GL v JL: Fare’s fair?

Introduction

The recent case of *GL v JL[[1]](#footnote-2)* was heard in the Outer House of the Court of Session and the opinion was delivered by Lady Wise. It related to an application for relocation of a child and, as with all decisions pertaining to children, the welfare principle was the courts paramount consideration. This short note shall provide a brief overview of the facts of the case, the submissions presented and the opinion delivered. It shall conclude the court was correct to refuse both orders on the basis of the welfare principle and the minimum intervention principle. However, it shall be submitted the case opens up the debate of whether Scottish courts, unlike their English counterparts, are misguided in their orthodox interpretation of the principle. *GL v JL*, and cases similar, provide discussion of the fairness of the welfare principle and the varying interpretations thereof.

Facts of the case

The pursuer, GL, was the mother of a two year old boy, O. Her husband, JL, was the defender and O’s father. The parties were married in October 2013 but decided their marriage had irretrievably broken down by May 2016.[[2]](#footnote-3) GL had stayed in Scotland for a number of years but after the breakdown of the relationship she wished to relocate to England, where she was originally from.[[3]](#footnote-4) She sought a residence order providing O would live with her in England and a specific issue order allowing her to remove him from Scotland, where he had lived all his life.[[4]](#footnote-5)

Submissions

Pursuer

GL gave evidence *inter alia* that she was O’s full time carer[[5]](#footnote-6) and she was of the opinion O’s primary attachment was to her rather than to his father.[[6]](#footnote-7) She asserted the defender, a partner in a law firm,“never” arrived home before 7pm[[7]](#footnote-8) and was sometimes as late home as 10pm[[8]](#footnote-9). Thus, she felt the defender had provided her with little support in bringing up O. GL averred the defender’s family had also failed to offer any help with the care of O.[[9]](#footnote-10) She explained she wished to move to Bromsgrove in England because there she would receive familial support in bringing up O.[[10]](#footnote-11) GL already owned a mortgage free property near to her parent’s home.[[11]](#footnote-12) GL’s parents would help care for O when she returned to work part time.[[12]](#footnote-13) GL craved that the defender be granted residential contact with O every alternate weekend.[[13]](#footnote-14) Also, she offered to bring O to Scotland one of those weekends, meaning the defender would only have to travel to England once a month to see his son.[[14]](#footnote-15) GL also proposed the defender be given one week residential contact during summer, which could be increased once O was of school age.[[15]](#footnote-16) GL admitted she had been witness to positive changes in the defender in relation to O including bathing him, reading to him and coming home earlier from work.[[16]](#footnote-17) However, GL argued the improvements only occurred in June 2016, after she sought legal advice on their separation.[[17]](#footnote-18) Finally, GL criticised the defender’s character throughout their marriage and claimed he was “domineering and controlling”.[[18]](#footnote-19)

Defender

JL refuted the pursuer’s averments and gave evidence to the court *inter alia* of hiswork computer log in times showing him routinely logging off between 5.20pm and 6.30pm.[[19]](#footnote-20) He disputed there had been any material change in his contribution to O’s care since June 2016.[[20]](#footnote-21) JL contended there was no financial or accommodation reason for the pursuer’s relocation.[[21]](#footnote-22) He claimed there also failed to be any employment basis for the pursuer’s move.[[22]](#footnote-23) Finally, JL argued the pursuer’s contact proposals were unrealistic and onerous on him but in any case he failed to trust they would be adhered to.[[23]](#footnote-24)

Decision

Both actions were refused by the court. With O’s welfare taken as the courts principle consideration, it was decided it would not be better for him to move to Bromsgrove. Further, such a move would be detrimental because the distance would significantly reduce the defender’s ability to be involved in O’s upbringing.[[24]](#footnote-25) The court held, *inter alia*, that the pursuer’s evidence was not entirely trustworthy or reliable. For example she was found to have a tendency to exaggerate, such as claiming things “never” occurred, when evidence proved otherwise.[[25]](#footnote-26) Despite the court making allowances for the stress of judicial proceedings, the pursuer was often found to be over emotional and distressed.[[26]](#footnote-27) Further, she failed to make any appropriate concessions during her cross-examination.[[27]](#footnote-28) The defender’s evidence was held to be much more reliable. [[28]](#footnote-29) He was composed throughout proceedings and provided information in an articulate and clear manner.[[29]](#footnote-30) Moreover, the pursuer’s descriptions of the defender’s character were held to be considerably embellished with the intention of tarnishing the court’s opinion of him.[[30]](#footnote-31) There was no evidence that he had been anything but a loving and caring parent.[[31]](#footnote-32)

The court found comparable characteristics of Bromsgrove and where O lived in Scotland. The two areas were alike in that they were both medium sized towns near to major cities .[[32]](#footnote-33) The findings were so similar the move was “almost entirely neutral from a child welfare perspective”.[[33]](#footnote-34) However, the court found it not to be the best outcome for O for contact with his father to be so limited as the move to England would result.[[34]](#footnote-35) Therefore, it was held no compelling reasons existed to support O moving to Bromsgrove, but there was an undeniable reason why he should not be relocated: the detriment it would cause to his relationship with his father. [[35]](#footnote-36) For, if the child was to continue to reside in Scotland both parents could continue sharing his care and upbringing meaning a more positive outcome for O.[[36]](#footnote-37)

Having heard evidence attacking the defender’s character and parenting style, the court failed to have confidence in the pursuer and her families’ likelihood of facilitating O’s contact with him.[[37]](#footnote-38) Ultimately, with O’s welfare taken as the paramount consideration, there failed to be any evidence in favour of the move but there existed a solid, undeniable argument in favour of the status quo.[[38]](#footnote-39) Finally, the court held there was no requirement to make an order because both parties agreed O should reside with the pursuer for the most part.[[39]](#footnote-40) It was not in O’s interest for an order to be granted because it was unnecessary. The court decided O’s care should be divided between the parties with the defender having O for five nights in a fortnight and the pursuer having him the remaining nine nights.[[40]](#footnote-41) It was held, it would be best if the parents agreed between themselves a detailed plan of how care should be split between them.[[41]](#footnote-42) However, if such an agreement was not possible, the court made it clear it would not hesitate to make an order comprising of the conclusions reached.[[42]](#footnote-43)

Analysis

It is submitted the court made the correct decision in rejecting both orders sought by the pursuer because there failed to be any compelling reason supporting the relocation, while there existed a strong case for it to be prevented: the detriment to the child's relationship with his father. The decision is difficult to argue with but the case itself ties into a wider debate within the realms of family law. The duty conferred on courts to take the child’s welfare as their paramount consideration when making decisions about their upbringing is on a statutory footing in Scotland[[43]](#footnote-44), England and Wales[[44]](#footnote-45). This duty is known as the ‘welfare principle’. The differences in approach emerge when one considers how courts have chosen to interpret the principle north and south of the border allowing for comparison for deciding which approach being better suited at providing an accurate and fairer assessment of a child’s welfare.

England and Wales

The primary care giving parent’s wellbeing is inextricably linked to their child’s wellbeing and this notion is recognised by the law in England and Wales. There is credence given to the emotional and psychological welfare of the primary carer for that consideration is believed to carry great weight in the assessment of the welfare of the child.[[45]](#footnote-46) The leading case is the Court of Appeal case of *Payne v Payne*.[[46]](#footnote-47) The court found that if the mother of the children involved was refused to relocate with her children:

 “her unhappiness, sense of isolation and depression could be exacerbated to a degree which could well be damaging to [the child]”[[47]](#footnote-48)

Thus, a primary care giver’s wish to relocate will be granted unless it can be shown it is incompatible with the welfare of the child. The *Payne* approach has been criticised for favouring the primary care giver[[48]](#footnote-49) and undermining the exact focus the principle sets out to promote. Eekelaar argues it fails to provide transparency[[49]](#footnote-50) because the approach hides the fact that the interests of others, namely that of the primary care giver, drive the decision. However, LJ Thorpe defended the approach for he understood it to protect child welfare rather than negate it:

“the child cannot draw on emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks.”[[50]](#footnote-51)

It is submitted LJ Thorpe’s argument holds force because it seems a correct notion that parental wellbeing will have a knock on effect to their child's wellbeing. A child is an extension of their parent and thus will be impacted by serious detriment to their parents wellbeing.

As mentioned, English decisions appear to show a tendency to prefer a residence parent’s request for permission to relocate provided the request is genuine, practical and reasonable and not motivated by a desire to cut off the non-resident parent’s contact with their child.[[51]](#footnote-52) In *GL v JL*, the court had suspicions of the integrity of the pursuer’s plans to facilitate contact with the defender and O if relocation was granted so therefore, it is suggested even had it been decided in an English court, the decision would have likely been the same.

Scotland

Scottish courts, however, have interpreted the welfare principle: “without any preconceived leaning in favour of the rights and interests of others”[[52]](#footnote-53) It prefers a more orthodox approach and treats a child’s welfare as the sole consideration. This holds symbolic value[[53]](#footnote-54) and courts are correct to consider children’s interests primarily, for they are the most vulnerable in family disputes and require the most protection. However, Eekelaar[[54]](#footnote-55) persuasively argues a strict view of the welfare principle provides a lack of fairness. He notes the principle “in its orthodox form can hardly be reconciled with due recognition of the rights of others”.[[55]](#footnote-56) The illustrates how the rights of adults are at times wholly undermined by the concept of child welfare, making for an arguably inequitable system. Although GL v JL was decided correctly, the welfare of the pursuer was eventually dismissed. GL, already having experienced her marriage collapse, was now prevented by the court from moving back to England where her parents and extended family lived. The pursuer was notably stressed and when quizzed by the court on why she wished to relocate she exclaimed: “its support, I need more support!”[[56]](#footnote-57) It could be argued that by denying this support, the court could have seriously damaged the woman’s wellbeing and this could, in turn, impact O’s wellbeing, ultimately hindering the pursuit of the principle. The welfare of the child is an extension of the welfare of their parent, especially in the early years of a child’s life, where they are so dependent on their parents and so, as Herring correctly warns:

“we do children no favours by regarding their interests as the only relevant ones.” [[57]](#footnote-58)

Further, Scottish courts consider the principle as an “individualistic construct”[[58]](#footnote-59) when in reality, it encompasses numerous factors. The principle, if interpreted in a vacuum, provides no reflection of the number of facets it holds in real life. With the child’s welfare as the courts sole consideration, they can only achieve an artificial formulation for their interpretation demands relevant factors be ignored, such as the wellbeing of a care giver. Therefore, it is suggested Scottish courts interpretation is short-sighted and misguided in comparison to our English counterparts.

Finally, in *GL v JL*, the courts use of applicable law is of significance. It was held the list of relevant factors in *M v M* was neither instructive nor appropriate.[[59]](#footnote-60) The court was correct because every case should turn on its own merit but it is submitted, the help of an illustrative list encourages for a broader understanding of the concept of the welfare principle. In doing so it provides a more realistic and fairer assessment of child welfare. Critics of the welfare principle argue a better alternative is relationship-based welfare which provides the virtue of the welfare principle while respecting the rights and interests of caregivers. This is the approach recommended by Herring and allows courts to weigh up a variety of factors to make an accurate assessment of the child’s welfare.[[60]](#footnote-61)

Conclusion

It is difficult to argue that the courts decision in *GL v JL* was incorrect because there failed to be a compelling reason for the move but the detriment of the proposed move to the defender’s relationship with his son supported the status quo. However the case ties into a wider debate of statutory interpretation by the courts. Scotland takes a narrower and stricter view of the welfare principle, while a wider view is taken by English courts, as seen in *Payne.* It is argued England's position is favourable because it correctly recognises a broader spectrum of factors involved and is better suited at providing a fairer and accurate assessment of child welfare. However, it is submitted a relationship-based welfare would be more effective than both jurisdictions current interpretation and should be considered in any future reform.

1. [2017] CSOH 60 [↑](#footnote-ref-2)
2. Para 1 [↑](#footnote-ref-3)
3. Para 1 [↑](#footnote-ref-4)
4. Para 1 [↑](#footnote-ref-5)
5. Para 10 [↑](#footnote-ref-6)
6. Para 16 [↑](#footnote-ref-7)
7. Para 11 [↑](#footnote-ref-8)
8. Para 11 [↑](#footnote-ref-9)
9. Para 18 [↑](#footnote-ref-10)
10. Para 17 [↑](#footnote-ref-11)
11. Para 14 [↑](#footnote-ref-12)
12. Para 79 [↑](#footnote-ref-13)
13. Para 18 [↑](#footnote-ref-14)
14. Para 18 [↑](#footnote-ref-15)
15. Para 18 [↑](#footnote-ref-16)
16. Para 23 [↑](#footnote-ref-17)
17. Para 12 [↑](#footnote-ref-18)
18. Para 21 [↑](#footnote-ref-19)
19. Para 11 [↑](#footnote-ref-20)
20. Para 44 [↑](#footnote-ref-21)
21. Para 44 [↑](#footnote-ref-22)
22. Para 44 [↑](#footnote-ref-23)
23. Para 57 [↑](#footnote-ref-24)
24. Para 81 [↑](#footnote-ref-25)
25. Para 67 [↑](#footnote-ref-26)
26. Para 67 [↑](#footnote-ref-27)
27. Para 67 [↑](#footnote-ref-28)
28. Para 69 [↑](#footnote-ref-29)
29. Para 69 [↑](#footnote-ref-30)
30. Para 73 [↑](#footnote-ref-31)
31. Para 73 [↑](#footnote-ref-32)
32. Para 79 [↑](#footnote-ref-33)
33. Para 79 [↑](#footnote-ref-34)
34. Para 81 [↑](#footnote-ref-35)
35. Para 81 [↑](#footnote-ref-36)
36. Para 81 [↑](#footnote-ref-37)
37. Para 82 [↑](#footnote-ref-38)
38. Para 84 [↑](#footnote-ref-39)
39. Para 85 [↑](#footnote-ref-40)
40. Para 86 [↑](#footnote-ref-41)
41. Para 86 [↑](#footnote-ref-42)
42. Para 86 [↑](#footnote-ref-43)
43. Children (Scotland) Act 1995 s11(7)(a) [↑](#footnote-ref-44)
44. Children Act 1989 s1(1) [↑](#footnote-ref-45)
45. Re B (Children: Leave to Remove: Impact of Refusal) [2004] EWCA Civ 956, [2005] 2 F.L.R. 239. [↑](#footnote-ref-46)
46. [2001] EWCA Civ 166 [↑](#footnote-ref-47)
47. Ibid, para 51 [↑](#footnote-ref-48)
48. M Hayes, “Relocation Cases: is the Court of Appeal applying the correct principles?” [2006] 18(3) CFLQ 351, p5 [↑](#footnote-ref-49)
49. J Eekelaar, “Beyond the Welfare Principle” (2002) 14 Child and Family L.Q 237, p237 [↑](#footnote-ref-50)
50. p31 [↑](#footnote-ref-51)
51. A Inglis, “Relocation, relocation, relocation” (2016) 19 SLT 93-98 [↑](#footnote-ref-52)
52. *M v M 2012* SLT 428, para 15 [↑](#footnote-ref-53)
53. J Herring, “Farewell Welfare?” (2005) Journal of Social Welfare and Family Law, 27(2), p168 [↑](#footnote-ref-54)
54. J Eekelaar, “Beyond the Welfare Principle” (2002) 14 Child and Family L.Q 237, p237 [↑](#footnote-ref-55)
55. *Ibid*, p239 [↑](#footnote-ref-56)
56. Para 25 [↑](#footnote-ref-57)
57. J Herring, The Human Rights Act and the Welfare Principle in Family Law - Conflicting or Complementary, 11 Child & Fam. L. Q. 223 (1999), p235 [↑](#footnote-ref-58)
58. A Moyo, “Reconceptualising the Paramountcy: Beyond the Individualistic Construction of the Best Interests of the Child”, 12 Afr. Hum. Rts. L.J. 142 (2012) [↑](#footnote-ref-59)
59. Para 9 [↑](#footnote-ref-60)
60. J Herring, “The Human Rights Act and the welfare principle of family law – conflicting or complementary?” (1999) 11 Child and Family Law Quarterly 223 [↑](#footnote-ref-61)