INTERNATIONAL SOCIETY OF FAMILY LAW

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PRESIDENT'S MESSAGE:

Dear Friends in Family Law,

Some of you were able to attend the North American Regional Conference at the Jackson Lake Lodge in Grand Teton National Park, Wyoming, last month. Those of you who weren't able to come missed some fascinating presentations and some congenial opportunities to chat with your colleagues over dinner, drinks, or while enjoying the dramatic scenery out the lounge windows.

The theme of the North American conference was "Family Realities and Family Law." The same theme will tie together presentations at the upcoming 2017 World Conference in Amsterdam.

As I listened to various fascinating presentations at the Tetons conference – which included information on new Italian legislation governing same-sex partnerships and cohabitants, new empirical research on cohabitation from Norway and on the relationship between custody and child support from the United States, and a range of new perspectives about marriage, parenting, family form, and family functioning – I found myself considering the conference theme and asking myself a number of questions.

First, what is family "reality"? A reality is, according to a standard English dictionary, "a real event, entity, or state of affairs," or "the totality of real things and events," or "something that is neither derivative or dependent but [which] exists necessarily." A family reality thus suggests something that families do or an essential aspect of what families are. But I am not sure that this gets us very far. Consider the reality of family violence. It is doubtful that there has ever been a time or place when some parents did not behave violently toward their children and some intimate adults did not behave violently toward their intimate partner. In the modern era, we view these violent realities as situations which Family Law should combat and sanction. But it was not so long ago that family law largely ignored family violence unless it caused serious injuries. Citing family privacy and harmony, courts and public officials were reluctant to intervene in family life unless a grave injury had occurred. Indeed, some behaviors that would have been viewed as a serious crime if inflicted on a stranger – rape of a spouse, for example, or caning a child – were explicitly sanctioned by both family law and criminal law when violence took place within the family circle.

Today, in most of the developed world, the law has shifted. But, even today, there is disagreement – among policy makers,

nations, and the public – over how much discretion parents should have in disciplining their children. Some nations have outlawed all corporal punishment; many others have taken the position that the widespread reality of corporal punishment, particularly within some ethnic and religious groups, requires preservation of a parental privilege to chastise a child physically. And some have outlawed corporal punishment for some groups of children but not others.

So, how should Family Law respond to Family Reality? The example of family violence vividly demonstrates that the sheer fact of a family reality tells us very little about the position that Family Law should adopt. Family law has a variety of policy goals, goals that are not always compatible. Family law strives to protect individual family members and ensure that their reasonable expectations are met; it also strives to promote family privacy and harmony. Family law channels families into paths and institutions thought to promote the public good; family law also aims to facilitate autonomous choices by family members.

With respect to family violence, and a wide range of other family realities, family law has shifted in its approach over the past half century. The goals that did, in an earlier era, seem paramount came to seem outdated. By and large, this shift in goals gave greater prominence to the interests of family members as individuals and placed lesser weight on the family as a social entity. But, to some extent, the changes also reflected changing perceptions of what a family is and what functions a family appropriately serves.

In sum, the topic Family Realities and Family Law is rich and far ranging. It invites us to consider every aspect of family life and to think long and hard about how family policy makers should respond to those realities. I hope you will begin thinking about how you want to address this theme as you began to plan for the next World Conference in Amsterdam.

Marsha Garrison
Marsha.garrison@brooklaw.edu

REPORT OF THE INTERNATIONAL SURVEY EDITOR:

The 2016 edition of the Survey is in its final stages of production. This year it contains 26 chapters representing all parts of the world from Albania to India, the Solomons to Chile, Canada to South Africa. I have been editing the Survey since 2007 and it is great news that Peg Brinig from Notre Dame, Indiana, has agreed to take over. Precise arrangements for the change have yet to be worked out, but, as newsletter editor and a long time servant of the Society, Peg will be superb as the next General Editor of the Survey. The task involves many hours of hard work but the results are rewarding. I have greatly valued the connections with so many authors, who have brought a depth of knowledge of their own jurisdictions to bear on their writing.

Bill Atkin
June 2016

REPORT OF THE WEBMASTER:

We are continuing to develop and improve the website. Please feel free to suggest content, or to send reports on recent developments in your country.

The generic password for members is ISFL2014 (it is not case-sensitive). If you want to change to your personal password, go to Update Member Details and then Update Password.

The website also allows you to find out when your membership expires if you are a current member. If your membership has already expired, it will ask you to renew.

To renew your membership, just log in with your email address. There have been a few problems because the last email address we have was out of date. If you have any difficulties please contact me at patrick.parkinson@sydney.edu.au. I can look up the email address we have for you.

Prof. Patrick Parkinson
University of Sydney

REPORT OF THE NEWSLETTER EDITOR:

I (and the Executive Council with me) welcome comments about the general format of the newsletter. This edition features two more brief articles about family law changes in Brazil and Greece for the "What's New?" section. This type of addition would be particularly welcome in the times, like the present, between World Congresses.

We also repeat the feature inspired by the Colloquium Hugues Fulchiron and his team conducted in Paris in April of 2015. This time, the problem on international relocation that we have reproduced at the beginning of the feature was written by Jo Miles, and various council members and younger scholars under their supervision have added "answers" from their countries' perspective. We hope it will not only be informative but also useful for comparative family law.

Many of you kindly send me updates of changes to your email addresses. This is very important, since otherwise not only will you miss the Family Letter, but also other notices that the Board sends out increasingly often from the website. When you get these notices, please do not reply to me but to the address indicated in the notice. The most important place to send changes of address is to Masha Antoloskoia, our Treasurer, though I will forward her your notes about address changes that are sent to me.

Masha and Patrick Parkinson worked hard to reconcile our membership lists and finally think they are up to date on paid members. In doing this arduous work, we have discovered that we have lost many members for a variety of reasons. While we have always been interested in attracting new members to the ISFL, at this time it is particularly important to do so. We ask you please to contact us about your associates who might have not updated addresses and emails, so that they have been dropped from membership. Further, if you know of junior colleagues in family law who might be interested in the Society, kindly let them know how you personally have profited from the Society. Several junior scholars new to ISFL attended the recent North American Regional Conference, and hopefully they will continue to be active.

For me personally, the knowledge gleaned over more than 25 years now from the ISFL

community of family law scholars has been really significant. I have benefited even more from the friends from all over that I have made and what I have learned about family cultures around the world and how we handle our similar issues in our various ways. I have also really enjoyed being the editor of the Family Letter for ten years now, though I know that Robin Wilson, who will be replacing me in 2017, will do a wonderful job and will continue to make it more informative and helpful for ISFL members.

The instructions for reaching the membership directory are included below, in Patrick's notes.

Margaret F. Brinig, Editor
The Family Letter
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OTHER PUBLICATION NOTICES

The *Child and Family Law Quarterly* is a multi-disciplinary journal covering all aspects of child and family law. It provides a forum for the publication of high quality research material, analysis and commentary, all of which influence policy and promote debate. Now in its 28th year of publication, the *Child and Family Law Quarterly* is the leading UK-based journal devoted to these subjects. Although primarily carrying material from and relating to the UK, it encourages submissions from around the world and each issue usually contains at least one contribution from another jurisdiction. The editorial team is led by Professors Gillian Douglas (Cardiff University), Jonathan Herring (Exeter College, University of Oxford) and Rebecca Probert (University of Warwick). Our Editorial Board consists of leading figures from the academic and practice worlds in the UK and includes Baroness Hale of Richmond and other senior members of the judiciary in England and Wales. Its work is supported by an International Advisory Board of distinguished academics from around the world.

The journal is available on the Social Science Research Network (SSRN) and HeinOnline, and is fully compliant with the open access policies of the Higher Education Funding Council for England (HEFCE) and Research Councils UK (RCUK).

Full details of the journal's subject matter, submission requirements, style guide and publication formats are available at www.familylaw.co.uk/cflq

CONFERENCES AND CALL FOR PAPERS:

Registration for the 16TH ISFL WORLD CONGRESS FAMILY LAW AND FAMILY REALITIES that will be held in Amsterdam, The Netherlands from 25 to 29 July 2017 will begin in June 2016. You will receive a separate email with the information about the registration.

Masha Antokolskaia
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WHAT'S NEW?

NEWS FROM BRAZIL

a) Mediation in Family Procedures

The recently enacted Brazilian Civil Procedure Code (Federal Law No. 13,105/2015) contains several provisions stimulating alternative dispute-settlement mechanisms, among which the mediation holds a special place. Specifically in the field of Family Law, the Code (art. 695) provides that, after receiving the claimant's complaint, the judge shall summon both parties to attend to a mediation session.

The interesting innovation is that, when summoned, the respondent will not receive a copy of the claimant's complaint, but only essential facts and information concerning the mediation session. The purpose of this provision is to avoid an extra stimulus towards litigation, since the claimant's complaint naturally contains a version of the facts that, being true or not, usually provokes in the respondent a feeling of hate and anger.

The new Code has the merit of introducing the mediation in Family Procedures, which will certainly help implement the spirit and culture of mediation, so that the parties can solve, better than a judge, their own conflicts.

Mediation can be used as a means for the parties to fully understand their conflicts, widening their conscience about its characteristics, consequences and facts.

The biggest problem in this mandatory mediation is that, at the moment, the Judiciary has not enough means and it is not equipped for this process.

b) Legal Capacity of Persons with Disabilities

Persons with mental or intellectual disabilities are no longer to be considered as absolutely incapable before the Brazilian Law.

This alteration on the provisions regarding the capacity of persons with disabilities had already been provided by the United Nations Convention on the Rights of Persons with Disabilities, ratified by Brazil and incorporated into its law by the Legislative Decree No. 186/2008 (the Convention's article 12 provides that "*persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life*").

However, the recently enacted Federal Law No. 13,146/2015 (Statute of the Person with Disability) regulates the Convention and goes further in the promotion of disabled persons' legal capacity, providing that the only ones that are absolutely incapable before Brazilian Law are the children under 16 years old.

According to this Statute (article 84), only in exceptional situations may the persons with mental or intellectual disabilities be subject to a trusteeship, and then always subject to their best interest and not in the interest of relatives or third parties.

However, this trusteeship, unlike the previous total incapacitation, shall be proportional to the needs and

circumstances of each case. Therefore, this trusteeship is not an interdiction of the person to exercise rights, but instead is a protective measure that only affects the acts involving a property nature.

Another innovation of this law is the so-called "Decision-Making Support", under which the person with disability choses at least two trusted and reputable persons with whom he or she has a relationship to support him in making decisions regarding acts of his civil life. According to the spirit of this new statute, the Decision-Making Support seems to have been chosen as the preferable means for the protection of persons with disabilities.

c) CNJ Bars Public Deeds on Polygamy Relationships

The Brazilian National Council of Justice (CNJ), the organ responsible for the supervision and control of the Brazilian Judicial System, has recently issued a preliminary decision suggesting notary and registry offices not to issue public deeds that regulate the affective relationships involving more than two persons.

The decision, even though not binding to the registry and notary offices, is a suggestion (and not a prohibition) until the matter is fully and deeply discussed, since it goes beyond the interests of the persons involved in the affective polygamy relationship. Moreover, such relationships have impacts in different areas of Law, such as Tax Law, Inheritance Law and Social Security Law

The constitutionality of this kind of relationship is being intensely debated in Brazil, since the Brazilian Constitution and the case law provide that only a relationship between two persons is recognized as a family entity. Therefore, a new interpretation of the Brazilian Constitution needs to be promoted so as to allow for the formalization of these new kinds of relationships.

José Fernando Simão

NEWS FROM GREECE

Greek law on cohabitation between persons of opposite or same sex.

Penelope Agallopoulou
Professor Emeritus of the University of Piraeus, Greece

The Law 3719 of 26 November 2008 was the first law on cohabitation in Greece, and was restricted to persons of the opposite sex. Eight years later, Law 4356 of December 24, 2015, abolished the previous regulation and regulated cohabitation between persons of the opposite and of the same sex alike. The main provisions of the new law are as follows:

1. Concluding the cohabitation agreement

A prerequisite for the conclusion of a cohabitation contract (between persons of opposite or same sex) is that both parties are fully capable of concluding juridical acts. Cohabitation contracts are made in the form of a notarial deed. Such an agreement enters into force as soon as a copy of the contract is

submitted to the registry of the couple's place of residence and is filed in a special archive.

2. Termination of the cohabitation agreement

The contract of cohabitation can be terminated consensually provided that the termination is concluded in the form of a notarial deed. The termination can also be unilateral, in which case the wish of the party to dissolve the cohabitation must be communicated to the other party by a bailiff after an invitation for mutual agreement and a period of three months after the notification has passed. The agreement of the termination of the cohabitation contract or the unilateral declaration of the one of the parties is filed in the same special archive, where the original agreement was registered. The contract of cohabitation is terminated *de jure and only in case that the contract is concluded between persons of opposite sex* as soon as the cohabitants marry each other.[1]

3. The cohabitants' surname

The cohabitation contract does not bring about a change of surname of any of the cohabitants. Socially, each contracting party can use the surname of the other cohabitant or add it to his /her own, provided the other consents to this.

4. Property relations

The law provides that the cohabitants can regulate their property relationship in the cohabitation contract. If they have not made an agreement each partner can, after the termination of cohabitation, claim the increase of the assets of the other party to the extent he/she has contributed to it. The burden of proof of the contribution of the one cohabitant to the increase of the assets of the other lies with the claimant. However, there is a rebuttable presumption, following the same provision that applies in cases of dissolution or annulment of the marriage, according to which the contribution is one third of the increase. Thus after the termination of the cohabitation contract, the provisions of the Civil Code concerning the claim to participate in the increments are applied by analogy.

In case of the death of one of the cohabitants, a claim to the increment of the assets accumulated during cohabitation does not lie to the benefit of the heirs of the deceased cohabitant nor can it be part of the deceased's estate: the surviving cohabitant can exercise the claim in question against the heirs of the deceased. This claim is valid for two years after the termination of the contract.

5. Maintenance after the termination of the cohabitation agreement

For maintenance after the termination of the cohabitation agreement, the provisions of the Civil Code concerning the maintenance after divorce are applied by analogy, unless the cohabitants have resigned from this obligation. More specifically:

The claim of one of the former cohabitants to maintenance presupposes on the one hand the claiming cohabitant's inability to secure his/her own maintenance, even if he/she were to spend his/her principal, and on the other hand the ability of the other former cohabitant to provide such maintenance.

In addition to those general preconditions, the former cohabitant who is entitled to maintenance must also

[1] Marriage between persons of same sex it is not recognized in Greece.

be unable to exercise a suitable profession on account of his/her age, health, or the need to care for a minor child, or on account of his/her inability to find stable work or his/her need for professional training. Finally, it is possible for maintenance to be granted to the former cohabitant for reasons of equity.

6. Right of inheritance

Upon the termination of the agreement because of the death of one of the cohabitants, it is also provided that the dispositions of the Civil Code concerning spouses are applied by analogy. More concretely: The survivor is entitled as an 'heir in intestacy' as regards the relatives of the first rank (e.g. descendants of the deceased) to 1/4 of the estate and with the relatives of the other ranks (e.g. parents, siblings, grand-parents) to $^1/_2$ of the estate. If there are no relatives of the deceased, the surviving cohabitant is called an intestate heir to the entire estate. The surviving cohabitant has right to a forced share in the estate but there the cohabitants have also the right to resign from this right. The forced heirship share is ½ of the intestate succession share.

7. Children born during a cohabitation agreement

In case of cohabitation agreement between persons of the opposite sex the registered cohabitant of the mother is presumed to be the father of the child born during the cohabitation agreement or 300 days after its termination. Children born during the cohabitation have all the rights, hereditary and otherwise, of children born to married parents.

The surname of the children is determined by a joint declaration of the parents, before the birth of their first child and it can be any combination of the surnames of the parents, but not more than two surnames. If the parents have not made such a declaration, the child has the surnames of both parents.

Both parents exercise parental care, like in marriage.

AN INTERNATIONAL RELOCATION PROBLEM AND SOME POSSIBLE SOLUTIONS

The following problem was drafted by Jo Miles and was the subject of discussion at the April, 2016, Colloquium held in London in conjunction with the Executive Council meeting.

Sam and George are a married couple who met in London and then married there in 2004. They have two children, Peter and Molly, aged 10 and 5. Sam is originally from New Zealand, and all of her family still live there; she migrated to the UK as a postgraduate student a couple of years before meeting George. The couple moved out to New Zealand for three years in the middle of their marriage, but relocated back to London in 2011 when their eldest child was ready to start school. They divorced in England a year ago after 12 years of marriage. The children have had their main home with Sam since the divorce, but spend alternate weekends and half of the school holidays with George and his new partner, Daisy, who is pregnant with their first child. Sam has recently decided that she wants to go home to New Zealand, taking the children with her, in order to be close to her family and to take up a good job offer that she

has just received; she also thinks that New Zealand provides a much better environment for raising children, and says now that she wasn't entirely happy with their original move back to London for that reason. George is strenuously opposed to this move, concerned about the impact that it will have on his relationship with the children and their ability to form a relationship with their new half-sibling, when he or she arrives.

Discuss from the point of view of your own jurisdiction (where the divorce was granted), and assume that the proposed relocation is to a country many time zones removed, so that frequent exchanges are impossible/impractical, but where the same language is spoken.

Would your analysis differ if Sam and George had never married, but were separating after a 12-year relationship?

Would you analysis differ if, since the divorce, Peter and Molly had spent roughly equal amounts of time with the children?

SOLUTION FOR BRAZIL

From the point of view of the Brazilian jurisdiction, in case the divorce was granted in Brazil, and the proposed relocation was to a country such as the ones in the Portuguese Africa (in both countries the Portuguese would be spoken), the following remarks would apply.

As a first remark, it is important to stress that the "custody" theme has already been subject to three different regulations since the Brazilian Civil Code entered into force 13 years ago. Therefore, new amendments concerning this subject could still be enacted in the following years.

Nowadays, the joint custody is the rule in Brazil (art. 1.584, §2, of the Brazilian Civil Code), and shall be granted by the judge whenever it is feasible and aligned with the best interest of the child. This implies that the rule should only be left aside when the exclusive custody is within the best interest of the child.

Even in the case of exclusive custody (which seems to be the case in the present problem) all the measures and decisions of the parents shall be in accordance with the best interest of their children. This includes the decisions regarding relocations, especially when they affect the child's possibility of spending time with both parents.

In the present case, there are strong arguments supporting both sides of the proposed relocation (i.e., the acceptability of the proposed relocation or its rejection). On the one hand, since the children are of young age, they are more adaptable to country changes. In this case, this argument is strengthened by the fact that the older child has even lived there for three years, so that this relocation would not have a deep impact in the children's adaptability.

The second factor is the essentiality of the proposed relocation. It appears from the case that the relocation is essential, since Sam has got a good job offer in New Zealand and the children there will be close to their mother's family. If this were not the case (i.e., supposing the relocation was caused just by a selfish desire of the mother to be away from her previous partner or to keep the children away from their father), the arguments pro-relocation would be weakened.

Another factor is the conviviality between Peter and Molly and their future half-sibling from their father side. One must take into consideration that the proposed relocation

will prevent the children from a healthy and intense conviviality with their half-sibling, which would only be possible in school holidays, for a short amount of time. This point certainly weakens the mother's intention to relocate. However, this topic should be weighed against the previous topic (i.e., the conviviality with the maternal grandparents).

Moreover, one must take into consideration if the one who caused the relocation (Sam) would be able to pay for the children to visit their father in the UK. Although not expressly provided in Brazilian Law, this could be a point that weakens the mother's intention. In case the relocation is approved and the parents have no means to provide for the children to visit their father in UK, this would severely impair the conviviality between them.

Would your analysis differ if Sam and George had never married, but were separating after a 12 year relationship?

The analysis presented above would NOT differ if Sam and George had never married. This answer is identical for two main reasons.

The first is that the analysis is based upon the principle of the best interest of the children and not upon the relationship status of their parents. In Brazil, this principle bears no relationship with the type of marriage or relationship into which the parents of the children are involved.

The second reason is that in Brazil, parties to a non-marriage relationship are granted the same protection and rights as a civil marriage. This implies that no distinction should be applied to the parents regarding the type of relationship that they have.

Would your analysis differ if, since the divorce, Sam and George had spent roughly equal amounts of time with the children?

This can be inferred from the problem, since after the divorce Sam was granted the unilateral and exclusive custody of the children, while George had the right to spend time with the children in alternate weekends and half of their school holidays.

The joint custody presupposes the physical company, and an equal conviviality between the children and each of their parents (always taking on account if it is possible, in fact, sharing equally this conviviality). It is the rule in Brazil, since it usually serves the best interest of the child and is healthier for the children.

If such were the case in this problem, the relocation would necessarily lead to the adoption of the exclusive custody, since only the mother (Sam) would have the children in her company, and the father (George) would have the right to spend time with the children on school holidays. That means that the best interest of the child, which was previously served with the joint custody, would in some manner be impaired with the adoption of the exclusive custody. Especially in the case of joint custody, the Brazilian Civil Code expressly provides (art. 1583, §3) that the city where the children live shall be the one that best serves their interest. That being said, George would have some leverage against the relocation, since the best interest of the child would indicate the preservation of the custody as it was.

José Fernando Simão

SOLUTION FOR CHINA

According to current Chinese marriage law and judicial interpretation, in this case, if divorced parents Sam and George couldn't reach an agreement on the change of parenting relationship, they should bring a lawsuit on whether or not change the parenting relationship of the children. The court should make a judgment to support the maintenance of the original parenting relationship and the request to change the rights of parenting should not be approved.

Since the elder son Peter was 10 years of age, court should ask for his opinions on whether change the rights of parenting or not. If Peter prefers to live with his father, the court should respect Peter's willingness and make a judgment to change the rights of parenting.

With respect to the younger sister Molly, because of her young age, the relationship between her and her mother is more important than the relationship between her and her elder brother. Therefore, with regard to Molly, the court should make a judgment to support the maintenance of the original parenting relationship.

In this case, if Sam and George have never married but separated after 12-years of cohabitation, In terms of the legal proceeding about whether the parenting relationship change or not, the results of the legal process would be the same.

Finally, if Sam and George had spent roughly equal amounts of time with the children since the divorce, based on the principle of the best interests of children, the court should make a judgment to change rights of parenting of the two children to protect their physical and mental growth.

Again, since Sam and George's elder son Peter has reached 10 years of age, the court should ask for his opinions about a change of parenting rights. If Peter expressed his willingness to continue living with his mother, the court should respect this willingness and support maintaining the original parenting relationship.

In the circumstance where Peter's original parenting relationship is maintained, with respect to the younger sister Molly, considering the relationship between her and her elder brother is more important than the relationship between her and her half-blood brother or sister. The court should therefore make a judgment to maintain Molly's original parenting relationship so as to let her live with her elder brother and mother.

* Chen Wei, Professor of Civil and Commercial Law, Southwest University of Political Science and Dong Siyuan, is a doctoral student in Civil and Commercial Law, Academy of Southwest University of Political Science and Law

SOLUTION FOR ENGLAND AND WALES

Key legislation:

Children Act 1989, ss 1-13
Child Abduction Act 1984

Key cases:

K v K (international relocation: shared care arrangement) [2011] EWCA Civ 793
Re F (Relocation) [2012] EWCA Civ 1364
Re F (International Relocation Cases) [2015] EWCA Civ 882
Re C (Internal Relocation) [2015] EWCA Civ 1305

Endnotes follow, on page 21

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Response to main question:

Where parents are married, then in English law they both automatically have parental responsibility (PR) for the child from birth: i.e. full decision-making capacity in relation to the child's upbringing, with associated rights and duties.[2] Under the Child Abduction Act 1984, it is a criminal offence for any person – including a person with PR – to remove the child from the jurisdiction for more than 1 month[3] without either the consent of all those who have PR or a court order. Since G has PR and is not consenting to the removal, S must apply to the family court for permission to emigrate with the children to NZ, under a child arrangements order and/or specific issue order under s 8 of the Children Act 1989 (CA 1989). This is the case even if S currently has the benefit of a child arrangements order specifying that the children should "live with" her whilst spending designated time with G: possession of such an order is not a passport to live with the children anywhere in the world. If G were at all worried that S might simply leave without permission and wished to avoid the hassle of Hague Convention proceedings in the destination country, he could apply to the court for a prohibited steps order (PSO) under s 8 CA 1989. However the matter reaches the court – whether on S's application or G's – its consideration of the substantive issues will be identical. (Although an application for a PSO would be dealt with immediately, usually on very limited evidence, whereas the application for leave to remove will take several months and require extensive evidence.)

Under s 1 CA 1989, the court's paramount consideration in deciding any matter in relation to the child's upbringing is that the child's best interests are the "paramount" consideration. It is well-established by case law that by "paramount", English law means "first and ***only***" consideration.[4] This is a matter of some controversy in so far as that appears to afford no room for independent consideration of the rights and interests of other family members, including the parents, under Article 8 of the European Convention of Human Rights, which includes a right to respect for family life. If S is permitted to go, such a move would inevitably interfere with G, P and M's right to respect for their family life together, and prima facie that impact should be evaluated under Art 8(2): does the interference pursue a legitimate aim and is the interference necessary and proportionate in pursuit of that aim? While there are suggestions that the Strasbourg court does now itself give the child's interests paramount weight under Art 8, it is

not clear that that is so in private law proceedings such as these, and the point remains open.[5] English judges, however, have on the whole ignored this issue or simply assumed – without any proper analysis of the point – that the outcomes achieved under English law are compatible with the ECHR.[6]

Putting the ECHR to one side then, the court's decision will be based on its evaluation of the children's best interests. Recent legislation has – quite pointlessly – added a statutory presumption that it is in the child's best interests for both parents to be "involved" in the life of the child. Since "involvement" is defined very broadly to include indirect (e.g. postal) contact and specifically not to require any particular division of the child's time,[7] this adds nothing to the pre-existing approach of the courts to post-separation parenting. The only other "guidance" offered by the legislation is the predictable "welfare checklist" set out in s 1(3) CA 1989, which contains an unsurprising list of factors relating to the child's situation to be considered – but these factors are not ranked and are in no way dispositive: they simply require the courts to have regard to x, y, and z, quite deliberately giving no indication of *what outcome* should be reached and so affording the judge significant discretion in the matter.

So, putting the legislation aside, the key question is how ***English*** ***courts*** approach the concept of "best interests" in the context of international relocation – in particular, what attitude do they take towards relocation and its impact on children's relationships with their parents (and by extension, on the parents themselves)? The question should be framed in that jurisdiction-focused way because it is clear that while many jurisdictions adopt the best interests test, the way that the test is understood in different jurisdictions differs substantially, such that attempts at international harmonisation based on that principle alone (such as the Washington Declaration) seem doomed to failure.[8] For example, Rob George's comparative empirical research has suggested that the English approach to best interests is very different from that in New Zealand owing to very different philosophies of post-separation parenting in those jurisdictions. NZ has – in practice[9] – a very strong policy in favour of shared parenting, continuity, preservation and strengthening of the parent/child relationship post-separation, such that the idea of relocation is regarded by practitioners as wholly anathema to that and rarely to be permitted. Meanwhile, although England and Wales has long had a strong pro-contact approach, that has not generally been thought to require refusal of relocation applications, because the courts have tended to take a fairly relaxed view about how much contact is necessary for a good relationship and a fairly (unduly?) optimistic approach to how well it would work after a relocation: and so English courts have historically been perceived to be generously disposed towards relocation.[10]

That approach of the English courts, and so of practitioners, had until recently been heavily influenced by the Court of Appeal decision in *Payne v Payne*,[11] in particular Thorpe LJ's judgment in the case, which was taken (rightly or wrongly) to suggest that, provided the proposals of the primary carer wishing to relocate were reasonable, practical and not motivated by a desire to exclude the other parent from the child's life, permission to leave would usually be granted. The child's best interests have in English law been closely allied with the situation of the primary carer (usually the mother), such that ensuring the stability and happiness of her situation has been regarded as central to ensuring that the child's best interests are served – and the inevitable detriment to the relationship with the left-

behind parent (usually the father) just something that would have to be dealt with as best it could. Thus where, as here, the mother is wishing to "return home", and has the offer of a job to go to, permission to relocate would almost certainly be granted, despite the long distance. On these facts, the reasonableness of the mother's position – and her view about the desirability of NZ as a place to raise children – might be regarded as reinforced by the couple's own earlier decision to relocate there (albeit that they then returned for schooling). Under *Payne*, it is very likely that relocation would have been granted.

However, the English courts have for some time been gradually reappraising the *Payne* decision, and the so-called "discipline" that it imposed on decision-making in this area (by way of the series of questions set out in Thorpe LJ's judgment for judges to address en route to their decision). And the most recent case law has finally determined that the *Payne* guidelines are no longer to be treated as providing the script for decision-making in these cases.[12] This position is in line with case law developments elsewhere in child law: the courts have been retreating from the idea that application of the statutory "best interests" test could or should be "firmed up" by reference to judge-made principles, assumptions, presumptions or "rules of thumb". Instead, it is said that the courts must revert to a "pure" best interests approach, providing a truly individualised, "holistic" evaluation of what is in this particular child's best interests, untrammelled by any particular starting points or notions of what the answer to that question might be, tempting as such "quick fix" approaches might be.[13] The court must evaluate all the options for the child's future, and determine which of them is, on balance, best for the child.

This might be thought to make decision-making in this discretionary area of law even less predictable, and it is too early to say what impact this change has had on the pattern of decisions. Indeed, it is too early to say whether the new statutory presumption of parental involvement might, despite its weakness, also have some influence here in causing the courts to rethink their previous pro-relocation stance. We do not have enough information on the facts provided to give a confident prediction about possible outcome: while it would not be at all surprising if permission to leave were granted on these facts, it is not a foregone conclusion. The court would be concerned, amongst other things (not least the items specified in s 1(3) Children Act 1989(, to explore the following issues:

- It would be important for adequate arrangements for contact between George and the children, including long visits once or twice a year[14] as well as regular Skyping etc., to be established, so S will need to come to court with comprehensive proposals for how that would be managed.
- The court would then wish to be confident that S would be properly supportive of facilitating contact between the children and G: any lack of commitment by S in the past would count against her.
- The fact that both children are still quite young, with Molly perhaps only about to start school and Peter on the verge of starting secondary school, may mean that this would be a good time for them to move in terms of minimising disruption to their education and maximising their opportunities to form new friendships in what would for all the children be a new school.
- The loss of opportunity to form a strong, frequent relationship with the new half-sibling might be regarded as offset by the new opportunity to form stronger

relationship with the wider NZ family that the move would permit.

- The child's wishes and feelings, having regard to their age and understanding, is a matter to which the court is directed by the statutory checklist – s 1(3)(a) CA 1989; it would be of more weight in relation to Peter than Molly.

***Would your analysis differ if Sam and George had never married, but were separating after a 12 year relationship*?**

To the substantive analysis, not at all. The best interests of the child are the paramount consideration, and the formal legal status of the parents' relationship is not of itself regarded by the English courts as pertinent to that issue.

The only potential difference here is effectively a procedural one: if S and G were not married, then G would not automatically require parental responsibility (PR) for the children on birth. However, the vast majority of such "unmarried fathers" do in practice acquire PR by being registered on the birth certificate as the child's father [assuming that Molly was born in England after May 2006, when the relevant law came into force]. Failing that, G could obtain PR by later (formal) agreement with S, or by court order.[15] However, if G has not yet acquired PR, then S has the right to remove the children from the jurisdiction without G's permission – and so that will place the onus on G to bring the matter of relocation to the court by applying for a child arrangements order and/or prohibited steps order under s 8 Children Act 1989. But however the matter reaches the court – on G's application or S's application – the court's analysis of the issues will remain the same.

***Would you analysis differ if, since the divorce, Peter and Molly had spent roughly equal amounts of time with their parents*?**

The headline principle remains the same: the child's best interests are the paramount consideration. But self-evidently the application of that principle to the facts of an individual case might be expected to be different depending on the current care pattern, in so far as that means that the proposed move would have different impact on the relationship between the child and the left-behind parent, who has up to now been providing a home for the child. Losing that home, and the associated deep relationship with the left-behind parent, will evidently have a greater impact on the children's day to day life and relationships than if the children clearly had their primary home with Sam and a contact-only relationship with George.

It was in the shared care context that the courts first began to withdraw from Thorpe LJ's *Payne* discipline, conscious that its approach presupposed a rather traditional primary carer/contact-parent set-up.[16] Rob George's recent survey of English court orders in international relocation cases suggests that the success rate of relocation applications in shared care cases (defined for the purposes of his analysis as cases with a care-time ratio between the two parents of at least 35:65) might be lower than in primary carer cases (where the other parent has the child for less than 35% of the time). However, permission to leave in such cases was far from rare in Rob's sample: 24 cases in the survey had shared care arrangements, and permission was granted in over 50% of cases; cf over 60% for all cases in which the care arrangements were known. But the success rate for the shared care cases was very close to that for cases where the child had some overnight stays with the other parent (as opposed to cases with direct contact but no overnights). So in practice shared care cases may not be being approached particularly differently from other cases with significant contact. But it is

important to note that Rob's findings were not statistically significant, so we cannot draw firm empirical conclusions from the numbers he found. And his research was conducted just as the key case law beginning to doubt the *Payne* guidelines, particularly for shared care cases, was developing – so it was early days for that case law and its implications may not have trickled down to trial judges at that point, so even if his results had been statistically significant the outcomes may not be representative of outcomes that we would get if the survey were repeated today.

As with the first, primary carer, scenario, it is therefore hard to predict the outcome in this case – it is fair to assume that the English court would be rather slower to grant permission here than in the first case, but beyond that it is very hard to say! The court would certainly want to know how S would juggle her new role as *primary* carer (rather than shared carer) with the new job – is it full-time? What child-care will she need and where will she get it? G might well offer to look after the children full time if S wanted to go herself – but it seems likely she would rather not go at all than to go without the children.

Jo Miles

SOLUTION FOR GERMANY

Under German law divorce itself does not affect the existing allocation of custody rights between the parents. In order to relocate to New Zealand with the children, the mother (Sam) could file for sole custody or, alternatively, for a transfer of the right to determine the children's place of residence (*Aufenthaltsbestimmungsrecht*). According to Sec. 1671 (1) (2) GCC (German Civil Code), a parent's application for sole custody is successful, if (1.) the revocation of joint legal custody as well as (2.) the transfer of sole legal custody to the applying parent is in the best interest of the child. This requires a comprehensive weighing of all affected interests, including the constitutional rights of each child and parent.

The guiding principle of the required weighing of interest is the best interest of the child, which needs to be assessed for each child individually.

Relevant aspects are;

- the child's right to be raised by both parents, Art. 6 (2) of the German Constitution (GG)
- the "principle of support", which examines each parent's ability to raise the child. It requires the applying parent to provide the best basis for the child to develop its own personality. Indications are a stable parent-child-relationship, but also the applying parent's willingness to support the relationship between the child and the other parent (*Bindungstoleranz*). If the mother's decision to relocate were based on her intention to prevent contact between the children and their father, she would not be considered best suitable to raise the children. Therefore, she would not provide the best basis for the children's development. On the contrary, the applying parent is expected to encourage the child in developing and maintaining a parent-child-relationship with the other parent as well. In this case, there are no indications that one parent is more qualified than the other.
- the "principle of continuity", which aims at maintaining stable parent-child-relationships in order to provide the

child with consistent surroundings. This principle has a personal and a local dimension. In this case, the children Molly and Peter have built relationships with both parents since they lived together as a family until a year ago. Since then the mother has exercised sole physical custody, while the father has visitation rights. This indicates that the children's most stable relationship is with their mother, which should therefore be maintained. However, the factual basis given here is thin, whereas the German Federal Supreme Court demands a strict examination of all existing relationships and their quality.

- the child's expressed wishes
- the existing relationships between the child and other people/ siblings, with whom they have a close bond.

Additionally, the constitutional rights of both parents need to be taken into consideration. Each parent has parental rights protected by Art. 6 (2) GG. Additionally, on the mother's side, as the parent who wishes to relocate to New Zealand, her freedom of movement protected by Art. 2 (1) GG is affected. However as a general rule, the mother's decision to move to New Zealand is a personal life decision and her motives to do so are therefore not subject to judicial review. Her motives only become relevant within the evaluation of the best interest of the child. For instance, a mother's motivation to prevent contact between the children and their father would not comply with the best interest of the child. However, personal or professional reasons in general, such as taking up a new job or building a life with a new partner, are valid reasons that are compatible with the best interest of the child.

Ultimately, in a case like this, the international relocation of one parent and the joint children results in a substantial loss of contact with the other parent. Therefore the question is, which alternative, i.e. the loss of which parent, would be most detrimental to the respective child. If further examination on a factual basis leads to the result that in this case the relationship between the children and their mother is so essential to the children's well-being that it outweighs the loss of frequent personal contact with their father, the mother's application will be successful. The result would have been different, if the mother had intended to relocate in order to prevent contact between the children and their father.

However, due to the principle of proportionality the mother will only be awarded the sole right to determine the children's place of residence while maintaining joint legal custody in other fields. As a consequence, the mother could likely take the children to New Zealand.

Case 2: [The parents were never married/ sole physical custody]

Although Sam and George never married, it must be assumed that they obtained joint legal custody of their children. Based on realistic assumptions, George would have acknowledged paternity after the children were born, according to Sec. 1592 (2) GCC. Both parents would then have submitted custody declarations in accordance with Sec. 1626a (1) (1) GCC and would thereby have established joint legal custody.

The mother could then file for a transfer of the right to determine the children's place of residence as described in case 1. Since all other circumstances, especially the sole physical custody of the mother, are consistent with case 1, the weighing of interests would be the same. The mother will most likely be awarded the right to determine the children's place of residence according to Sec. 1671 (1) (2) GCC.

Case 3: [The parents were married, but are now divorced/ joint physical, joint legal custody]

Again, the mother's filing for the transfer of the right to determine the children's place of residence will be successful if the requirements established by Sec. 1671 (1) (2) BGB are met.

However, in this case the weighing of interests might result in a different outcome due to different circumstances. Since the divorce, the children spent roughly the same amount of time with their mother and their father. This indicates that both parental relationships are equally important to the children's upbringing. There is neither a stronger relationship between the children and one parent nor did the children express their opinion. Again the question is, which alternative is best compatible with the best interest of the children. In this case, the "principle of continuity" suggests that children stay with the parent, who provides the most continuity and stable surroundings. Considering the integration of the children into their London environment (the father and his new partner and child, school, pre-school, friends) as opposed to a new start in New Zealand, the father provides the most continuity for the children. As a result, the mother's filing for a transfer of the right to determine the children's place of residence will likely not be successful.

Laura Bolz, Research Assistant to Professor Nina Dethloff, Institute for German, European and International Family Law at the University of Bonn.

SOLUTION FOR NORWAY

1. Moving abroad with the child is regulated in the Norwegian Children Act 1981 section 40: *"If one of the parents has sole parental responsibility, the other parent may not object to the child moving abroad. If the parents have joint parental responsibility, both of them must consent to the child moving abroad."*

According to the Supreme Court, this is an all-or-nothing rule and no middle position or compromise is possible, Rt. 2000 p.185. In other words, the court cannot determine joint parental responsibility with the limitation that the one parent can move abroad with the child without the consent of the other parent. Therefore, in our case Sam cannot move abroad with the children unless she obtains sole parental responsibility. In practice, this is very difficult to obtain.

The concept of "parental responsibility" includes both a duty to care for the child and a right to decide on behalf of the child, the Children Act section 30.

Sam and George have been married; therefore they have joint parental responsibility for the children Peter and Molly, section 34. Parents who divorce may agree that one of them shall have sole parental responsibility, but until an agreement or decision on parental responsibility is made, they share parental responsibilities. [In general, three decisions have to be made upon relationship breakdown: (1) parental responsibility, (2) the child's residence and (3) access/visitation rights.]

The decision of the court shall first and foremost be taken on the basis of what is best for the child, the Children Act section 48. It is generally agreed that it

will be best for the child that both parents, as the main rule, continue to hold parental responsibilities. The court will comply with a request for sole parental responsibility only if there are "special circumstances" supporting the claim. Such special circumstances will include the possibility that the other parent might be considered *unsuited* to sharing parental responsibilities, for example where the parent's general behaviour is considered to be harmful to the child: maltreatment, violence, suspicion of sexual abuse etc.

In our case, however, George is not unsuited to sharing parental responsibilities. In some cases *the relationship between the parents* may be a reason for relieving one of the parents of his or her responsibilities. If the parents cannot in any way cooperate, it could be damaging to the child. A Supreme Court judgement, Rt. 2003 p. 35, where a suitable parent was not allowed to continue sharing parental responsibilities, illustrates this: The child was autistic and the mother was awarded sole parental responsibility. It was emphasized that the relationship between the parents was poor and, in the view of the court, "there was a gulf impossible to bridge". Further, the child's negative reactions to the father, relating to her autism, were of significance. An important issue was that the mother could become unable to care for the child, because of the stress caused by contact with the father.

Thus, in practice, sole responsibility is very difficult to obtain when both parents are suited. The best interest-principle prevails, (section 48) and the European Convention on Human Rights (ECHR) Article 8 must also be taken into account. In a recent case, similar to our draft problem, the mother did not obtain sole responsibility and therefore she was not allowed to move to Sweden with the children (Borgarting Court of Appeal 2015-04-27).

To sum up: As Sam and George have joint parental responsibility, in order for Sam to move, George has to lose his parental responsibility. In this case it is highly unlikely that he will lose his parental responsibility. Therefore, Sam will not be able to move abroad with the children.

2. The analysis would be the same if Sam and George never married. According to the Children Act section 35, cohabiting parents have joint parental responsibility for children of the relationship. When they move apart, they will continue to have joint parental responsibility, unless otherwise agreed. If they do not agree, they may ask the courts to decide. In other words, Sam and George will both have parental responsibility even if they are not married, and the analysis and result will be the same as above (1).

The provision that gives unmarried cohabiting parents the right to share parental responsibility is relatively new. It applies only to children born after 1 January 2006 and could therefore apply both to Peter and Molly "aged 10 and 5". For children born earlier than 1 January 2006 (possibly Peter), unmarried parents had to send notification to the National Population Register to have joint parental responsibility. If they did not send such a notification, the mother would have sole parental responsibility. If Sam has sole parental responsibility for Peter in this case, she could move abroad with him according to the Children Act section 40. However, she would have to notify George, six weeks prior to the move at the latest, (section 42a). George could then claim joint

parental responsibility, and Sam could not move abroad until this case was settled.

3. Would you analysis differ if, since the divorce, Peter and Molly had spent roughly equal amounts of time with the children?

   In this case it would be even harder for Sam to obtain sole parental responsibility.

Tone Sverdrup

SOLUTION FROM THE UNITED STATES

1) In framing an "American" response to the Shared Parenting and International Relocation Problem, it is important at the outset to remind readers that there is not just one body of American Family Law, but there are at least 51 separate bodies of American Family laws. Family relations are primarily regulated by the states; that is one of the "reserved" areas of legal regulation retained by the states and not given to the national government by the Constitution of the United States and its amendments. So all fifty states have their own, separate Family Laws, and the federal government also has its laws that impact upon the regulation of family relationships throughout the nation. Some states are very "progressive," and others are very "conservative," and others are all shades of grey in-between. Thus, there could be as many as 51 different "American" state-based responses to the questions raised by the Shared Parenting and International Relocation hypothetical. The answer to the questions in part depends upon the inroads made (or not made) by the fathers' rights movement in the various states.

2) Nevertheless, there are some general common approaches in the Family Laws of the 50 U.S. States. While the details will vary from state to state, there are some prevailing positions and dominant approaches that provide a baseline for analysis and comparison.

3) Because continuity and consistency are considered to be very important in child-rearing, most American courts probably would start with a (stronger or weaker) presumption in favor of keeping main custody with Sam, who has been the main custodian. Since there have not been any (mentioned) significant custody problems with her care, it is likely that the presumption in favor of custodial continuity would apply in most cases of post-divorce relocation.

4) However, since Sam now proposes to move halfway around the world, which would profoundly interfere with the children's continued regular, frequent (weekly if not often daily) contact with their father, who has been an active, caring, involved parent and a significant part of their lives, so the presumption in favor of continued custody with Sam would be weakened. The profound impact of her moving to New Zealand upon the children's regular in-person contact with their father would be a relevant consideration, and would be a major factor in deciding the issue. The fact that the family lived in New Zealand for three years might lighten the influence of that distance factor, but would not eliminate its negativity.

5) Some American courts would be inclined to tell Sam that while she is free

to move to New Zealand or wherever else she wishes to go, she is not free to remove the children to a location so distant and remote that it effectively denies the children and their father their regular, ongoing, in-person, father-child contact that they have long enjoyed with each other. Other courts would view the presumption as so strong that she would be free to remove the children, with George's visitation rescheduled to take place in longer, less frequent, time periods.

6) In some states, the presumption in favor of continued custody would be overcome and replaced by a presumption that continued living in their long-familiar environment of Los Angeles, in a USA version of the problem, with continued regular association with their involved father would be most beneficial for the children. Their mother would be free to stay in LA or in reasonable proximity to LA, as she has for the past year since the divorce, and for most years during their marriage. Sam's pursuit of her career and personal life preferences would not be permitted to disadvantage the children or profoundly disrupt the relationship they have with their father. That would exacerbate the trauma of divorce. Sam's (and George's) parental responsibilities will impinge upon their career choices; neither will be permitted to drag the children away from their settled environment and away from their other parent to pursue their personal or career preferences. Parenthood thus comes with a price.

7) In other states, the children's interests in the continuity of care with their mother would prevail over the "frequent contact with both parents" principle, so long as Sam's motivations for moving were not to disadvantage George.

8) I think that the "roughly equal time" factor would be relevant, but that it would not be a big factor since both parents have had extensive, regular, parental care of the children throughout their lives anyway, whether it was 50-50 or 75-25. In those states viewing stability and continuity of care as trumping other factors, this would change the analysis so that the move with the children would not be seen as in their best interests.

9) I believe that the fact of marriage could matter analytically because marriage is the "gold standard" for adult family relationships, but that would probably have little practical effect in this case. Because of the length of their relationship, and due to the long pattern of both parents being involved in parenting, etc., the fact of marriage, alone, will not be dispositive. In some, less progressive states, the fact that the parents chose not to marry and thus did not link their lives together, might be determinative, allowing Sam to relocate.

10) One possibly significant additional consideration is that it has only been one short year since the divorce, Some problems may emerge as their post-divorce lives develop, and that may make the court leery of allowing the children to move so far away (out of its jurisdiction). If the foreign nation was signatory to international treaties on child abduction and followed the principles of the Chome state" of the child remaining constant unless abdicated by both parties to the original decision, this would be less of a concern.

11) American courts would press the parties to settle. That may not result, but the court would strongly encourage it, and if one party more than the other seemed to obstruct settlement, that would likely be

viewed as a negative factor and as a predictor that if that party had custody, he/she might not facilitate, or support but would obstruct the children's contact with the other parent. That could influence an American court in a close case to award custody to the other parent who seems more willing to co-operate in a shared parenting scheme.

Lynn Wardle (with qualifications added by Margaret Brinig)

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[2] CA 1989, ss 2-3.

[3] Those without PR commit an offence if they remove the child for any period of time.

[4] *J v C* [1970[AC 668.

[5] See Simmonds (20120 CLJ 498, discussing *YC v UK (App No* 4547/10) [2012] ECHR 433.

[6] See recently, for example, *Re C (Internal Relocation)* [2015] EWCA Civ 1305, remarks of Black LJ at [55] to [61], responding to discussion from Ryder LJ in an earlier case, which were a notable, rare example of engagement with Art 8 in the relocation context.

[7] CA 1989, ss 1(2A)-(2B), (6)-(7).

[8] For useful discussion, see George, 'The International Relocation Debate' [2012] *JSWFL* 141.

[9] Cf the formal understanding that the test is a neutral one: *Kacem v Bashir* [2010] NZSC 112.

[10] George, *Relocation Disputes: Law and Practice in England and New Zealand* (Hart: 2014), George, 'Practitioners' Views…: Comparing Approaches in England and New Zealand' [2011] *CFLQ* 178. Cf his recent work on English orders which suggests that the English courts might refuse permission to leave more frequently than is generally perceived: 'How do judges decide international relocation cases?' [2015] *CFLQ* 377.

[11] [2001] EWCA Civ 166.

[12] *Re C (Internal Relocation)* [2015] EWCA Civ 1305.

[13] See also *K v K (international relocation: shared care arrangement)* [2011] EWCA Civ 793; *Re F (Relocation)* [2012] EWCA Civ 1364; *Re F (International Relocation Cases)* [2015] EWCA Civ 882; and more generally *Re B* [2009] UKSC 5.

[14] This consideration obviously has a strong economic aspect – such trips would be unaffordable for many families.

[15] See generally s 4, CA 1989.

[16] Cf Black LJ's suggestion in *K v K)* [2011] EWCA Civ 793 that *Payne* could be modified for the shared care context.