocation. The Judiciary, who surely should carry out an inquisitorial role, are hampered by a reluctance to refer to research which contradicts their own subjective position (refer to our campaign report which can be downloaded at www.relocationcampaign.co.uk).

In those circumstances, in my judicial capacity as a judge hearing such cases, whether at first instance or on appeal, I am bound by the authority in Payne v Payne. So far as my position as President of the Family Division is concerned, while I have power to give guidance to the courts in relation to matters of practice and procedure, such power does not extend to so called Guidance which seeks to put a gloss on those principles.

Sir Mark Potter has the judicial capacity to distribute the research findings highlighted in The Custody Minefield report to the judiciary.

This is not to say that the matters which you raise are not a matter of concern to the judiciary, particularly in relation to differences of approach as between common law jurisdictions c.f. the New Zealand case of D v S to which you have referred.

It is important to question those principles which underlie the judgment of relocation applications in the context of the global jurisprudence and to understand the interrelationship between relocation and abduction. At present only abduction is the subject of an international family law convention, the Hague Convention of 1980.

However there is clearly an opportunity for an international convention or protocol that would establish general principles to be applied in the determination of relocation disputes. The United Kingdom hoped that such a development might have been debated at the fifth Special Commission at The Hague in 2006. Unfortunately time did not allow.

At the Commonwealth/Common Law Family Law Judicial Conference at Windsor in August 2009 a day was given to the discussion of formulating principles which at least have served to illustrate the magnitude of the task.

The Hague Conference and the International Centre for Missing and Exploited Children are co hosting a conference in Washington in March 2010 to take forward the debate. The leading specialist judges and academics from a variety of jurisdictions will be present. Obviously there are high hopes that shades of difference in the approach of the courts in this jurisdiction, Canada, Californian, Australia and New Zealand may be eliminated by recommendations for a common approach [are the UK judiciary seeking a reversal of the child-centered approach seen in those other jurisdictions?]. Such an outcome would greatly facilitate the development of a protocol or convention [but would impede children's psychological, social and educational development in other countries as well as our own].



You draw attention to the report of the Reunite Research Unit. It is important also to have regard to the research projects underway in other jurisdictions [but not the wide ranging academic studies published in the UK, and highlighted in our own report]. Professor Parkinson is leading a research team in Australia and Professor Hennegan in Australia. Both have embarked on longitudinal study of outcomes.

Sir Mark Potter again ignores the wide body of UK based research cited in the Custody Minefield report detailing the impact on children from the loss of meaningful care from either parent. It is a concern that the courts will wait until a report is published, somewhere, anywhere, that defends its own position.

Finally you refer to Professor Carolyn [Marilyn surely?] Freeman. I understand that she is convening a conference here in London next summer to consider the very issue raised in your letter. The English judiciary will participate in that conference. Meanwhile, however, short of reconsideration of Payne v Payne by the Supreme Court, it will continue to be authoritative in this field [and children will continue to suffer harm due to the courts' unwillingness to accept that it has got it wrong for 39 years, and will do for the foreseeable future].

New legislation is urgently needed to safeguard child welfare because the courts are not making informed decisions, and refuse to consider evidence which contradicts their position.

Sir Mark Potter's reply sadly supports the allegation that the courts are unwilling to accept evidence and opinion which directly contradicts their own subjective position. That growing criticism comes from charities, Commonwealth Courts of Appeal, independent think tanks, politicians, welfare campaigners, academics, psychiatric professionals, members of their own profession and the Ministry of Justice's own funded research. His reply confirms that senior members of the judiciary are more intent on defending an indefensible position rather than safeguarding child welfare.

A copy of our report can be downloaded at www.relocationcampaign.co.uk.