

Emigrating with Children

A practical guide

The application

1. Does the non-resident parent have parental responsibility?
 - (a) Strictly speaking, a mother with sole parental responsibility for a child need not seek the consent of the father to move abroad with the child.

However:

- (b) Permission should be sought where the father has a pending application for an order pursuant to Children Act 1989 before the court.
 - *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146
 - (c) Permission ought to be sought where the father is having regular contact with the child.
 - *Re V (Jurisdiction: Habitual Residence)* [2001] 1 FLR 253.
2. Is there a residence order in force?
 - (a) If so, then application needs to be made pursuant to Children Act 1989 section 13.

Change of child's name or removal from jurisdiction

(1) Where a residence order is in force with respect to a child, no person may –

- (a) cause the child to be known by a new surname; or
- (b) remove him from the United Kingdom;

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

- (b) If not, then application is to be made for a specific issue order pursuant to section 10. Alternatively, application could be made for a residence order.
3. Should the non-resident parent make a counter-application?
- Contact order
 - Prohibited steps order
 - Residence order

The legal test

- *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473, [2001] 1 FLR 1052
- *Re C (Permission to Remove from Jurisdiction)* [2003] EWHC 596 (Fam); [2003] 1 FLR 1066 at 1070

1. Is the proposed move genuine and realistic?

- (a) Genuine:

Three categories of case:

1. Employment opportunities for applicant or partner
2. Return to cultural roots
3. Lifestyle choice

The application must not be motivated by some desire to exclude the non-resident parent.

- (b) Realistic:

- Living arrangements
- Schooling
- Employment
- Cultural and family advantages
- Conditions in the host country

2. What would be the effects on the non-resident parent?

- Strength of relationship with the non-resident parent
- Effect of the move on the relationship
- Contact proposals

3. What would be the effect of refusal on the emigrating parent?
 - To what extent would a refusal cause unhappiness, bitterness and distress?
 - The impact on any new family unit
 - Lost opportunity
 - Negative aspects of continuing to reside in the UK

4. Overriding view of the child's welfare
 - Apply 2 and 3 above
 - Advantages of existing living arrangements
 - The effect of change
 - Loss of current UK schooling
 - Advantages of returning to the maternal homeland

Relevant authorities:

Re C (Permission to Remove from Jurisdiction) [2003] EWHC 596 (Fam);
[2003] 1 FLR 1066

The mother wished to move to Singapore with her new partner and two children aged 11 and 8¾. Charles J. found the case to be finely balanced and gave the mother the option to consider the points made and to agree to stay in the UK. He concluded that her happiness as primary carer otherwise lent to permission being granted.

Tyler v Tyler [1989] 2 FLR 158

The mother's desire to move to Australia was reasonable and sensible, and the court recognised that refusal of the application would cause the mother bitterness and frustration. Nevertheless, there was a strong bond between the children and their father, and for all practical purposes real contact between the children and the father would come to an end if they went to Australia. The application to emigrate was refused.

M v A (Wardship: Removal from Jurisdiction) [1993] 2 FLR 715

The mother's plans to move to Canada were ill thought-out and poorly researched. The children also expressed a wish not to change the status quo. Permission was refused.

Re B (Children) (Removal From Jurisdiction) [2001] 1 FCR 108

It is important to have regard to the whole period of the children's dependence when considering the application and its effects, and not just the next twelve months.

Re B (Removal from Jurisdiction); Re S (Removal from Jurisdiction) [2003] EWCA Civ 1149; [2003] 2 FLR 1043

Where a refusal to permit emigration would jeopardise the continuation of a new family unit, then that is likely to be manifestly contrary to the child's welfare.

Re T (Removal from Jurisdiction) [1996] 2 FLR 352

The court of first instance was wrong to have ordered a transfer of residence to the father as the mother had said she would not emigrate without the child if leave was refused.

Re Y (Leave to Remove from Jurisdiction) [2004] 2 FLR 330

Where there is effectively shared residence, then the court is unlikely to give permission to one parent to emigrate with the child.

R v R (Leave to Remove) [2004] EWHC 2572 (Fam); [2005] 1 FLR 687

The emotional stability of the applicant parent may be a relevant factor.

An assurance or undertaking by the applicant parent that the English court will retain jurisdiction in relation to future issues has no effect once the child has become habitually resident in the new jurisdiction.

Re M (Leave to Remove from Jurisdiction) [1999] 2 FLR 334

The Canadian authorities would not allow the mother to advance her application for permanent residence in Canada until she had obtained permission to remove the child from the United Kingdom. Her plans before the English court were therefore inchoate. The court granted her conditional leave to remove the child, subject to her making reasonable contact proposals for the father once her plans to move to Canada had been progressed.

Re S (Removal from Jurisdiction) [1999] 1 FLR 850

It was appropriate to attach strict conditions to the order, including a requirement that the mother obtain at her own expense the authentication of the contact order in the Chilean Supreme Court. As that process could take 3-4 months, and it was not in the child's best interests to delay the planned departure, the court ordered that the mother lodge £135,000 in a deposit account in the name of the father's solicitors, pending notification to the father that the authentication had been implemented.

Recent Court of Appeal guidance:

Re S (Children: Application for removal from jurisdiction) [2005] 1 FCR 471

The court must be careful when classifying proposals to emigrate as “lifestyle choices”, albeit that a lifestyle choice to move is no bar to an application being granted.

Re G (Removal from Jurisdiction) [2005] 2 FLR 129

A mother should not be criticised for failure to produce evidence of her proposed business activities in Argentina, given that she had not yet had an opportunity to embark upon them. The court has to consider the impact of refusal on both the mother and the children.

Re B (Leave to remove: Impact of refusal) [2005] 2 FLR 239

It was important to give great weight to the emotional and psychological well-being of the primary carer, and not merely to take note of the impact on the primary carer of a refusal. There is no reason in principle to distinguish between a “lifestyle” case – where the motivation is to improve general living conditions – as against a wish to return to one’s roots, or to take up an employment opportunity.

Evidence:

1. Evidence filed in support of an application needs to be full. It should exhibit ample independent evidence.
2. Depending on the nature and reasons for the proposed move, any statement in support of the application ought to include matters such as:
 - Proposed employment contract
 - Letters from prospective employers
 - Property agents’ particulars of proposed accommodation
 - How the cost of the accommodation will be funded
 - Maps setting out
 - Amenities
 - Distance to support and relatives
 - Prospectus for the proposed school
 - Letter from the class or head teacher at the proposed school

- Cultural advantages
- Family support
- Medical services
- Detailed proposals as to contact
 - Details of how contact is to be facilitated in practice
 - Details of costs of transport for contact and who will pay
- Where appropriate, evidence of the nature of the legal system in the proposed country and the availability and effectiveness of mechanisms for ensuring contact

Contact for the non-emigrating parent:

1. Should there be a residence application?

Should there be a contact application?
2. Use the move as a negotiating tool. A father remaining in the UK who has a good relationship with the child should expect extended staying contact in school holidays. Webcams and e-mail means of contact should be built in to the contact provisions.
3. Construct safeguards as to contact in any order:
 - Precise and practical means of travel, including funding of the cost of travel.
 - A comprehensive mechanism for agreeing dates.
 - Means of enforcement in the host country:
 - Practical effectiveness of international law
 - Conditions on permanent leave to remove
 - *Re S (Removal from jurisdiction)* [1999] 1 FLR 850

Enforcing contact

1. Within the United Kingdom

- (a) Parents are in general free to move to another constituent part of the UK with their child, notwithstanding the views of the non-resident parent.
 - Child Abduction Act 1984 section 1
 - Children Act 1989 section 13

[United Kingdom is defined as England and Wales, Scotland, and Northern Ireland.

- Interpretation Act 1978 section 5, Schedule 1]
- (b) In exceptional circumstances, the court might place a condition on a residence order in relation to a child's proposed move with the UK.
 - Children Act 1989 section 11(7)
 - *Re H (Children) (Residence Order: Condition)* [2001] 2 FLR 1277
 - *Re S (A Child) (Residence Order: Condition)* [2001] 3 FCR 154
- (c) A contact order made in one part of the UK can be enforced in any other part where the child is habitually resident. The order must be registered in accordance with
 - Family Law Act 1986 *section 27* and
 - Family *Proceedings* Rules 1991 rules 7.8-7.15.

[The enforcement provisions in the Family Law Act 1986 apply to the Isle of Man in addition to the United Kingdom.

- Family Law Act 1986 (Dependent Territories) Order 1991]

2. Within the European Union

- (a) Since 01.03.05 all EU countries (except Denmark) are to mutually enforce other EU contact orders under the Central Authorities mechanism provided by Brussels IIR.
 - European *Convention* on Recognition and Enforcement of Decisions concerning Custody of Children 1980 (now only applies to Denmark)
 - Council *Regulation* (EC) No 1348/2000 ("Brussels II") has been replaced by
 - Council *Regulation* (EC) No 2201/2003 ("Brussels IIR")

- (b) Brussels IIR Articles 40 and 41 provide for the enforcement of correctly drawn and certified contact orders in EU member states:

Article 40

1. This Section shall apply to:
 - (a) rights of access; and
 - (b) the return of a child entailed by a judgment given pursuant to Article 11(8).
2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.
2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:
 - (a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;
 - (b) all parties concerned were given an opportunity to be heard; and
 - (c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.The certificate shall be completed in the language of the judgment.
3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

- (c) The certificate in Annex III can be found at <http://www.legaltext.ee/text/en/T80476.htm>

- (d) The country granting permission retains jurisdiction over contact for the first three months after the child has moved to the new country
- (e) Further international instruments are proposed.
 - European Convention on Contact Concerning Children

3. Hague Convention countries:

- (a) As with return order applications, enforcement is via the Central Authorities.
 - Hague Convention 1980 Articles 7 and 21
 - Child Abduction and Custody Act 1985 Schedule 1

Article 21

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

- (b) The Convention does not prevent a parent from applying for contact in the foreign court without reference to the Convention.
 - Hague Convention 1980 Article 29
- (c) The Hague Convention can only be used to enforce 'rights of access', rather than specific 'contact orders'.
 - *B v B (Minors) (Access: Jurisdiction)* [1988] 2 FLR 6
 - *Practice Note – Child Abduction Unit – Lord Chancellor's Department* (5 March 1993) [1993] 1 FLR 804:

"The duty of this Central Authority is to make appropriate arrangements for the applicant by providing solicitors to act on his behalf in applying for legal aid and instituting proceedings in the High Court under s 8 of the Children Act 1989."

- (d) These limits and the possibility of a new Protocol to meet them are being considered following the 2002 Special Commission.
 - Report of Special Commission at http://hcch.e-vision.nl/upload/abd2002_rpt_e.pdf
 - (e) The Hague Convention 1996 may assist if the UK were to ratify it.
 - As to potential for ratification, see the Lord Chancellor's Department consultation paper at <http://www.dca.gov.uk/consult/general/hague.htm#part3>
4. Non-Hague Convention countries:
- (a) Mirror orders
 - (b) Bonds or charges

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