M and F
Royal Court
8th March, 2013

JUDGMENT
39/2013

Application by the mother seeking a specific issue order pursuant to section 17(1)(c) of the Children (Guernsey and Alderney) Law, 2008 to enable the child to be removed permanently from the Bailiwick to France, and application by the father for a shared residence order if the child was to stay in Guernsey.

Approved Text
[Anonymised]
08.03.2013

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(MATRIMONIAL CAUSES DIVISION)

Between: **M** **Applicant**

-and-

F **Respondent**

Hearing dates: **5th, 6th & 14th February 2013**

Judgment handed down: **8th March 2013**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Counsel for the Applicant: **Advocate A N Brown**
Counsel for the Respondent: **Advocate F J Haskins**

Cases and legislation referred to:

Children (Guernsey and Alderney) Law, 2008
B v B (unreported, 22 June 2012)
Re AR (A Child: Relocation) [2010] 2 FLR 1577
Hershman & McFarlane, *Children Law and Practice*
Payne v Payne [2001] 1 FLR 1052
Re J (children) (residence: expert evidence) [2001] 2 FCR 44
Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2009
I v I (unreported, 10 October 2005)
Re V (Residence: Review) [1995] 2 FLR 1010
Re K (Children) [2012] 2 WLR 941, [2011] EWCA Civ 793
Re Y (leave to remove from jurisdiction) [2004] 2 FLR 330

Re W (Relocation: removal outside jurisdiction) [2011] 2 FLR 409
Re H (Application to Remove from Jurisdiction) [1998] 1 FLR 848
C v D [2011] EWHC 335 (Fam)
Re B; Re S (Removal from Jurisdiction) [2003] 2 FLR 1043
Re X and Y (Leave to Remove from Jurisdiction): No Order Principle) [2001] 2 FLR 118
Re P (Shared Residence Order) [2006] 2 FLR 347
Re K (Shared Residence Order) [2008] 2 FLR 380
Re G (Children) [2007] EWCA Civ 1497
Chamberlain v de la Mare (1983) 4 FLR 434
Housing (Control of Occupation) Law, 1994

[NB This is the anonymised (and perfected) version of the judgment handed down]

Introduction

1. The Court has before it two applications relating to young girl of primary school age (hereafter referred to as "C"). By an application dated 1 March 2012, the mother (hereafter referred to as "M"), seeks a specific issue order pursuant to section 17(1)(c) of the Children (Guernsey and Alderney) Law, 2008 to enable C to be removed permanently from the Bailiwick to France. By an application dated 17 October 2012, the father (hereafter referred to as "F"), seeks a shared residence order if M stays in Guernsey, with C residing with M and F on alternative weeks and holidays being dealt with on the attached schedule, together with a specific issue order pursuant to section 17(1)(c) "*that both parents undertake to permit and encourage C to undertake extra curricula activities and to honour such activities on the other's contact times*". F's original application for a sole residence order was not pursued because M had indicated that she would not move to France leaving C behind.

2. Cases of this nature are never easy. They involve a balancing exercise, not between the competing interests of the parents, and their wider families, or between the parents' and the child's interests, but balancing the different interests of the child in the scenarios presented and deciding which is best. I note what the Bailiff said in the second paragraph of his judgment in *B v B* (unreported, 22 June 2012) and found the words of Mostyn J in *Re AR (A Child: Relocation)* [2010] 2 FLR 1577 (at para. [4]) particularly apposite:

> "*Applications for leave to relocate are always difficult for the court and distressing for the parties. They involve a binary decision – either the child stays or he goes. There is no scope for any middle way. If the decision is that the child goes, then the left-behind parent inevitably suffers a disruption to his relationship with the child, at the very least in terms of quantum and periodicity of contact. If the decision is that the child stays then the primary carer, if not invariably, then frequently will suffer distress and disappointment in having what will normally be well-reasoned and bona fide plans for the future frustrated. So the decision, whichever way, is bound to cause considerable trauma.*"

Having seen the parties in Court over the three days of the hearing, I am in no doubt that both of them love C deeply and want the best outcome for her. This was clearly demonstrated by it being a very highly emotionally charged atmosphere. I am also satisfied that both parents will apply themselves wholeheartedly to giving full effect to the decision I have reached so as to make it work for the benefit of C.

The two applications

3. Both applications have been heard together and fall to be determined in this single judgment. However, Counsel were not agreed as to precisely how the Court should go about determining these questions.

4. For F, Advocate Haskins submitted that this was a case where the Court is obliged to decide on the residence questions before moving on, effectively as a separate determination, to decide if C should be permitted to relocate out of the jurisdiction with M. She referred to para. 302B of Hershman & McFarlane, *Children Law and Practice*, in which it states "*Where the future care of the children is in dispute, this must be resolved before an application for removal from the jurisdiction can be considered*". The authority for that statement is given as *Payne v Payne* [2001] 1 FLR 1052 and the judgment of Dame Elizabeth Butler-Sloss P, albeit that the paragraph cited incorrectly refers to para. [80] when I think the reference should be para. [86], which reads:

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

5. Advocate Haskins also referred to para. [31] of *Re J (children) (residence: expert evidence)* [2001] 2 FCR 44, in which it was suggested that "*what he should have done is asked himself, first, who should these children be living with, and secondly, where should that be?*", as supporting a sequential approach. However, in doing so, she has possibly overlooked that this passage refers to the complaints made by counsel for the appellant in that case about the approach of the trial judge, to which Hale LJ (as she then was) responded (in para. [32]):

> "*In answer to that, it can properly be argued that in all children cases it is not possible to engage in such clear-cut definition of the issues and everything has to be taken into account. It is impossible, in deciding which parent the children are to live with, to ignore the plans of each of those parents and to ignore the likelihood, if such it be, that one of them will eventually be permitted to take the children out of the country.*"

6. On behalf of M, Advocate Brown drew attention to the way that Thorpe LJ dealt with cross-applications in *Payne v Payne* (*supra*, at para. [42]):

> "*In very many cases the mother's application to relocate provokes a cross-application by the father for a variation of the residence order in his favour. Such cross-applications may be largely tactical to enable the strategist to cross-examine along the lines of: what will you do if your application is refused? If the mother responds by saying that she will remain with the child then the cross-examiner feels that he has demonstrated that the impact of refusal upon the mother should not be that significant. If on the other hand she says that she herself will go nevertheless then the cross-examiner feels that he has demonstrated that the mother is shallow, or uncaring or self-centred. But experienced family judges are well used to tactics and will readily distinguish between the cross-application that has some pre-existing foundation and one that is purely tactical. There are probably dangers in compartmentalising the two applications. As far as possible they should be tried and decided together. The judge in the end must evaluate comparatively each option for the child, one against the other. Often that will mean evaluating a home with the mother in this jurisdiction, against a home with mother wherever she seeks to go, against a home in this jurisdiction with the father. Then in explaining his first choice the judge will inevitably be delivering judgment on both applications.*"

He also referred to the way that paragraph had been cited by Mostyn J at para. [16] in *Re AR (A Child: Relocation)* (*supra*).

7. Although Advocate Haskins suggested that F was not making a cross-application because he was no longer pursuing a sole residence order in his favour, I am satisfied that the making of F's application for a shared residence order and his opposition to M's application for permission to relocate leaves the Court with the type of choice envisaged by Thorpe LJ. Although the English cases and the commentary thereon are not binding on this Court, I believe it is appropriate as a matter of Guernsey law to take into account how a judge in an English Court, confronted with comparable applications to those made in the present case, would approach the matter. I have, therefore, considered everything in the round, rather than sequentially, with a view to reaching a conclusion about what I think is in C's best overall interests. This does not, as in the English cases to which Counsel referred, necessarily involve a straight choice between which of the parents should be granted a sole residence order. The choices rest between a shared residence order or continuing the sole residence order in favour of M, as previously agreed between the parents and, in either case, whether permission to relocate should be granted to M. By explaining my "*first choice*", I will in the process decide both applications.

Background

8. The history of the family members explains how the present position has been reached. F is now 42 and M 35. Both were born and raised in Guernsey. Prior to M and F meeting, M had previously been married, living with her then husband overseas and in Guernsey. It was a short marriage of approximately two years. After a little over a year together, M and F married, with C born almost one year later. Their marriage ran into difficulties when C was approximately 2½. They continued to live at F's property for a few months thereafter. A judicial separation was pronounced in the summer of 2009 (hereafter referred to as "the Judicial Separation"). The terms of that order were amended by consent a couple of months later (hereafter referred to as "the Consent Order"). A property was purchased at that time for occupation by M and C. Divorce proceedings were commenced in the autumn of 2011, culminating in a Final Order in early 2012.

9. Following the separation, M began a relationship with the man who is now her husband (hereafter referred to as "S-F"). S-F is a French national. They commenced cohabitation in September 2010 and were married in France nearly two years later. S-F has a child from a previous relationship (hereafter referred to as "D"), who was born in mid-2005. M and S-F are expecting a baby next year. They currently live in rented accommodation, which they consider unsuitable for their family's longer-term occupation, with their lease due to expire in the Spring of 2013, meaning that another house move in the near future is almost inevitable.

10. In December 2010, F began a relationship with a woman to whom I will refer as "L". They commenced cohabitation in August 2011. L has two daughters, who also now live in F's house, although they also have contact with their respective fathers, largely on a regular basis but also with an extra degree of flexibility for the younger daughter due to her father's personal circumstances.

11. When C was born, M had a home birth at F's house, the former matrimonial home. C has her own bedroom at F's house. By virtue of para. 15 of the Judicial Separation (re-numbered 24 because of the insertion of additional paragraphs under the Consent Order), both parents retained joint custody of C and by para. 16 (subsequently re-numbered para. 25), M "*shall have the day to day care and control*" of C and F "*shall enjoy unlimited access to her, including regular staying access*". The Form E signed by both parents in 2009 stated that C "*will live with [M] at a house in the process of being purchased*" and that "*Whilst [F] and [M] will be flexible, it is probable that [C] will live with [M] during the week and [F] during the weekend*". In the Statement of Arrangements for C accompanying M's divorce petition,

just after C commenced her primary school education, she indicated that "*The present arrangements shall continue save that I may wish to relocate to France*". In F's Statement of Arrangements the following month, he indicated that "*The present arrangements shall continue save that in the event that [M] wishes to relocate to France, [C] shall reside with [F]*" and, on contact, "*In the event that [M] remains in Guernsey the present arrangements shall continue*". There have been no court orders about residence or contact since that time.

12. The pattern of contact that developed was for C to stay with F on Saturday overnight, the contact running from 12.30 pm on the Saturday until 7 pm on the Sunday. Sometimes, the overnight was swapped by agreement between M and F. At other times, C's stay with F has been extended by agreement, whether into a holiday Monday or by also including Friday night. This has not been happening since C began school. F has been seeking increased contact during that time. M has not agreed to what F wishes, although she did propose that an overnight stay on Wednesday during term-time might be introduced, but that could also not be agreed. As a result of their inability to agree, F made his application on 17 October 2012. The absence of agreement between the parents relates only to regular term-time contact because they have been able to agree longer periods of contact during school holidays. In 2012, for example, C spent a total of 37 nights with F, comprising four blocks ranging from 7 to 9 nights at a time, plus a couple of shorter blocks at Christmas. The parents envisage no difficulty in agreeing approximately an equal split of holiday periods in the future.

13. In terms of contact with grandparents, since C was a baby, F's parents have regularly looked after her on a Wednesday afternoon. More recently, they have been collecting C from her school and providing her with a meal before returning her to M's home. At times, F's maternal grandmother is also present. They also see C during the school holidays when she is in Guernsey and at family gatherings. M's mother has similarly had a close and regular relationship with C since her birth. The Safeguarder's report refers to contact between M's mother and C taking place after school on Thursday, but M's mother also referred to spending more time than just that with M, and now S-F as well, referring to a few days each week, including sharing mealtimes. M's mother also babysits for C.

14. M's mother currently lives in rented accommodation and retires from her employment in 2013. She has been worried about her future in Guernsey for some time, not wishing to survive on benefits and being unable to afford to stay in her present accommodation. Those worries have resolved themselves because S-F and M purchased a property in France in 2012, which includes a self-contained wing and have offered M's mother the opportunity to move to live there, which the latter has accepted.

15. M and F held a meeting on 13 September 2011 at which their respective partners, S-F and L, were also present. They discussed the situation pertaining to the ownership of the property purchased for occupation by M and C and M raised her wish to relocate with C to France. M indicated at that meeting that she would not relocate without F's agreement and agreed to provide him with further information to enable him to consider further her and S-F's proposals. M duly provided that information, in which they explained the rationale for the proposals, and F responded in detail by e-mail on 16 November 2011.

16. Once M's application for permission to relocate was made some months later, a Safeguarder, Ms Sadie Gill, was appointed. It is unfortunate that it has taken as long as it has to arrange a suitable hearing date for this matter. The delay has meant that C has got halfway through her school year, and so will have missed the bulk of the academic year in France, should relocation be permitted, which is not what was envisaged when the application was made, the idea being that if the proposed move were permitted it might be achieved before the start of the current school year, with C effectively starting French school at the intake along with everyone else. It also means that M's pregnancy has advanced to its later stages when the distresses associated with these proceedings to which I have already referred cannot but have increased her physical discomfort. It has also meant that F, who was described by L as having

been "a mess" since M's application was made, has faced the strain of these proceedings for a longer period than he would have wished.

17. During the course of the three days of the hearing, the third day fortunately being available just a week after the first two, I heard oral evidence from M, S-F, M's mother, F, both F's parents, L and the Safeguarder. I have also digested the content of their position statements and been provided with a considerable amount of other material. At the conclusion of the hearing, I reserved my judgment, indicating that I would announce the outcome 5 days later, because I wished to think very carefully about everything that had been put before me, knowing how much this case means to all involved. The full reasoning for my decision is now set out in this judgment.

The Safeguarder's recommendations

18. The Safeguarder has filed a report dated 15 January 2013. Within that report, she set out the enquiries she had undertaken, which included a visit to France in June 2012, the background to the applications and the views of the parents, before setting out by reference to the child welfare checklist her comments about C, including what C stated during a meeting of approximately 20 minutes held on 9 January 2013. In section 6 of her report, the Safeguarder analysed in some detail M's application for permission to relocate with C, using the *Payne v Payne* approach as guidance. She accepted during her evidence that her analysis did not spell out her thinking about F's application for a shared residence order, which is what she had recommended the Court should grant, albeit not in the exact terms F sought. She explained her reasoning during the course of her evidence. Her recommendation in section 7 of her report was:

> "*7.1 After considering all the above information I would recommend that both Parties should have a Shared Residence Order.*
> *7.2 That permission should* ***not*** *be granted to permanently remove [C] from the Jurisdiction.*
> *7.3 That [C] should be given the opportunity to benefit from both of her parents caring for her on a more frequent basis so her contact with her father should increase.*"

19. The next paragraph set out the Safeguarder's suggestion for contact over a fortnight cycle during term-time, under which both parents were to have C with them for alternate weekends, Friday through to Monday, with M's weekend continuing right through to the start of F's weekend, but to be broken up with an afternoon visit to F's house, including for a meal, and the weekdays following F's weekend to be with M through to the end of school on Wednesday, then with F through to the start of M's weekend. In making this suggestion, the Safeguarder was rejecting F's wish for equal time with C on the basis of alternate weeks and also M's proposal to add in a Wednesday overnight stay, building on the existing arrangement under which F's parents look after C after school on that day. The Safeguarder explained that she felt that there should be increased contact for F, recognising his wish to play a more "hands-on" role in C's development by participating in day-to-day routine and school-related matters and further that it was desirable for both parents to get weekend time with C rather than it always being primarily spent with F. During her evidence, the Safeguarder said she envisaged that the arrangement she proposed might evolve into a more equal split, possibly "week on, week off", within the next 18 to 24 months. She had not suggested that arrangement at this stage because of the fear that it would give mixed messages to C. With M and S-F's new baby imminent, any such significant change in living arrangements might appear as if C were being pushed aside in favour of the new baby. Everyone understood that that would be undesirable.

20. The Court is not obliged to accept the Safeguarder's recommendations. As indicated in section 84 of the 2008 Law, "*it is the function of the Safeguarder Service to safeguard and*

promote the welfare of the child by giving advice to the relevant court" (emphasis added). Section 44(1) of the Children (Miscellaneous Provisions) (Guernsey and Alderney) Ordinance, 2009 provides that "*a Safeguarder's principal and overriding duty is to promote the interests of the child throughout those [family] proceedings, having regard to the child welfare principles and child welfare checklist*". However, where a Court does not accept the advice given by a Safeguarder in her recommendations, the importance of explaining the reasons for not following it must be clear to the parties and to the Safeguarder – see, eg, *I v I* (unreported, 10 October 2005), citing with approval (at para. [23]) the following passage from the judgment of Russell LJ in *Re V (Residence: Review)* [1995] 2 FLR 1010, 1019:

> "*... it is good practice for any tribunal which disagrees with a recommendation made by a court welfare officer to deal with the reasons advanced by the court welfare officer adequately, so as to demonstrate why the court is departing from his view. ... What is vital is that the parties should understand in terms why the recommendations of the independent officer appointed by the court to advise it are not being accepted. It is a courtesy to the court welfare officer that he or she should know. However, provided the judgment read as a whole directly or by necessary inference discloses the reasons for departure, its precise format and phraseology must be a matter for the judge.*"

The law

21. As a matter of Guernsey law, there is no authority from a higher court on relocation cases which binds in relation to the approach to be taken in this Court. Accordingly, I will start by considering the statutory provisions that apply before considering the English cases that offer further guidance on the approach to be taken.

22. The Court is obliged to have regard to the "*overriding principle that the child's welfare is the paramount consideration*" (section 3(1)(b), 2008 Law). It is obliged (see sections 3(1)(a) and 4(1)) to have regard to the child welfare principles and the child welfare checklist contained in the 2008 Law. I have, therefore, borne in mind the principles set out in the following paragraphs in section 3(2) of the 2008 Law:

> "*(a) that a child's welfare is normally best served by being brought up within his own family and community,*
> *(b) that, where it is not possible for a child to be brought up within his own family or community, his welfare is normally best served by maintenance of regular contact with his family and community,*
> *(d) that any delay in determining a question about a child's upbringing is likely to be prejudicial to the child's welfare,*
> *(e) that irrespective of age, development or ability, a child should be given an opportunity to express his wishes, feelings and views in all matters affecting him,*
> *(f) that, except where it is shown to the contrary, it is presumed that a child is capable of forming a considered view from the age of 12 years,*
> *(i) that it is expected that parents and others responsible for a child's welfare will consult and co-operate with one another, and where possible resolve matters by agreement, in an atmosphere of openness and non-confrontation, with recourse to formal proceedings (whether court or tribunal) only as a last resort,*
> *(j) that it is normally in the best interests of a child to have ongoing contact with both parents and it is the responsibility of the parents and any public authority to take reasonable steps to promote such contact*".

I have also had regard to all of the matters listed in section 4(2) of the 2008 Law because, in my view and as supported in the Safeguarder's report, each of them is, to some extent at least, relevant to my determination of M's application and so also relevant when determining F's application.

23. The way in which those principles and the checklist have been approached in other cases offers helpful guidance, but no more, as to the approach to take. Indeed, the only principle from *Payne v Payne* (*supra*) is the paramountcy one and the guidance mentioned therein must not be elevated so as to become treated as if it were an established principle of English law and, in my view, that applies equally as a matter of Guernsey law. The English law position has been clarified in *Re K (Children)* [2012] 2 WLR 941, [2011] EWCA Civ 793 (at para. [39] *per* Thorpe LJ):

> "*… the only principle to be extracted from Payne v Payne is the paramountcy principle. All the rest, whether in paragraphs 40 and 41 of my judgment or in paragraphs 85 and 86 of the President's judgment is guidance as to factors to be weighed in search of the welfare paramountcy.*"

24. If only because the thought-processes articulated in it spell out more fully why this conclusion has been reached, I can also helpfully refer to para. [86] in the same case from the judgment of Moore-Bick LJ:

> "*… where this court gives guidance on the proper approach to take in resolving any particular kind of dispute, judges at all levels must pay heed to that guidance and depart from it only after careful deliberation and when it is clear that the particular circumstances of the case require them to do so in order to give effect to fundamental principles. I am conscious that any views I express on this subject will be seen as coming from one who has little familiarity with family law and practice. Nonetheless, having considered Payne v Payne itself and the authorities in which it has been discussed, I cannot help thinking that the controversy which now surrounds it is the result of a failure to distinguish clearly between legal principle and guidance. In my view Wilson LJ was, with respect, quite right to warn against endorsing a parody of the decision. As I read it, the only principle of law enunciated in Payne v Payne is that the welfare of the child is paramount; all the rest is guidance. Such difficulty as has arisen is the result of treating that guidance as if it contained principles of law from which no departure is permitted. Guidance of the kind provided in Payne v Payne is, of course, very valuable both in ensuring that judges identify what are likely to be the most important factors to be taken into account and the weight that should generally be attached to them. It also plays a valuable role in promoting consistency in decision-making. However, the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child. As Hedley J said in Re Y, the welfare of the child overbears all other considerations, however powerful and reasonable they may be. I do not think that the court in Payne v Payne intended to suggest otherwise.*"

25. The third judgment delivered in the case came from Black LJ, who sought to offer an analysis in favour of ending the apparent divergence of approach between a case involving a primary carer (the *Payne v Payne* approach) and a case where the existing care pattern was equal or thereabouts (the line of cases developed from the different approach taken by Hedley J in *Re Y (leave to remove from jurisdiction)* [2004] 2 FLR 330):

> "*141. … the principle – the only authentic principle – that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child. …*
>
> *144. Payne therefore identifies a number of factors which will or may be relevant in a relocation case, explains their importance to the welfare of the child and suggests helpful disciplines to ensure that the proper matters are considered in reaching a decision but it does not dictate the outcome of a case. I do not see Hedley J's*

decision in Re Y as representative of a different line of authority from Payne applicable where the child's care is shared between the parents as opposed to undertaken by one primary carer; I see it as a decision within the framework of which Payne is part. It exemplifies how the weight attached to the relevant factors alters depending upon the facts of the case."

26. As I have already said, unlike the English courts, which are bound by the previous decisions, including *Payne v Payne* (*supra*), this Court can decide whether it wants to be guided in the same way or differently. The explanation offered in *Re K* (*supra*) strongly suggests that, despite some attempts to move away from the guidance in *Payne v Payne* (see, also, *Re W (Relocation: removal outside jurisdiction)* [2011] 2 FLR 409, especially the postscript of Sir Nicholas Wall P at para. [129]), this remains the approach that is being followed by the English courts and may even be the approach more generally if the explanation of Black LJ to treat *Re Y* (*supra*) as part of the overall framework takes root. Reference to the *Payne v Payne* approach was made by the Bailiff in *B v B* (*supra*) and was how the Safeguarder analysed the pros and cons for C in the present case before reaching her recommendation that M's application for relocation should be dismissed. Although Advocate Haskins may have been seeking to persuade me that a series of cases in which there has been shared care point towards the Court moving away from the *Payne v Payne* primary carer approach, I remind myself of the view offered by Thorpe LJ in *Re H (Application to Remove from Jurisdiction)* [1998] 1 FLR 848 that "*not a lot is to be gained by seeking support from past decisions, however superficially similar the factual matrix may appear to be*" and, for that reason, I do not propose to comment on those other, earlier cases to which my attention was drawn.

27. The usefulness of the English cases is first to extract principles that might or might not apply as a matter of Guernsey law, and then to consider if they offer any guidance that can be adopted, with or without modifications, to suit the situation in Guernsey. The paramountcy principle, as found in section 3(1)(b) of the 2008 Law, is a principle I am bound by statute to apply. To the extent that that principle has been confirmed in the English relocation cases to which I have just referred, those cases helpfully clarify the position. Because the guidance offered by *Payne v Payne* (*supra*) has been used by this Court previously, I see no good reason for not drawing assistance from it in this case. It is indisputable that M has been C's primary carer to date. Even if there is to be some readjustment of the amount of time F spends with C, as recommended by the Safeguarder, this would not amount to M and F sharing equal care of C, meaning that M remains C's primary carer. Again, even if the approach derived from *Re Y* (*supra*) were to prevail, the rationale for treating it as part of the overall *Payne v Payne* approach, as set out in *Re K* (*supra*) by Black LJ, is an attractive way to regard these matters for the purposes of Guernsey law, which is not placed in the same precedent straitjacket experienced in English law. For these reasons, I propose to approach the difficult balancing exercise the Court is required to undertake by considering the various factors set out in *Payne v Payne* (*supra*), deciding what weight to give them, and also to such other factors as are necessary to ascertain what the "*first choice*" decision should be for C's welfare.

28. In the judgment given by Thorpe LJ in *Payne v Payne* (*supra*), he suggested "*the following discipline as a prelude to conclusion*" (at para. [40]):

> "*(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 his 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?

(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 the judgment of Dame Elizabeth Butler-Sloss P, she suggested "*that the following considerations should be in the forefront of the mind of a judge trying one of these difficult cases*" (at para. [85]):

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

(b) There is no presumption created by s 13(1)(b) [of the Children Act 1989, and which is not, in any event, replicated in quite the same way in the 2008 Law] in favour of the applicant parent.

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

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

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

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

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

29. In relation to situations where there has been re-marriage, as in the present case, Thorpe LJ has added to the guidance he gave in para. [40] of *Payne v Payne* (*supra*), to which Theis J also referred with approval in *C v D* [2011] EWHC 335 (Fam) (at para [30]). In *Re B; Re S (Removal from Jurisdiction)* [2003] 2 FLR 1043, His Lordship stated:

"*[11] I would in the light of recent experience of applications and appeals in relocation cases, offer the following extension to subparagraph (c) of para [40]. Where the mother cares for the child or proposes to care for the child within a new family, the impact of refusal on the new family and the stepfather or prospective stepfather must also be carefully evaluated.*

[12] That consideration applies with greater force in the case where the child's stepfather is a foreign national. There, as well as work, all his history, his family ties and his loyalties pull in the same direction. If the Court frustrates that natural emigration it jeopardises the prospects of the new family's survival or blights its potential for fulfilment and happiness. That is manifestly contrary to the welfare of any child of that family."

Whilst recognising that these passages are no more than supplementary guidance, given S-F's nationality and the proposed place of relocation for him, M, C and the new baby, this is a factor which I consider must be borne in mind when weighing up what are the best interests of C.

30. The totality of this guidance involves the Court looking at all the information provided and assessing whether the application for relocation passes the first hurdles of being genuine and well-researched. If so, then a balancing exercise must be undertaken, always returning to the child's welfare as the paramount consideration. Such a balancing exercise requires careful consideration of the child welfare principles set out in section 3(2) of the 2008 Law, taking into account the child welfare checklist in section 4(2) of that Law. Whether or not any one

factor tips the balance one way or the other will vary from case to case. There are no presumptions and the outcome depends on an evaluation of the evidence (*Re X and Y (Leave to Remove from Jurisdiction): No Order Principle)* [2001] 2 FLR 118).

31. Although I have concentrated thus far on the principles and guidance applicable to relocation cases, I do not overlook that F's application is for a shared residence order in respect of C, which is what has been recommended by the Safeguarder. I have borne in mind what Wall LJ stated at para. [22] of *Re P (Shared Residence Order*) [2006] 2 FLR 347:

> "*Such an order emphasises the fact that both parents are equal in the eyes of the law, and that they have equal duties and responsibilities as parents. The order can have the additional advantage of conveying the court's message that neither parent is in control and that the court expects parents to co-operate with each other for the benefit of their children.*"

32. I have also noted what Wilson LJ (as he then was) said in *Re K (Shared Residence Order)* [2008] 2 FLR 380 (at para. [6]):

> "*In my experience it is now quite common for a parent with a substantial degree of contact with a child to apply, as here, for a ruling that the time to be spent by the child with him (or, less often, her) should be increased to a level of equality with that to be spent with the other parent and for the arrangements favoured by the court to be expressed as terms of a shared residence order. Equally, in my view, the proper legal approach to the application is now clear: it is that, because a shared residence order may serve the interests of the child not only in circumstances in which the division of his time between the two homes is equal, the two aspects of the application, namely for a ruling in favour of an equal division of time and for a shared residence order, do not stand or fall together. On the contrary, they have to be considered separately; and the convenient course is for the court to consider both issues together but rule first upon the optimum division of the child's time in his interests and then, in the light of that ruling, to proceed to consider whether the favoured division should be expressed as terms of a shared residence order or of a contact order.*"

In the present case, F is applying for an equal division of C's time between him and M and, effectively in consequence, a shared residence order. Adopting the sensible approach suggested by Wilson LJ, the first consideration is the optimum amount of time for C to spend with F and with M, which inevitably also entails considering whether M will be living with C in France or in Guernsey, and then deciding whether the circumstances are such that F should be granted the shared residence order he seeks.

33. In giving his judgment in *Re AR (A Child: Relocation)* [2010] 2 FLR 1577, Mostyn J stated (at para. [52]):

> "*I am clearly of the view that a joint or shared residence order should be made. Indeed, such an order is nowadays the rule rather than the exception even where the quantum of care undertaken by each parent is decidedly unequal. There is very good reason why such orders should be normative for they avoid the psychological baggage of right, power and control that attends a sole residence order, which was one of the reasons that we were ridden of the notions of custody and care and control by the Act of 1989. A joint/shared residence order is not inapt even if leave to relocate is granted: see Re G.*"

Guernsey, of course, was similarly "*ridden of notions of custody and care and control*" by the 2008 Law.

34. The decision in *Re G (Children)* [2007] EWCA Civ 1497 to which Mostyn J referred was explained in para. [10] of the judgment of Thorpe LJ in that case:

> "*The judge decided the highly contentious issue in favour of the mother, granting her application to relocate. He also granted the father's application for a joint residence order, an issue that was hardly contested. He decided the level of contact following the children's removal. That was an important issue, since obviously it was his responsibility and intention to protect, as best he could, the very important relationship that the father had developed with the children following separation. The making of a joint residence order was entirely appropriate, given the fact that the children were spending 41% of their time with their father under the generous contact arrangements that had been agreed.*"

Although the sequence of applications in that case was the other way round and both parties were not British, meaning the children were "*truly international children*", which is not the case for C, who can accurately be described as "a Guernsey girl", I have found the approach taken and analysis of the issues helpful to me as guidance in dealing with the applications by M and F.

Discussion

35. One thing on which all the witnesses agreed is that C is loved by both sides of her family. That was evident to me from the way in which they all spoke about C when giving their evidence. As the Safeguarder pointed out, this is not a case where questions have been raised about either parent's capability as a parent of meeting C's needs (section 4(2)(e) of the 2008 Law) or where there is any question of needing to conduct a fact-finding exercise under Practice Direction No. 6 of 2008. She regards C as equally happy in both family units and concludes that C is lucky to have two equally committed parents. I was similarly impressed with the level of commitment both have to their tasks as parents. It means that the balance between granting or refusing M's application for permission to relocate is very fine and particularly difficult.

36. I share the view, as noted by Griffiths LJ in *Chamberlain v de la Mare* (1983) 4 FLR 434 (at 445), that "*the welfare of young children is best served by bringing them up in a happy and secure family atmosphere*". His Lordship's judgment then continued with comments of a very similar tenor to what Thorpe LJ had to say in *Re B; Re S (Removal from Jurisdiction)* (*supra*). Accordingly, in considering what are C's best interests, I have kept in mind that M and S-F are now married and that F has formed a committed relationship with L, which involves a new household including L's two daughters. Both are happy and secure family environments but the wish of M and S-F to settle in France and M's expressed dissatisfaction with Guernsey are factors that must be taken into account in considering what the future holds for C and how that affects her welfare.

37. Before turning to the *Payne v Payne* considerations, as supplemented by the *Re B; Re S* gloss, I note the way in which section 5 of the Safeguarder's report deals with the child welfare checklist (section 4(2) of the 2008 Law).

38. By reference to para. (a), I understand why the Safeguarder was initially reluctant to meet with C, due to her age, in order to explore what C's wishes and feelings might be. Quite sensibly, the parents have not aired with C the possibility that she will move permanently to the home that S-F and M now own in Brittany. They have shielded C from the raising, and possible dashing, of expectations. However, in order to ascertain C's thoughts about frequency of contact with F, the Safeguarder met C, in the presence of C's class teacher, on 9 January 2013. The Safeguarder's preferred approach was consistent with section 3(2)(e) and (f) of the 2008 Law and what actually took place was quite in keeping with those principles.

39. C's views are summarised at para. 5.1.3 of the Safeguarder's report. The main features of her views are that she enjoys seeing her family, is happy with the current arrangements and expressed the wish to see more of her father and his mother. She did use the phrase "*week on, week off*" in relation to living with F, which caused the Safeguarder some concern. F openly admitted in evidence that this was a phrase he had used. It derives from the arrangements that F's sister has in respect of her own child and her arrangements with that child's father. F denied that this was an indication of an attempt to manipulate C. The Safeguarder had not told C's parents when she was likely to meet with C, at least until informing F the day before, in response to a request for information from F. At that time, F did not have contact with C, and so was unable to influence her one way or the other. I accept his explanation that this was a matter discussed with C from time to time but not directly before she used the phrase when meeting the Safeguarder. However, the fact that C has, according to F, heard the phrase more than once and has apparently retained it and used it when speaking with the Safeguarder does suggest that the subject of what time she might spend with F in the future has been talked about with her. Whether or not that has had any impact in what otherwise appear natural and honest responses to the Safeguarder seeking to ascertain C's wishes about contact probably does not make any difference to the outcome of the applications, but it has produced an unnecessary distraction into the assessment of what views C really wished to express.

40. In relation to para. (b), it has to be acknowledged that C was born to and has been brought up in Guernsey by parents who were similarly born and brought up in Guernsey. Having regard to section 3(2)(a) of the 2008 Law, a proposal to relocate with a family member will impact, in part, on being brought up in what has, until now, been C's only community. M drew attention to her feeling when growing up of being treated adversely by her peers because her mother is not from Guernsey but from England. She has described feeling unhappy and isolated as an adult and has referred to her belief that she has a connection to some ancient familial French heritage. If that is intended to suggest that C has similar French associations, I reject that suggestion. Any associations C has with France currently derive from the nationality of S-F and C's visits to the new home in Brittany and nothing more.

41. C's only language is English. She has had exposure to French through S-F, but it was not clear whether or not the French language is spoken much, if at all, within her home environment. I expect that more could have been done to offer a firmer grounding in the French language by now, but I also acknowledge that to do so may have been counter-productive, raising questions in C's mind as to why this was being done, when the parents and their partners have shielded C from any awareness that a permanent move to France is under consideration. I accept, however, that picking up the French language at a comparatively young age, especially through immersion if living in France, should be a practical option for C and, within a fairly short time, should not be a barrier to integration in school and the local Brittany community.

42. Although concerns have been raised about C possibly suffering from a medical condition, I am satisfied that this can be addressed by the parents whether C remains in Guernsey or moves to France. Both parents have joint parental responsibility for C. With this issue having been raised in the way it has, it will be incumbent on both of them to ensure that appropriate testing is undertaken when C reaches the right age for it. It is, of course, a concern, but is not one, in my view, that points one way or the other as to the jurisdiction in which it is best for C to reside. Because of the likelihood that M and F will agree how best to manage this concern for C's sake, I do not regard this as something that requires any formal direction from the Court.

43. The only matter raised, and dismissed, in respect of harm that C might suffer (para. (c)) relates to what has been said about S-F and an allegation relating to D made at the time of S-F's separation from D's mother. I am satisfied that this is not something that has been hidden away and only just come to light and that it was properly addressed at the time. From the fact that no further action was taken against S-F and he continues to have a close involvement in

the upbringing of D, I can only conclude that this was an allegation without foundation and that C does not face any risk of harm.

44. C's physical, emotional and educational needs (para. (d)) appear to be being met, although there remains a concern about C's educational development arising from her possible condition that needs to be kept in sight. The Safeguarder expressed her concern that this might be overlooked because M thinks she knows C's needs better, having something similar herself, or that any move to France might mean that this gets "lost in translation". As I have just indicated, I am satisfied that the issue has been aired now in such a way that M will take it forward, if necessary through prompting from F, and that this concern is one that can be properly and appropriately managed for the sake of C going forwards.

45. I have already pointed out that there are no concerns whatsoever about para. (e).

46. The question of contact with other family members and significant people (para. (f)) raises issues that also form part of the balancing exercise under the *Payne v Payne* approach. I am very conscious that to date C has had a regular and fairly settled pattern of contact with both sides of her family. Contact with her grandmothers has taken place since she was born and she also has a relationship with her paternal grandfather and great grandmother. As a result of M and F forming their own new relationships, C has formed relationships with other children of a similar age to her, namely S-F's son, D, and L's two daughters, the younger of whom is close enough in age to C to be someone with whom shared interests are highly likely to continue to develop. Any changes to the pattern of contact will inevitably have some impact on these relationships but I take into account what the Safeguarder wrote at para. 5.5.3 of her report:

> "*Both parties have been able to demonstrate to me that they are flexible to agreed change and that they can make arrangements amicably in [C's] best interest, around their busy lives and incorporating the other children within their household's own contact plans.*"

Having seen the parties give their evidence and their respective presentations throughout the hearing, I believe that they will always want to ensure that C gets the best out of the living arrangements made for her and that current and any new relationships are appropriately nurtured and both permitted and encouraged to develop. The relationships that have been established to date should be sustained for the benefit of everyone concerned, although the exact bases on which they develop will require M and F to juggle C's time with them accordingly.

47. In relation to para. (g), one of the effects of C's removal from Guernsey at this stage of her life is that she is not yet a qualified resident in her own right under the Housing (Control of Occupation) Law, 1994. There is, of course, uncertainty at present as to what regime will be in place in the future if the 1994 Law is repealed and replaced. If it continues as at present, there is still a long period of time before C will reach the age of 10 and so obtain her residential qualification. The option to defer reaching a decision on relocation until she is aged 10 would, in my view, be likely to be prejudicial to the child's welfare and so contrary to the principle in section 3(2)(d) of the 2008 Law. If it were a case of deferring any relocation for a matter of a few months only, weighing that in the balance of the other competing interests for an immediate move might just tip the balance in favour of delaying the proposed move for that period. However, the period involved is, quite simply, too long to countenance deferral of the question.

48. As the Bailiff said in *B v B* (*supra*), "*I do not see the need to obtain local residential qualifications as an overriding consideration. In my opinion, it is one of the issues that need to go into the balancing exercise*". I will adopt that position in this case and treat it as a further factor to put into the scales.

49. By running through the child welfare checklist in this way, I have reminded myself of the matters to which the Court is obliged to have regard. I believe they highlight the way in which the *Payne v Payne* guidance, as supplemented, can be approached, constantly bringing me back to consider the overriding principle that C's welfare is the paramount consideration when determining the two applications before me.

50. Everyone is agreed that C and F should have more contact, although the parties' proposals about how much more differ. F seeks a shared residence order based on equal time for C with him and M. For the reasons advanced by the Safeguarder, I agree that that would entail too great a change in C's life and so is not the appropriate order to make now. Suffice it to say that the amount of time C should spend with F depends on whether M is going to live in France or Guernsey, so that issue needs to be considered alongside the question of the optimum time to spend with F. The proposals of the Safeguarder for approximately a 60:40 split are, in my view, at the higher end of the range that might be appropriate for C at this stage, representing an increase from the current arrangements of C spending in the region of 25% of her nights with F.

51. Moving to the first question in *Payne v Payne* of whether "*the mother's application [is] genuine in the sense that it is not motivated by some selfish desire to exclude the father from the child's life*", the Safeguarder accepted that M's application was genuine. I sensed that F feels that M should not have made her application at all because, at the meeting on 13 September 2012, M had indicated that if F did not agree to her proposal to relocate with C she would not pursue it further. However, any such indication was clearly not binding on M and, to the extent that it extended to S-F, on him as well, and I note that M did not make her application immediately on getting F's response but took time to reflect before deciding that it was what she felt was the right thing to do for her new family. M's application was made before she married S-F and before she became pregnant. She has maintained her application through these events and in the face of strong opposition by F. I am quite satisfied that her application is a genuine one.

52. Advocate Haskins questioned M's motivation in proposing to move to France with C. In my view, the way she did so constitutes F challenging the genuineness of M's application, although I find that this challenge is without foundation. M's motivation was clear to me. M wishes to live in France with her new husband, S-F, the latter wishing to return to his homeland and the region where his family still live. M considers that the opportunities for her family to be settled and happy in France are greater than if the family were to remain in Guernsey. Accordingly, C will be a direct beneficiary of that happiness and stability, enjoying the opportunities available to her as part of that family and in the environment chosen by M and S-F.

53. Similarly, there is no suggestion that M's application is anything other than well-researched. I took particular note of the Safeguarder's evidence that it was definitely the best-researched relocation proposal she has dealt with. The property in France that M and S-F have purchased looks to me to be a great place for them to consider raising C and their new baby. Because of the different property markets, they have been able to acquire something much better than they could afford in Guernsey. The schooling available may be different from the Guernsey system but that does not mean that it is inferior. S-F's business, in which M is now a shareholder and employee, can be run from either location. Their proposals also appear to be affordable for them.

54. The impression I have of M is that she and S-F have worked tirelessly to overcome the various hurdles they have faced since deciding they wished to go to France permanently. The times of commercial flights available from Dinard for the proposed weekend trips to Guernsey changed in an adverse way, so they considered alternatives. The airport at St Brieuc, being slightly closer to the house they own in Brittany than Dinard, was discovered to

be closed on Fridays at the time when a flight might be sourced there, so they have concentrated on private arrangements from Dinard Airport. They have obtained information about the ways in which flights can be organised there on a regular basis. In other words, each time something has arisen that might be regarded as showing the proposals fall down, they have taken steps to find a solution. They might not have provided the fullest information that the Safeguarder has sought, eg, in relation to speech and language therapy, but I consider that M's response each time, no doubt with assistance from S-F, demonstrates that the two "gateway" considerations in *Payne v Payne* are satisfied, meaning that the Court can move on to balancing the second and third considerations.

55. The first of those considerations focuses on F's opposition and what is driving it. The way it is set out in the Safeguarder's report is as follows:

> "*4.1 [F] feels that the proposed move to France will create a "lessening of his relationship" with his daughter and is strongly against the idea.*
> *4.2 He does not believe that a move to France is in [C's] best interest because he wants "to be able to influence her life, her choices, to be there with a hand to help her with school work, to share and shoulder her pain when she is sad, to encourage and support her when she is striving towards a goal and to give her a consistent message on what is right and wrong.*""

In summary, F wants to be a hands-on father and does not want to be a "holiday" or "fun" father.

56. Although the concept of leaving Guernsey had been raised by M in an e-mail on 19 March 2010, when she was concerned about her future financial position, it was not until the meeting on 13 September 2011 that the proposal really crystallised. By that time, M was in a relationship with S-F and the option of S-F returning to the area from whence he came to Guernsey in the 1990s had been formulated. Their proposals were much more concrete than M's first "in principle" raising of the possibility of her and C leaving Guernsey.

57. As requested by F, M set out in a three-page document the way that a planned move to France might work, to which was appended some property details indicating the type of property she and S-F were considering purchasing. F responded by e-mail on 16 November 2011. He rejected the proposal, adding "*I presume that you will now not consider moving [C] as I have given you a more detailed response*". The passages summarising his reasons for not agreeing to M's proposed move to France were:

> "*… my daughter is my number one priority and I want her protected from the stress of moving away from her place of birth, her family and her friends.*
> *My initial response is that I wish you and [S-F] every success in starting a new life together in France but I do not believe that it is in [C's] best interests to move away from the Island. I, and my parents and grandmother, have an active involvement in [C's] life and wish to continue to do so.*
> *… having [C] move during these early formative years for her personality is a risk I do not wish [C] to be part of. …*
> *I also believe that the more [C] integrates into French society the less willing she will be to visit Guernsey every other weekend …*
> *I genuinely feel that if you and [S-F] wish to make a life for yourself in France then you should do so but that [C] should continue to live in Guernsey, with me.*"

58. F's opposition to M's application has effectively remained the same since that time, as confirmed when he gave evidence. His view is that M and S-F are financially able to afford to pay rent, as they have been, and so stay in Guernsey, making use of their French property in the manner originally envisaged as a holiday home. F did not consider that the terms of the separation agreed between him and M placed M is a financially difficult position by being

massively in his favour. Having heard M and S-F give their evidence, I doubt that the financial position created by the terms of the settlement enters much into their choices. On their separation, M and F agreed to arrangements that they felt were appropriate to reflect the brevity of their marriage, what they brought to it and what they should take from it. Although one might raise an eyebrow over the way in which F acquired legal and equitable interests in the property purchased by M for her and C to live in and the consequences to which the terms of the Consent Order might lead, I do not regard that history as something motivating either parent's current position. They have moved on since that time and there is no merit in re-opening the issue of whether things might now be different had F been more generous financially in the wake of their separation.

59. F's opposition quite understandably concentrates on the effect of C's relationship with him and his family and her connection with the Island of her birth. These are principles set out in section 3(2) of the 2008 Law. However, another way of looking at F's position is that he was against the proposed move in the autumn of 2011 and has failed to consider since then whether there are actually the type of advantages for C being articulated by M. Bearing in mind that M's application was made some 11 months before the hearing took place, I was surprised that F had not taken the opportunity to go across to Brittany to see for himself what the community into which C would move, were permission to be granted for M to relocate with her, including the schools, is like. He has effectively treated the application as a desk-top exercise, meaning that he has not been able to see whether there are indeed any benefits to put against his consistent opposition. It is almost as if he has closed his mind to that possibility. Consequently, his opposition is less compelling than it might have been had he actually pointed to something he had actually seen on the ground relating to the proposals that raised his concerns.

60. F admitted he is a worrier, something confirmed by L in terms that were a testament to her directness and honesty. It was also apparent from the way F gave his evidence that he is a cautious person, considering carefully what he says before saying it. As part of his opposition to M's proposals relates to the use of a small private aircraft, all that I think needs to be said on that topic is that I understand why someone like F might have those concerns but believe that they arise more because he is a worrier than because it is a risky form of transportation. As F confirmed in his evidence, he knows that M loves C very much and would not put her life in danger.

61. To the extent that F's concerns about M's proposals have been based on the effect that fortnightly trips back to Guernsey will have on C, I noted that F's own application for a sole residence order proposed the same pattern of visits, albeit in reverse, "*if workable and not too stressful for [C]*". The implication of him having made application in those terms as recently as October 2012 is that he considered such arrangements a possible solution, arguably bringing his opposition on this basis into question.

62. In relation to "*the extent of the detriment to his and his future relationship with the child were the application granted*", if I compare the position proposed by M with the current arrangements then the changes will not be large. There is, it is quite clear, a difference between C living in Guernsey where F is available just down the road as and when the need arises and the situation where C spends part of her time in France and part in Guernsey. Although the distance is only some 80 miles, a manageable distance where the means of transport would be a car or a train, that is not the case across the stretch of water between here and Brittany. It remains a manageable distance, but is more complex than the same distance just across land, eg, in England or even between regions in France. Getting between the two locations takes additional time and effort and generally involves forward planning.

63. I must, however, also compare the position between what the relationship between C and F and his family would be if the permission to relocate were not granted. As everyone has acknowledged, there would be an increase in the contact time, albeit not to the level, at this

stage, of equal periods with each side of C's family. Consequently, if relocation is granted, it will inevitably have a detrimental impact on the amount of time F and C get to spend together. It will also mean that F does not have the opportunity he wants to have of participating more in C's day-to-day life during school term times. In my view, that issue is, however, quite finely balanced because, to date, F has not been playing any regular role in caring for C during the school week. It has happened occasionally, but it has not been a consistent feature of C's experience since she started school. Because everyone also agreed that what C likes is consistency, I believe that the type of relationship that F and C have, were permission to relocate granted, would evolve from how it has been since F and M separated in what would appear in C's mind to be a consistent manner. It might have been different if C had already spent regular time during the week with F and had built up some pattern of reliance on him in relation to this type of matter, but that is not the case here. As such, the extent of the detriment to F's relationship with C is, in my view, going to be lower than it might otherwise be because of how contact has been taking place to date.

64. I must also not overlook C's relationship with F's family. In relation to L and her daughters, the relationships may well involve some readjustment but they are comparatively recent additions to C's family circle and they have been seeing each other mostly on weekend bases and for longer periods during holidays. Moving forwards, if C moves to France with M and S-F it would be similar, although the frequency of contact would change and that may have an impact on how the relationships develop. However, the quality of the time spent together has the potential to be better and will enable the whole family to enjoy more time together because it will not be concentrated on weekends when L's daughters are not always around.

65. The regular contact with F's parents and, in particular, his mother, would change. I can see that this will be something that will, at least in the short term, affect C's relationship with them. Even the Safeguarder's proposals for shared residence with M and F both living in Guernsey did not carve out any specific time at which C would see her paternal grandparents. Instead, this was something that would involve F organising appropriate time for his parents, and particularly for his mother, to see C. That will be the case if permission to relocate is granted. M's proposals envisage that C would be in Guernsey during weekdays in the French school holidays. I imagine that some arrangements will have to be made by F to provide care for C whilst he is at work. That is when C's grandparents and other family in Guernsey will potentially have a significant role to play. Accordingly, there would still be scope for C's relationships with F's family to be sustained and to develop, albeit in a different way from how it would work if C continued to live in Guernsey year-round.

66. In summary, therefore, any move to France would, as will always be the case, involve changes to how C's relationships with those she would be leaving behind develop. That is the detriment that has to be put into the balancing exercise. Whilst I do not intend to under-estimate that impact, I do not assess it as being as great as would be the case if the proposed move were further afield or the ability to return to Guernsey were on just a few occasions each year. The way that M's proposals have been researched and thought through demonstrate to me that a good level of contact will be achievable and that C would effectively continue to have two homes. Accordingly, the principles in section 3(2)(b) and (j) can, in my view, be regarded as adequately respected under M's proposals.

67. The question of how much the detriment to C's relationships with F and his family would be offset by building closer relationships with the maternal family is finely balanced. The family who already live in France are S-F's family. Because of the shorter time that M and S-F have been together, those relationships are only just beginning. Thinking ahead, as C is now part of M's new family, including when the baby arrives, S-F will inevitably wish to visit with his family in France on a regular basis. If the family lives in France, that will be easily managed and one can readily imagine that they would be like any other family living in comparatively close proximity to one another. This would mean that C would be likely to develop closer

relationships with those relatives who she does not know particularly well yet than if she continued to live in Guernsey.

68. The relationship between C and D must also be borne in mind. I am not sure I fully understand what S-F and M see as the best way to keep the two children in regular contact, but that is something that S-F and D's mother will need to address. It is, quite obviously, an important relationship in C's life, but I take comfort from the clear impression I have got that S-F fully intends to maintain good contact with D, meaning that C will also benefit from the relationship moving forwards.

69. One of the big factors to place into the balance is what M's mother is planning to do when she retires in May 2013. I accept her evidence that, because the opportunity to move to France and live in the self-contained wing of S-F and M's property has arisen, that is what she is going to do. Whilst I cannot entirely discount that she would change those plans were the Court to refuse M's application to relocate, I did get the impression from hearing her that she was relieved that her concerns about her future had been removed and that she will make that planned move to Brittany come what may. Accordingly, if M's application is granted, C would be living on the same site as her maternal grandmother. That relationship appears to me to have been more significant of the grandparental relationships to C in her life thus far and so I consider that the opportunity for that relationship to continue to be close is a positive factor for C's best interests in the balancing exercise. If the application to relocate is rejected and M's mother then emigrates, this would be a negative factor.

70. I am conscious that F strongly argues that M has arranged her affairs in such a way as to present the Court with a fait accompli. The part played by offering accommodation to M's mother at the property in France is an aspect of that. However, I do not regard what S-F and M have chosen to do, and M's mother's plans, as being the fait accompli suggested. I take at face value what S-F said in his evidence, namely that if M's application is rejected they will continue to enjoy the French property as a holiday home and will make the best of their situation in Guernsey. He quite accurately said that this would not be their preferred outcome but he was honest enough to accept that they had made a choice to purchase a property in France rather than in Guernsey not knowing whether permission to relocate would be granted.

71. The financial position of M and S-F was given careful scrutiny on behalf of F. Given F's professional background and the way in which he and M negotiated their separation agreement, I believe that F is an astute person when it comes to family monies. He is also someone who has been raised in Guernsey and has no wish to leave, and I certainly make no criticism of him for taking that very understandable stance. On his analysis, M and S-F could have chosen not to sell the property purchased for M and C to live in but rather to live in that property. I do, however, understand M's wish to free herself from an ownership arrangement that tied her to F and his family at a time when she wished to forge a new life with S-F. Alternatively, M and S-F could have invested their capital into a Guernsey property, no doubt with additional monies needing to be borrowed, and, in that way, have stayed in Guernsey for the foreseeable future. As a logical proposition, F's position cannot be faulted. But all that proves is that M, along with S-F, have had choices to make and, for reasons they explained, they chose not to invest in Guernsey's real property market at this time, preferring to do so in France. In the event that M's application for relocation is unsuccessful, they would face the consequences and decide how best to house themselves in Guernsey. Accordingly, this is not a factor that tips the balance one way or the other.

72. The impact of refusal on M is clear. She stated in evidence that she would be "devastated" if her application were to be rejected. It was apparent from M's demeanour that she has placed a lot of faith in making the application and hoping to be able to forge a new life for her new family in France. She clearly feels a huge empathy for the plan and is looking forward so positively to raising C and her new baby in that environment, whilst always retaining their birth associations with Guernsey. She was very clear that she did not intend to frustrate C's

developing relationship with F and that she would insist on the times allocated to F taking place. All she could see were the positive benefits to C of growing up with a foot in both France and Guernsey. To have that aspiration thwarted would, I accept, be a huge blow to her.

73. The Safeguarder's report (at para. 6.20) states that M "*would make the best of any situation for the sake of her children*". That is what any good parent would do and no one has suggested that M is not a good parent. I think that this downplays the effect that refusal of her application would have on M. I also think that the Safeguarder has relied more than perhaps she should have done on the reaction of S-F, which was along the lines of "*well if we are not currently able to reside in our dream house now, then we will use it as a holiday home and relocate at some point*".

74. The Safeguarder has not approached the question in the way suggested by the gloss put on *Payne v Payne* in *Re B; Re S*. S-F wants to go back to his homeland. His immediate family are still there. The company that he and M now jointly own, and for which he is the main worker, is easily transportable. It provides services that S-F can really deliver just as easily from France as from Guernsey and he will be able to provide at least as well for his new family in France as in Guernsey. If the company continues to have some Guernsey-based business, that is an added reason for visiting on a reasonably regular basis. It potentially supports the plans to move rather than suggesting that the personnel of the business, S-F and M, should remain in Guernsey. As S-F's new wife, M wishes to support him in that move. It is something they think will be good for their new baby. M's mother will be emigrating to France. For their family, everything points towards Brittany rather than Guernsey, save for the fact that F and his family will continue to live here. These are all the considerations that the Safeguarder had in mind before then adding "*I struggle to come to the conclusion that it will be in [C's] best interest*" (para. 6.10 of her report). The Safeguarder proceeds to explain why she has had that struggle by reference to whether contact will take place on a sufficiently regular basis, how C's possible educational needs may be affected if she is not properly assessed for the possible condition to which I have previously referred, C putting in jeopardy her residential qualification and the positive attitude that M and S-F would demonstrate if relocation were refused. In her evidence, the Safeguarder said that nothing she had heard or witnessed during the hearing had made her change her views.

75. As I have just said, I believe that the Safeguarder has not placed sufficient weight on the impact of a refusal on M. The importance of this factor, especially when considered in the context of a parent who has remarried and in doing so has formed a new family with a foreign national, is, in my view, clear. Because both M and F have made fresh starts they are left in a position where C's time necessarily has to be shared between them in an appropriate division, concentrating always on how this impacts on C's welfare. In his evidence, F stated that the ideal for C is for her to have two sets of parents who are happy and stable. I have reached the conclusion that M's happiness, and so her stability, will be adversely affected if permission to relocate is not granted. I regard the impact on her and her family, including specifically the impact on C, will be considerable. She has researched her proposals fully. She has taken steps to meet the various objections that have been raised. In the circumstances, I take the view that her proposals are genuinely made in the best interests of C, and that they are reasonable and realistic. M, with support from S-F, has shown herself to be flexible and has sought to respect C's relationship with F and with his wider family. It seems to me that she should be entitled to enjoy her new family life in the manner she wishes.

76. Having considered all the material placed before me and had regard to how the parties and their witnesses gave their evidence in such an emotionally-charged setting, I consider that the balance, fine though it is, tips in favour of granting M's application for permission to relocate. That is my "*first choice*" as being what I regard to be in C's best interest, her welfare being the paramount consideration. The amount of time that C will in future spend with F will be as much as it sensibly and reasonably can. The main question relates to term-time weekend

visits to Guernsey, but what I have in mind is for C to spend a little over half of her holidays with F and not to have uniform fortnightly trips back to Guernsey as proposed by M. The total amount of time spent living with F may remain broadly as it is at present, at around 25%, meaning that the option of it being a shared residence order rather than contact is also finely balanced but, for the reasons explained by Mostyn J in ***Re AR (A Child: Relocation)*** (*supra*), I take the view that this is a case where F's position as the provider of one of C's homes, indeed the consistent home she has had since birth, should properly be reflected by the making of a shared residence order. This was an outcome that the Safeguarder supported without hesitation in the event that I was minded to grant M's application. Further, it will reflect the very real need for M and F to continue to co-operate over their care arrangements for C to make the different periods with each of them the best they can be for C, so that neither of them perceives that they can purport to exercise power or control over the other.

77. Although I am uncertain of the precise position, by emphasising that the effect of the shared residence order is that C will have two homes, one in Guernsey and one in Brittany, this may also go some way towards addressing C's residential qualification under the 1994 Law. The Housing Department might accept that when C is in Guernsey living with F she is ordinarily resident in Guernsey for those periods. Although C will be principally resident in France because of the percentage differential between the times she spends in each jurisdiction, rather than being a visitor enjoying contact with F, C will formally be residing in Guernsey under the terms of the order and, during those times, will not have a home elsewhere.

Conclusion

78. For the reasons given, I agree with the Safeguarder's recommendation that this is an appropriate case in which to make a shared residence order. The percentage of time that C will spend with each parent is not equal or even that close to equality, but I consider that in this case it properly reflects the reality that C will have two homes.

79. I do not, however, follow the Safeguarder's recommendation to dismiss M's application for permission to relocate to France. In my judgment, the benefits of such a move for C as part of the new family comprising M, S-F and the new baby are established. Because of the proximity of Brittany and Guernsey, regular stays with F are feasible and realistic. C will continue to be raised in loving environments and will spend a significant amount of time with F and in her Guernsey home. The main reason why I differ from the Safeguarder's advice on this point is that I do not believe that the Safeguarder paid sufficient attention to the importance of M's marriage to a foreign national and the gloss added to the ***Payne v Payne*** approach in ***Re B; Re S*** (*supra*).

80. I have considered whether it would be best for that permission only to take effect from the end of the current school year but have concluded that there is no particular advantage in delaying the date from which permission is granted to that extent (see, also, section 3(2)(d) of the 2008 Law). If C attends a school where she does not have to move for the school year starting in September 2013, it would make no difference anyway and just delays the process of moving and settling in. If C starts at one school and then moves to a different school in September, I consider that this will all be part and parcel of settling into the new environment. Accordingly, I will simply grant permission to relocate to France with effect from 20 April 2013, being the weekend before the lease of M and S-F on their current residence expires.

81. The grant of permission to relocate is going to be subject to conditions.

82. The first is that a mirror order must be obtained from the appropriate French court. One of the reasons why I have made a shared residence order is to reflect that C's ongoing care remains very closely associated with Guernsey as well as in France. The making of an order in both jurisdictions should provide a level of comfort to both parents and, in the event of any problems arising, they can potentially be addressed in either place.

83. The second condition relates to the time to be spent with F. The balance of the time is extremely important to ensure that F's relationship with C and that of F's wider family with her, is not placed in jeopardy. Equally, however, the number of trips must not become so burdensome that C struggles to cope. The frequency and regularity of interaction with both parents is important, but must not impact on the overall quality of C's contact with them. I have noted the pattern of the French education system term times and holidays and give the following directions and additional suggestions:

- The long summer break will be split equally between C living with M and living with F, the actual times to be agreed between them and, in default of agreement, to be prescribed by further order.

- In relation to the Christmas and New Year break, C will alternate between spending Christmas with M and New Year with F one year and spending Christmas with F and New Year with M the next year, with the number of nights spent with each parent being as close to equal for the number of nights of that particular holiday (including the weekends at each end, which I imagine potentially means splitting approximately 16 nights).

- In relation to the three other French school holidays, I think the Safeguarder's suggestion that the time spent with F should run from midweek to midweek for approximately half of the overnights is sound advice, which I adopt. The idea, therefore, would be for C to live with F in Guernsey from the Tuesday in the first week to the Thursday in the second week, ie, 9 nights, thereby giving C slightly longer during these holidays to see F and his family (although alternative days of arrival and departure can be agreed by M and F if that would be preferable on any given occasion).

- Because the Easter weekend does not always fall within a French school holiday, M and F are to agree whether the Easter weekend for C should be alternated between them or whether they prefer to leave it as a weekend when C might travel to Guernsey for an "ordinary", but possibly extended, term-time weekend with F. Again, if agreement cannot be reached, a more prescriptive order can be sought from the Court.

- The pattern of "ordinary" trips to Guernsey to live with F during the 8- or 9-week French term times is an area where I fear that the proposed fortnightly rotations from Friday after school until Sunday evening will be difficult for all concerned. It is also possible that the term from the autumn holiday until Christmas is for a period shorter than eight weeks, where appropriate adjustments will be needed. Accordingly, I will order that C must make a minimum of two trips during each of any term of seven or more weeks to Guernsey, and that she must make one trip in the middle of any term of six weeks or shorter, leaving France on the Friday after school and returning to France on the Sunday evening. By way of example, if the term is nine weeks long, the weekend trips would be at the end of the third and sixth weeks, subject always to M and F agreeing differently. If the term is eight weeks long, the shorter gap of two weeks probably should not be in the middle of the term but at the beginning or the end, allowing for the fact that C will have returned to M in France before the end of the previous holiday or will stay with M for a few days at the beginning of the next. If the term is six weeks, as appears to be the case in November and December 2013, C would make a trip to Guernsey in the middle of it, ie, on 29 November 2013, subject again to M and F agreeing to substitute a different weekend. The general idea is to keep the times between trips to Guernsey not too far apart and as consistently spaced as possible.

- Ideally, the travel arrangements should be agreed by M and F for a rolling period of at least six months in advance. By that I mean that dates should be discussed by M and F, agreed by them and bookings made in advance, for a minimum period of six months into the future at any one time. This is to ensure that everyone knows where they stand.

- In the event that there is disruption to travel plans, whether for fog or technical reasons, a substitute weekend is to be arranged as early as practicable. If that can be the following weekend, even if that might be coupled with shifting the next weekend back as well to create more evenly spaced trips for C, that should be done.

- The requirement is for a minimum of two weekend trips for C to stay with F in Guernsey each French term but M and F are, of course, at liberty to agree additional weekends if they wish, eg, to accommodate some special event. They should, I suggest, be flexible about timing in relation to any weekend on or about C's birthday each year.

- There should be flexibility for F to have contact with C in France in the event that he chooses to visit that country, such contact to be agreed between M and F. Visits by F to France might be additional to the planned regular trips to Guernsey or M and F might agree that what would otherwise be a weekend in Guernsey for C will instead be a weekend spent with F in France.

84. I will add a condition that C is to be accompanied by an adult whenever she travels between Brittany and Guernsey. I consider this necessary for a child of C's age but appreciate that the time will come when everyone is comfortable with her travelling unaccompanied. Rather than make a guess at when that time will occur, I will make the condition without limitation at this stage but invite the parties to remove the condition by consent when they believe the time is right. In addition, upon the arrival of C at her destination, the receiving parent must contact the other parent to confirm safe arrival.

85. As offered by M in support of her application, all travel between Brittany and Guernsey, and in reverse, as required by the terms of this order (ie, the one trip during each of the shorter French school holidays and one or two trips in the summer, plus the "ordinary" weekend trips each term, usually two but possibly only one on occasions) is to be funded by M. Any additional trips agreed between M and F are to be funded in accordance with the arrangements agreed between them and it is not an automatic requirement that those additional trips must be at M's expense.

86. Indirect contact is also going to be important for C. It should operate both when C is with M and with F. As a minimum, contact by Skype (or a similar medium) shall be facilitated with the non-resident parent (and extended to include such of his or her family as he or she wishes) once every half week, ie, twice a week during a full week when C is with the other parent and once during a week split between them. Other indirect contact, eg, telephone and, in due course, by text or e-mail, can be flexible and unlimited.

87. Because I am confident that M and F will make these arrangements work for the benefit of C and for their extended families, I do not consider it appropriate to make the specific issue order sought in F's application, which I understood in any event to be dependent on C remaining in Guernsey. Consultation and co-operation between M and F is an important principle (see section 3(2)(i) of the 2008 Law) and I sincerely trust that, whatever differences have arisen during the lengthy course of resolving these applications, they will be put aside by them and that they will strive jointly to reach decisions about C's future well-being and development.

88. In the light of those conclusions, I invite Advocate Brown to prepare a draft Act of Court for consideration by Advocate Haskins and thereafter for submission to the Court, ideally as an agreed document or for resolution by me of any differences. The sooner that is done the better because, until it is finalised, seeking the mirror order, as required, will be delayed. If there are any further applications arising following this judgment then they can be made in due course by liaising with the Greffe. I am grateful to Counsel for their assistance and the manner in which they dealt with what has been a very difficult case.

