

Court of Appeal considers Brexit impact child relocation case (L v F)

03/01/2018

Family analysis: The Court of Appeal has clarified the approach to relocation disputes and provided the first consideration at high appellate level of the requirements of the new PD 12J where domestic abuse is alleged. It also considered the approach in relation to Brexit where European cross-border issues are involved in a contested family case. Barrister Dr Rob George of Harcourt Chambers in London (who was junior counsel for the successful appellant) comments on what lessons can be learned from this case, and considers the wider implications.

Original news

[L v F \[2017\] EWCA Civ 2121](#)

The Court of Appeal, Civil Division allowed a second appeal from the High Court, and restored the order made by a trial judge in the Family Court at Oxford, in a case concerning the relocation of a child in a contested family case.

What is the background to this case?

The case concerns a five-year-old boy. His parents are both Italian nationals who have known each other for over 20 years. The father moved to England in 2001 and the mother in 2003. In 2004 they began a relationship, living together, with each working. After the child's birth both parents were involved in his care.

In mid-2015, the father lost his job. By then there were difficulties in the parents' relationship and they considered moving to live elsewhere in Europe. Their relationship finally broke down after a visit to Italy in November 2015. On their return, they continued to live together in a state of great unhappiness until the father moved out of the rented home in April 2016 and the mother then moved elsewhere. Care of the child was shared equally between them from that point on.

On 4 April 2016, the mother issued an application seeking permission to remove the child to live in her parents' home region in Italy. If she was unsuccessful in obtaining this permission (and the child had to remain in England) she proposed that he should live with her and stay with his father on five days a fortnight in term time and half the school holidays. The father opposed the mother's application to relocate and proposed that they should continue to share the care of the child equally.

The Court of Appeal highlighted that this was first occasion on which it has considered a second appeal from the High Court since the introduction in October 2016 of the new routes of appeal in private law family case. What is the significance of this?

The 2016 reforms to the appeals process for private law family cases meant that appeals from circuit judges in the Family Court in such cases now go to the High Court, unless the case is certified by a High Court judge as being particularly significant such that it ought to be considered by the Court of Appeal.

Ordinarily, therefore, the appeals process will stop at High Court level. However, where a point of law arises which is of broader significance, a further appeal to the Court of Appeal is possible. In this case, the Court of Appeal used the opportunity to give judgment not only on the substantive issues under appeal, but also to remind the Judges of the High Court of the correct approach to first appeals which now come before that court.

What were the issues considered by the court? What did it decide?

The appeal raised wide-ranging issues. The Court of Appeal had these five issues before it for resolution:

- the correct approach to determining an application for leave to remove
- what was said to be the necessity for the trial judge to make findings in respect of allegations of domestic abuse
- the circumstances when a shared care arrangement may be appropriate
- the extent to which a judge must justify departing from a Cafcass recommendation
- the need for a court to consider the effect of the departure of the UK from the EU

All grounds of appeal (other than the Brexit one) succeeded.

Relocation

The main issue was about the correct approach for a judge to take to an application for leave to remove a child permanently from the jurisdiction, confirming the well-established position that there must be a global welfare analysis addressing the pros and cons of each realistic option for the child's future.

The Court of Appeal made clear, contrary to the High Court's view, that it was not necessary or appropriate for a judge to seek to determine a child's care arrangements as between the parents first, prior to considering the issue of relocation—on the contrary, the issues are inherently interconnected and should be considered together.

Domestic abuse

The Court of Appeal considered the new Family Procedure Rules 2010, [SI 2010/2955](#) (FPR 2010), [PD 12J](#) and endorsed the trial judge's approach. She had considered the allegations made and taken some matters into account from the evidence, but had specifically declined to engage in a detailed forensic examination of the allegations on the basis that she did not consider that that would help her to resolve the issues in dispute about the child's future.

Shared care

The Court of Appeal also upheld the trial judge's approach to the issue of shared care arrangements for children, applying earlier appellate authority to make clear that a hostile relationship between parents is not inherently a bar to a shared care arrangement. Each case has to be looked at on its facts, but such an arrangement is permissible if it is in the child's best interests.

Differing from professional advice

The trial judge had departed from a Cafcass recommendation in two respects, and the Court of Appeal held (contrary to the High Court judge's view) that the judge had given more than adequate reasons for doing so. Ultimately, the decision in every case is for the judge, not any professional making recommendations to the court.

Brexit

Finally, the Court of Appeal held that the High Court judge had been wrong to criticise the trial judge for failing to consider Brexit as part of her reasoning. As the Court of Appeal said, relocation decisions are difficult enough without adding 'imponderables' of this kind into the mix. Peter Jackson LJ ruled that the reason why Brexit was not mentioned by the trial judge was because it was mentioned neither in the evidence nor submissions she heard.

Of more general application, he ruled that 'the consequences of the UK's departure from the EU are presently unclear, and there is no sound basis on which courts can factor in the hypothetical possibility that an EU national's immigration position might at some future date become precarious'.

What are the implications for practitioners?

This case is important in a number of respects. It clarifies the approach to relocation disputes, which had been significantly muddled by the High Court's judgment, but also offers the first consideration at senior levels of the requirements of the new [PD 12J](#) in relation to domestic abuse allegations.

The Court of Appeal makes clear that it will not always be necessary to make specific findings of fact in relation to allegations, so long as the judge is alive to the nature of the allegations and gives proper consideration to how they should be addressed within the proceedings. The judgment also clarifies, for the avoidance of doubt, how appeals to the High Court should be conducted.

Interviewed by David Bowden of David Bowden Law.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.