

**A** man and his eight-year-old son walk out of their house in a quiet English village and get into their car. It is late afternoon and they are going for a short drive. The father's mood seems sombre, the child's carefree. A simple scene that appears quite normal – but the truth of the situation is different. The father is driving his son to the house of his ex-wife for the last time. The next day, she, her second husband, their baby daughter, and the boy are getting on a plane and heading for a new life on the other side of the world. The father has just lost a long and traumatic legal battle to prevent the mother of his only child from taking him permanently to Australia.

It is a car journey of no more than a quarter of an hour, yet for the father it is like a death sentence. His mind is clouded, he finds it hard to focus on the road. 'It was like I was wilfully and legally signing off my relationship with my child, and giving him away,' Jon says now, sitting in the house where he and his son, Toby, had lived most of the boy's life. 'I felt as if I was delivering my child into a big black hole, into a great unknown. I had thought about how I was going to manage to do

that so many times, but I also had to think about my son. It's hard to know what's going on inside a kid's head – for him, the whole thing was like an adventure; he couldn't have the awareness or the maturity to appreciate the enormity of the moment. Whereas I did. So I had to be strong. I didn't want him to see me crying, or for him to feel that he'd caused me any pain.'

Jon cannot face taking Toby to the door of the woman who he blames for the break-up of his marriage, his home, and now his family. In the past, he had always managed to keep exchanges with Teresa as brief and businesslike as possible. But this is one hand-over too far for him to bear.

'I'm pretty tough, but I knew it would test me,' he says. 'When you go beyond your ability to cope, what happens next? How controlled can you be? Do you fall down in a heap or do you get angry? I didn't want to risk my ex-wife and my son witnessing either of those possibilities.'

Jon stops the car at the top of the short drive and lets Toby out. He hugs him, holds him tight, and explains to him, in as composed and reassuring a manner as he can muster, that he will have to walk the last stretch on his own. A little confused,

the boy swings his small rucksack over his shoulder and heads towards his mother's house.

After a few steps, Toby glances back to take another look at his father. Jon's head is bowed, his hand covering his face, and it is clear that he is weeping. Before he reaches the house, Toby turns round again. 'Don't cry, Dad.'

**Jon's final journey with Toby might seem like an extreme instance, something that could have been scripted by an activist for a group such as Fathers 4 Justice. But in reality, his devastating experience highlights many of the issues affecting thousands of post-separation parents and children in Britain today.**

It is estimated that there are up to 1,200 cases every year in Britain involving 'international relocation' (the lawyers prefer terms such as 'leave of jurisdiction' or 'leave to remove'). With increased international movement and emigration, that figure is thought to be rapidly increasing; for those involved in the areas of fathers' rights, family law reform and social policy,

## **'I FEEL LIKE TOBY'S BEEN KIDNAPPED. BEING TAKEN ABROAD HAS KIDNAPPED OUR COMMON INTERESTS AND OUR FUTURE'**

Jon's plight is part of a disastrous growing trend.

With one in three marriages now ending in divorce, and more and more unmarried parents separating, it is believed that about 200,000 children a year are affected by parental break-ups. Many separations are bitter and acrimonious; there are often battles over financial settlements, maintenance, access and residence. According to Harriet Harman, the former justice minister, more than 400,000 cases go to the family courts every year, and 30,000 of them involve contact disputes.

Parents, politicians, legal practitioners, social workers, child psychiatrists, academics and campaigners seem to agree on one thing: that the child's rights and welfare are paramount. Yet critics of the system argue that the current British legal framework often leads to injustice, to feelings of exclusion and powerlessness, and to a process that only heightens, not reduces, the intense suffering of separation.

Many also maintain that, while it is the system and not gender that is the key issue, fathers in particular suffer disadvantage and prejudice at the hands of current policy. Of the separated or divorced men who apply to the family courts to have their

# Torn apart

When Jon and his wife Teresa split up after several years of marriage, he naively assumed he would be granted fair access to their son. Not only did he lose custody, but he had to stand by and watch as the law allowed his ex-wife to take their child to live on the other side of the world.

By **Philip Watson**. Illustration by **Brett Ryder**



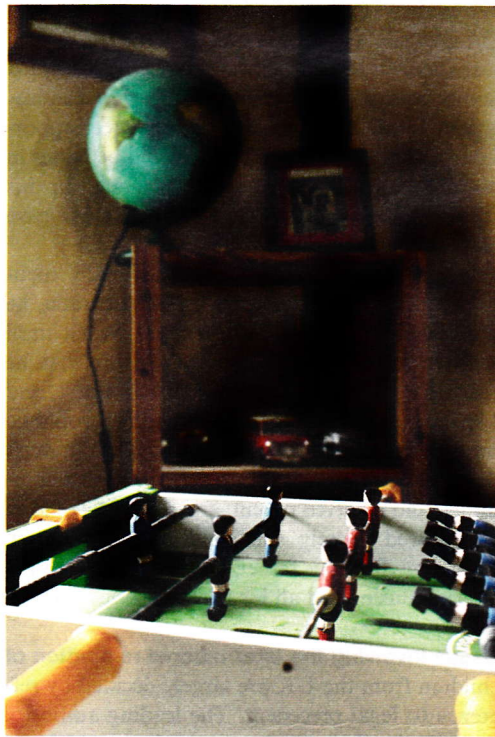
children live with them, only seven per cent succeed. The campaign group Families Need Fathers, which provides help for 100,000 family members every year, estimates that in 98 per cent of cases, it is the father, not the mother, who experiences obstacles in maintaining contact with children after a family break-up.

Lady Butler-Sloss, the former president of the High Court's Family Division, has recognised that 40 per cent of fathers lose contact with their children after separation – and that rises to 90 per cent if the children go abroad. There are, in effect, 750,000 fatherless children in Britain. Far from being exceptional, Jon's case goes to the very heart of the complex issue of how society regards, values and defines fatherhood today.

**Toby is the product of a nine-year marriage** between Jon, who was born and raised in England, and Teresa, a Canadian who grew up in South America. They met in Hong Kong in 1995. Jon, then 38, was working as the managing director of an international bank; Teresa, then 28, worked in accounts. It was a halcyon time for them; their cost of living was low and disposable incomes exceptionally high. Jon, in particular, enjoyed a prosperous lifestyle. In early 1997 Teresa moved into Jon's large apartment overlooking the harbour. 'It was very pleasant, but I can't look back on that time with any fondness now,' Jon says. 'For me, it feels like a holiday that started off well and the weather was wonderful, but then I ended up losing all my luggage, and the plane crashed.'

In 1998 Jon and Teresa married in a pretty church in Ireland; I should know, as I was there. It was a fine summer's day, and the wedding couldn't have been more perfect. Toby was born in Hong Kong the following year.

Jon and Teresa had long talked about coming to live in England, and that year they bought a beautiful 17th-century house in a picturesque



## 'AS TOBY GOT OLDER I COULD SEE HE NEEDED TO SPEND MORE TIME WITH HIS FATHER. YET I HAD NO SECURITY AS THAT FATHER'

village in the Home Counties. Jon transferred to his bank's London office, and Teresa found a job in sales, working from home. They hired a nanny to look after Toby part-time. To anyone meeting them at this time, they must have seemed blessed. But things were about to change radically.

Just five months after they had set up home, Jon was made redundant. Teresa found working from home harder than she had expected and, according to Jon, complained that she was becoming a boring housewife. Sometime later that year, according to evidence Jon later presented in court, Teresa began an affair. After being married for less than three years and with Toby having just turned two, she moved out, saying that she and Jon were not getting on and she needed more space. She moved into a rented flat nearby with Toby, and told Jon that he could visit at any time and have his son every weekend.

'I asked her why she had to take Toby with her, why she had to remove him from his family home, but she wouldn't listen,' Jon says. 'She played the mother card: she said, "I'm his mother, and I'm taking him." So I let her, partly because I thought it was a temporary thing, that she wanted to sort herself out, and that Toby being with her would help. I never thought for one moment that it would end up as it did.'

Later that year, Teresa moved back to the

Jon still lives in the family home, which is agonisingly full of reminders of his son. He calls it a 'mausoleum'

family house; there were ideas of reconciliation, of giving it another go. Yet they slept in separate rooms, continued to lead separate lives, and two months later, Jon says, he discovered the affair.

Teresa moved out again in 2002. Both had by then sought legal advice on divorce and future contact with Toby. Jon wanted his son to live with him in the family home for half of the time. But Teresa refused. 'I said, "Why not? I didn't ask for any of this, and he's as much my son as yours," but she wouldn't have it.' She offered Jon contact with Toby every other weekend, Friday evening to Monday morning, but eventually agreed to every Wednesday as well; Jon was to have Toby five nights a fortnight. Holiday time would be shared equally. Jon had a good relationship with the nanny and, through her, he would also be able to speak to Toby on the telephone almost every day and see him occasionally after he had attended kindergarten.

'I wish now, of course, that I'd pushed harder, but I'd also been advised to keep a good relationship with the mother of my child,' Jon says.

This access arrangement continued until the end of 2005, when Jon wrote to Teresa proposing shared residence for Toby. By then Jon and Teresa

had divorced, Teresa was working for an accountancy firm in Reading, and Jon was spending more time at home, working as a freelance business consultant. Increasingly frustrated that Toby was regularly being looked after by local parents after school, Jon felt he had the time, and the desire, to look after Toby more himself.

'I could see that, as Toby got older, he was needing to spend more time with his father,' he says. 'Yet I was also very conscious throughout that I had no security as that father. Teresa had the upper hand.'

Jon never received a response to his proposal, and in April 2006 he applied to the court for equal access. One month later, however, events dramatically escalated.

**The law in England and Wales regarding the residence of, and access to, children after separation** is framed by the Children Act 1989. While the legislation introduced the notion of parental responsibility and of parents retaining equal and independent rights to their children, in practice, residence and contact orders are more often granted to one parent, usually the mother.

This is especially true if the mother has previously established the majority of residence and contact with the children. Once a mother has been defined as the 'primary carer' or 'custodial guardian' of the children, the family courts appear reluctant to revise or reverse that status quo. Shared residence orders are extremely rare.

It is this perceived prejudice against fathers that has led to the rise of the fathers' rights movement, both in the UK and abroad. Arguing that the courts are out of touch with modern family dynamics, particularly with the increased role fathers now play in bringing up their children, and with the wealth of research that shows children gain important mental and emotional benefits from continuing relationships with their fathers, groups such as Families Need Fathers and the Equal Parenting Council are pressing for reform of the Children Act that would create a legal presumption of equal parenting. In turn, that would lead to genuine shared responsibility, and the greater likelihood of equal residency.

'Family law as it currently stands doesn't work,' Bob Geldof wrote in an essay titled *The Real Love that Dare not Speak its Name*. Geldof has been a vocal campaigner for fathers' rights ever since he refused to accept limited access to his three daughters following the break-up of his marriage to Paula Yates. 'The law rarely benefits the child, and promotes injustice, conflict and unhappiness on a massive scale. When it comes to access, divorced men don't have a chance.'

The equal parenting, or joint custody, plan has so far been rejected by the government. Critics of the proposal, and of fathers' rights campaigners in general, maintain that men make unlikely victims, especially at the hands of women and the system. They point out that most fathers still earn higher incomes than mothers, and that many women stay at home with young children or provide most of the care when working.

Jon contends, however, that any legal system that engenders widespread discrimination is profoundly flawed. 'The default for anyone involved in these cases – from judges to social workers to most members of the public – is that the mother is the primary carer, by virtue alone, it seems, of her being a woman,' he says. 'Any man who challenges that idea is looked upon with suspicion



and contempt. Questions will be asked about his sanity and suitability as a parent. Yet if family law really is about the rights of the child, and about equal responsibility to that child, then it should be about the most important equality of all – equality in the right to be a parent.’

**Teresa had met Barry in 2003. An Australian** nine years her junior, he had been living in London, working as a catering manager, for five months as part of what he later described as ‘going OS’ – the overseas experience.

A relationship began, and in 2005 Barry moved into a house close to Jon’s that Teresa had recently purchased. Following a request from Teresa, Jon contributed £40,000 to the price of the house, as part of a final financial settlement a few months later of £250,000.

‘She told me that the house would be better for her and Toby, and I agreed, not realising that her boyfriend would be moving in,’ he says. ‘It’s one of the many things that really hurts: I paid a lot of money which helped set her up with a boyfriend who ultimately took my son to the other side of the world.’

During this period, Jon remained in the former family home, because he wanted the time Toby spent with him to be as normal, stable and consistent as possible. At the end of 2004, Jon had begun a new relationship with Libby, a woman he had met through work. She lived in a flat in a town nearby.

Last year Teresa and Barry married. They also applied to the family court for leave to remove Toby to Australia. The couple had been there on holiday a few months earlier and, according to

Teresa, it was a turning point in both their lives. She later explained to Jon that she felt she had no real connections with the UK; with no extended family here, she was suffering from stress and isolation. Teresa also said that Barry’s career opportunities and standard of living would be better in Australia, and that he was homesick for his friends and family. Early this year Teresa gave birth to their daughter, Jane.

While Jon says Toby had occasionally mentioned that he was going to live in Australia, he dismissed it as childhood fancy. It wasn’t until a letter arrived from Teresa’s solicitor that he realised it was true. ‘I was in denial I think, and I know it sounds naive, but I thought I would be protected by the law,’ he says. ‘I thought, I haven’t done anything wrong, I’ve only ever been a committed and involved parent, and surely it wouldn’t be allowed. Surely she can’t legally take my child away from his father, grandparents, aunts, uncles, cousins and all his friends.’

**Cases involving the international relocation of** children from the UK are largely decided by reference to legal precedent. The leading authority at present is *Payne vs Payne* (2001), in which the mother, a citizen of New Zealand, successfully relocated her four-year-old daughter to New Zealand against the wishes of her British father.

The case establishes that as long as plans to move can be shown to be in the interests of the child; not motivated by selfishness, malice or a desire to exclude the other parent; and to be genuine, realistic and practical, the courts in the UK tend to favour the applicant.

If that applicant (who is almost always the

mother) is already deemed by the judge to be the primary carer, and can establish that she would suffer distress that could detrimentally affect the child if the leave to remove was refused, then she is even more likely to succeed. The potential suffering of the mother appears to be given greater weight than any consideration of the harm a move would cause to the father and to the relationship between father and child.

Critics of the system argue that the interests of the child are too closely linked with the interests of the mother. Many also point out that parents and lawyers often proceed to court too easily, not as a last resort; that there is insufficient encouragement for mediation and conciliation; and that the adversarial court system is inappropriate for family cases – it encourages a one-parent-good, one-parent-bad approach, with often hostile parents prepared to go to desperate lengths to win.

There is also a growing belief that family courts should be more open to public scrutiny. The *in camera* rule, designed to protect the child, and the restrictions placed on the media’s freedom to report family court cases (all names, locations and identifying details in this article have been changed), mean there is little transparency.

‘I have concluded that it is now impossible to defend a system from accusations of bias and discrimination if it operates behind closed doors,’ Harriet Harman wrote last year, shortly after setting up a Constitutional Affairs Committee inquiry into the operation of the family courts.

Other countries take a different approach. In Scotland family court proceedings are conducted in open court. In many US states, mediation is mandatory and publicly funded, and US courts



## IN SCANDINAVIAN COUNTRIES COURTS MUST BE FIRMLY SATISFIED THAT IT IS BETTER FOR THE CHILD TO RELOCATE

Jon can now see his son for only 11 weeks a year. Six of these must be spent in Australia; during term time this means waiting in a hotel while Toby is at school

have seen a gradual shift away from rigid guidelines in favour of more elastic concepts that allow cases to be evaluated on their individual merits. In Scandinavian countries, notably Sweden, the burden of proof is far greater on the applicant; courts must be firmly satisfied that it is better for the child to relocate than remain. And in New Zealand, courts have declined to follow the guidance in the *Payne* case. As well as granting far more joint residence orders and far fewer relocation applications, New Zealand has a statutory provision that states there must be no presumption in favour of either parent.

**Jon and Teresa first went to the High Court** early this year. The judge ruled that the gravity and complexity of the case, and the competing claims of the parties, warranted a report being compiled by a child psychiatrist and a court guardian being appointed to represent Toby. The sessions with the psychiatrist were, Jon said, helpful, sympathetic and constructive. Interviews were conducted with Jon and Libby, with Teresa and Barry, and with Toby, both alone and with his mother and Barry. ‘Toby’s comments in the interviews were really heart-breaking,’ Jon says. ‘He mentioned that he got on well with his parents and their new partners, but that he wanted everyone to be happy and for all this to end. It was also clear that he was worrying a lot about

the situation, and about whether his comments might actually determine the outcome of the case. He seemed especially concerned about how often he would see me if he went to Australia.’

The psychiatrist noted that Toby’s relationship with his father was a very strong one, and that it would become profoundly different and inherently abnormal if Toby moved to Australia. ‘He explained that this would, in effect, be the end of my role as Toby’s father,’ Jon says. ‘He knew that I would not be able to have any involvement in Toby’s school, to attend parents’ evenings, sports events, plays. I wouldn’t be there when he was ill, or in an emergency, if he needed to go to hospital. I wouldn’t even be there when he needed a hug.’

Jon says the child psychiatrist’s report was comprehensive and insightful, but that the approach taken by Toby’s court guardian was wholly different. An officer with Cafcass, the Children and Family Court Advisory and Support Service, the court guardian had inherited a previous officer’s report, which concluded that, on balance, the mother’s application was not unreasonable and should be granted.

It is Jon’s contention that the court guardian was process-driven and prejudiced against him as a father. ‘His opinion and report carried great weight in court, but I felt that he’d already made up his mind,’ he says. ‘His job was to protect and represent the interests of the child, to be the



## 'I AM STRIPPED OF MY RIGHTS AS A FATHER BECAUSE MY EX-WIFE'S NEW HUSBAND WAS HOMESICK'

child's spokesperson in court, but he wasn't interested in my concerns, or in understanding the bond between me and my son.

'He had never dealt with a leave of jurisdiction case before, and he seemed suspicious of me. He was more concerned with timetables, about how he could get Toby to Australia with the minimum of disruption and delay.'

Jon and Teresa returned to the High Court in May; the proceedings lasted three and a half days. Teresa explained that she and Barry were not British citizens and felt lonely and isolated in England. She argued that their plans were reasonable, realistic, and would benefit Toby. Jon's barrister maintained that the boy was thriving in the present arrangements, that his father was playing a significant role in his upbringing, particularly in nurturing his exceptional artistic and athletic talents, and that the move to Australia would not satisfy Toby's needs, especially for a deep and continuing relationship with his father.

At one point, hearing the recommendation from the Cafcass officer that, to help Toby better integrate into his new life in Australia, it would be best if he did not return to the UK until Christmas 2008, Jon broke down on the witness stand and had to leave the court. 'It suddenly dawned on me that the decision had already been made, that not only was I only going to get 11 weeks' contact a year with my son, not only was I going to have to go to Australia to see him, but that he wouldn't see his family and friends in England for 18 months' he says. 'It was as if they were considering how to cut the umbilical cord between his family in England and this new life in Australia as cleanly as possible. I felt gelded, belittled, a mere accessory to my son's life.'

In June the High Court judge found that since separating, Teresa had been Toby's primary carer, and accepted the distress she was experiencing by remaining in England. He rejected Jon's arguments and found Teresa and Barry's plans to relocate were well motivated and compatible with Toby's welfare. The judge came to the clear conclusion that Teresa's application must succeed.

**Teresa, Barry, Toby and Jane (the baby)** left for Australia 11 days after the final judgment was delivered. Jon wrote to the Court of Appeal,

seeking to appeal against the High Court's decision, but permission was denied on the basis that there had been no error in law. He also explored the possibility of making an application to the European Court of Human Rights asserting that Toby's relocation had breached both of their rights to family life under Article 8 of the European Convention on Human Rights, but costs of £20,000 or more made it prohibitive.

'I am stripped of my right to be a father because my ex-wife's new husband was homesick,' Jon says. 'Where is the justice in that? I will do everything I can to maintain my relationship with my son, but everything is stacked against it.'

The contact order allows for Toby to spend 11 weeks with his father – five in the UK, six in Australia. In addition, the judge followed the Cafcass officer's recommendation that, to give Toby time to settle into his new life, he should not return to the UK until Christmas of next year. It also angers Jon that the court order directs that, when he travels to Australia for a fortnight, 'one week of the contact shall take place during holiday time and one week during term time'. 'I recognise that I should experience and bond with Toby's new school life, but this order takes away our vital and short-lived time together,' he says. 'Dropping Toby off at school and then waiting around all day, trapped in a hotel room in a town I have no wish to be in, is a nightmare.'

After protracted negotiations with Teresa, Jon has arranged to spend several weeks with Toby in Australia early next year, but that is several months away. In the meantime, he lives in a house that is agonisingly associated with his son. Photographs, paintings, school certificates, soccer awards, videos and DVDs around the home act as constant reminders. In the kitchen is a photo frame, a present from Toby, inscribed with the words: 'I love my dad. He spends lots of time with me, reads me stories when it rains, and tucks me into bed at night.' Jon refers to the house as 'a mausoleum'; he cannot even bear to go into Toby's bedroom.

'It's odd – it's not as if Toby's dead, it's more that he's been sentenced to a life on the other side of the world. The bond you have with a child is a slow-burn, brick-by-brick process; it's building the most magnificent creation that you can imagine, knowing that you are a part of it. All that has been taken away.

'I feel like Toby's been kidnapped – on so many different levels. Toby being taken to Australia has kidnapped our common interests; it's kidnapped our future together.' ■