

# Relocation: Best Interests in the Shadow of Presumptions and Judicial Guidance

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Over the last decade, relocation has become one of the most litigated and researched areas of family law in the common law world. This article has a simple, and limited aim – to commence a conversation about how Irish courts ought to approach relocation disputes in light of recent constitutional and legislative developments, while drawing on the experience of jurisdictions with broadly similar legal frameworks. To this end, it will look at the development of relocation principles in the English courts, and then at the relocation judgments handed down by the Irish courts, decisions which have often relied heavily on English case law. It will then attempt to fill a gap in the current Irish literature by examining current trends in relocation law internationally, both in terms of judicial approaches to the problem and, crucially, the debates about exactly how courts should approach the application of the best interests principle in a way that addresses the peculiarities of a relocation dispute.

What emerges from the literature and case law is that a pure best interests approach based on legislative statements of broad factors to be considered is insufficient in relocation disputes. A form of structured guidance, including an indication of relative weighting of these factors, which falls short of the use of strong presumptions is best suited to handling this particular kind of case. It will conclude that the Irish courts need to find a way of providing guidance as to how to implement s.31 of the Guardianship of Infants Act 1964. Simply considering various factual circumstances found in a case against statutory criteria would run contrary to the emerging international preference for weighting guidelines, and may lead to courts failing to fulfil the overarching constitutional duty to ensure that the best interests of the child really are the paramount consideration.

## **Relocation in England and Wales**

One of the earliest relocation decisions was *Poel v Poel*,<sup>1</sup> where it was held that welfare was to be the primary factor which should influence a court, but that there was a significant amount

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<sup>1</sup> [1970] 1 WLR 1469.

of discretion afforded to the parent having custody of the child. The issue was revisited in several cases,<sup>2</sup> and the Children Act 1989 brought about a reorientation of the law relating to the exercise of parental responsibility so that welfare was to be the paramount consideration, and in effect, the only consideration.<sup>3</sup> However, it came to be felt that if a proposal by a child's primary carer to relocate was reasonable, the application would likely be successful.

The decision in *Payne v Payne* restated the relevant principles, and became a seminal decision for relocation cases globally.<sup>4</sup> Two significant judgments were given; the first by Thorpe LJ, the second by Butler-Sloss P. In respect of the former, Thorpe LJ made clear that the only applicable legal principle in relocation cases was the welfare of the child. He saw fit, however, to provide the following guidance, now known as the "discipline", on how the welfare of the child could be determined:

(a) Pose the question: is the mother's application genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life. Then ask is the mother's application realistic, by which I mean founded on practical proposals both well researched and investigated? If the application fails either of these tests refusal will inevitably follow.

(b) If however the application passes these tests then there must be a careful appraisal of the father's opposition: is it motivated by genuine concern for the future of the child's welfare or is it driven by some ulterior motive? What would be the extent of the detriment to him and his future relationship with the child were the application granted? To what extent would that be offset by extension of the child's relationships with the maternal family and homeland?

(c) What would be the impact on the mother, either as the single parent or as a new wife, of a refusal of her realistic proposal? [Where the mother cares for the child or proposes to care for the child within a new family, the impact of the refusal on the new family and on the stepfather or prospective stepfather must also be carefully calculated.<sup>5</sup>]

(d) The outcome of the second and third appraisals must then be brought into an overriding review of the child's welfare as the paramount consideration, directed by the statutory checklist insofar as appropriate.

In suggesting such a discipline I would not wish to be thought to have diminished the importance that this court has consistently attached to the emotional and psychological

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<sup>2</sup> *Chamberlain v De La Mare* [1983] 4 FLR 434, *Belton v Belton* [1987] 2 FLR 343, *Re F (A Ward) (Leave to Remove Ward Out of Jurisdiction)* [1987] 2 FLR 116.

<sup>3</sup> See generally, Rob George *Relocation Disputes: Law and Practice in England and New Zealand* (Oxford: Hart Publishing, 2014) ch 2; Rachel Taylor, "Poels Apart: Fixed Principles and Shifting Values in Relocation Law" in Stephen Gilmore, Jonathan Herring and Rebecca Probert, *Landmark Cases in Family Law* (Oxford: Hart Publishing, 2011).

<sup>4</sup> [2001] EWCA Civ 166, [2001] 1 FLR 1052.

<sup>5</sup> This sentence was added by Thorpe LJ in *Re B (Removal from the Jurisdiction); Re S (Removal from the Jurisdiction)* [2003] EWCA Civ 1149, [11].

well-being of the primary carer. In any evaluation of the welfare of the child as the paramount consideration great weight must be given to this factor.<sup>6</sup>

It has been thought that this decision effectively prioritises the interests of the applicant for relocation, to the extent that a judge who pays insufficient attention to the impact on the applicant of a refusal is making a serious error.<sup>7</sup> However, the correct approach is to consider the impact of a denial of the application as one factor to be assessed and weighed while undertaking a welfare analysis – if there will be a significant detrimental effect on the applicant, this is an important factor in determining the child’s welfare.<sup>8</sup> Thorpe LJ’s judgment came to dominate relocation litigation for over a decade.

The judgment of Butler-Sloss P is somewhat broader. She stated that the welfare of the child is always paramount, there is no presumption in favour of the applicant parent, and that the “reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.”<sup>9</sup> Courts also need to scrutinise the proposals and motivation behind the intended move, the effect on the applicant of a refusal, and the impact on contact with the left behind parent.<sup>10</sup> Butler-Sloss P’s decision also seemingly introduced a crucial distinction into relocation law – the distinction between those cases where there is a primary carer and a parent with contact, and those cases where care is shared between the parents.<sup>11</sup> Later case also sought to introduce other categories based on the applicant’s primary reason for moving - “going home” cases, “specific opportunity” cases, “new partner” cases, “lifestyle” cases and “get away”.<sup>12</sup>

However, the scope and application of Payne became the subject of much dispute and courts began to resile from placing such a heavy emphasis on Payne, and the discipline in particular, in both *K v K*,<sup>13</sup> and the 2012 decision of *Re F*.<sup>14</sup> Further, these decisions also sought to move

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<sup>6</sup> *Payne* [40]-[41].

<sup>7</sup> Mary Hayes, “Relocation Cases: Is the Court of Appeal Applying the Correct Principles?” (2006) 18 *Child and Family Law Quarterly* 351.

<sup>8</sup> See *Re AR (A Child: Relocation)* [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577; *J v S (Leave to Remove)* [2010] EWHC 2098 (Fam), [2011] 1 FLR 1694.

<sup>9</sup> *Payne* [85]-[86].

<sup>10</sup> *Ibid.* It has been stated that it is this, rather than Thorpe LJ’s decision, which provides the “best summary of the approach which judges are required to take to these difficult decisions” – *Re D (Leave to Remove: Appeal)* [2010] EWCA Civ 50, [2010] 2 FLR 1605, [18].

<sup>11</sup> On the question of alternatives to the *Payne* guidance, see Rob George, Damian Garrido, Francis Judge, Anna Worwood, *Relocation: A Practical Guide* (Bristol: Jordan’s Family Law, 2013) 20-26.

<sup>12</sup> *Ibid.*, 4-5.

<sup>13</sup> *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793, [2012] Fam 134.

<sup>14</sup> *Re F (A Child) (Relocation)* [2012] EWCA Civ 1364, [2013] 1 FLR 645.

away from the attempts at case classifications.<sup>15</sup> The judgments in *K v K* and *Re F* state that “the only principle to be extracted from *Payne v Payne* is the paramountcy principle. All the rest ... is guidance as to factors to be weighed in search of the welfare paramountcy.”<sup>16</sup> The law on relocation was comprehensively restated in the 2015 Court of Appeal decision of *Re F*.<sup>17</sup> This followed the approach of the more recent case law by emphasising that the central function for the court was a holistic evaluation of the child’s welfare. The over-reliance on the *Payne* discipline was heavily criticised, stating that such reliance would likely lead a court into error.<sup>18</sup> With respect to how the court ought to undertake the task of evaluating the competing proposals made by parents, it was stated that it was necessary to do so

in the light of, *inter alia*, the welfare check list ... and having regard to the interests of the parties, and most important of all, of the child. Such consideration needs to be directed at each of the proposals taken as a whole. The court also needs to compare the rival proposals against each other since a proposal, or a feature of a proposal, which may seem inappropriate, looked at on its own, may take on a different complexion when weighed against the alternative; and vice versa.<sup>19</sup>

## **Relocation in Ireland**

There is, at present, a limited amount of case law on relocation from Ireland, although increasing attention is being paid to the issue.<sup>20</sup> The proper statutory basis for a relocation application under s.11 of the Guardianship of Infants Act 1964, which gives the courts a wide discretion to make orders in relation to custody and access. Ireland has recently enacted its own version of a statutory welfare checklist, found in s.31 of the 1964 Act.<sup>21</sup> This obliges a court to consider a range of factors; among the most relevant to relocation disputes are the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child’s upbringing, and the need to have sufficient contact with them to maintain such relationships.<sup>22</sup> The willingness and ability of each of the

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<sup>15</sup> See *K v K* [86], [87], [144], *Re F*, *ibid*, and Rob George, “International Relocation, Care Arrangements and Case Taxonomy” [2012] *Family Law* 1478.

<sup>16</sup> *K v K*, [39] per Thorpe LJ, and see also Munby LJ in *Re F* [37] and [61].

<sup>17</sup> *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882.

<sup>18</sup> *Ibid*, [27]

<sup>19</sup> *Ibid*, [43].

<sup>20</sup> See Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection* (Government Publications 2013) 151-162; Ghislaine Lanteigne, “Parenting arrangements and relocation law in England and Wales, and Canada: In search of better rules and guidelines” [2014] 4(1) *Irish Journal of Legal Studies* 39

<sup>21</sup> Inserted by s.63 of the Children and Family Relationships Act 2015. This came into effect on 18 January 2016 – see Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016 (S.I. 12/2016).

<sup>22</sup> S.31(2)(a)

child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent and relatives is also a factor that must be considered.<sup>23</sup> The physical, psychological and emotional needs of the child, and the likely effect on him or her of any change of circumstances must be considered,<sup>24</sup> as must the history of the child's upbringing and care.<sup>25</sup> Any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, must be taken into account, incorporating the protection of the child's safety and psychological well-being.<sup>26</sup> Courts must also consider the views of the child concerned.<sup>27</sup> Section 31(4) further indicates that "a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only". Prior to the enactment of this section however, the 1964 Act provided much more limited guidance, stating merely that welfare was the first and paramount consideration,<sup>28</sup> with welfare being defined as comprising the religious and moral, intellectual, physical and social welfare of the child.<sup>29</sup> Application of the new s.31 checklist therefore involves a more comprehensive assessment of the child's welfare, but it remains to be seen how this will be implemented.

What little relocation case law has been reported was mostly considered under the auspices of the older statutory regime. In *EM v AM*,<sup>30</sup> the father was the child's sole custodian, and the mother sought to relocate with the child to the United States to be near her family. Flood J outlined that the welfare of the child had to be the first and paramount consideration, and then went on to state that "the task of the Court is to decide ... which of the two [parents], in all the prevailing circumstances, is the more appropriate to have custody by virtue of the fact that joint custody has proved unworkable."<sup>31</sup> As a result, he regarded the relocation application as a trigger for a more far-reaching assessment of how to promote the child's welfare. In undertaking this exercise, regard had to be had to six factors:

- (1) Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child];
- (2) The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family;
- (3) The professional advice tendered [by an expert witness];
- (4) The capacity for, and frequency of, access by the non-custodial parent;

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<sup>23</sup> S.31(2)(j).

<sup>24</sup> S.31(2)(c).

<sup>25</sup> S.31(2)(d).

<sup>26</sup> S.31(2)(h).

<sup>27</sup> S.31(2)(b).

<sup>28</sup> Section 3 of the 1964 Act.

<sup>29</sup> Section 2 of the 1964 Act.

<sup>30</sup> HC, 16 June 1992.

<sup>31</sup> *Ibid*, 7.

- (5) The past record of each parent, in their relationship with [the child] insofar as it impinges on the welfare of [the child];
- (6) The respect, in terms of the future, of the parties, to orders and directions of this Court.<sup>32</sup>

The decision in *EM* is rather unusual, in that it was the non-custodial parent who sought to relocate with the child. The non-custodial parent was allowed to relocate with the child, which led a later court to state that *EM* in no way creates any form of presumption in favour of the custodial parent.<sup>33</sup>

In *KB v LO'R*,<sup>34</sup> Murphy J made the rather curious statement that “the welfare of the children and of their mother, who have constituted a unit since 2003 is of paramount importance.”<sup>35</sup> This went some distance beyond the *Payne* disciple which attached significant weight to the relocating parent’s interests by regarding the relocating parent and the child as a family unit whose interests could not be severed. This would logically go some way to creating a presumption in favour of the custodial parent, whether they were the relocating parent or not – *Poel* and *Payne* were discussed in such a way as to indicate that these cases went some way to introducing a presumption in favour of the primary carer. Such an approach, however, arguably ran contrary to both the constitutional right of the child to have its welfare regarded as the first and paramount consideration under Art 40.3° and the 1964 Act.

A more comprehensive restatement of the Irish position on relocation was undertaken by in *UV v VU*.<sup>36</sup> MacMenamin J expressly disavowed the notion that presumptions played any role in English relocation law, while acknowledging that there had been some inclination towards such a position.<sup>37</sup> MacMenamin J did cite Butler-Sloss P’s judgement in *Payne* with approval, and then proceeded to place some significant weight on the protection of [the child’s] rights to access or contact with *each* parent, where practicable, and appropriate, having regard to their welfare.<sup>38</sup> This was indeed seen as a necessary under the EU Charter of Fundamental Rights, which “must be read in such a manner so as to respect the obligation to take into consideration the child’s best interest, and the fundamental right of the child to “maintain on a regular basis

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<sup>32</sup> Ibid, 7-8.

<sup>33</sup> See comments of MacMenamin J in *UV v VU* [2011] IEHC 519, [20].

<sup>34</sup> [2009] IEHC 247.

<sup>35</sup> Ibid, [8].

<sup>36</sup> [2011] IEHC 519.

<sup>37</sup> Ibid [28]-[30].

<sup>38</sup> Ibid, [43] emphasis in original.

personal relationships and direct contact with both of his or her parents, stated in Article 24(3)”.<sup>39</sup>

MacMenamin J highlighted that the rights established by the Constitution must be used as the guiding principles in relocation disputes. He restated that Article 40.3 contains the right of the child to have decisions in relation to guardianship and custody taken in the interests of his or her welfare,<sup>40</sup> and that under Art 42, any action by the state to further a child’s welfare must also have due regard for the natural and imprescriptible rights of the child including the right to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education. With specific reference to the relevance of the Constitution to relocation disputes, MacMenamin J held that “the issue is the identification of the balance of rights between the individual parents who are in contention, and the rights of the children. In such a situation the rights of the children are, as a matter of constitutional law, to be the paramount consideration.”<sup>41</sup> Relating this constitutional principle to the discussion surrounding *Payne*, he stated that

very great weight should be attached to the views of the custodial parent, but there can be no actual *presumption* that the views of that parent should hold sway with a court. The children’s welfare is paramount. *A fortiori*, this observation applies in circumstances where (as here) the parents have joint custody. This is very far from determining that the children’s welfare is the only consideration. However, the rights of all parties must be weighed in accordance with the fact that the welfare principle is the overarching one. But a *presumption* raises issues of equality. All citizens are entitled to equal status before the law.<sup>42</sup>

Later in the judgment, MacMenamin J considered a variety of factors, including the stability of the current arrangements, the findings of expert evidence, the mother’s motivation for relocation, the feasibility of her plans, the feasibility of maintaining a meaningful contact with the father, the relationship between the parents and the father’s conduct to date, the children’s views, and the potential impact of relocation, or its refusal, on each parent.<sup>43</sup> These factors were not listed as issues that had to be considered as a matter of law, but rather as evidential issues going to the determination of where the children’s welfare lay. So far as legal principles can be extracted from the case, it eschews the idea that presumptions can play any part in the law, and

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<sup>39</sup> Ibid [41], citing *Case C-400/10 PPU JMcB v LE* [2010] ECR I-8965.

<sup>40</sup> *FN v CO* [2004] 4 IR 311.

<sup>41</sup> *UV v VU* (above) [17].

<sup>42</sup> Ibid, [18]. Emphasis in original.

<sup>43</sup> Ibid, [47] - [88].

while recognising the that views of relocating parent should be attached some significant weight, the determining factor will always be the child's welfare. This would seem to indicate the Irish approach has been to adopt an open-ended best interests test with some significant weight attached to the maintenance of close relationships with both parents, and to the views of the custodian parent, a position which could, in some cases, come close to contradiction. The decision in *UV* was interpreted by Abbot J in *G v K* as meaning that "in the Irish context any presumptions or quasi presumptions in relation to movement were not consistent *in many cases* with the best interests of the child, or with the specific dictates of the Guardianship of Infants 1964, as amended, and the Irish Constitution in relation to the paramountcy of the interests of the child".<sup>44</sup> Presumptions, therefore, were not seen as unconstitutional per se, but inconsistent with the underlying constitutional and statutory principles steering the courts towards a more open-ended approach to welfare.

A further attempt at providing a list of "important balancing factors" was undertaken in *SP v JE*.<sup>45</sup> White J considered a relocation application where the mother sought to relocate to England permanently, having moved between England and Ireland over several years. He quoted extensively from the *UV* decision, before going on to summarise what he regarded as the "important balancing factors":

- (i) The present welfare of the child;
- (ii) The possible disruption to the child if relocation is not granted and the impact on his welfare;
- (iii) The impact on the access rights of the respondent if relocation is granted; and
- (iv) [Whether] contact be maintained with the non custodial parent if relocation is granted?<sup>46</sup>

Reviewing the evidence, he highlighted the presence of the mother's extended family in England, the tenuous nature of her housing and employment prospects in Ireland, and the feasibility of access arrangements to be relevant indicators of these four criteria. As a result, the relocation was permitted, with significant access arranged which was to take place in each jurisdiction. This places no emphasis whatever on the child's views, the feasibility of the proposed move, or the reason for the proposed relocation, all of which were considered to be important evidential matters in *UV*.

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<sup>44</sup> [2013] IEHC 650, [30], emphasis added.

<sup>45</sup> [2013] IEHC 634

<sup>46</sup> *Ibid*, [31].



One point of crucial significance emerged from the decision of *RL v Judge Heneghan*.<sup>47</sup> In the older case of *EM v AM*, Flood J used the relocation application as an opportunity to revisit the primary question of custody. However, in *RL* it was held that in relocation applications, the courts are not empowered to undertake a wide-ranging review of the child's situation which may lead to the making of orders transferring custody from one parent to another, if that is outside the scope of the proceedings. At the conclusion of the Circuit Court appeal proceedings in which a custodial mother seeking to relocate, Judge Heneghan refused the mother's application and also made the father the child's primary carer, overturning the pre-existing relationship. The Court of Appeal was clear that, even though s.11 1964 Act is widely drafted, the Circuit Court was exercising its appellate jurisdiction, and the powers of the court are limited by the nature of the initial application.<sup>48</sup> In the present case, the father had not sought custody of the child, and as such a custody application was not before the court, and so the order granting him custody was quashed. This clarifies that s.11 does not grant a free-standing jurisdiction to undertake a full welfare review. A non-custodial parent may continue, as in *EM*, to apply for relocation, but the section does not allow the court to grant orders not sought in the pleadings under its own motion.

Only one relocation judgment has been reported since the coming into effect of the Children and Family Relationships Act 2015. All Irish cases discussed so far were international relocations. The decision of *HOR v MR* concerned an internal location, where permission was sought for a child to move from a city to a town in the outer reaches of that city's commuter belt, approximately 85 kilometres away.<sup>49</sup> After the parents' separation, the mother purchased a home in the town in question, and the child began schooling there. The father was aware of this and cooperated with the move. A series of court applications followed, as a result of which the mother and child again took up residence in the city, while the mother retained her other property. She was granted permission by the Circuit Court to relocate to that town permanently, but the father appealed to the High Court.

Abbott J had to consider the factors outlined in s.31, and in doing so made several comments that will require further clarification in later case law. First, he seemed to indicate that the "meaningful relationship" considered in s.31(1)(a) would mean that "...the relationship should

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<sup>47</sup> [2015] IECA 120.

<sup>48</sup> *Ibid*, [15]-[27]

<sup>49</sup> [2016] IEHC 781.

not be trivial, but earnest and sincere”.<sup>50</sup> Further, the obligation on the courts is to “...continue to strive for the barest minimum relationship by contact through letter, phone or some other basic route, so that the potential for improvement of contact is preserved, and that total loss of contact, with all the disastrous psychological consequences, is avoided.”<sup>51</sup> This will, he posits, in many cases result in the court attempting to salvage some form of contact while, in cases such as the present, the focus should be on attempting to optimise the relationship. With respect to the understanding of the term “relatives and other persons who are involved in the child’s upbringing”, contemplated by both s.31(1)(a) and s.31(1)(d), Abbott J drew a distinction between those relatives who were fully involved in providing for a child’s upbringing, and those who form part of the child’s “social capital.”<sup>52</sup> Relatives who form part of the latter group “...may have a more intense involvement during emergencies in the event of mother being away and when assistance may be required with school, but the activities of such persons are random and casual and should not be taken” as meaning that they are involved in child’s upbringing.<sup>53</sup> The understanding of these terms is crucial to any parenting dispute, and it is unfortunate that little clear information is presented in the judgment as to precisely what the access arrangements were as between the parents so as to help us understand exactly how the relocation would have impacted on what the court considered to be an already meaningful relationship between father and child. Further, there is no real detail on the nature of the relationship between the child and the extended family members. The distinction between “social capital” relatives and “upbringing” relatives is a welcome one, but one that will inevitably be context sensitive, and so some further clarity is needed on this point.

The judgment does contain some highly concerning statements relating to relocation law however. The mother was seeking permission to relocate to her own home where she had previously lived with the child with the knowledge and cooperation of the father. Nonetheless, Abbott J saw her initial move as an undesirable pre-emption of the decision making power of the court.<sup>54</sup> This is a very problematic statement. No proceedings were in being at the time of the initial move, and it is not evident from the judgment that there was an indication that proceedings were likely; this was not a unilateral or surreptitious move designed to interfere with the relationship between father and child, but one that the child’s primary carer firmly

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<sup>50</sup> Ibid, [7].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid, [11].

<sup>53</sup> Ibid.

<sup>54</sup> Ibid, [21].

believed to be in the child's interest and which was carried out in conjunction with the father. To characterise a consensual relocation in such negative terms can only have a chilling effect on such moves which may be in a child's interests. He further characterised the purchase of the property as a constraining factor on his application of s.31 criteria, which indicates that what happens prior to an application being brought may be regarded as a *fait accompli*. This would be especially concerning if the action in question were one which was manifestly negative for the child's interests.

An even more troubling view is the one expressed by Abbott J that if the mother had sought a court order to approve her initial relocation, it

... in all likelihood would not have been approved by the court as it would have been viewed at that stage as not being in the interest of the child or father insofar as it placed the obvious strain on access arrangements and cut off options that would be preserved for the child if both parents were remaining in the city close to their employment.<sup>55</sup>

This is an extremely concerning statement. Nowhere does the Constitution or the legislation permit the court to consider the best interests of a parent in any proceedings relating to children. It is the child's best interests alone which can determine the outcome of such proceedings. Even taking this statement to mean that a relocation application would have been premature, it must be asked at what point an application would be appropriate? Many relocations take place shortly after parental separation,<sup>56</sup> and there seems to be no clear basis for determining that an application has been made too soon. Implicitly, it seems from Abbott J's statement that the best interests test demands that options be kept open or be given a chance to work before relocation becomes an option. Yet all options regarding access and other matters can be considered in the context of a relocation action. Following the approach of the English Court of Appeal in *Re F*, a holistic assessment of all the options can be entered into when a relocation is sought;<sup>57</sup> there is no need to "wait and see". It reads almost as if there is a presumption against early relocation.

Clearly, s.31 is going to place new demands on courts and will impact on the way in which relocation applications are approached. No case law was cited in the *HOR* judgment, so it can be assumed the Abbott J's decision sought to resolve a very particular problem. However, relocation cases will continue to present difficulties for courts, parents, and children. The new

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<sup>55</sup> *Ibid*, [16], emphasis added.

<sup>56</sup> Rollie Thompson, "Presumptions, Burdens, and Best Interests in Relocation Law" (2015) 53(1) Family Court Review 40, 44.

<sup>57</sup> *Re F* [2015], above.

statutory guidelines on the meaning of best interests are an extremely welcome and long overdue reform, but how are such checklists applied internationally? It is to this question that we must now turn.

## **Examining the current state of relocation law internationally**

### *Relocation Law in New Zealand*

The law in New Zealand was underpinned the *Poel* decision until the 1995 case of *Stadniczenko v Stadniczenko*.<sup>58</sup> The New Zealand Court of Appeal held that where a child lives is usually a matter for the custodial parent, and that the child's best interests should determine any dispute, but that the rights of both parents also had to be considered as they could impact on the welfare assessment. All the factors had to be weighed, without any "preconceived notion" as to the weight to attach to each factor. The nature of the relationship between the child and the access parent was said to always be of importance, and the closer the relationship and the more dependent the child is on it for their emotional wellbeing and development, the more likely it would be that harm would occur to the child if the move went ahead. The court also placed importance on the reason for the move, the distance involved, and the child's views.<sup>59</sup> *Standniczenko* was reaffirmed in *D v S*,<sup>60</sup> where the Court of Appeal criticised the use of any kind of presumptions in New Zealand relocation law, and rejected the use of the *Payne* discipline.

Following these decisions, the Care of Children Act 2004 was passed. Sections 4, 5, and 6 are broadly similar to the welfare checklist used in England and Wales. One particular point worth emphasising about the New Zealand legislation is that it places a heavy emphasis on parental cooperation,<sup>61</sup> and continuity in the child's upbringing.<sup>62</sup> The impact of the new legislation was considered in detail in the New Zealand Supreme Court decision of *Kacem v Bashir*.<sup>63</sup> At an earlier stage in proceedings, it was held that, due to the way in which the legislation was worded, the need to preserve the relationships between the child and both of their parents could

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<sup>58</sup> [1995] NZFLR 493.

<sup>59</sup> *Ibid*, 500.

<sup>60</sup> [2002] NZFLR 116.

<sup>61</sup> Section 5(c).

<sup>62</sup> Section 5(d) and (e).

<sup>63</sup> *Kacem v Bashir* [2010] NZSC 112.

take priority in relocation applications.<sup>64</sup> This would effectively make relocation extremely difficult. The Supreme Court, however, rejected this, stating that one factor in the welfare assessment cannot either be elevated to a stand-alone principle, and or take priority over any others. The 2004 Act simply did not permit any priority among the factors outlined. Ultimately, there can be “no statutory presumption or policy pointing one way or the other”.<sup>65</sup> Heneghan has argued that the consequences of the Supreme Court decision in *Kacem* are “uncertainty as to the result, and an element of lottery depending on the judge who decides the case.”<sup>66</sup> In this context, having a list of factors to consider, such as statutory welfare checklists does not add much in terms of guidance for decision makers – without guidance as to weighting, different judges will emphasise different factors. For Heneghan, this is “not law; this is the application of personal preference”.<sup>67</sup> He suggested instead a system that asks that we consider “the degree of actual responsibility taken for the child” by each parent,<sup>68</sup> and give priority to the child’s emotional and physical safety, and to the child’s views. So long as safety is not an issue, the attitude of the applicant parent towards the other parent is given emphasis “because where parents work together, children inevitably benefit”.<sup>72</sup> However, the current psychological state of the parents is not given particular emphasis.<sup>73</sup> Heneghan does not argue that he is proposing a series of presumptions, but rather a “discipline” that would make decision-making more transparent while accommodating what social scientific literature tells us about the dynamics post-separation parenting.

### *Relocation in Canada*

Canadian relocation law was originally based around what was described as a “presumptive deference” to primary care givers, due to the belief that the welfare of the child was “predominantly attached” to the welfare of their primary custodial parent.<sup>69</sup> This was given its fullest expression in an Ontario decision which placed an evidential burden on the parent opposing relocation to demonstrate that the move was not in the child’s best interests, once the applicant custodial parent demonstrated that they were “acting responsibly.”<sup>70</sup> The Supreme

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<sup>64</sup> *Bashir v Kacem* [2010] NZCA 96, [51]

<sup>65</sup> *Kacem*, above, [24]

<sup>66</sup> Mark Heneghan, “Relocation cases: The rhetoric and the reality of a child's best interests: A view from the bottom of the world” (2011) 23(2) *Child and Family Law Quarterly* 226, 241.

<sup>67</sup> *Ibid*, 248.

<sup>68</sup> *Ibid*, 247.

<sup>69</sup> Rollie Thompson, “Movin’ On: Parental Relocation in Canada” (2004) 42 *Family Court Review* 398.

<sup>70</sup> *McGyver v Richards* (1995) 22 OR 3d 481.

Court of Canada ruled in *Gordon v Goertz*, however, that there could be no presumptions whatsoever, and that courts must take individualised determinations of the child's best interests with no presumptions or special evidential burdens in favour or against either parent.<sup>71</sup> In outlining how courts should make relocation decisions, Justice McLachlin stated that:

The focus is on the best interests of the child, not the interests and rights of the parents. More particularly the judge should consider, *inter alia*:

- a. the existing custody arrangement and relationship between the child and the custodial parent;
- b. the existing access arrangement and the relationship between the child and the access parent;
- c. the desirability of maximizing contact between the child and both parents;
- d. the views of the child;
- e. the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
- f. disruption to the child of a change in custody;
- g. disruption to the child consequent on removal from family, schools, and the community he or she has come to know.<sup>72</sup>

The provision at point (e) has proven to be controversial. According to *Gordon*, parental motivation is generally not relevant to the application, unless it is an exceptional case where the parent needs to move in order to meet the child's needs. Barring "an improper motive reflecting adversely on the custodial parent's parenting ability", the custodial parent's motives for the move should not be scrutinised.<sup>73</sup>

Research conducted for the Canadian Department of Justice has found, however, that "this direction is now generally disregarded by the lower courts, which regularly consider and assess the reasons for a proposed move."<sup>74</sup> Thompson has gone further and argued that, despite the Supreme Court's ruling against presumptions, trial courts operated such a presumption in practice,<sup>75</sup> rendering the *Gordon* approach "theoretically untenable and practically unworkable".<sup>76</sup> Further, Bala and Wheeler also support the idea that presumptions tend to operate in practice, noting the existence of two distinct sets of presumptions: a presumption in favour of relocation exists where the parent opposing relocation has perpetrated acts of familial

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<sup>71</sup> [1996] 2 SCR 27.

<sup>72</sup> *Ibid*, 49.

<sup>73</sup> *Ibid*, 48.

<sup>74</sup> Nicholas Bala, Lorne Bertrand, Andrea Wheeler, Joanne J Paetsch and Erin Holder, *A Study of Post-Separation/Divorce Parental Relocation* (Ottawa: Department of Justice Canada, 2014) 23.

<sup>75</sup> Rollie Thompson, "Relocation and Relitigation: After *Gordon v. Goertz*" in Gerald P. Sadvari and Harold Niman, *Family Law: "Best Interests of the Child"* (Toronto: Law Society of Upper Canada, 2001) 305.

<sup>76</sup> *Ibid* 296.

abuse, the parent seeking relocation has sole custody (legal or *de facto*), or the child wishes to move. They identify a presumption against relocation if the parent seeking relocation has made clearly unfounded allegations of familial abuse, there is shared physical custody (each parent has at least 40 per cent of the time), the parent seeking relocation has unilaterally moved the child, the child does not wish to move, the case is at an interim stage.<sup>77</sup> In light of these criticisms, courts have also recognised that it may be time for the Supreme Court to revisit *Gordon*.<sup>78</sup>

The operation of such presumptions clearly runs contrary to the spirit of *Gordon*. British Columbia has also introduced a statutory scheme which seeks to address some the problems that have resulted from the application of *Gordon*. The Family Law Act, SBC 2011 provides in s.37 that the court must only consider child's best interests. It further provides in s.69 for a range of additional factors that must be taken into account in relocation cases, and mandates differential treatment of relocation cases based on prior custody arrangements. Where the parents do not have substantially equal parenting time with the child, the relocating guardian must satisfy the court that the proposed relocation is made in good faith, and that they have "proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life".<sup>79</sup> Where a court is satisfied of both of these criteria, "the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise,"<sup>80</sup> thereby producing a pro-relocation presumption. The relocating parent must prove both good faith and reasonable proposals prior to being able to avail of the presumption.<sup>81</sup>

In cases where there is a substantially equal split in parenting time between both parents, however, the relocating parent must prove good faith, the presence of reasonable contact proposals, and that the move is in the child's best interests,<sup>82</sup> thereby successful applications in shared time cases significantly more difficult than in cases where there is a predominant primary carer. In determining the good faith of the relocating parent, the court must consider all relevant factors, including the reasons for the proposed relocation, whether the proposed

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<sup>77</sup> Nicholas Bala and Andrea Wheeler, "Canadian Relocation Cases: Heading Toward Guidelines" [2012] Canadian Family Law Quarterly 271.

<sup>78</sup> See the comments of Newbury J in *REQ v GJK* [2012] BCCA 146, [59].

<sup>79</sup> Section 69(4)(a).

<sup>80</sup> Section 69(4)(b).

<sup>81</sup> *CMB v BDG* [2014] BCSC 780, [75].

<sup>82</sup> Section 69(5).

relocation is likely to enhance the general quality of life of the child and of the relocating parent, whether the relevant statutory notice of the application was given,<sup>83</sup> and any restrictions on relocation contained in a written agreement or an order.<sup>84</sup> The British Columbia model thereby provides an impetus to revise *Gordon*, although Bala et al note that the federal Supreme Court seems disinclined to do so.<sup>85</sup>

### *Relocation in Australia*

The Australian courts do not see relocation cases as a separate category of dispute, but rather as “parenting cases where the proposal of one of the parties involves relocation”.<sup>86</sup> What this means in effect, is that the legislative rules relating to the best interests of the child found in s.60 of the Family Law Act 1975 govern such disputes. Several cases had attempted to set down some guidelines for how these cases ought to be determined, and the most comprehensive guidance is found in the decision of *A v A: Relocation Approach*,<sup>87</sup> where seven principles were outlined. The Full Court started by outlining two binding principles from *AMS v AIF*: the best interests of the child are the “paramount consideration, but not the sole consideration”, and a court cannot require the applicant to demonstrate “compelling reasons” for the relocation.<sup>88</sup> The third principle is that the court must evaluate the competing proposals presented by the parties and weigh up the advantages and disadvantages of each for the child’s best interests. Fourthly, this should not be done in a way that separates the issue of relocation from that of residence.<sup>89</sup> The fifth principle is that the evidence must be weighed as to how each proposal would hold advantages and disadvantages for the child’s best interests. It follows that, sixthly, the evaluation of the competing proposals is carried out by referring to the relevant sections of the Family Law Act that relate to the best interests of the child.<sup>90</sup> Finally, the Court

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<sup>83</sup> Under section 66, a relocating parent must give at least 60 days’ notice of the move unless notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or there is no ongoing relationship between the child and the other guardian or the person supposed to have contact with the child.

<sup>84</sup> Section 69(6).

<sup>85</sup> Bala et al, above, 24.

<sup>86</sup> *A v A: Relocation approach* (2000) FLC 93-035, quoting *Paskandy v Paskandy* (1999) FLC 92-878 at 86,453.

<sup>87</sup> *A v A*, Ibid.

<sup>88</sup> Ibid, 87,544-545.

<sup>89</sup> Ibid, 87,545.

<sup>90</sup> Ibid, 87,545 – 87,546. The relevant sections are now numbered s.60B and s.60CC.



held that “the object and principles of s60B provide guidance to a court’s obligation to consider the matters in s68F(2) that arise in the context of the particular case”.<sup>91</sup>

Having outlined the seven guiding principles, the Court set out a three-step summary of the correct approach to determining a parenting case that involves a proposal to relocate the residence of a child.<sup>92</sup> The first step is to identify the relevant competing proposals for future care of the child. The second step is to explain the advantages and disadvantages of each proposal by examining the factors set out in the legislation. One relevant factor to be weighed will be the “reasons for relocation as they bear upon the child’s best interests”.<sup>93</sup> This must be weighed against other factors. The third step is to explain why one proposal is to be preferred, having regard to the best interests of the child as the paramount consideration, but not the sole consideration. No single factor should determine which proposal is to be preferred. As part of this process, it was held that regard must be had to the following issues: none of the parties bears any special kind of evidential onus,<sup>94</sup> the importance of a party’s constitutional right to freedom of movement, and finally, matters of weight should be explained – in other words, the court must indicate which of the relevant matters were of greater significance and how the matters balance out.<sup>95</sup>

The decision in *A v A* was made prior to a major series of reforms passed in 2006 aimed at promoting shared parenting in Australia.<sup>96</sup> The 2006 Act divided children’s interests into primary and additional considerations, with the benefit of the child having a meaningful relationship with both parents being among the primary considerations.<sup>97</sup> It also recast the objects and principles provisions of the legislation. One of the objects is to ensure that a child has the benefit of both of the child’s parents having a meaningful involvement in the child’s life, to the maximum extent consistent with the best interests of the child.<sup>98</sup> While the case law on relocation since the introduction of these reforms has not altered the approach outlined *in A*

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<sup>91</sup> Ibid, 87,547. This is an important matter of statutory interpretation in Australian family law, and there are separate objects (s.60B) and factors (s.60CC). provisions within the FLA.

<sup>92</sup> Ibid

<sup>93</sup> Ibid, 87,548.

<sup>94</sup> Ibid, 87,554.

<sup>95</sup> Ibid at 87,551.

<sup>96</sup> Family Law Amendment (Shared Parental Responsibility) Act 2006.

<sup>97</sup> Section 60CC(2).

<sup>98</sup> Section 60B(1)(a).

v A, Parkinson notes that the number of successful relocation applications has declined since the introduction of the 2006 Act.<sup>99</sup>

### **Presumptions, guidelines, and asking the right questions: How to approach relocation decisions**

The brief outline of how relocation is handled in the jurisdictions mentioned above demonstrates a number of salient features – all jurisdictions have a statutory akin to a welfare checklist, and that in the majority of cases, courts have seen fit to provide additional guidance on how to weigh those factors in relocation disputes. Further, virtually all experts on the subject regard unfettered or pure best interests approaches to be harmful in the relocation context. They also accept that the operation of de facto presumptions can creep in despite legislative and judicial statements to the contrary. It is essential that the Irish courts consider how to apply the new s.31 criteria in light of international experience. If this is not done, it is likely that the matter kind of criticisms levelled at the law in New Zealand and Canada will inevitably follow here, leading either to the use of judicial personal preference, or the introduction of presumptions via the back door. But this introduces a very important question – can presumptions of some kind ever be justifiable while retaining the overarching emphasis on a child’s best interests?

Thompson has argued that presumptions not only do exist in Canadian relocation law, but that their use should be embraced. He argues that merely directing trial courts to ask a series of questions is telling such courts to do what they are doing anyway, and that in any event, this approach has been a failure.<sup>100</sup> While any decision must be in the child’s best interests, relocation research can tell us certain things about how different kinds of relocation application are likely to impact on a child. Presumptions, therefore, are to be used as starting points in the best interests analysis. A presumption for or against relocation would, he recognises, be far too crude to be of any value and would not respect the child’s interests. He proposes four presumptions that should be built into the best interests framework -

- where the relocating parent seeks to move in the interim, pending a full hearing, there should be a presumption against relocation, with some scope for rebuttal;

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<sup>99</sup> See generally, Pat Parkinson, “The realities of relocation: Messages from judicial decisions” (2008) 22 *Australian Journal of Family Law* 35, and Pat Parkinson, “Freedom of movement in an era of shared parenting: The differences in judicial approaches to relocation” (2008) 36 *Federal Law Review* 145.

<sup>100</sup> Rollie Thompson, “Presumptions, Burdens, and Best Interests in Relocation Law” (2015) 53(1) *Family Court Review* 40.

- where the relocating parent has moved or has attempted to move, unilaterally or surreptitiously or without notice, there should be a presumption that the relocation is not in the best interests of the child, unless the contrary is proved;
- where the parents substantially share the care of a child, there should be a presumption that the relocation is not in the best interests of the child, unless the contrary is proved.
- Where the relocating parent is the predominant primary caregiver, there should be a presumption that the relocation is in the best interests of the child, unless the contrary is proved.<sup>101</sup>

Thomson specifically categorises these presumptions as “weak”, capable of being displaced by evidence to the contrary. For example, in cases there is a history of family violence, that history alone would be sufficient to displace a presumption against a move.<sup>102</sup> Additionally, he reasons, there will always be a percentage of cases which do not fall within the categories he outlines; in such cases, it will be necessary to lapse back onto the traditional best interests approach. Many of these, he predicts, will involve cases where both parents are active in the child’s life and where it cannot be said that there is either shared care or a predominant primary carer. Ultimately, he posits that presumptions will give greater guidance to litigants and lawyers at an earlier stage in proceedings, encouraging them to arrive at practical, and workable contact arrangements via negotiation or mediation.<sup>103</sup>

Introducing presumptions would involve a quite radical rethink of how we reconcile their use with the judicial preference for individualised decision making in children’s cases, especially now that Ireland has given the best interests principle a constitutional status. Alternative reform models predicated on providing a clearer structure for relocation judgments have also been proposed. Parkinson and Cashmore recognise that the financial cost of litigating in a high-conflict, high-stress context itself causes further negative outcomes for children,<sup>104</sup> but argue that the use of presumptions would do more harm than good.<sup>105</sup> Presumptions can make the mistake of aligning a child’s interest with those of their carers,<sup>106</sup> and that the overall emphasis on children’s best interest demands reality testing of proposals, rather than presumptions that may colour the outcome of that testing.<sup>107</sup> They similarly criticise a broad understanding of

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<sup>101</sup> Ibid, 48-51.

<sup>102</sup> Ibid, 42, 49.

<sup>103</sup> Ibid, 52.

<sup>104</sup> Pat Parkinson, Judy Cashmore, Judith Single, “The need for reality testing in relocation cases” (2010) 44 *Family Law Quarterly* 1.

<sup>105</sup> Pat Parkinson and Judy Cashmore, “Reforming Relocation Law: An Evidence Based Approach” (2015) 53(1) *Family Court Review* 23.

<sup>106</sup> Pat Parkinson and Judy Cashmore, “Reforming Relocation Law: A Reply to Prof. Thompson” (2015) 53(1) *Family Court Review* 56, 60.

<sup>107</sup> Ibid, 60-61.

what a welfare or best interests based approach would entail, leading them to argue “...for guided decision making, not unbridled discretion.”<sup>108</sup> While they acknowledge the role that such checklists can play, they are insufficient in relocation disputes. In order to promote quality decision making, Parkinson and Cashmore advocate that courts should ask three questions:

First, how close is the relationship between the non-resident parent and the child and how important is that relationship developmentally to the child? Second, if the relocation is to be permitted, how viable are the proposals for contact with the nonresident parent? Third, if the relationship between the child and the nonresident parent is developmentally important to the child and is likely to be diminished if the move is allowed, then (a) what are the viable alternatives to the parents living a long distance apart? and (b) is a move with the primary caregiver the least detrimental alternative?

Such an approach, they argue, would allow the consideration of options such as the relocation of the non-resident parent to the same location as the child and resident parent, if feasible, while also considering the quality of the relationship between the child and the non-resident parent to be a significant factor in the court’s decision – non-resident parents with little and sporadic contact with the child would not be a position to prevent a legitimate move. They later accepted that there is some merit in Thompson’s position, particularly over the importance of notice requirements and presumptions against unilateral relocation.<sup>109</sup> They also recognise that differentiation between family circumstances based on general indicators such as care history or family violence is important.<sup>110</sup> They also conclude that the first of their questions may be difficult to answer in the absence of an expert, often court-funded, report into the family’s care dynamics.<sup>111</sup>

Further support for a form of structured guidance is found in Rob George’s work. He highlights the desire among practitioners engaged in relocation litigation for judicial guidance.<sup>112</sup> He convincingly criticises presumptions in the relocation context as confusing predictions of future outcomes with facts from which a presumption may be readily drawn, and as obscuring the complex and differing realities that can underpin cases which may attract broadly similar labels.<sup>113</sup> Like Parkinson and Cashmore, he proposes that guidance be provided through a series of questions: Courts should first ask how are the care-giving responsibilities for the child (and

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<sup>108</sup> Ibid, 57.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid, 58.

<sup>111</sup> Ibid, 62-63.

<sup>112</sup> Rob George, *Relocation Disputes: Law and Practice in England and New Zealand* (Oxford: Hart Publishing, 2014).

<sup>113</sup> Ibid, 146-149.

other family members, if relevant) currently being discharged? Secondly, why does the applicant parent wish to relocate, and why is the application being opposed? Thirdly, what scope is there for either parent to change their plans so that the child can remain in close proximity to both and what effect such a course of action would have on the parents and on the child. Fourthly, if the applicant is going to relocate and the respondent is not, what would be the likely effect on the child either of relocating or of remaining in the current location with the respondent instead? Finally, what are the wishes and feelings of each child involved?<sup>114</sup>

Would the incorporation of structured questioning as outlined in these models be acceptable in the Irish context? They could be criticised as introducing a judicial gloss on the statute. This is not necessarily the case. Guidelines for the questions trial judges should ask, such as those proposed by Parkinson, Cashmore and George would be a minimalist intervention by appellate courts with the aim of providing greater predictability as to how the statutory criteria will be interpreted without going so far as to introduce presumptions. They still permit individualised decisions and they give some guidance on how important the various criteria (such as maintenance of meaningful relationships) are in relocation context, thereby allowing clearly unmeritorious arguments or unrealistic proposals by either parent to be filtered out of proceedings at an early stage while retaining the integrity of the statute and allowing a court to fulfil its constitutional obligations to children's welfare.

## **Conclusion**

This article has a reasonably limited ambition. Like Thompon's article, it is designed to start a conversation about how relocation disputes now ought to be handled. The presence of a new constitutional and legislative framework, coupled with international experience of the problems relocation presents, demand that a workable solution is found for the Irish courts. Present guidance is inadequate – much of the Irish case law predates the current legislation, and the post-2015 case law shows a troubling inclination to accommodate irrelevant factors. What does seem clear is that the constitutional position both under Art 40.3 and Art 42A.4 is that the welfare of the child must remain the paramount consideration, but does this mean that there can be no room for presumptions in Irish law, even if couched in terms of the “weak” presumptions argued for by Thompson? It would seem that the decisions to date stand against the use of such an evidential tool, and so recourse must be had to the use of structured, weighted

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<sup>114</sup> This is a slightly modified version of George's list which seeks to retain the integrity of his original version. For the full version with a series of sub-factors, see *ibid*, 151-153.

guidance that avoids the pitfalls of a simple application of the statutory factors. While many of Thompson's presumptions have merit, it may be that the constitutional constraints on judging will likely require that structured guidance be utilised in future decisions. However, a defence of presumptions in the new legal context would be a welcome addition to conversation.