Changing Names, Changing Places: Reconsidering Section 13 of the Children Act 1989

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Changing a child's surname or removing a child permanently from the United Kingdom are rather special issues in post-separation child welfare. In part because of this special nature, both these matters are addressed explicitly by the Children Act 1989 in s 13. This article explores the Act's approach to these two aspects of child welfare, and suggests that there may be reason to reconsider some points of interpretation regarding the detail of the section.

Before going further, it is worth recapping the precise wording of s 13:

> 13— (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.

Clearly, s 13 does not intend to prevent changes to children's surnames or their removal from the UK *per se*. The section intends to introduce a veto point, preventing either of these important decisions from being made unilaterally in cases where more than one person has parental responsibility for the child.

The primary issue addressed by this article is one which seems to have caused a degree of confusion, namely the nature of the application to the court made by someone seeking leave to change a child's surname or remove her from the UK. Put briefly, there are two connected issues. First, there is an (often unstated) assumption that the application required to overcome the s 13 veto is one which is brought under s 13 itself. Second, and following from this first issue, the court has concluded that s 13 applications differ from s 8 applications, with the twin consequences that the *welfare checklist* does not apply to s 13 applications, and that directions related to orders granting or refusing the leave are not enforceable. This article questions the first of these views, and consequently draws different conclusions about the second as well.

The Nature of an Application for s 13 Leave:

By s 13 it is specified that changing a child's surname or country of residence requires court leave unless all those with parental responsibility for the child will give written consent to the change. However, little is specified about the nature of such leave. The assumption made by

the court seems to be that leave is being given under s 13 itself, as is evident from cases on name change (*Re B (Change of Surname)* [1996] 1 FLR 791, CA) and relocation (*Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FLR 1052).

This view has some support. As the Court of Appeal pointed out in *Re B (Change of Surname)* (above), the Family Proceedings Rules 1991 not only specify the existence of s 13 orders (see r 4.1.2(c)), but also require the use of different Forms for the two applications (Form C43 for s 8, Form C 44 for s 13). On this basis, the Court of Appeal held that an application for an order relating to s 13 could not be the same thing as an application for a *specific issue order* under s 8. Indeed, the Court of Appeal went as far as to say that when s 13 applies (ie when a residence order is in force), that is the only route that can be used: *Re B (Change of Surname)* (above) at 792. Other cases have taken a less firm view on this latter point (see *Dawson v Wearmouth* [1997] 2 FLR 629, CA, at 635, aff'd [1999] 1 FLR 1167; *Re M (Leave to Remove Child from Jurisdiction)* [1999] 2 FLR 334, FD, at 340), but the general position remains that when s 13 applies, that is the section under which an application should be brought.

However, it is suggested that this view may represent a misunderstanding of the Act. It is specified in s 13 that leave is required for the two listed actions; but it is not clear that s 13 itself provides any mechanism by which such leave could be granted. A clue about the nature of the leave required by s 13 is to be found in s 13(3), which states that leave to relocate can be given either generally or for specified purposes 'in making a residence order'. The key point is that the Act says, in terms, that the leave is being granted under s 8; it might just as easily have said 'in making an order under this section' (compare, eg, Children Act 1989 s 16A(2): 'in carrying out any function to which this section applies'). While it might be that s 13(3) serves merely to provide an alternative means, perhaps to avoid separate applications having to be made when seeking a residence order, this view would not fit especially neatly with the Law Commission's aim of streamlining children's law.

It is submitted, therefore, that s 13(3) not only suggests that the leave stipulated in s 13(1) is not granted using s 13 itself, but also indicates the mechanism by which it is provided, namely an order under s 8. Either a change or surname application or a relocation application can be brought as a *specific issue order* application (or *prohibited steps order* application if the party opposing the change wishes to be pro-active and not rely on s 13, as required if, for instance, enforcement of the s 13 veto is needed; see below). An application for leave to relocate can also be incorporated into a *residence order* if the timing is such as to make that sensible, as s 13(3) states.

This approach fits with the Law Commission's view in the pre-Children Act report. There, name change and relocation are addressed as part of the section on residence orders, with the Law Commission wishing to continue, more or less, the existing practice of prohibiting name changes and removal from the jurisdiction as automatic conditions of custody orders (*Review of Child Law: Custody and Guardianship*, Law Com 172 (1988) paras [4.14] and [4.15]). The Children Act 1989 continues this theme, in that s 13 only applies *at all* if a s 8 residence order is in force. As the Law Commission's report suggests, s 13 is a form of statutory adjunct to a residence order.

The Law Commission's treatment of this point neatly highlights what the issues being raised by s 13 are. Disputes about changes to children's surnames or to their country of residence are archetypal disputes over how best to raise a child after the separation of the parents; about the factors which are important in the child's life. The starting point for thinking about the

resolution of any such dispute which requires court intervention is to turn to s 8. The fact that s 13 has specified two issues which require litigation in the absence of agreement does nothing to change this position.

The view advocated here also has the implied support of Hale J (as she then was), who has an unrivalled understanding of the Children Act since, as a Law Commissioner, she was one of its key architects. In 1999, Hale J decided *Re M (Leave to Remove Child from Jurisdiction)* (above). This relocation dispute raised questions about the interpretation of the statute, since the child in question was not the subject of a residence order, and therefore s 13 did not apply. While recognising that the Court of Appeal's interpretation of s 13 in *Re B (Change of Surname)* (above) was binding on her, Hale J nonetheless saw fit to preface her comments by saying 'if it be correct that an application under s 13(1) is different from a specific issue order application…'.

The implication, surely, is that her Ladyship considers the Court of Appeal's view to be wrong and that, if there is such a thing, 'a s 13(1) application' is the same as a s 8 application. The learned judge went on to say that since 'a person can apply [to change a child's surname or remove a child from the UK] when there is no residence order in force, it is odd that they should have to use a different route when there is a residence order'. Indeed it would be. The argument put forward in this article is that this 'oddity' is illusory, for s 8 should be the route regardless of whether there is a residence order or not. (This conclusion does not, incidentally, rob s 13 of any potency: where a residence order is in force, a s 8 application would *have to* be made, whereas if no residence order exists then it would merely be strongly advisable to obtain leave.)

A similar implied support is found in academic writing. Stephen Gilmore presumably (though he does not say so in terms) considers that applications for leave to remove children from the UK *are* applications for *specific issue orders*, since his discussion of *specific issue orders* (see S Gilmore, 'The Nature, Scope and Use of the Specific Issue Order' [2004] *Child and Family Law Quarterly* 367) deals at length with relocation cases which were brought only with reference to s 13 and with no express mention of s 8. While Gilmore's approach unfortunately ignores some of the challenges which arise from the courts' failure to acknowledge that relocation applications are s 8 applications, it does lend some support to the view that such applications are brought under s 8 and not s 13.

Two Routes to Relocation and Name-Change?

As noted previously, s 13 only applies where a s 8 residence order is in force. But of course, the issues coved by s 13 do not only arise when there is a residence order, especially given the Children Act's *no-order* principle in s 1(5) which instructs the court not to make any order unless it will be better for the child than no order at all. Indeed, the question of whether s 13 applies or not is entirely unrelated to the question of applying to change a child's surname or to remove a child from the UK. The Law Commission recognised that s 13 would not cover every case, and said in its discussion of *prohibited steps orders* that one use for such orders would be to prevent the removal of children from the UK where no residence order was in force (para [4.20]).

Given that the precise same issues arise regardless of the applicability of s 13, 'it would make no sense at all that the powers of the court were different' in the two situations, as Hale J said in *Re M (Leave to Remove Child from Jurisdiction)* (above) at 340. (The differences between s 8 and s 13 are considered in the next section.) One of the Law Commission's main

criticisms of the law before 1989 was that 'the orders available differ according to the proceedings brought' (para [4.2]), which was considered contrary to the aim of promoting children's welfare. It would be most odd if the Law Commission's carefully crafted Report, implemented in an equally well considered Act (see P Harris, 'The Making of the Children Act: A Private History' [2006] Fam Law 1055), created an ambiguity which did not exist before the Act was passed. This would-be oddity adds further weight to the argument presented in this article: s 8 is the procedure to be used for name-change and relocation, regardless of the applicability of s 13.

The Consequences of Misconstruing s 13:

If, then, an application for the leave required by s 13 ought properly to be sought (and granted) under s 8, what are the implications of the court's thinking otherwise? There are two main consequences that follow from an application coming under s 8 rather than s 13.

First, any orders made under s 13, and directions related to such orders, will be unenforceable, whereas appropriately worded orders under s 8 are enforceable. For an order to be enforceable, it must be in the form of an injunction (County Court Rules 1981, Ord 29, r 1(3)), and orders related to non-removal (whether imposed by the mere existence of s 13 or by a refusal of leave under that section) are not in that form (see *Re P (Minors) (Custody Order: Penal Notice)* [1990] 1 WLR 613, CA, on r 94(2) of the Matrimonial Causes Rules 1977, the predecessor to Children Act 1989 s 13) and so are not enforceable *per se*. Enforcement of a restriction on change of surname or relocation, or of any directions related to such restrictions, would require a *prohibited steps order* under s 8 to be made (see N Lowe and G Douglas, *Bromley's Family Law* (10th edn, OUP, 2007), pp 568-569).

The second consequence is that the Court of Appeal has reached the unfortunate conclusion, in both the name-change and the relocation contexts, that applications related to s 13 are not subject to the *welfare checklist* in s 1(3). In *Re B (Change of Surname)* (above), the court said that the checklist constituted 'a most useful *aide-mémoire*' in change of surname cases, while in *Payne v Payne* (above) judges were advised to 'take the precaution' of having regard to the list even though they 'technically' did not have to. (Compare *Dawson v Wearmouth* (above) at 635, that judges will 'invariably' use the s 1(3) criteria 'even if under no statutory duty to do so'.)

There are several key parts of the welfare checklist which are highly relevant to change of surname or relocation disputes, not least of which is the likely effect on the child of any change in circumstances. The most important loss to the court process from this sidelining of s 1(3), though, is the failure to give significant attention to the child's wishes and feelings in relation to the issue. In the leading relocation case of *Payne v Payne* (above), for example, there is no mention of the views of the child involved in either Butler-Sloss P's or Thorpe LJ's judgments. Admittedly, the child in that case was only 4 years old, but since the Court of Appeal in *Payne* was explicitly trying to offer a comprehensive reconsideration of relocation law, the facts of the case ought to have taken less importance in the judges' reasoning. In any case, research shows that even young children are capable of having and expressing views on decisions related to them (see, eg, N Taylor, P Tapp and M Henaghan, 'Respecting Children's Participation in Family Law Proceedings' (2007) 15 *Int'l J. of Children's Rights* 61).

This is not to suggest that judges will necessarily behave differently because they are not obliged to have explicit regard to the welfare checklist. The factors to be considered on the

list have become well engrained in the collective consciousness of all those involved in family justice over the last 20 years. However, there may yet be something to be said for having specific regard to the welfare factors. After all, it must be for this very reason that s 1(3) exists at all, since the factors contained in the subsection are fairly common sensical.

(On the flip side, it might be countered that requiring use of s 1(3) might not have much effect in terms of incorporating the child's views. Arguably, the court gives too little weight to this factor when s 1(3) does apply, so requiring name-change and relocation cases to be subjected to s 1(3) may not have the effect advocated for here.)

Interestingly, the court had previously taken a different view on the role of the *welfare checklist*. In *H v H (Residence Order: Leave to Remove from Jurisdiction)* [1995] 1 FLR 529 at 530, CA, Wall J assumed (without discussion) that s 1(3) applied to s 13 applications. Similarly, in *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930 at [9](e), Butler-Sloss LJ, having noted that two routes existed to change a child's surname, said that 'on any application, … the judge must have regard to the s 1(3) criteria', though again this was assumed without discussion. In a short-lived re-working of the approach to relocation law, Munby J also thought that s 1(3) would apply: *Re X and Y (Leave to Remove from Jurisdiction: No Order Principle)* [2001] 2 FLR 118, esp at 147.

Technically, it has to be admitted that these cases are wrong to insist that the checklist 'must' be applied to a s 13(1) application, if such a thing exists. Section 1(4) of the Children Act 1989 specifies when use of the checklist is mandatory, and applications under s 13 are not included. Given the argument made in this article, though, that exclusion is unsurprising, for the contention is that there is no such thing as 'a s 13 application'. Recognising that all such applications are brought under s 8 satisfies judges' evident desire to bring the checklist into play, while not having to re-write the Act to achieve this.

The Section 1(5) *No Order Principle*:

The *no-order principle* under s 1(5) of the Children Act has faced rather different challenges in relation to s 13. Regarding name changes, the matter has been conclusively addressed by the House of Lords, holding that s 1(5) applies: *Dawson v Wearmouth* [1999] 1 FLR 1167.

However, when Munby J suggested that this approach also applied to relocation disputes (*Re X and Y*, above), he was quickly overruled by the Court of Appeal. In *Re H (Residence Order: Condition)* [2001] EWCA Civ 1338, [2001] 2 FLR 1277, Thorpe LJ said that, unlike change of surname cases, relocation cases raise acute disputes, often involving cross-applications which required the court to make one order or the other, thus making s 1(5) inapplicable. This reasoning is rather unsatisfactory – why 'no order' cannot be made in relation to both the cross-applications is never made clear – and it is hard to see in principle why a relocation dispute is not susceptible to the principle the same as any other private law case. However, this difficulty is a slightly separate issue relating to s 1(5), and does not arise in relation so s 13 itself, and is therefore mentioned here only in passing.

Conclusions:

Under s 13 of the Children Act 1989, two specific prohibitions are made regarding children who are the subject of a residence order. Such children cannot have their surname or their country of residence changed without the written permission of those with parental responsibility or leave of the court. It has been shown here that, although these restrictions

are contained in a separate part of the Act, they are strongly linked to the court's general powers regarding children's upbringing in s 8. Since there is nothing in s 13 itself which gives the court power to provide the leave specified in that section, it follows that applications for leave fall under the court's power to make *specific issue orders* under s 8 of the Act.

Recognising this fact would remove the unfortunate consequence of the court's present view, that the welfare checklist under s 1(3) does not apply to applications related to s 13. Changes of surname and, particularly, international relocations are cases where the checklist should have an enhanced role to play, not a lesser one. The court needs to reconsider the basis on which it makes these orders, and thus re-engage the *welfare checklist*. Doing so may help to bring children's wishes and feelings about the decision in question back to the centre of the decision, where they belong.

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