IN WHOSE BEST INTERESTS? RECONSIDERING THE JUDICIAL APPROACH ADOPTED IN RELOCATION DISPUTES.

Oliver Powell, University of Oxford

I – Introduction
The question of whether a primary carer should be permitted to relocate with the child outside the United Kingdom against the wishes of a non-resident parent is a fraught one. These relocation disputes have been described as the ‘San Andreas fault of children’s law’. Indeed, they raise some of the most complex questions in family law. This paper seeks to demonstrate that the approach to relocation disputes in England and Wales does not necessarily produce results that are in the child’s best interests. This proposition will be developed in three stages. Firstly, it will be evidenced that decisions from the Court of Appeal (CA) are sending messages to trial courts as to specific factors they should or should not focus on in relocation disputes. It will be argued that this approach prevents a careful evaluation of each case, and risks leading to a conclusion contrary to the child’s best interests. Secondly, an assessment of social science research from other areas of child law will be undertaken to demonstrate that what is in the child’s best interests in relocation disputes is complex: this complexity militating against the CA’s inflexible approach to relocation disputes. Finally, the approach to relocation disputes in New Zealand, Australia and Canada will be examined; this enquiry showing that, although each jurisdiction focuses on the child’s best interests as the main consideration, none approach the question like England and Wales.

Given these findings the paper will conclude that the current approach to relocation disputes in England and Wales should be reconsidered, as it risks producing results that are not in the child’s best interests. In light of this, alternative approaches will be evaluated, with the Declaration developed at the Conference on International Relocation in Washington considered the best alternative.

II – Current Law
Applications to relocate with a child from the UK where a residence order is in force are governed by section 13(1)(b) of the Children Act 1989: the child’s welfare being the paramount consideration. The now-leading case on this issue is Payne v Payne, involving an appeal by the father against his ex-wife’s permission to relocate with their child to New Zealand. The mother was the child’s primary carer, the father enjoying substantial contact. Dismissing the appeal, the CA considered the approach taken by UK courts to relocation applications outside the jurisdiction, with the President and Thorpe LJ giving full judgments. However, as George states, it is

---

1 The primary carer is usually the mother, and the non-resident parent the father. For convenience this is assumed herein.
3 Children Act 1989, s 1(1)
4 [2001] EWCA Civ 166 (CA)
Reconsidering the Judicial Approach Adopted in Relocation Disputes

Thorpe LJ’s approach that has ‘dominated the English approach’ to relocation disputes.⁵

Thorpe LJ explained how relocation cases have been decided consistently on two principles. Firstly, that the child’s welfare is the paramount consideration. Secondly, that refusing the primary carer’s application to relocate is likely to impact detrimentally on the welfare of the child. Therefore, relocation should be permitted unless contrary to the child’s welfare.⁶ Bearing these principles in mind, Thorpe LJ laid out a ‘discipline’ for judges to apply in relocation cases to prevent ‘too perfunctory an investigation’ stemming from an assumption that ‘the mother’s proposals are necessarily compatible with the child’s welfare.’⁷

III – Criticism

Payne has been strongly criticized. Hayes argues that Thorpe LJ’s ‘discipline’ imposes ‘a gloss on the welfare principle’⁸ causing the courts to ‘treat the impact of his ruling on the mother as the most significant consideration’.⁹ Hayes stresses the need to allow judges to approach the question with an open mind considering ‘all of the factors in the welfare checklist’ to reach a conclusion in the child’s best interests.¹⁰ Perry questions whether Payne truly puts the child’s interests as the paramount consideration.¹¹ Furthermore, in F v M Mostyn J states that relocation disputes, with their heavy emphasis on the emotional reaction of the primary carer, put ‘an illegitimate gloss on the purity of the paramountcy principle’.¹² Reflecting on this, we turn to consider the three apparent messages that the CA are sending to trial courts, and whether they are conducive to promoting the child’s best interests.

III(a) – The mother’s wishes

Given the mother-child bond of love, it seems uncontroversial to state that a mother’s wish to relocate will often correlate with the child’s best interests. However, it is submitted that the approach advocated in Payne has led the CA to focus unduly on the mother’s wish to relocate, sending messages to trial courts to do the same and blinding them to a full and proper assessment of the child’s welfare. This concern is evident in a number of cases.

In Re H (A Child) Wilson LJ refused the father’s appeal, listing ten factors supporting the mother’s wish to relocate, stating that it was ‘natural’ that ‘she would wish to

---


⁶ Payne (n 4) [26]

⁷ Ibid, [40]-[41]

⁸ Mary Hayes, ‘Relocation cases: is the Court of Appeal applying the correct principles?’ [2006] CFLQ 351, 359

⁹ Ibid, 360

¹⁰ Ibid, 351

¹¹ Alison Perry, ‘Case Commentary: Leave To Remove Children From The Jurisdiction’ [2001] CFLQ 455

¹² [2010] EWHC 1346 (Fam) [8]
return home’ to her native country. 13 No comparative list is developed for the father. This signals to trial courts to focus on the mother’s wishes. Equally concerning is the case of Re B (Children), Re S (Child)14 where Thorpe LJ allowed the mother’s appeal to relocate, endorsing her statements that Australia is ‘where my future well-being will be. I feel I will be happy there’. 15 The language is centred on her well-being and wishes, not the child’s. The approval of such comments is concerning: nowhere is the wish to relocate expressed in terms of the child’s well-being. This sends powerful signals to trial courts that the mother’s wishes are of paramount concern not the child’s. Furthermore, in Re B (Children) Thorpe LJ criticized the trial judge for placing significance on a hypothetical question that the mother could not answer concerning her backup plans if the children did not settle after relocating. 16 The message sent to trial courts is clear; focus on the mother’s wishes and do not ‘stress-test’ them. This is concerning given the question relates directly to the child’s welfare.

The mother’s wishes may correlate with the child’s best interests, however the messages from the CA distort and narrow the enquiry by placing emphasis on acceding to them. This risks blinding trial courts to a proper enquiry of what is in the child’s best interests. Interrelated to the mother’s wish to relocate is the impact of having those wishes refused. This is a prominent factor in relocation cases that requires analysis.

**III(a)(1) – Impact of refusal**

The impact of refusing a mother’s proposal to relocate, and the consequent impact on the child’s welfare, has ‘consistently been stressed as the key factor’ by the CA in relocation disputes,17 unsurprising given judicial utterances that this is the ‘major question’. 18 Undoubtedly, the mother’s devastation flowing from refusal may impact on the child’s well-being. However, this unwavering message from the CA has the potential to blind trial courts’ assessment of what may actually be in the child’s best interests. This concern relates particularly to the question of the mother’s ability to cope with the refusal - something the current approach of the CA arguably overlooks.

In Re W (Leave to Remove), Thorpe LJ criticized all parties for not focusing on the impact of refusal on the mother. 19 However, as stated, the impact on the mother and consequent impact on the child will depend on the mother’s robustness. Crucially in Re W the trial judge, having assessed the mother in the witness box, concluded that she had ‘an exceptionally strong personality’; 20 implying she would cope with refusal and consequently the impact on the child would be less significant. Thorpe LJ’s disregard for this finding ignores the trial court’s careful assessment and encourages other trial courts to follow suit. This risks preventing a proper analysis of the degree

13 [2010] EWCA Civ 915 (CA) [29]
14 [2003] EWCA Civ 1149 (CA)
15 Ibid, [22]
16 [2004] EWCA 956 (CA) [13]
17 George (n 5) 98
18 Re G (Removal from Jurisdiction) [2005] EWCA Civ 170 (CA) [19]
19 [2008] EWCA Civ 538 (CA) [20]
20 Ibid, [19]
to which the child’s welfare will actually be impacted by the mother’s reaction to refusal. Given the importance of this factor to the court’s decision, a careful assessment free from generalizations is vital in reaching a decision in the child’s best interests. Furthermore, it sends the message to trial courts that they must conclude that the mother has more than an ‘exceptionally strong personality’ otherwise their decision is likely to be appealed, potentially altering their decision making process.

**III(a)(2) – The non-resident parent**

Coupled to the messages discussed, the CA also appear to pay little attention to the father-child bond. As Wall LJ states in *Re D (Children)*, there is a ‘perfectly respectable argument’ that *Payne* ‘ignores or relegates the harm done to children by a permanent breach of the relationship which children have with the left behind parent’. Indeed, in *Re H*, having cited ten reasons to permit relocation, Wilson LJ offers one line in recognition of the excellent father-child relationship, and the ‘grave truncation’ in contact that would result from the move. Context is important. One line on the father-child relationship in the context of a list of factors in favour of allowing relocation sends a clear message that although relevant, the father-child bond is less important. Furthermore, in *Re B & Re S* there is no reference to the father-child relationship whatsoever. Conversely, where the trial judge relies upon the reduction of father-child contact as a reason for refusal, the CA subject that decision to forensic analysis, unpicking the reasoning: *Re S (Children)*. This approach sends a strong message to trial courts that they must have particularly good reasons to refuse an application on this ground.

The CA’s approach to the father-child bond sends messages to trial courts to give little weight to this factor. This contrasts with the weight accorded to the mother’s wishes and the impact of refusal on her. Undoubtedly, these cases may have been rightly decided, but the blanket messages that emanate from the CA risk instructing trial courts to take in every case, distorting a careful assessment in these finely balanced, fact sensitive cases. This risks producing results contrary to the child’s best interests. Given these strong messages favouring the mother’s application to relocate, one would expect cogent evidence that relocation is generally in the child’s best interests. The picture, however, is not so clear.

**IV – Social Science Research**

The paucity of research on relocation disputes is alarming. Freeman states, ‘we don’t know’ whether relocation is in the child’s best interests. Geldof disagrees, arguing that empirical evidence shows that the current ‘pro-relocation’ stance is ‘wholly destructive to a child and its family’. However, Geldof’s proposition rests upon research relating to shared residence and contact where, as Herring and Taylor

---

21 [2010] EWCA Civ 50, [33]
22 *Re H* (n 13) [30]
23 *Re B, Re S* (n 14)
24 [2004] EWCA Civ 1724 (CA) [10-16]
highlight, there is ‘so little agreement between researchers’.27 Nevertheless, cautious conclusions can be extracted from residence and contact research that may aid in answering whether the current approach to relocation disputes is in the child’s best interests. Research regarding the impact on the child’s welfare from a truncation of contact with the non-resident parent, and the impact on the mother of having to facilitate contact with the father after a court dispute, are both particularly relevant.

**IV(a) – Residence and contact research**

As Herring states, the dominant view in England and Wales ‘is that contact between a child and both parents is in general beneficial.’28 In the context of joint residence, the government have stressed that ‘children whose fathers have been actively involved in their lives experience better outcomes’.29 Furthermore, Gilmore highlights research studies that applaud the merits of shared residence for child welfare.30 These findings contrast with the fleeting consideration given to the father-child relationship in relocation disputes. However research from the USA appears to conclude that contact frequency is ‘not a good predictor of children’s well-being’;31 this seemingly supporting the mother’s application to relocate. Nevertheless, Gilmore’s review of contact research indicates that ‘it is not contact per se but the nature and quality of contact that are important to children’s adjustment’32 and as Trinder states, ‘a certain amount of time [together] will be needed to enable a quality relationship to develop’.33 This led to a position where fathers with high frequency contact were likely to have higher-quality relationships with their child.34 These findings militate against the messages from the CA to ‘gloss over’ the father’s importance, as the father-child relationship may be very important to children’s welfare.

This conclusion cannot be divorced from the influence that the inter-parental relationship has on contact quality. Relocation disputes often lead to parental animosity. Refusal of the mother’s application is unlikely to ease this animosity. As Gilmore states, ‘when parents are antagonistic to one another frequent visitation may do more harm than good.’35 These findings could prove detrimental to any benefit the child gets from maintaining contact with the father. Similar conclusions are drawn in shared residence research.36 Indeed, Harris-Short states that the ‘tensions and complexities of a joint residence regime….may actually increase rather than decrease hostility between the parents.’37

---

29 Sonia Harris-Short and Joanna Miles, *Family Law Text, Cases, and Materials* (OUP 2007) 839
31 Ibid, 348
32 Ibid, 358
33 Liz Trinder, ‘Shared residence: a review of recent research evidence’ [2010] CFLQ 475, 486
34 Gilmore (n 30)
35 Ibid, 351
36 Trinder (n 33)
37 Harris-Short (n 29) 845
**IV(b) – Social science research conclusions**

Assessing the research as a whole, two cautious conclusions relevant in relocation disputes can be reached. Firstly, it is the quality of contact with the father that is important for the child’s welfare: that quality being engendered through regular contact. Against this is the potential for a hostile inter-parental relationship stemming from refusing relocation, and the effect this may have on the child’s welfare. Nevertheless, one clear conclusion is that the overall picture shows ‘a complex interaction of family dynamics’. 38 This complexity does not advocate generalizations. 39 It is submitted that the inflexible messages from the CA to trial courts fail to account for this complexity, and risk producing a judicial atmosphere supportive of generalizations in cases where acute complexities must be balanced and evaluated in order to reach a conclusion in the child’s best interests.

**V – Relocation in Other Jurisdictions**

In asking whether the approach to relocation disputes in England and Wales produces decisions in the child’s best interests, an analysis of the approach taken to relocation in other common law jurisdictions is beneficial. New Zealand, Australia and Canada put the child’s best interests at the centre of the enquiry yet, as Boshier states, ‘there are some significant differences’ between the approaches they take to answering the question compared to England and Wales. 40

**V(a) – New Zealand**

Significantly, in *D v S* the New Zealand Court of Appeal rejected the approach in *Payne*, preferring an all-factor child centred approach, 41 with no *a priori* assumptions regarding the impact of refusal. 42 George suggests two trends are emerging in New Zealand relocation disputes. Firstly, that the primary carer’s well-being is increasingly given little presumptive weight, and secondly that importance is given to children having relationships with both parents; 43 trends that stand in stark contrast to those developed in England and Wales.

Recent New Zealand High Court decisions appear to corroborate George’s conclusions. In *L v B*, the court considered that relocation should be refused as insufficient consideration had been given to the need for both parents’ involvement in the child’s life and the need to preserve and strengthen family relationships. 44 Similarly, in *B v B* the court criticized the first instance decision for not giving proper weight to the child’s interests in having a relationship with his father. 45 In *LH v PH* the mother’s belief that she would be devastated by a refusal to relocate was given

---

38 Gilmore (n 30) 358
39 Ibid, 358–359
40 Peter Boshier, ‘Have Judges Been Missing the Point and Allowing Relocation Too Readily?’ [2010] IFL 311, 312
41 [2002] NZFLR 116 (CA) [46]-[47]
42 Ibid, [32]-[33]
43 George (n 5) 123
44 [2010] NZHC 53, [104]
45 [2008] NZHC 664, [59]
little consideration.\textsuperscript{46} Irrefutably, the New Zealand approach to relocation disputes seems distinct from the approach adopted in England and Wales.

\textit{V(b) – Australia}

The legislative framework governing relocation disputes in Australia has recently changed. Nevertheless, the child’s best interests remain paramount. Easteal and Harkins state that the ‘changes give greater emphasis to the child’s right to have a relationship with both parents’.\textsuperscript{47} Furthermore, the new shared care provisions appear to promote a strong parent-child relationship. Overall, George states that Australia adopts an all-factor approach, with the statutory provisions militating against relocation.\textsuperscript{48}

Recent decisions of the Australian Court of Appeal highlight a different approach to that adopted in England and Wales. Indeed, the lack of regard for the impact of refusal on the mother is noteworthy. As Easteal and Harkins state, references to this are made ‘indirectly and as part of a broader enquiry’:\textsuperscript{49} scepticism of placing weight on this consideration is seen in \textit{Taylor & Barker} where it was stressed that ‘expert opinion based on observation and fact rather than conjecture’ are needed to permit consideration of this factor as relevant.\textsuperscript{50} Indeed, fewer cases are mentioning the mother’s happiness at all.\textsuperscript{51}

What is considered important is the time a child spends with each parent and the role they play in the child’s life: \textit{Winter & Winter}.\textsuperscript{52} Additionally, the importance of a ‘meaningful relationship’ with both parents is stressed:\textsuperscript{53} though what constitutes a ‘meaningful relationship’ has been broadly interpreted.\textsuperscript{54} As with New Zealand, what emerges in relation to Australia’s approach to relocation disputes is quite distinct from that of England and Wales.

\textit{V(c) – Canada}

As Chamberland indicates, the law on relocation in Canada has oscillated between various approaches,\textsuperscript{55} with it currently being ‘extremely flexible’.\textsuperscript{56} The leading case is \textit{Gordon v Goertz} which places the best interests of the child as the ultimate question.\textsuperscript{57} An ‘individualized assessment’ is required with no presumptive weight

\begin{thebibliography}{999}
\bibitem{46} [2007] NZHC 187, [41]
\bibitem{47} Patricia Easteal and Kate Harkins, ‘Are we there yet? An analysis of relocation judgments in light of changes to the Family Law Act’ [2008] AJFL 259, 262
\bibitem{48} George (n 5) 20
\bibitem{49} Easteal (n 47) 272
\bibitem{50} [2007] FamCA 1246 [128]
\bibitem{51} Easteal (n 47) 272
\bibitem{52} [2008] FamCAFC 159 [81]
\bibitem{53} McCall & Clark [2009] FamCAFC 92 [50]
\bibitem{54} Easteal (n 47) 268
\bibitem{55} Jacques Chamberland, ‘The Canadian Law of Parental Relocation’ [2010] IFL 17, 17
\bibitem{56} Ibid, 23
\bibitem{57} [1996] 2 SCR 27 [50]
\end{thebibliography}
given to any factor: though the views of the custodial parent are given serious consideration. 58

Ontario and British Columbia case law reach some interesting conclusions. In Elliot v Turcotte the court warned of permitting relocation where the father had good contact with the child. 59 Karpodinis v Kantos also stressed that maximum contact with both parents was generally in the best interests of the child. 60 Furthermore, in Falvai v Falvai, the need to maintain the father-child relationship was seen as a ‘determining factor’. 61 Little significance is placed on the impact of refusal though it has been recognized as a factor which may be relevant: Bjornson v Creighton. 62 Unlike in England and Wales, Canadian cases emphasize the disruption to the child of relocation: Young v Young. 63

V(d) – Conclusions

Each jurisdiction addresses the question of the child’s best interests differently in relocation disputes. Nevertheless, two themes emerge. Firstly, less weight is given to the impact of refusal on the mother in comparison to the approach in Payne. Secondly, the desire to promote a child’s relationship with both parents appears – at least in New Zealand and Australia – to be gathering momentum. These disparate approaches are perhaps due to the lack of evidence to rest principles for deciding these disputes upon. However, it is submitted that this comparative analysis adds weight to the proposition that the current approach in England and Wales is not necessarily right and risks failing to promote the child’s best interests.

VI – Time for Change?

In light of the analysis above, the proposition for change can be simply put. The messages sent from the CA to the trial courts instruct them to approach the relocation enquiry in a particular manner: focusing on the mother’s wishes and the impact of refusal, whilst ignoring the importance of the father. This distorts the welfare enquiry, potentially producing results contrary to the child’s best interests, as general messages as to how to approach a case are being forced upon disputes with unique facts. The complexity of the enquiry is highlighted by the social science research, which underlines the importance of a careful examination of the facts free from generalizations. Finally, the approaches in other jurisdictions value a broad ‘all-factor’ enquiry, with no tendency to promote the mother’s wishes or the impact of refusal above other factors, often stressing the importance of both parents to the child’s welfare. These three elements together provide a strong argument in favour of departing from Payne. The judicial approach to relocation disputes must therefore be reconsidered.

58 Ibid, [48]
59 [2009] ONCA 240 [18]
60 [2006] BCCA 272 [19]-[20]
61 [2008] BCCA 503 [16]
63 [2003] ONCA 3320 [28]
VII – Reconsidering Relocation

Beneath the approach enunciated in *Payne* rests a laudable objective: the paramountcy of the child’s welfare. Despite its apparent focus on this virtuous goal, the welfare principle has been subject to criticism that must be borne in mind when considering alternatives. The most prominent in the context of relocation disputes is the ‘lack of transparency’ criticism. As Reece states, the welfare principle permits the untested judicial ideology to ‘exert an influence from behind the smokescreen of the paramountcy principle’.64 In the context of relocation disputes the concern is surely that the courts are ‘easily persuaded that the child is better cared for by the mother than by the father.’65 Bearing this criticism in mind, alternatives can be considered.

VII(a) – A rights-based approach

Harris-Short states that for many the introduction of the Human Rights Act 1998 ‘promised long overdue changes in the judiciary’s approach to legal disputes concerning the family’.66 Flowing from this, there are two strong arguments that can be made for a rights-based approach to relocation disputes. Firstly, the welfare principle is ‘incompatible with the demands of Article 8’ of the European Convention on Human Rights,67 and must be reinterpreted to take account of individual’s rights.68 However, the reality is that the judiciary has not done this.69 Harris-Short laments the fact that the domestic courts, in the private law context, have ‘generally failed to engage’ with the issue.70

Secondly, the rights-based approach appeals to reason. Herring and Taylor advance a cogent three-step rights-based approach to relocation disputes.71 Firstly, each person’s rights should be individually weighed. Secondly, the justification for interference with the right considered, and the proportionality test applied. Thirdly, an ‘ultimate balancing exercise’ should be undertaken; the balancing exercise being workable by ‘focusing on the values that underlie the right’.72 In the context of relocation, ‘the court should consider which interference will constitute a greater blight on the vision of the good life that each had’ (or the child may have):73 the question being ‘how far the court’s decision will interfere with that vision’.74 This approach Herring and Taylor argue, will normally produce results similar to the current approach. However,

64 Helen Reece, ‘The Paramountcy Principle. Consensus or Construct?’ in Sonia Harris-Short and Joanna Miles (eds), *Family Law Text, Cases and Materials* (OUP 2007) 598
65 Herring (n 28) 512
68 Harris-Short (n 66) 344
69 Choudhry (n 67) 480
70 Harris-Short (n 66) 347
71 Herring Taylor (n 27)
72 Ibid, 526
73 Ibid, 527
74 Ibid, 527
they believe it will make a difference in some cases and provide a more transparent reasoning process.\textsuperscript{75} Conversely, Choudhry and Fenwick believe a rights-based approach will produce different results.\textsuperscript{76}

This approach is persuasive. Nevertheless, the principal reason for not fully advocating a rights-based approach in this paper is that ‘the welfare principle sends an important symbolic message. It recognizes the value, the importance and the vulnerability of children’.\textsuperscript{77} Children are vulnerable and the law should protect them. This is a moral argument upon which reasonable opinions can differ. However, ‘if the welfare principle does anything to focus the minds of the parents on the child’s welfare rather than their own rights then it has great value’.\textsuperscript{78} Furthermore, the potential for a ‘misuse of rights’ under a rights-based approach is concerning. As Herring and Taylor state, it may lead adults to pursue their own agenda.\textsuperscript{79} It is hard to forget the comments of the mother in \textit{Re B, Re S} that Australia is ‘where my future well-being will be. I feel I will be happy there’.\textsuperscript{80} A rights-based approach will arguably promote these selfish statements, taking the focus off the child.

Notwithstanding these concerns, it is considered that greater regard must be had for the 1998 Act. Therefore, a balance between the welfare principle and a rights-based approach is required. This, it is submitted, is found in the Washington Declaration.

\textbf{VIII – The Washington Declaration}

The Conference on International Relocation in Washington developed a Declaration that has been called an ‘interesting, and potentially momentous, development’.\textsuperscript{81} It is submitted that with two amendments, this Declaration provides the best framework for resolution of relocation disputes.

\textbf{VIII(a) – The Declaration explained}

Point three of the Declaration states that the best interests of the child should be the paramount (primary) consideration.\textsuperscript{82} Point four provides a non-exhaustive list of thirteen factors for the judge to consider. Noteworthy is the omission of any explicit reference to the impact of refusal on the primary carer, the recognition given to the role that each parent and their families have played in the child’s life and the nature of the inter-parental relationship.

\textbf{VIII(b) – Discussion}

Four issues arise from the Declaration that require discussion. Firstly, it is apparent from Point three that the child remains the centre of the enquiry. As argued, this is considered morally correct. However, the Declaration offers a choice between

\begin{itemize}
  \item \textsuperscript{75} Ibid, 527
  \item \textsuperscript{76} Choudhry (n 67) 491
  \item \textsuperscript{77} Jonathan Herring, ‘Farewell Welfare?’ [2005] JSWFL 159, 168
  \item \textsuperscript{78} Ibid, 168
  \item \textsuperscript{79} Herring (n 27) 530
  \item \textsuperscript{80} Re B, Re S (n 14)
  \item \textsuperscript{81} F v M (n 12) [10]
  \item \textsuperscript{82} Washington Declaration on International Family Relocation [2010]
\end{itemize}
‘paramount’ and ‘primary’ when considering the child’s best interests. It is submitted that the child’s best interests should be the ‘primary’ consideration; thus accounting for the 1998 Act. Indeed, this is one re-interpretation of ‘paramount’ suggested as possibly compatible with the 1998 Act.\(^83\) This alteration would permit greater recognition of the parent’s rights and interests pursuant to the demands of the rights-based era, whilst maintaining the focus on the child.

Secondly, Point three of the Declaration expressly rejects any presumption for or against relocation. Although Payne similarly rejects a presumption in favour of relocation,\(^84\) it is hard to argue in light of the academic critique and the analysis above that the current approach to relocation is not, at the very least, tendentious: a mother’s reasonable proposals to relocate normally being granted.\(^85\) This provision would press the judicial ‘reset button’ and help restore the need, as Hayes states, for justice to be even-handed.\(^86\) This is coupled with express recognition in Point three that the weight to be given to any one factor will vary from case to case.

Thirdly, the thirteen criteria provided to aid judges in their assessment of the case will produce a more transparent reasoning process, soothing the transparency criticism that attends the welfare principle.\(^87\)

Fourthly, the impact of refusal on the mother is only implicitly recognized in factor (viii) of Point four of the Declaration. Despite concerns raised of an over-emphasis on this factor, it is nevertheless considered that the impact of refusal should have independent recognition. Throughout this paper, it has been recognized that in certain cases, this factor may be significant. However, by placing it equally among the other thirteen factors, it would sit as a consideration in the enquiry not the consideration, permitting the judge to place emphasis on it if the facts suggest it is appropriate. It is for these four reasons that the Declaration is considered the best judicial approach to “external” relocation disputes in England and Wales.

**IX – Conclusion**

Given the regularity with which the judiciary pronounce how difficult relocation disputes are, it would be easy – almost understandable - to conclude that there is no answer and that searching for a better solution is hopeless. But perseverance is necessary. This paper has sought to illustrate that the current approach to relocation disputes risks producing results that are not in the child’s best interests. This has been demonstrated through a three-stage process: these three-stages combining to produce an argument in favour of reconsidering the approach to relocation.

In light of this, alternative approaches have been considered. Reconsidering the judicial approach is far from straightforward. These cases are frighteningly complex - any alternative professing a simple answer should be viewed with caution. Furthermore, the paucity of research on relocation casts doubt on any suggested alternative because we know so little about the consequences of these decisions.

---

83 Harris-Short (n 29) 616
84 Payne (n 4) [40]
85 Herring (n 28) 534
86 Hayes (n 8) 360
87 Text to (n 64)
Nevertheless, it is believed that the approach encompassed in the Washington Declaration offers a guiding light for the resolution of these disputes: a light that focuses on the best interests of the child whilst identifying the reality of the rights-based era. It provides the best opportunity to produce a result in the child’s best interests. Perhaps in these most tragic and complex disputes, this is all that can be hoped for.