International Relocation of Resident Parents: A Comparative Discussion and Proposal for Future Direction

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Abstract

For the judges involved, relocation disputes present some of the most difficult and unsettling problems that they are required to resolve. In the main there is no right answer to these cases as any decision will be, to some extent, unsatisfactory. This difficult area of family law has challenged the courts; different legal systems have adopted different stances on the issue. This article intends to question what the best approach could be nationally, as well as in the pursuit of an international standard. It is suggested that in the international sphere, the Washington Declaration provides an important benchmark that should be adopted in all jurisdictions worldwide as the best process to resolve relocation cases. The Washington Declaration has the potential to become the international protocol, thereby significantly increasing the transparency of decision-making, and ensuring careful consideration of the interests and rights of all parties in relocation cases. However, creating clear and internationally accepted relocation legislation is only part of the solution. Further work is also required in order to ensure that orders relating to cross-border contact are enforced and adhered to.

1. Introduction

Cross border migration is increasingly popular and has almost doubled since 1980.¹ International travel has never been so accessible, and people are now much more able to live, work and develop relationships outside their native country.² If such couples remain in a stable relationship few issues arise. However, if their relationship breaks down the situation can become problematic, especially where children are involved. The importance of children growing up within a secure and stable environment has long been recognised. If one parent (usually the mother)³

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¹ The UN Population Division estimates that there are around 200 million international migrants each year. Bridget Anderson, Nandita Sharma, and Cynthia Wright, ‘Why No Borders?’ (2009) 26(2) Refuge 5, 5.

² Within the EU, 13% of all marriages had an international element in 2007. As a result, a large number of children could potentially be involved in some sort of international relocation dispute. Commission, ‘Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes’ SEC (2011) 327 final, 8.

wishes to relocate with her child back to her home country, or simply relocate elsewhere as a result of career developments, relationship breakdown or indeed a new relationship, the issue of the child’s residence can become complicated. One difficulty with relocation is that the child’s relationship with the non-relocating parent can be threatened with complete severance due to factors such as distance and difficulty in maintaining contact. On occasion, agreement can be reached between the parents as to how best to manage the separation. However, in the absence of such agreement, a court order must be obtained to allow the relocating parent to take the child out of the country; otherwise they may risk facing proceedings for international child abduction. International child abduction, as a phenomenon, is therefore closely linked to international relocation.

It has been correctly observed that with the ‘(…) unprecedented growth in immigration and international marriage the number of [relocation] cases can only increase.’ The question then arises as to whether or not it is desirable to have greater international consistency in the approach to international relocation disputes. Most Western States emphasise the welfare and best interests of the child as the paramount consideration in such disputes, however the application of these principles varies widely. Each jurisdiction interprets and manages international relocation disputes differently as there are often no clear answers.

This article will discuss the issue of international child relocation as it relates to Scotland, and will offer a comparative analysis with other jurisdictions by considering case law and legislation from around the world. Section 2 will discuss the underlying principles applying to relocation cases around the globe. The third section will consider the approach adopted in the Scottish courts, focusing on the welfare principle. Taking into account the fact that criticisms have been raised against the welfare principle, this section will additionally explore whether Scots law could be usefully reformed to enhance dispute resolution. Following on from this, a fourth section will illustrate various approaches utilised in different jurisdictions. Some scholars have classified countries’ approaches to international relocation disputes into categories, distinguishing between ‘pro-relocation,’ ‘anti-relocation’

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4 Slightly over 10% of the EU’s 3.8 million immigrants in 2008 were returning to their country of birth. Commission, ‘Demography Report - Older, more numerous and diverse Europeans’ SEC (2011) 431 final, 43.

5 The link with child abduction is one of the reasons for the growing international interest in this area. There are a number of similarities between the two issues. However, whereas a body of international treaties and legislation has developed on child abduction, unfortunately there have been no similar international instruments or even international consensus on the proper way to deal with child relocation cases. Some have argued that this link between relocation and abduction may be overly simplistic. However, the question is beyond the scope of this article. For further details, see Nicola Taylor, Megan Gollop, & Mark Henaghan, ‘Relocation following parental separation: The welfare and best interests of children’ (Research Report to the New Zealand Law Foundation, University of Otago, Dunedin: Centre for Research on Children and Families June 2010) 38 <http://www.otago.ac.nz/cic/pdfs/Relocation%20Research%20Report.pdf> accessed 5 October 2014.

and ‘neutral’ countries. On the basis of these categories, this section will provide a comparative analysis of the approaches adopted in Scotland, England, Canada, New Zealand and South Africa. The approaches of France, Germany and Australia will also be briefly discussed. In addition to regulation existing at a domestic level there have been attempts to draft instruments at an international level. An overview of these instruments will be provided in section 5. As a result of the difficulties inherent in developing a common, coherent international standard, this article will briefly consider whether reformers should divert their focus from developing a single common principle to other important aspects of relocation such as mediation and enforcement of contact orders. Based on this article’s findings, reconsideration of the current approach to relocation in Scotland, as well as in the international sphere, will be encouraged.

In some jurisdictions relocation cases are decided differently depending on whether a proposed parental relocation is within a particular country or abroad. Although this is an important point, this article will focus solely on international relocation cases. Throughout the article the word ‘child’ will be used to signify an individual child or several children. The term ‘relocating parent’ will be used to describe the parent seeking to relocate and ‘resident parent’ or ‘primary carer’ will refer to the parent with whom the child is likely to spend the majority of their time. Conversely ‘non-relocating parent’, ‘non-primary carer’ or ‘non-resident parent’ will describe the parent who is not relocating and with whom the child spends less time. The relocation of non-resident parents, although raising questions regarding the child’s welfare, is not restricted and therefore falls outside the scope of this article. The free movement rights and the gendered nature of international relocation law are discussed in greater detail herein.

2. Underlying Themes around the World

Around the world, child relocation cases have proven to be significantly challenging and problematic. Such disputes provoke an array of emotions and the methods adopted by the courts for dealing with them have provided a ‘(…) fertile source of dispute.’ Despite differences around the world, there are a number of common factors underlying the decision-making process in most countries. These include: (a) common principles of welfare; (b) the growing trend of joint parenting; (c) the...
gender issues that can emerge from relocation cases and (d) the sociological research conducted on the topic.

A. The Welfare of the Child\textsuperscript{10}

In the Western world, the ‘welfare principle’ can be seen as one of the most widely accepted principles within child law and it is consistently applied in relocation cases.\textsuperscript{11} In both the Scottish and English legal systems the ‘welfare principle’ is at the ‘(…) heart of the decision-making process’,\textsuperscript{12} ensuring that the legislation is child centred. The importance of child welfare was recognised in the United Nations Convention on the Rights of the Child (UNCRC) 1989, which states that ‘(…) the best interests of the child shall be a primary consideration.’\textsuperscript{13} The ‘welfare principle’ gives judges a significant amount of discretion, guaranteeing individualised justice pertinent to the specific case. However, there is ‘(…) no commonly accepted definition of the concept…on an international or even national level’.\textsuperscript{14} Interpretation of the term ‘welfare’ is therefore subjective. In Scots law, ‘welfare’ is a very broad term that can include almost anything. In determining a child’s best interests courts should consider the physical\textsuperscript{15} and emotional\textsuperscript{16} welfare of the child, among other considerations. Lord MacDermott’s interpretation of the ‘welfare principle’ in the English case of \textit{J v C}\textsuperscript{17} ensures that:\textsuperscript{18}

\begin{quote}
(...)[when] all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare.
\end{quote}

This is very demanding and emphasises that the child’s welfare trumps all other considerations. Some countries, such as England, have introduced lists of factors in order to direct judicial decisions.\textsuperscript{19} Other countries have adopted an ‘all factor’ approach that can encompass anything which affects the child and leaves the question to judicial discretion. This latter approach is more consistent with the position in Scotland. The ‘welfare principle’ has been subject to significant criticism as regards its application in different jurisdictions, some of which is discussed further in sections 3 and 4 of this article.

Not all jurisdictions consider the child’s best interests to be the sole factor that courts should consider. For example, in Germany consideration is given to the constitutionally protected rights of the parents, such as freedom of movement, in

\textsuperscript{10} The terms ‘welfare’ and ‘best interests’ will be used interchangeably throughout this article as the expressions are broadly indistinguishable.

\textsuperscript{11} Scotland (Children (Scotland) Act, s11(7)); England (Children Act 1989, s1); France (Arts 373-2 CCiv); Canada (Divorce Act 1985, s16(8)); New Zealand (Care of Children Act 2004, s4).

\textsuperscript{12} Elaine Sutherland, \textit{Child and Family Law} (2nd edn, Thomson 2008) 452.


\textsuperscript{14} Preliminary Note on International Family Relocation (n7) 14.

\textsuperscript{15} \textit{Clayton v Clayton} 1995 GWD 18-1000.

\textsuperscript{16} \textit{Geddes v Geddes} 1987 GWD 11-349.

\textsuperscript{17} \textit{J v C} [1970] AC 668.

\textsuperscript{18} ibid at 710-11 (Lord MacDermott).

\textsuperscript{19} Children Act 1989, s1(3).
addition to the child’s welfare. The German approach assumes that parents will relocate regardless of the court’s decision. The question therefore is whether the child’s best interests are served by moving with the relocating parent or remaining in Germany with the non-relocating parent. The German courts have a number of factors to consider in assessing the best interests of the child. The weight attached to each factor will depend on the specific circumstances of the case. Ultimately, although the welfare principle is common throughout much of the world, the approach will vary depending on how different courts, in different jurisdictions, believe the child’s interests are best protected.

B. Joint Parenting

In an ideal world both parents should remain involved in their child’s life, providing there have been no allegations or history of abuse. However, after separation, it is often the case that one parent, usually the mother, is awarded custody. This situation, where the child lives with one parent and the other has contact with the child, can be described as ‘sole residence’. There is, however, a growing international trend towards courts making decisions in favour of joint parenting. Shared or joint parenting refers to a collaborative order issued by the court or an agreement between consenting parents whereby both maintain possession of the responsibility and right to be actively involved in raising their child. Joint parenting does not necessitate an equal split of time spent with the child, but is generally expected to afford each spouse upwards of 30% of contact time. As a result of joint parenting there remains an emphasis on the notion of maintaining the family unit and ensuring continued contact with the child for the non-relocating parent. Relocation is obviously contrary to the idea of shared parenting and this trend ‘(...) could lead to a more restrictive approach to relocation.’ These ideas are discussed in greater detail in section 4.

20 German Federal Republic’s Constitution of 1949, Art 6(2) (parents have the right to bring up their children) and Art 11 (free movement). The Federal Court has, however, outlined that this right of free movement is only indirectly protected and the welfare of the child is still significant.


22 ibid.

23 In Re M (Minors) (Children’s Welfare: Contact) [1995] 1 FLR 274, 278, Wilson J pointed out the ‘fundamental and emotional need of every child to have an enduring relationship with both of his parents’.

24 The case of Brixey v Lynas 1996 SLT 908 emphasises the maternal preference in Scots Law. However, this is not the same in all countries. Pakistan, for example, has a much more patriarchal society and, at least in the case of boys, the father has preference in terms of residence. Nevertheless, the case of Mst Nighat Firdous v Khadim Hussain (1998 SCMR 1593) made it clear that ‘(...) the right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case.’ See Tassaduq Hussain Jillani, ‘Cross-border family relocation: law and mediation in international family law’ [2012] IFL 91.

25 New Zealand (Care of Children Act 2004, s17); Canada (Divorce Act 1985, s16(4)); France (Articles 372-3 C civ); Australia (Family Law Act 1975, s60B); England (Children and Families Act 2014, s11(2)).

26 In Re Y (Leave to Remove from Jurisdiction) [2004] 2 FLR 330, the child spent 42% of his time with the father.

27 Preliminary Note on International Family Relocation (n7) para 27.
C. Gender Concerns

The relocating parent has so far been referred to as female. This is because the majority of primary carers, and therefore relocating parents, are women.\(^{28}\) This emphasises another underlying theme of the relocation debate: the gender element. There are significant differences between mothers and fathers, both as regards the way in which they seek permission to relocate and how they are affected by the decision. Refusal to grant relocation can be seen as bringing about the sacrifice of parenthood, but this ‘(...) may underestimate the extent to which these sacrifices are not evenly shared.’\(^{29}\) Relocation generally has a bigger impact on the resident mother’s rights and freedoms than on the non-resident father’s. Non-resident parents are not restricted in their movements in the same way as resident parents, meaning that fathers have much greater freedom.\(^{30}\) In the South African case of \(B v M\),\(^{31}\) the court considered the gendered nature of parental roles after divorce. As primary carers tend to be mainly female, an excessively restrictive approach to relocation may be discriminatory against a woman’s freedom of movement, while the non-resident parent’s ability to move is unrestricted.\(^{32}\) Satchwell J stated that ‘(...) careful consideration needs to be given to applying the best interest principle in a manner which does not create adverse effects on a discriminatory basis.’\(^{33}\) In \(F v F\),\(^{34}\) another South African case, the court took into account the fact that ‘(...) despite constitutional commitments to equality, the division of parenting roles in South Africa remains largely gender based.’\(^{35}\) Ultimately, the issue of relocation is inherently gendered and disproportionately affects women. However, excessive focus on the potentially discriminatory outcomes of relocation can lead ‘(...) quickly into dangerous waters.’\(^{36}\) In considering a relocation dispute, it is argued that the primary focus should not be on the gendered nature of the case but on ensuring the welfare of the child is at the nucleus of the decision.

D. Sociological Research

\(^{28}\) In a recent study by Ornella Cominetti and Rob George it was shown that 93% of applicants were mothers. As most children remain with the mother on divorce this reinforces the traditional view of women as the carers of the children. See Cominetti and George (n3) 153.


\(^{30}\) When choosing to relocate, the non-resident parent will not need a court order regardless of the distance or impact the relocation may have on the welfare of the child.

\(^{31}\) \(B v M\) [2006] 3 All SA 109 (W).

\(^{32}\) This is considered by many commentators to be a serious flaw in the system. Some argue that the reasonableness of the father relocating with the child should be considered. This matter will be looked at further in Section 4.

\(^{33}\) \(B v M\) (n31) [162].

\(^{34}\) \(F v F\) 2006 (3) SA 42 (SCA).

\(^{35}\) ibid [12].

\(^{36}\) Wesahl Domingo, “‘For the Sake of the Children” South African Family Relocation Disputes’ (2011) 14(2) PER 148, 161.
The exact number of children affected by international relocation issues is unknown, although given the statistics presented in the introduction it is fair to speculate that many are involved. There is also little agreement between sociological researchers on the best approach to decision-making. Available research divides into two contrasting schools of thought. The first view argues that a child’s welfare is best protected by ensuring a good relationship with the primary carer, thereby allowing relocation of the mother.\textsuperscript{37} The converse view is that maintaining the family unit and frequent contact with both parents will ensure the child’s long term welfare, resulting in more refusals of relocation applications.\textsuperscript{38} Trends in judicial decision-making are consistent with many social studies; these will be considered in greater depth in section 5. In light of two research schools producing conflicting findings and a lack of concrete principles, judicial decisions are based on assumptions, with limited supporting evidence and this affects the degree of faith parents have in the process.\textsuperscript{39}

Each of the four aforementioned themes is present in the relocation legislation and case law of many countries. The most influential consideration is the welfare of the child, with gender, joint parenting and sociological factors having a lesser influence globally. As stated previously, welfare of the child is difficult to define and legislatures are hesitant to create categorical definitions which may result in an inflexible and merciless approach. Joint parenting has generated a shift in decision-making in some countries. This has been beneficial in England, encouraging judges to consider a wider range of factors rather than simply focusing on the detrimental effect of refusal on the relocating party.\textsuperscript{40} However excessive focus on this idea in New Zealand may have led to an overly strict law that limits a parent’s freedom.\textsuperscript{41} The lack of empirical evidence to support relocation decision-making is troubling. Evidence is simply not available to demonstrate whether relocation is in the best interests of the child. As a consequence, jurisdictions that base their decision-making process on such ideas could be creating serious issues for the child and their future development. There is also limited attention paid to the child’s wider family, for example grandparents, by many jurisdictions.\textsuperscript{42} This is regrettable, as the child’s wider family ties and awareness of their cultural heritage may be irredeemably lost following relocation. It is argued here that greater consideration should be afforded to the effect of the loss of relationships on the non-relocating parent and the child’s extended family.

\textsuperscript{37} Judith Wallerstein and Tony Tanke, ‘To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce’ (1996) 30(2) FLQ 205.
\textsuperscript{40} See Section 4A below.
\textsuperscript{41} See Section 4B below.
\textsuperscript{42} The child’s extended family is mentioned in para 4(viii) of the Washington Declaration on International Family Relocation 2010, however, no reference is made to it in Scottish or English legislation and case law only pays lip service to the effect of relocation on grandparents or other extended family members.
The Scottish approach to relocation will now be analysed, with reference to a number of these underlying themes.

3. The Position in Scotland

Under Scots law, parents possess numerous parental rights and responsibilities (PRR) in relation to their child by virtue of the Children (Scotland) Act 1995 (hereinafter the 1995 Act). Upon the birth of her child, the mother automatically acquires PRR. The father, however, will only acquire such rights if he is married to the mother at the time of the birth or is named on the child’s birth certificate. These PRR give both parents a responsibility, and a right, to have their child reside with them or, where that is not possible due to the circumstances of the relationship, to maintain personal relations and direct contact. Children thrive in a stable home environment and there is increasing focus on the importance of having both parents involved in a child’s life. When a residence order is in force it is not possible to remove a child permanently from the UK without the consent of all persons having PRR in relation to the child. Ultimately, it is conducive to the relationship between the relocating parent, the child and the non-relocating parent if the parties can come to an effective and amicable agreement regarding any relocation and the associated degree of contact. However, this is often not forthcoming and in such situations the parties must resort to the court for permission to leave the jurisdiction. The courts generally adopt a non-interventionist approach to family life, ruling only when they consider that it is ‘(...) better for the child that the order be made than that none should be made at all.’ Continuity of care is important for any child’s emotional welfare and, if the status quo appears satisfactory, courts will tend to be reluctant to disturb it.

Despite this non-interventionist approach, s11(2) of the 1995 Act provides Scottish courts with extensive powers to make any order they deem appropriate in the circumstances. Parties wishing to relocate can request a ‘specific issue order’ under s11(2)(e). In this scenario, the court will consider the principles contained in s11(7). This section is considerably child-centred, with three important principles: the welfare of the child; the child’s views and the ‘no order’ principle. The

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43 Children (Scotland) Act 1995, ss1 and 2.
44 ibid ss3(1)(b) and 4(1) respectively (for births registered after 1st May 2006).
45 ibid ss1(c) and 2(a) and (c). See also UNCRC (n13) Art 9.
46 However, the case of Sanderson v McManus 1997 SC (HL) 55 outlines that there is no presumption in favour of contact and the child’s best interests will be the influential factor.
47 1995 Act (n43) s2(3); Child Abduction Act 1984, s6.
48 1995 Act (n43), s11(7)(a). It is for the party seeking the order to discharge the dual burden imposed by the Act, showing that the move would be in the child’s best interests and that it would be better for the child for an order to be made. It could be argued that, due to the burden of proof, Scotland is tilted slightly towards an anti-relocation stance as it requires the applicant to prove that the relocation is better than preserving the status quo. See Osborne v Matthan (No 2) 1998 SC 682, 704 (Lord Caplan).
49 In addition to this, the courts can grant an order that prohibits the removal of the child from the UK. Family Law Act 1986, s35(3).
50 The principles in s11(7B) and (7D) of the 1995 Act (n43) will also be relevant when the court is making its decision.
overarching and most significant principle is that the welfare of the child is paramount.\textsuperscript{51} It could of course be argued that, if the proposed relocation would increase the economic well-being and opportunities of those relocating, this would ultimately be in the best interests of the child. In \textit{Johnson v Francis},\textsuperscript{52} the couple divorced and their two sons lived with their mother, who subsequently remarried to become Mrs Francis. Mr Francis, the children’s stepfather, had an offer of employment in Australia and was ‘(...) under definite threat of redundancy in his present employment.’\textsuperscript{53} In the application to relocate with the children, the court considered the delicate issue of whether the disadvantage of losing contact with their natural father was so material that the children should remain domiciled in Scotland.\textsuperscript{54} The positive prospects of employment were influential and the court concluded that it was ‘(...) marginally in their interests that they should emigrate to Australia.’\textsuperscript{55} Conversely, it is increasingly recognised that children benefit from a relationship with both their parents; as such, this is an important factor to take into account.\textsuperscript{56} Nevertheless, the benefits of contact must be weighed against the benefits of the proposed relocation. In the case of \textit{M v M},\textsuperscript{57} the court allowed the mother to relocate from Scotland to Arizona with her children. The mother’s motive for relocating was to be closer to her own mother and to safeguard her interest in the family business, which would ultimately pass down to her children. The father would evidently lose out on regular contact with his children as a result, but, on the evidence, the court decided that it would be in the best interests of the children to go to the US. The strong views of the eldest child in favour of relocating were also held to be important.\textsuperscript{58} The UNCRC emphasises that states should ensure that children capable of expressing their own views are given the opportunity to be heard and that their views are given due weight in accordance with their age and maturity.\textsuperscript{59} This is incorporated into Scots law by s11(7)(b) of the 1995 Act. The child’s views are sometimes given considerable weight.\textsuperscript{60} In \textit{Shields v Shields},\textsuperscript{61} the decision of the lower court was overturned as the judge had failed to consider the views of the

\textsuperscript{51} 1995 Act (n43) s11(7)(a).
\textsuperscript{52} \textit{Johnson v Francis} 1982 SLT 285.
\textsuperscript{53} ibid 286. Despite the judge commenting that this was an exaggeration of Mr Francis’s circumstances, he did accept that the recession had had an impact on his firm and that redundancy was a possibility..
\textsuperscript{54} ibid.
\textsuperscript{55} ibid 288.
\textsuperscript{56} Great weight has been placed on the continuance of the relationship between the child and both parents. See \textit{Cosh v Cosh} 1979 SLT (Notes) 72. In that case, Lord Jauncey considered that it was not in the best interests of the children to sever contact with their father and that the children’s apparent dislike for their father came from the mother’s remarriage and her attitude towards their father (see 73). It was also stressed that much of the responsibility for ensuring contact and making arrangements was on the mother, who should encourage the children to see their father and also create a climate where the father was viewed in a positive light (see 73). See also \textit{Blance v Blance} 1978 SLT 74.
\textsuperscript{57} \textit{M v M (Residence Order)} 2000 Fam LR 84.
\textsuperscript{58} ibid [20].
\textsuperscript{59} UNCRC (n13) Art 12.
\textsuperscript{60} \textit{Mason v Mason} 1987 GWD 27-1021.
\textsuperscript{61} \textit{Shields v Shields} 2002 SLT 579.
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child. However, while the child may possess the right to be heard, it does not extend or amount to a right to decide. Furthermore, where, as in the majority of cases, younger children are involved, less substantive weight tends to be given to their opinions.

A. Reconsidering the Scottish Approach

The ‘welfare test’ in s11(7) of the 1995 Act has been sufficiently flexible to adjust over time in line with a changing society. No one would argue that a principle protecting the welfare and interests of the child should be abandoned. However, relocation disputes highlight the tensions inherent in applying the ‘welfare principle’. Sutherland’s view is that relocation cases are assessed by an ‘out-of-touch judiciary’ who are required to make predictions about an uncertain future. Different courts see the various issues differently and facts which one court finds relevant may be disregarded by another. As welfare decisions are based on values and opinions rather than concrete facts and scientific evidence, the judge’s personal perceptions can be influential, causing problems with regards to the transparency of decisions. The ‘welfare principle’ does not always achieve its objective of promoting the child’s best interests and, furthermore, simply prioritising children’s rights is not necessarily the best way of ensuring their interests are protected. Ultimately, it is open to question as to whether the Scottish courts are currently making the right decisions in relocation cases. Related questions are whether the concept of the child’s welfare is ambiguous or whether the court system is too adversarial for such matters.

Such questions are important. Alternatives, such as mediation, offer much more effective dispute resolution. In contrast with the adversarial nature of the court system, with its emphasis on winners and losers serving to entrench disagreements, mediation assists in reducing conflict and is ‘(...) almost certainly more child

62 ibid [10]. This case also outlines, at [11], that the duty to consult the child applies throughout the proceedings until the final decision is handed down.


64 A child over the age of 12 is presumed to be of sufficient age and maturity to give their view, but children younger than this may also be considered sufficiently mature (1995 Act (n43) s11(10)). However, there are fewer cases that involve older children; the mean age of the children in relocation cases during 2012 was 6 years old so less weight is given to their views. See Cominetti and George (n3) 153.

65 Lisa Young, ‘Resolving relocation disputes: The “interventionist” approach in Australia’ (2011) 23(2) CFLQ 203, 203.

66 Sutherland (n12) 452.

67 The weighing of all the factors is hard and unpredictable. The case of Brixey v Lyanas (n24), although not a relocation dispute, illustrates the problems associated with family law disputes that involve sensitive issues. These problems are only heightened in relocation situations. This case went through four courts, each of which identified and weighed the factors differently and thus arrived at a different decision from the other courts (see 909-910).

68 The value-laden nature of the welfare principle is extremely clear from a number of cases that denied residence applications to homosexual couples. See Early v Early 1990 SLT 221; Meredith v Meredith 1994 GWD 19-1150.
focused.’\textsuperscript{69} Mediation also improves communication, reduces bitterness and facilitates more meaningful relationships after relocation. As a consequence, mediation agreements are more likely to be complied with than court decisions. In resolving relocation (and many other family law) disputes, it is much better to give the parents the reins and allow them to create personalised, acceptable and cooperative solutions themselves. Duggan points out that judges can make mistakes, causing damage that is difficult to undo and perhaps even irreparable.\textsuperscript{70} It is not truly possible for a judge to predict the child’s future welfare and whatever decision they reach will be hard to modify. Parents are more likely to know what is in the best interests of their child and can take daily corrective action to ensure their child’s best interests are promoted and protected. Mediation is being used increasingly widely to resolve many types of cross-border disputes. Accordingly, it should be encouraged and promoted to a greater extent as an alternative for family dispute resolution. In England, as a result of the new Children and Families Act 2014, the parties involved in a family dispute must attend a family mediation information and assessment meeting.\textsuperscript{71} This seeks to ensure that parents are informed of the different methods of dispute resolution and are able to choose the one best suited to them, rather than simply feeling that court action is the only option. Similar reforms could be introduced in Scotland.

However, mediation is not suitable for all families. Therefore some other reform of the Scottish law on relocation still needs to be considered. It has been sarcastically suggested that flipping a coin would result in an outcome that was just as predictable as Scottish court decisions and that this would reduce hostility and delay.\textsuperscript{72} These suggestions are clearly hyperbolic and unrealistic, not least because they would not take any account of the child’s interests. Some more meaningful proposals for reform will now be explored.

B. Statutory Checklist

In the Scottish Law Commission (SLC) consultation that preceded the 1995 Act, the possibility of a statutory checklist, similar to that in England, was considered.\textsuperscript{73} In England, the paramount consideration is the welfare of the child.\textsuperscript{74} The English courts will, however, decide applications with reference to a statutory welfare checklist,\textsuperscript{75} which has been viewed as a ‘(…) means of providing greater consistency and clarity in the law,’\textsuperscript{76} reducing the degree of judicial prejudice and the scope for different interpretations. It was intended to give more guidance to parents, lawyers, social workers and judges on how cases may be resolved, thereby reducing litigation. However, the statutory checklist gives English judges a narrower margin of discretion in comparison with Scottish judges. There exists a risk that a list can

\textsuperscript{70} Duggan (n39) 193.
\textsuperscript{71} Children and Families Act 2014, s10.
\textsuperscript{72} Duggan (n39) 193.
\textsuperscript{73} Scottish Law Commission, Report on Family Law (Scot Law Com No 135, 1992) para 5.20.
\textsuperscript{74} Children Act 1989, s1(1).
\textsuperscript{75} ibid, s1(3).
\textsuperscript{76} Law Commission, Review of Child Law, Guardianship and Custody (Law Com No 172, 1988) para 3.18.
become too rigid and not evolve with the times in the manner that the Scottish common law approach would. Each case is unique and no list of ‘relevant factors’ will ever be wholly satisfactory.\(^77\) Furthermore, a checklist could result in decisions becoming more mechanical and divert attention from important factors that may not have been included on the list.\(^78\) Ultimately, such a mechanical and rigid list may not provide the best method for reform. In fact this approach was ultimately rejected by the SLC.\(^79\)

C. A Rights-Based Approach

Fortin claims that the ‘welfare principle’ stands in the way of the right to private and family life contained in Art 8 of the European Convention on Human Rights (ECHR).\(^80\) She further suggests that it should be reformed into a qualification to that right within the meaning of Art 8(2).\(^81\) This would mean that parental rights and responsibilities would be protected under Art 8 but that, if an order such as a contact order or one made in relation to relocation was not in the child’s best interests, refusal would be justified as necessary and proportionate under Art 8(2). At first sight, this seems to be an attractive approach to follow. However, it places the best interests of the child at too low a level. Children’s rights would only prevail over those of adults when the action was proportionate; fulfilled a legitimate lawful interest; and was necessary.\(^82\) This raises the question of why the parent’s rights should be afforded such protection and only interfered with in very limited circumstances. It seems to flip the current situation around so that parents’ rights are treated as presumptively protected and, more importantly, that they are only being modified if children’s needs require it. Eekelaar points out that this could, as with the conventional approach, result in only ‘lip service’ being paid to other relevant interests.\(^83\) This rights-based approach can be persuasive and it attractively deals with the issue of other interests. Nonetheless, a fundamental reason for not adopting such an approach is that the ‘welfare principle’ sends a significant, symbolic message, recognising the importance and magnitude of the child’s best interests,

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\(^77\) Sutherland (n12) 452.
\(^78\) Scottish Law Commission (n73) para 5.23.
\(^79\) ibid para 5.23.
\(^81\) ibid 254.
\(^82\) Art 8(2) ECHR. This Article states that: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’. The ECHR works with a system based on proportionality. In Elsholz v Germany [2000] 2 FLR 486, a father had contact with his child until he expressed a strong dislike for him. It was held that it was not beneficial to continue contact. The ECtHR decided that, although the father’s Art 8 rights had been interfered with and that, although the interference was in accordance with the law following the legitimate aim of protecting the child’s health and morals, the interference was not proportionate and so it constituted a violation of Art 8. See John Eekelaar, ‘Beyond the welfare principle’, (2002) 14 CFLQ 237, 241.
\(^83\) John Eekelaar (n82) 241.
focusing the mind of the parents and judiciary.\textsuperscript{84} Any other test would risk undermining the protection afforded to children.

The Scottish approach may benefit from reconsideration in order to ensure fairness in decision-making. Transparency is essential and a clearer process would be invaluable. Nevertheless, the best interests of the child should be the most important consideration. There needs to be strong sociological evidence and guidance on the best approach to reform, as restructuring relocation law in Scotland is a complex task. Neither of the approaches suggested above will completely resolve the issues inherent in the welfare test. Mediation should, without a doubt, be utilised to a greater extent. It could also be useful to look to other jurisdictions or international law when considering the best method to be adopted. Scots law can learn lessons from the approaches of other jurisdictions and current international instruments. The Washington Declaration on International Family Relocation 2010 is an ‘interesting, and potentially momentous, development’; one which provides a truly acceptable model.

4. Jurisdictional Variations

The European Court of Human Rights (ECtHR) has stated that ‘the consideration of what is in the best interests of the child is in every case of crucial importance.’\textsuperscript{85} However, acknowledging the costs and effects of applying this principle on a discretionary basis, a number of jurisdictions have adopted a position akin to a presumption.\textsuperscript{86} ‘These presumptions amount to generally broad and crude rules’\textsuperscript{87} and are ultimately ‘nothing more than the judge’s personal preference.’\textsuperscript{88} Other jurisdictions adopt an ‘all factor’ approach and reject the idea of presumptions being helpful. These divergent approaches have resulted in inconsistency around the world regarding relocation disputes and, in some instances, within particular jurisdictions. This has led to many jurisdictions realising the importance of common international standards and working to achieve them. Although it is not realistically possible to definitively categorise the approaches of all countries, three main trends can be distinguished: pro-relocation, anti-relocation and neutral. After comparative analysis, it will be seen that, although most jurisdictions utilise the welfare and best interests approach, none addresses the question of relocation in the same way as Scotland.

A. The Pro-Relocation Approach

\textsuperscript{85} \textit{L v Finland}, (2001) 31 EHRR 30 [118].
\textsuperscript{86} Such as England and New Zealand. See Nicholas Bala, ‘Moving closer to international relocation advisory guidelines’ [2013] IFL 47, 47.
\textsuperscript{87} ibid.
\textsuperscript{88} Duggan (n39) 199.
These jurisdictions place great emphasis on the idea that a happy mother means a happy child.\textsuperscript{89} The welfare of the child is intrinsically linked with the welfare of the mother, as the mother will be unable to provide the emotional and psychological stability required unless she herself is emotionally and psychologically stable.\textsuperscript{90} England has, in the past, been described as a typical example of a pro-relocation jurisdiction and has a reputation for being one of the most liberal jurisdictions in the world.\textsuperscript{91} Findings in cases such as \textit{Payne v Payne}\textsuperscript{92} made it very difficult for a non-primary carer to prevent a relocation application from being granted. In that case, the mother wished to return to her country of origin (New Zealand) after the breakdown of her marriage. She was the primary carer of the child, although the father had considerable contact. Examining the case law in the preceding 30 years, the Court of Appeal concluded that decisions were made on two principles. These were, firstly, that the welfare of the child is paramount and secondly, that refusing an application is likely to have a detrimental impact on the primary carer.\textsuperscript{93} This reasoning tilted the balance in judicial decision-making in favour of well-prepared and genuine relocation applications. In the decision, although Dame Elizabeth Butler-Sloss stated that no presumption existed, ‘great weight’ was given to the primary carer’s desire to move.\textsuperscript{94} The decision created a situation where, in reality, any non-primary caring parent challenging the relocation would have ‘(…) little hope of success’,\textsuperscript{95} as the primary carer has an ‘(…) insurmountable head start in these applications.’\textsuperscript{96} In practice, therefore, \textit{Payne} created a presumption in favour of relocation.

The decision has been subject to significant criticism and conflicts with the importance that has previously been placed on continued contact between children and the non-primary caring parent in England. The presumption makes cases imbalanced and it is very difficult for a non-relocating parent to successfully oppose a relocation application. However, a number of cases subsequent to \textit{Payne} have upheld its principles and, until 2011, judges generally refused to review the

\textsuperscript{90} \textit{Payne v Payne} [2001] Fam 473, 485.
\textsuperscript{91} See discussion in ‘Preliminary Note on International Family Relocation’ (n7) para 53.
\textsuperscript{92} \textit{Payne} (n90).
\textsuperscript{93} ibid [26].
\textsuperscript{94} ibid [500].
\textsuperscript{96} Vallance-Webb (n6) 2.
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guidelines.97 Some judgments have even been overturned on appeal as insufficient attention was deemed to have been paid to the well-being of the primary carer.98 The ‘distress principle’ that arose from Payne has meant that decisions are not truly made on the basis of the child’s best interests and it is now too easy for mothers to relocate.99 In Payne very little evidence was provided of the potential benefits to the child that might arise from the mother’s relocation. In fact, the main evidence supporting the relocation was the mother’s sense of unhappiness and dislike of London.100 It was felt that the resentment and frustration she would feel if her application were rejected would impact negatively on the child’s welfare. Eekelaar opines that the Payne judgment seems to promote the interests of others ‘(…) under the guise of the child’s welfare.’101 It has been argued that the significance afforded to the emotional impact on the primary carer is ‘(…) inherently unfair and is easily staged by the applicant.’102 The principle surely should be that a happy child creates a happy mother, rather than the ‘(…) happy mother creates a happy child’ approach followed in Payne.103 Payne is outdated and runs counter to the principles of equality of contact and joint parenting. It has been judicially held that the distress principle ‘(…) ignores and relegates’104 any damage done to the non-relocating parent. The child will lose out on contact with the non-relocating parent and this could be damaging to their relationship. Ultimately, English law has been criticised for making it too easy for a custodial parent to relocate and allowing ‘(…) the interests of others…to be promoted under the mask of the child’s interests.’105

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97 In Re G (Children) (Leave to Remove) [2008] 1 FLR 1587 para 14, the Court of Appeal deflected an attack on the Payne guidelines and concluded that there was no social shift that would justify a reconsideration of the principles. In Re A (Leave to Remove: Cultural and Religious Considerations) [2006] 2 FLR 572 at [55], Justice McFarlane held that his hands were tied by the strength of the Payne line of cases. At [5] of Re D (A Child) [2010] EWCA Civ 593, Wall LJ criticised Payne for placing too much emphasis on the views of the mother but went on to acknowledge that, ‘(…) until such time as Payne v Payne [was] either overtaken by legislation…or [went] to the Supreme Court’, the lower courts would be bound by its principles. However, K v K (Children: Permanent Removal from Jurisdiction) [2011] EWCA Civ 793 took a step away from Payne by restricting a resident parents movement in favour of joint parenting.

98 Re G (Children: Removal from Jurisdiction) [2005] 2 FLR 166.

99 The decisions in Re B (Children) (Removal from Jurisdiction) [2004] EWCA 956 CA and Re S (Child) [2003] EWCA Civ 1149 CA also centered on the mother’s well-being rather than that of the children. This seems to promote a powerful message that the mother’s interests should be promoted above the child’s and that they should not be ‘stress-tested’ (Re B (Children) [2004] EWCA 956 CA [13]).

100 Payne (n90) [13].

101 Eekelaar (n82) 242.

102 Vallance-Webb (n6) 3.


Fortunately, however, the ‘(…) relocation landscape has changed considerably since the hey-day of *Payne v Payne*.‘\(^{106}\) In a seminal decision in *Re AR*,\(^{107}\) Judge Mostyn held that *Payne* had not been ‘(…) uncritically accepted’ and that emphasis on the physiological effects on the mother paradoxically ‘(…) appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions.’\(^{108}\) He further was of the opinion that the welfare checklist in s1(3) of the Children Act 1989 makes no reference to the impact of the decision on the primary carer and therefore it is questionable whether Parliament ever intended such an issue to be considered. He found it doubtful that this omission was an oversight.\(^{109}\) The judgment in *K v K*\(^ {110}\) took a step away from *Payne*, outlining that the court in *Payne* had simply emphasised that the welfare of the child was paramount, observing that the remainder of the *Payne* judgement was only guidance that ‘(…) must not be overstated.’\(^ {111}\) In *Re TC & JC*,\(^ {112}\) Judge Mostyn took this even further, emphasising that presumptions should play no part in this area of child law.\(^ {113}\) Here he provided a helpful assessment of the previous jurisprudence in this area, specifically emphasising that no presumption should be utilised.\(^ {114}\) Although the older jurisprudence favours well-prepared applications by the primary carer, this is no longer the case to the same degree: ‘(…) there is no legal presumption, let alone some legal or evidential presumption, in favour of an application.’\(^ {115}\) In *Re TC & JC*, the mother, an Australian citizen, abducted the two children after the breakdown of the relationship and took them to Australia.\(^ {116}\) However, following proceedings based on the Hague Convention, the children were returned to the UK.\(^ {117}\) The decision takes into account principles set out in a decision of the Supreme Court of New Zealand, namely *Kacem v Bashir*.\(^ {118}\) Generally speaking, there is a significant geographical separation between the child and the non-primary carer in international relocation cases, however this case was quite unusual in that both parents had indicated that, whatever the decision, the unsuccessful parent would move to be with the children. The CAFCASS officer felt that as a result this was a


\(^{107}\) *Re AR* (n85).

\(^{108}\) ibid [12]. Here Mostyn J outlines that this is ‘the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward’.


\(^{110}\) *K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793.

\(^{111}\) ibid [168] (Black LJ).

\(^{112}\) *Re TC & JC (Children: Relocation)* [2013] EWHC 292 (Fam).

\(^{113}\) ibid [18].

\(^{114}\) ibid [10]-[18].

\(^{115}\) ibid [11].

\(^{116}\) ibid [1].

\(^{117}\) ibid [2]. The Hague Convention on the Civil Aspects of International Child Abduction (1980) Article 1(a) tries to ensure the prompt return of children who have been abducted abroad. In this case, after the mother abducted the children to Australia, proceedings were initiated in that jurisdiction on the basis of the Hague Convention in order to ensure the safe return of the children. After an appeal and rehearing, the children returned to the UK.

\(^{118}\) *Kacem v Bashir* [2010] NZSC 112. The principles are examined further on in this article.
'(...)' very difficult – almost unprecedented' case,119 and he was unable to make a clear recommendation. The court’s decision was based ‘(...)' from first to last on the interests of [the] children.'120 Judge Mostyn felt that their physical, emotional and educational needs would be met equally well in the UK or Australia. Considering the children’s ages (3½ and 2), a move would not have a very disruptive effect on them. Thus, for Judge Mostyn, the decisive factor was the effect the decision would have on each parent. That was because an unfavourable decision would weigh far more heavily on the mother than on the father. The mother was a much more fragile character compared with the father who was highly competent and self-sufficient.121 The father would have few obstacles to obtaining work in Australia while the mother’s immigration status was much less certain and there would be significant financial pressures upon her. The decision was not made on the basis of the ‘distress principle.’ Judge Mostyn came to his decision after weighing up all the factors and taking the route that was in the best interests of the children. This decision indicates that the court decisions are clearly moving away from the ineffective presumption in Payne. The father was a ‘victim of his own virtues.’122 Ultimately, while Judge Mostyn had much sympathy for the father, he had to resist the temptation to punish the mother for her previous actions and so he granted her application to relocate.123

Despite the success of the mother in this case, Judge Mostyn was very clear that there is no presumption of success. The principles in Payne are further undermined by the changes wrought by the Children and Families Act 2014. This Act seeks to encourage joint parenting and the continuance of relationships by introducing (through s11(2)) a presumption that, unless the contrary is demonstrated, ongoing involvement of both parents in the child’s life will further the child’s welfare. The Act does not require equal time to be spent with each parent, nor does it necessitate joint parenting, and it may therefore result in only limited modification of court decisions. Nevertheless, it recognises that children are generally better off when both parents work together and are involved in their child’s life. The Act and the more recent case law outlined above provide significant challenges to the doctrine established in Payne. England, although traditionally classed as a very pro-relocation jurisdiction, seems now to be gravitating towards a more neutral stance towards relocation decision-making. With the use of mediation and changes to the justice system introduced by the Children and Families Act,

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119 Re TC & JC (n112) [8]. An officer from the Children and Family Court Advisory and Support Service (CAFCASS) is often involved from an early stage in disputes concerning children. They provide a helpful report to the court containing the child’s views and an indication of the child’s best interests in order to help the court come to its decision.

120 ibid [52].

121 ibid [47].

122 ibid [51].

123 ibid [52].
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decisions more neutral in nature will hopefully become the norm, consigning the reasoning adopted in Payne to the history books.\textsuperscript{124}

B. Protecting the Family Unit

Other jurisdictions have adopted an anti-relocation stance, taking the view that the child’s best interests are protected by maintaining the family unit. Relocation in New Zealand is governed by the Care of Children Act 2004. Joint parenting is much more common in this country and so parents must cooperate to decide issues of relocation, only turning to the court if they are unable to agree.\textsuperscript{125} Consistent with the approaches of most other States, the Act provides that the ‘(…) welfare and best interests of the child must be the first and paramount consideration.’\textsuperscript{126} In assessing the child’s best interests the judge should pay heed to the principles set out in s5 of the Act, as well as the need to resolve cases in a reasonable time.\textsuperscript{127} The Act also emphasises the need to ensure family relationships are ‘(…) preserved and strengthened’ in pursuit of the child’s best interests,\textsuperscript{128} reflecting the view that when a parent moves away with their child the ‘(…) absent parent is rendered yet more absent.’\textsuperscript{129} This of course can be damaging to the child’s relationship with the absent parent. In New Zealand ideas of stability and continuity of relationships are emphasised. The New Zealand Court of Appeal in Kacem v Bashir suggested that, due to the wording of the principle in s5(e), that principle may assume priority.\textsuperscript{130} The idea that both parents, and their extended families, should be involved in the child’s care and upbringing can create a significant barrier to successfully adjudicating relocation cases. However, the New Zealand Supreme Court made it clear that the ultimate point is that one principle ‘(…) cannot be read as having any presumptive precedence over the other principles, or indeed any presumptive precedence of a stand-alone kind.’\textsuperscript{131} The decision in each case will depend on an individualised assessment of the issues and the ‘(…) key point is that there is no statutory presumption or policy pointing one way or the other.’\textsuperscript{132} Ultimately, although applicants do not start off facing some form of presumption, principle 5(e) will have particular factual significance.

A presumption against relocation will restrict a parent’s ability to relocate following divorce. All people should be able to relocate and reside where they wish,

\begin{itemize}
\item \textsuperscript{125} Care of Children Act 2004, s5(a). If agreement cannot be reached then applications tend to be made to the court as a parenting order (s48).
\item \textsuperscript{126} ibid s4(1).
\item \textsuperscript{127} ibid s4(2).
\item \textsuperscript{128} ibid s5(d).
\item \textsuperscript{129} Carruthers (n89) at 190.
\item \textsuperscript{130} Bashir v Kacem [2010] NZCA 96 [51] (Glazebrook, O'Regan and Arnold JJ).
\item \textsuperscript{131} Kacem (n118) [22].
\item \textsuperscript{132} ibid [24].
\end{itemize}
but it is debatable whether this should be qualified and weighed against the rights and needs of the child. In Europe, EU law adds another dimension to the issue of relocation. The free movement of citizens is a central tenet of the internal market and is strongly protected in EU law.\textsuperscript{133} Free movement is not, however, absolute, although restrictions thereto must be objectively justified and proportionate.\textsuperscript{134} Despite the legitimate aim of protecting the child’s welfare, a blanket rule placing restrictions on all cases of relocation is unlikely to be deemed proportionate under EU law.\textsuperscript{135} Mothers would be compelled to remain in a country they do not want to be in only so that the father can maintain contact. Yet the free movement of the father is not restricted to the same extent.

The approach in South Africa could be seen as somewhat more neutral or pro-relocation and as such it provides a good comparison.\textsuperscript{136} In \textit{B v M},\textsuperscript{137} the court pointed out that primary carers ‘(…) should be free to create their own lives, post-divorce, unfettered by the needs or demands of their former spouses’.\textsuperscript{138} Satchwell J made the point that the primary carer is not shackled to the other parent and does not lose their independent right to freedom of movement.\textsuperscript{139} It is argued by many commentators that the father’s mobility should inform part of the decision-making process in relocation cases, as this is the only way to ensure relocation law treats both the mother and father equally.\textsuperscript{140} If the parents could move together then this would give the child the benefits of the move and of the continued relationship with both parents. However, \textit{requiring} a non-primary carer parent to move would infringe upon their ‘right to stay’, the converse of the right to free movement. The court has no power to force a party to relocate even if this would be in the best interests of the child.\textsuperscript{141} The reality is that ‘(…) maternity and paternity always have an impact upon

\begin{itemize}
  \item[133] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47. This treaty protects the free movement of both workers (Article 45) and citizens (Article 21).
  \item[134] \textit{Case C-413/99 Baumbast v Secretary of State for the Home Department [2002] ECR I-7091}.
  \item[135] On the basis of principles established in \textit{Case C-66/82 Fromançais SA v Fonds d'orientation et de regularisation des marchés agricoles (FORMA) [1983] 3 CMLR 453, paras 7-9}.
  \item[136] This pro-relocation stance can be seen in \textit{Jackson v Jackson [2002] 2 SA 303 (CA)}. At [2] it was held that ‘(…) the interests of the children are the first and paramount consideration.’ However, ‘(…) a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parents is shown to be bona fide and reasonable…Indeed one can well imagine that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case be decided on its own particular facts.’
  \item[137] \textit{B v M [2006] 3 All SA 109 (W)}.
  \item[138] Domingo (n36) 159.
  \item[139] \textit{B v M (n137) 158}.
  \item[140] This issue was raised in \textit{U v U} (2002) 211 CLR 238, an Australian case, and the Australian courts are now obliged to consider this point. However, the idea assumes that the relocating parent would wish for the other parent to relocate as well when this is often not the case. Furthermore, there is no guarantee that the relocating parent will remain in the new jurisdiction for a long period of time and it is not fair to require the other parent to continuously move in order to stay close to their child. In \textit{G and A [2007] FCWA 11}, considering the mother’s previous lifestyle, the move may have been the first of a number of moves, so the case should not have been decided on the basis of the father’s mobility. See [61].
  \item[141] Nevertheless, it has been considered, for example in \textit{Re S (Children) (Application for Removal from Jurisdiction) [2004] EWCA Civ 1724 [21]}. See Ruth Lamont, ‘Free movement of persons, child
\end{itemize}
the wishes and mobility of parents.’ Parents have the right to free movement only to the extent that this freedom does not conflict with the obligations they have to their children. In Scotland, the courts are ‘(…) naturally reluctant to interfere with a person’s right to decide where he or she resides’. This seems to strike a fairer balance.

C. Neutral States

The Scottish courts have resisted any temptation to ‘(…) elevate the primacy of the parental claim into anything approaching a principle, far less a rule.’ It remains true that each case will depend on its own facts and circumstances. The dictum of Payne receives ‘(…) questionable prominence’ in English law and does not represent the position under Scots law, which instead ‘(…) view[s] the matter exclusively through the prism of the welfare of the child.’ In the Scottish case of M v M, the decision of the lower court was overturned on appeal by the Court of Session, which held that excessive weight had been given to the mother’s wishes to relocate; more weight should have been given to the father’s future contact possibilities and the fact that the children were settled in Scotland. The Court of Session expressly held that the ratio in Payne ‘(…) forms no part of the law of Scotland.’ Had the Sheriff at first instance not placed excessive emphasis on the mother’s wishes he would not have treated other factors in the case the same way. Presumptions, such as the one in Payne, direct the court’s attention away from the child’s best interests and towards the desires of the primary carer. The earlier Scottish case of Sanderson v McManus also emphasises that there is no presumption in favour of contact between a child and his natural father. Such a presumption would be incompatible with the need for the court to consider a child’s welfare as paramount. It may normally be assumed that a child would benefit from continued contact with his natural parent but this question must be assessed on the evidence.

As a result of the decision in Sanderson it can be said ‘(…) with confidence that the requirements contained within s11(7)…[Children (Scotland) Act 1995]…effectively...
preclude reliance on any presumptive rule or guideline tending to favour the wishes or interests of either parent.'\(^{154}\)

Canada, like Scotland, has also adopted a neutral stance after the leading case of *Gordon v Goetz*.\(^{155}\) In this case the Canadian Supreme Court held that judges should be ‘(...) unconstrained by burdens or presumptions in favour of either party.’\(^{156}\) However, in Canada it is felt that this approach is ambiguous and that the lack of a presumption and guidance has created inconsistencies in the case law with ‘(...) results [that] are totally unpredictable.’\(^{157}\) Many have called for the Canadian Supreme Court to reconsider the issue and develop ‘(...) sensible and practical mobility guidelines.’\(^{158}\) British Columbia has introduced relevant new legislation: the Family Law Act 2012. The provisions are very child focused; it creates two rebuttable presumptions depending on whether or not the parents have substantially equal parenting rights. If the parents do not have largely equal parenting then s69(4)(a) states that a good faith relocation must be considered to be in the best interests of the child if the non-relocating parent cannot provide evidence to rebut this and there is a workable contact arrangement proposed. However, if there is substantially equal parenting then the relocating parent must satisfy the court that the proposed move is in the best interests of the child.\(^{159}\) Thompson feels that this ‘(...) actually creates some law on relocation’ rather than the ‘(...) black hole of *Gordon v Goetz*’ and suggests similar principles should be adopted across Canada.\(^{160}\) Ultimately, Canadian academics generally feel that due to the lack of specification in the best interests test, a presumption is more appropriate for relocation cases.\(^{161}\)

D. The Problems with Presumptions

Greenberg *et al* point out that ‘(...) nothing matches the appeal of simple solutions to complex problems.’\(^{162}\) Presumptions are intended to simplify the cases that come before a judge. There has been much debate regarding the best presumption to be adopted in relocation cases. However, it is argued here that no presumption should be adopted at all. The advocates for presumptions base their arguments on the idea that the welfare principle on its own is too vague and uncertain, creating

\(^{154}\) *M v M* (n147) [9].

\(^{155}\) *Gordon v Goetz* [1996] 2 SCR 27.


\(^{157}\) Philip Epstein in *ibid* at 156.

\(^{158}\) *Diamond* (n156) 157. The British Columbian Court of Appeal suggested in *Q(RE) v K(GJ)*, 2012 BCCA 146 [59], that it may be time for the Supreme Court to reconsider whether cases should be based solely on best interests or whether further guidance should be provided.

\(^{159}\) Family Law Act 2012, s69(5)


inconsistencies in case law and causing problems for lower courts. Presumptions reduce litigation, time and costs, making decisions easier and more consistent. However, presumptions tend to be frowned upon and unhelpful in matters involving children, obstructing the proper operation of the welfare principle. Presumptions adopt a ‘one size fits all’ approach. They are very crude and create broad, sweeping assertions that fail to take into account the individual circumstances and extensive differences in cases. The advantages of presumptions are essentially illusionary and they will not in fact resolve problems with welfare. The case of Kacem v Bashir makes some ‘(…) highly acute observations demonstrating the fallacy of the suggestion that there is, or should be, some kind of presumption in favour of an application to relocate.’ Due to the nature of relocation applications, anything other than an individualised assessment of the particular facts will be flawed and deficient. Pre-determined responses may reduce the number of cases before court; however this does not mean the parties are satisfied or that the child’s best interests have in fact been supported. The barriers to overcoming these presumptions are incredibly high, creating a deck that is stacked against the respondent. This provides a detrimental view of the fairness of our legal system by shifting the process from an individualised, fact-specific decision regarding the welfare of the child, to a specific formula that needs to be fulfilled in order to relocate. In such situations the child’s interests can easily be relegated and consideration given to other aspects, such as the mother’s distress, through the prism of the child. Laws that are exceptionally restrictive in preventing relocation applications could also lead to parents taking the law into their own hands and abducting the child to another jurisdiction. Conversely, if the law is too liberal, then the non-relocating parent may end up abducting the child to prevent them from relocating and severing contact. Instead of creating defective presumptions that distort the welfare inquiry, relocation law would be better served by improved decision-making, the provision of better training and greater use of mediation. The cornerstone of family law is the independence and impartiality of the judiciary and their ability to assess the evidence and give fact-based solutions particularised to each individual case in the hope that it will be followed. There is great sympathy for women who wish to relocate home or to a new country with their children; however, from the beginning

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163 A number of cases, including the aforementioned M v M 2012 SLT 428, have been overturned due to their reliance on presumptions. As a result, lower courts can find it difficult to know which case to rely on in reaching their decision.
164 Bala (n86) 47.
165 See Greenberg (n162) 148.
166 Judge Mostyn in Re TC and JC (n112) para 14.
167 The child’s best interests cannot be adequately met by a simple automatic response that does not consider the facts of the individual case. Presumptions restrict the court and leave parties feeling dissatisfied with the decision. They are told by their lawyers that there is no point raising an action in court as they will undoubtedly lose. This will create great distress and anger. Furthermore, parties are more likely to be happy with a decision if it is reached after consideration of all the factors and both parties have had a chance to be heard.
168 Greenberg et al (n162) 148.
169 This draws attention to the incompatibility of presumptions with Article 6 ECHR.
170 Greenberg et al (n162) at 167.
to the end of the process, the best interests of the child should be the most important factor.

This difficult area has challenged the courts, and different legal systems have adopted different stances on the issue of relocation. The Scottish courts have adopted a non-presumptive approach that focuses on a child-centred decision. Pro-relocation countries have adopted a more liberal approach. They emphasise the right of a person to choose where they want to live. However, this creates imbalance in cases making it very difficult for a non-relocating parent to successfully oppose the relocation. Ultimately, the child will lose out on parental contact. Anti-relocation countries have perhaps gone too far the other way, by restricting relocation in favour of the family unit. At first sight this is appealing, however it unnecessarily restricts a parent’s right to move and can cause increased tensions within the family. Ultimately, it is never known whether relocation is in any child’s best interests. Further research is therefore essential in order to achieve greater understanding and agreement over which relocation principles should be adopted. Most countries seem to be gravitating towards a more centralised, neutral position that rejects the appropriateness of presumptions in this type of case. While this decision will undoubtedly be difficult for the judge to make, a presumption will not be of any assistance considering the individual facts of the case. Bearing in mind the varying approaches to tackling these cases, it is arguable what the best approach would be. Presumptions therefore have no part to play in these fact-based, evaluative judgements.

5. Looking for an International Standard

No jurisdiction has devised wholly acceptable guidelines and rules regarding relocation. Different countries have followed different directions when trying to establish a coherent path that deals with cases effectively. This variance in approach underlines the problem that exists when States try to create a unified international standard for relocation. Nevertheless, there is still an ‘(…) ongoing effort to achieve greater international consistency in the approach to cross-border relocation disputes.’171 So far, the attempts, undertaken principally through the staging of recent international conferences, have resulted in the emergence of mainly soft law that contains largely advisory principles. In this section, it will be considered whether an International response to relocation would be appropriate and whether it would be feasible, drawing on the experience of the United States. The current international instruments applying to relocation will also be outlined and it will be considered whether the ‘welfare principle’ is ultimately the best unifying standard. Finally, until there is broad agreement on how any principles should be applied, it has to be accepted that complete consensus is unlikely. This paper will argue that focus should also be placed on cross-border contact and the promotion of mediation.

A. Feasibility

171 Preliminary Note on International Family Relocation (n7) para 12.
It is increasingly recognised that common principles adopted at an international level would be beneficial in achieving a more unified global response to relocation. However, with each jurisdiction taking a different approach to the issue it is difficult for an international standard to emerge. The experience in the US as regards the creation of greater inter-state consistency may be relevant when considering the likelihood of agreement in the international sphere. The US has a federal system of government and relocation issues are determined by the law of each State, with the consequence that approaches vary and standards differ. There have been several attempts to standardise the US approach to relocation but this has often been met with ‘substantial resistance.’

There has been a lack of overall consensus regarding the procedure or substance of principles to be adopted in the US and such proposals as were put forward were not adopted in a large number of States. The approach in relocation cases is dictated to some extent by a particular State’s local history and values, its legal and social traditions, religion and perceptions. The global community is a great deal more diverse than the US, with distinct languages, cultures and history, making ‘(...) the task of harmonising or systematizing relocation law a daunting one.’ The difficulties experienced in the US are therefore only a microcosm of the barriers and hurdles to consistency and agreement at an international level. The different presumptions, burdens of proof and legal traditions present in all countries suggest that ‘(...) despite such good faith efforts among informed experts to agree upon the most modest of recommendations...there will be substantial opposition to internationally harmonizing substantive and procedural law relating to relocation cases.’

Given the differences in approach and complexity of the cases involved, it may seem easier to say that there is no right answer and let each jurisdiction adopt its own process. However, despite the undeniably wide international diversity in approach described above, some steps have been taken and significant progress has been made. By its very nature, relocation is an international topic, creating similar problems around different world jurisdictions. Judges and practitioners are increasingly coming into contact with cases that require consideration of international issues; cases that clearly demonstrate the benefits of a uniform solution. There is constant concern that contact agreements or orders put in place by courts will not be enforced in the new jurisdiction of choice. International standardisation of the relocation issue could help resolve these problems, creating harmony.

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174 ibid 165.

175 ibid 162. Even in the EU there is limited consensus on the best model to choose. Other than in Scotland and England as described above, France and Spain can also be characterised as pro-relocation countries. Sweden adopts an anti-relocation stance and Germany is closer to a neutral position. If coherence cannot even be found in the EU even greater difficulties will emerge throughout the globe (see 162).

176 ibid 165.
transparency and ensuring consistency in enforcement. In our increasingly mobile, ever-globalising world ‘(...) judicial cooperation is not only encouraged but essential.’\cite{HSE Ireland v SF (A Minor) [2012] EWHC 1640 (Fam) [26] (Baker J)}

\section*{B. Current International Instruments}

International agreements relating to child abduction have been very successful in achieving their aims. The most important of these is the Hague Convention on the Civil Aspects of International Child Abduction 1980. This is underpinned in Europe by the Brussels II Regulations and also the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.\footnote{Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L338/1, repealing Regulation (EC) No 1347/2000 (hereinafter BIIR); The Hague Convention on the Civil Aspects of International Child Abduction (1980) and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996).} There are, however, no treaties or conventions to establish consensus on international relocation. It is an area that is in severe need of international collaborative support, which, it is felt, would also simultaneously assist the international child abduction regime.

In pursuit of common international standards, a number of conferences have been held.\footnote{In 2009, 42 judges attended the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions in Windsor, England. In March 2010, the International Judicial Conference on Cross-Border Family Relocation created the Washington Declaration on International Family Relocation. Also, in 2010, the Inaugural Conference on International Child Abduction, Forced Marriage and Relocation met in London.} Following one such conference in 2010, 50 judges and other experts drew up what became known as the Washington Declaration.\footnote{International Judicial Conference on Cross-Border Family Relocation, ‘Washington Declaration on International Family Relocation’, Washington D.C., United States of America, 23-25 March 2010 (hereinafter the Washington Declaration).} Even though it is not legally binding on its signatories,\footnote{ibid para [13].} it has provided some common factors that should be taken into account in judicial relocation case decision-making.\footnote{See \textit{ibid} para [14].} These factors were intended to bring greater unification to the international approach.\footnote{ibid para [13].} The Declaration ‘(...) specifically ordains a non-presumptive approach.’\footnote{Re AR (n109) [11].} Unsurprisingly, the ‘(...) best interests of the child’ principle was adopted as the most important consideration.\footnote{Washington Declaration (n180) para 3.} However, in order to promote greater uniformity internationally and help judges in reaching their decision, a list of 13 factors requiring consideration provides ‘(...) real rather than synthetic’\footnote{Re AR (n109) [11] (Mostyn J).} analysis of the
impact of relocation on the child as well as others involved.\footnote{Washington Declaration (n180) para 4.} This non-exhaustive list is intended to help guide judges, ensuring that many aspects in each particular case are considered in the decision. It is noteworthy that the Declaration makes no specific reference to the effect of refusal on the primary carer. Instead, \textit{all} family members involved in the child’s life are to be considered.\footnote{ibid para 4(viii).} The Declaration provides a more neutral and balanced approach to questions of relocation, which is in line with the developing attitude of many jurisdictions. It is the only instrument to emerge from international conferences that actually focuses on relocation. In January 2012, a meeting of the Special Commission was held to review the Practical Operation of the 1980 Hague Abduction and 1996 Child Protection Conventions.\footnote{See Report of the further work recommended by the Special Commission on the Practical operation of the 1980 Child Abduction Convention and the 1996 Child Protection drawn up by the Permanent Bureau Preliminary Document No 12 of March 2012.} The likelihood and practicality of further work in the area of relocation was also considered. It was widely agreed that further research into relocation disputes would be beneficial for assessing whether there should be any international developments and, if so, in what direction these developments should go. However, there was ultimately no agreement on an instrument that would unify relocation policies internationally.\footnote{ibid [83]. Relocation is still considered a matter of domestic law. Some states questioned the authority of international conferences. However, as George points out, all law is domestic law until states decide to regulate it at international level. Rob George ‘Current developments: The international relocation debate’ (2012) 34(1) JSW&FL 141, 149.}

It is this author’s view that the Washington Declaration, although not legally binding, provides a beneficial framework that should be refined and followed.\footnote{See Re H (a Child) [2010] EWCA Civ 915 para [25].} Despite the text of the Declaration not being ‘(…) of satisfaction to any individual on the drafting committee’ it is a step in the right direction.\footnote{The Rt Hon Lord Justice Thorpe, ‘Relocation – The Search for Common Principles’ (2010) 1(2) Journal of Family Law and Practice 4, 9 <http://www.frburton.com/archive/Issue%202.pdf> accessed 5 October 2014.} The balancing and consideration of other factors in paragraph 4 ‘(…) brings the conflict into the open’ and so will resolve a number of the criticisms raised against the ‘welfare principle’.\footnote{Jonathan Herring and Rachel Taylor, ‘Relocating relocation’ [2006] CFLQ 517, 537.} It significantly increases the transparency of decision-making, ensuring careful consideration of all rights and interests. Nevertheless, although the emphasis on ‘best interests’ is understandable, the clear disparities in the application of the current welfare principle in different jurisdictions raises questions about its utility as a principle to bring unity to the international sphere.\footnote{George, ‘Practitioners’ views’ (n105) 179.} The States most likely to be signatories to any new international agreement already emphasise the welfare principle. It is unlikely, therefore, that its inclusion would create much more consistency for, although countries have entirely different presumptions and burdens of proof, they would not be required to change their approach to conform to a welfare-based standard. Nevertheless, it is not suggested that the ‘welfare principle’ should be abandoned. The Washington Declaration has handled the
concept in a different way, making sure that the interests of others are included as part of the assessment, balancing the rights of the child and those of adults. The approach of the Washington Declaration is to offer a choice between ‘paramount’ and ‘primary’ in the weighing of the child’s best interests. It is submitted that the child’s best interests should be classified as primary. This type of assessment is also currently utilised in immigration law to ensure that the rights and interests of others are included in the process. It is argued that this approach to welfare is the best standard for relocation cases and it will help ensure consistency and equality in decision-making. As a descriptive term, ‘paramount’ is not synonymous with protection. As discussed previously, in England, despite the child’s welfare being paramount, the interests of the mother have in the past been promoted through the guise of welfare. It is the protection afforded to ‘(…) children’s welfare that needs to be strengthened and supported, not the paramountcy.’ However, difficulty arises when contradictory, and thus incompatible, rights emerge. The Washington Declaration does not attach weight to the considerations listed in paragraph 4 and does not assist with balancing. It is submitted that there should be ‘primary’ and ‘secondary’ interests, the child’s welfare being a primary consideration. Wherever a ‘primary’ and ‘secondary’ interest cannot be reconciled, the former should prevail. This would ensure that all the interests are addressed individually, removing the risk of confusing different interests and the inadequate consideration thereof that would inevitably follow. This ensures that the welfare of the child is always kept

195 See Washington Declaration (n180) para 4(viii) and (ix).
196 ibid para 3.
197 Until November 2008, the UK had a reservation to the UNCRC, which meant that the provisions did not apply in relation to immigration matters (See Tenth Report of Session 2002-03, The UN Convention on the Rights of the Child, HL Paper 117, HC 81 para [20]) Now, under Article 3(1) of the UNCRC (n13), the rights of the child in immigration cases will be the ‘primary consideration’. In ZH (Tanzania) v SSHD [2011] UKSC 4, Lady Hale noted, at [22]-[25], that the duty to make the child’s welfare the ‘primary consideration’ is not the same as the requirement under the Children Act 1989 s1(1) to make it the ‘paramount consideration’. The Borders, Citizenship and Immigration Act 2009 s55 strengthens the rights and interests of the child, but the child’s interests do not constitute ‘(…) a factor of limitless importance’ ([46] (Lord Kerr)). The nationality and best interests of the child will be an important consideration, but they are not a ‘trump card’; they can be outweighed by the strength of other factors.
198 See, for example, Payne v Payne (n90).
201 If the interests of the relocating parent, non-relocating parent etc. are separated and weighed against the child’s interests, there is a much lower risk of these interests being blurred and afforded inadequate weight. Utilising this type of assessment in the decision of Payne v Payne (n91) the same decision would have been reached but in a more transparent way. If the damage to the mother’s welfare of being unable to return to her home country was weighed against the detriment the child would suffer from losing direct contact with the father and moving away from their settled home then, on balance, the mother’s interests should prevail and relocation should be granted. Rather than hiding behind the ‘welfare of the child’, a balancing exercise provides a more credible analysis of the decision to grant relocation than an analysis based on the ‘welfare of the child’. See Eekelaar (n82) 244.
uppermost in the mind of the judge, but not to the complete exclusion of other considerations and interests. Adopting such an approach across the globe would help reduce the devastating impact that relocation can have on the non-relocating parent, as parties feel happier with a decision if they know that their rights have been properly considered rather than simply disregarded. The Washington Declaration creates the most acceptable and satisfactory resolution for all concerned, ensuring that the child’s interests are held in high regard; furnishing a visible framework for decisions; and making them more predictable and transparent. Nevertheless, until some broad agreement on the interpretation of ‘best interests’ can be reached, differences will remain around the world. It may be beneficial for international measures to focus on ensuring cross-border contact rather than simply attempting to create concrete principles.

C. Enforcement of Contact Orders

Research from Reunite, the UK’s leading charity specialising in child relocation across borders, indicates that a large number of contact arrangements break down in the first 2 years. This highlights the difficulty for non-relocating parents in maintaining contact after the child has moved away. It is generally not possible for the child and the non-relocating parent to maintain the same quality of relationship after relocation as they had hitherto enjoyed. In C v M, Sheriff Halley recognised that indirect contact can be rare and irregular and it is naive to assume that internet or phone contact is a suitable alternative to regular face-to-face contact. It is often too easy for a relocating parent to undermine the relationship and ignore or avoid the undertakings she had previously given during proceedings. In a quest to find some certainty and try to maintain relationships across borders in the EU, Brussels II Revised Regulation (BIIR) was introduced. The lawful relocation of a child will trigger the application of Art 9, which outlines that the ‘Member State of the child’s former habitual residence shall... retain jurisdiction during a three-month period following the move.’ This allows the courts to modify judgements in an attempt to

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202 However, assessing the child’s welfare is currently a very difficult task without also having to incorporate the interests of others into the decision. As a result, it is argued that in achieving this balancing exercise the legislature or judiciary should create a set of objective indicators. This will assist judges in making their decision taking into account the interests of others but not at the risk of the welfare of the child.

203 It is estimated that 40-50% of fathers will lose contact with their children within 2 years. See Freeman (n103) 10.

204 In DY v LY 2012 GWD 5-89 the sheriff thought that summer holiday visits to Scotland would be sufficient to continue the child’s relationship with his mother. However, in reality this would mean that the child would not see his mother in person for 11 months at a time. He noted that it is ‘(…) difficult to conclude other than that the relationship between the child and his mother would be adversely effected’ [99].

205 C v M 2012 GWD 9-170.

206 ibid [70].

207 BIIR (n178) preamble [3]. The goal of the regulation is to ensure reciprocal recognition and enforcement of orders across the EU and to establish rules regarding jurisdiction. All EU states apart from Denmark have signed up to the regulations and they are directly applicable in Member States.

208 ibid Art 9.
ensure contact orders are working effectively. A certificate can be issued under Art 41 which will have the effect of making judgements that comply with the conditions enforceable in another Member State ‘(...) without the need for a declaration of enforceability.’

Outside the EU, enforcement is achieved through the Hague Convention regime. Relocation from Scotland to non-EU States such as the US and Australia is very common, something which makes the Hague regime very significant and influential. Recognition of judgements under Art 23 of the Hague Convention 1996 can only be refused in limited circumstances. Similarly, there is no appeal against the issuing of a BIIR Art 41 certificate. This ensures that contact will be achieved as quickly as possible and cannot be frustrated by drawn out appeals. This framework for recognition can relieve some worry and dispel doubts for the non-relocating parent. However, it is still easily circumvented once the relocating parent actually moves. Under BIIR Art 9, the former jurisdiction only has the power to modify an order, not to enforce it. Enforcement of an order is carried out in accordance with the domestic laws of the new jurisdiction. The non-relocating parent will therefore have to apply to the court in the new jurisdiction if the contact order is not being adhered to by the relocating parent. This is often difficult, expensive and the cause of delay, all of which frustrate contact. As such, although BIIR and the 1996 Hague Convention seem to offer reassurance regarding the enforcement of contact orders, they are unlikely to be completely effective. Those who intend to abide by the contact order will not need to rely on such regulations. Yet the regulations will only provide limited protection to non-relocating parents who suffer if the relocating parent never intended to comply with the order and utilises any available method to obstruct contact. The courts cannot force parents to have good relationships with either their children or the other parent following relationship breakdown. Even in domestic cases, the courts often admit defeat even

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209 ibid Art 41. Judgements will receive an Art 41 certificate only if they comply with the requirements in paragraph 2 of Art 41. For further discussion on enforcement of contact orders abroad, see Re H (A Child) [2010] EWCA Civ 915 and Re G (A Child) [2006] EWCA Civ 1507. Judgements can also be recognised under Art 21.


211 Fawcett v McRoberts 326 F 3d 491 (2003) is one example of a long-running, cross-border dispute between parents. The father granted an undertaking that he would not remove the child from the UK ([4]). Nevertheless, in breach of this promise, he subsequently took the child to the US ([5]). This initiated much litigation in the US under the 1980 Hague Convention. The federal court in Virginia indicated that a court order should be made for the child’s return to Scotland on the basis of the 1980 Hague Convention and the International Child Abduction Remedies Act (ICARA), 42 USCA ss11601-11610 (West 1995) ([1]). However, the Court of Appeals reversed this decision, holding that the federal court had erred in its application of Scots law, notwithstanding the fact that the child had already returned to Scotland ([43]).


213 BIIR (n178) Art 43(2).


215 For example, parents can refuse to disclose their address, refuse to allow the children to fly for arranged contact meetings or not let the children see the father when he flies over. It is extremely difficult for the courts to enforce contact with a non-compliant parent.
though it means the child will not see their father.\footnote{In Re D (A Child) (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam), Munby J said that the father was entitled to feel let down by the system and that there was much wrong with the courts’ current approach ([2]). After a 5 year battle to obtain contact with his child, caused by substantial delays and baseless allegations by the mother, Munby J accepted that the court system had failed him [59] and that no contact could be awarded.} As a result, if the court makes a relocation order based on the assumption that the contact prescribed will actually occur, ‘(...) this assumption ought to be seriously questioned.’\footnote{Patrick Parkinson & Judy Cashmore, ‘The need for reality testing in relocation disputes: Empirical evidence from Australia’ (International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions, Cumberland Lodge, Windsor, England, 2009) 15.} More guidance is needed to ensure courts have the tools at their disposal to secure cross-border contact.\footnote{Hannah Baker, Juliane Hirsch, Nicolas Sauvage, ‘International family relocation from an English, French and German perspective’ [2012] IFL 97, 102.}

A number of commentators have suggested that the only practical way in which the law can deal with the significant variance of circumstances in relocation cases is to afford judges a significant degree of discretion through the broad, vague ‘welfare principle’.\footnote{See, for example, Greenberg et al (n162) 139; Tim Carmody, ‘Moving On with Relocation Law Reform’ (2007) 45 Fam Ct Rev 214; Timothy Scott, ‘The retreat from Payne: MK v CK’ (2011) 41 FL 886.} Although this again leads to inconsistency, uncertainty and difficulties for judges in coming to a decision, it is more effective and appropriate than a presumption or specific rule. Concrete rules are unable to respond swiftly, and are too blunt to deal with the difficulties and complexities of individual cases. The Washington Declaration adopts the best practices of both worlds. By utilising the discretionary ‘welfare principle’, it ensures that individual circumstances can be taken into account; then again, by outlining a number of factors that should be considered based on statute, common law, empirical research and social science, the Washington Declaration removes the risk of serious injustices and inconsistencies. Ultimately, it will create the situation where judicial discretion allows for individualised justice relevant to the specific facts of the case but within the limits of certain restrictions. It is argued here that the Declaration should become legally binding on signatories and applied with more force in jurisdictions around the world as the best current international standard. Creating clear and internationally accepted relocation legislation, such as that represented by the Washington Declaration, is only part of the solution. Further work is also required in order to ensure that orders relating to cross-border contact are enforced and adhered to. The frustrating fight for contact is very difficult for all parties and the regime in place is only marginally helpful. It is often the case that relocation creates an insurmountable barrier to the continuance of parental relationships. There is a need for further research to test the reality of relocation decisions to ensure they are actually working. A system of monitoring the situation after relocation is vital to ensuring that contact rulings are enforced, that relocation has been successful and that legislation is effective. It would be helpful if a monitoring body were created that possessed the power to intervene in cases where contact orders were not working effectively or to notify an organisation, such as a
supranational EU body, that could then intervene. However, in the international sphere and even the EU, this aspiration remains unrealistic. The best way to ensure improved and more acceptable solutions to relocation disputes is to utilise the process of mediation. Mediation should be promoted to a much higher extent in domestic as well as cross-border cases. The Washington Declaration makes mediation a ‘major goal.’ Contact will function most effectively when it is based on collaborative agreement; hence cooperative relationships are more likely to emerge from mediation than from court cases.

6. Conclusion

For the judges involved, relocation disputes ‘(…) present some of the knottiest and most disturbing problems that our courts are called upon to resolve.’ There appear to be no right answers in these cases as ‘(…) all practical answers are to some extent unsatisfactory and therefore to some extent wrong.’ No jurisdiction has effectively met the needs of all parties and no system is perfect. There is still a lot of work to be done but the efforts so far are productive steps. Rauscher points out that contact between the child and the non-relocating parent is a delicate, time-sensitive issue. As such, it is important to implement mechanisms to ensure contact is enforced and that relocating parents cannot obstruct contact taking place. Both parents are tied together by the indissolubility of parenthood. However, it should probably be accepted that the parent-child relationship is never going to be the same following relationship breakdown. When both parents have a loving and strong relationship with their child, yet one parent wishes to move away, the law generally cannot provide an acceptable answer. In many cases contact can be completely severed with the non-relocating parent, and the child is required to contend with huge and insurmountable change only rectifiable once they reach adulthood.

In the international sphere, the Washington Declaration provides an important benchmark that should be adopted in all jurisdictions worldwide as the best process to resolve relocation cases in the interim. In Scotland, adoption of the Washington Declaration would provide a more appropriate solution than that currently utilised. The Scottish approach is currently too vague and uncertain. However, a statutory checklist or a rights-based approach would not fully encompass the rights of all either. It is argued that the neutral approach adopted by the Washington Declaration is more in line with the best interests of the child. With the shift towards shared parenting it allows for consideration of all factors in the dispute and does not pre-determine any judicial decision. Mediation is also an

220 Washington Declaration (n180) para 8.
222 G v G (Minors: Custody Appeal) 1985 1 WLR 647, 651 (Lord Fraser).
223 The passage of time will work against the best interests of the child: the longer the separation, the more estranged the child will become, thus reducing the rationale for contact. See Thomas Rauscher, ‘Parental Responsibility Cases under the new Council Regulation “Brussels IIA”’ (2005) 1 European Legal Forum 37, 44.
225 When the father has only limited contact with the child, the decision is less challenging.
indispensable tool that should be utilised to a much greater extent in Scotland, thus helping to create more agreement and continuing relationships.

There is no doubt that international consistency would ensure the desired gold standard. This would create better decision-making and help ensure that each jurisdiction protects the child’s right to have consistent and valuable contact with the non-relocating parent. The Washington Declaration has the potential to become the international protocol, thereby significantly increasing the transparency of decision-making, and ensuring careful consideration of the interests and rights of all parties in relocation cases. However, in conjunction with the Washington Declaration there needs to be greater enforcement of contact orders, with the possibility of this being administered by a national or international body to ensure compliance. The recognition of cross-border contact orders requires confidence in the law and policy of other legal systems and it is felt that this would emerge from international consensus. Ultimately, cases involving child relocation should be dealt with by a small group of specialist and experienced judges in each jurisdiction to ensure that cases are dealt with effectively and to remove the perception of uncertainty and a lack of clarity in this area of law. There is also a need for more research into relocation disputes to assess whether, and in what direction, further international legal developments should progress and to test the reality of relocation decisions to ensure they are working effectively. Whilst significant progress is still required, there can be optimism that developments are heading in the right direction.