http://www.incadat.com/ ref.: HC/E/UKe 159
[21/12/1992; High Court (England); First Instance]
Re O. (A Minor) (Abduction: Habitual Residence) [1993] 2 FLR 594, [1993] Fam Law 514

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

21 December 1992

Rattee J

In the Matter of O.

Mark Everall for the father

Jean Henderson for the mother

RATTEE J: There is before me an originating summons under the Child Abduction and Custody Act 1985, in the matter of a young girl, to whom I shall refer as O, who was born on 1 January 1987. She is the child of the marriage of two American parents, the plaintiff and the defendant to the originating summons, the plaintiff being the father and the defendant the mother.

O was born in the State of Nevada in the USA in 1987, her parents having been married in that State in 1985. A decree of divorce dissolving that marriage was made in September 1988 by the District Court of Clark County in Nevada, and an order at that stage was also made for joint legal custody of O to be vested in the father and the mother. The mother remarried on 18 September 1989, and on 19 October 1990 a further order was made by the district court in Nevada giving what was called 'primary physical custody' of O to the mother, with leave for the mother to move with O to Denver in the State of Colorado in the USA in order to live there.

On some later occasion, the precise date of which is not material for present purposes, she was given further leave by the district court to move to England, together with O. That move took place in fact in November 1990, and from that date onwards until the events which I shall mention, which have taken place recently, the mother, together with her new husband and O - and indeed, a younger child born of the new marriage of the mother - lived in England, although the mother and O made trips to Nevada to enable the father to have access to O there.

On 25 September 1992, on an application made by the father to change the custody position in relation to O, the district court in Nevada made an order, the effect of which was that the father's application was to be heard substantively on 6 November 1992, and the mother was to take O to that hearing in Las Vegas, Nevada.

On 6 November 1992 the mother attended at the court in Las Vegas, and, having taken evidence apparently, somebody called the Domestic Relations Referee of that district court, whose precise function is not entirely clear from the evidence presently before the court, made a report

recommending that the father's application for what is called there 'primary custody' should be granted, and that he should be awarded what was referred to as 'primary physical custody' of O. The Domestic Relations Referee went on to recommend that O was to remain in Las Vegas until the resolution of what was referred to as 'an objection hearing', which was to take place on 13 November 1992, and further recommended that the father - and I quote - 'is to receive the child at 10.30 am' -- and it is apparent, I interject to say, that that was a reference in fact to 10.30 am on 10 November 1992 at a certain exchange point mentioned in the recommendation.

The recommendation continued that the father should keep the child until Thursday - again, no date is specified for that -- at 8 am before he started work, with the transfer point again being the same location as that recommended in relation to the handover to the father.

On 10 November 1992 the district judge in Nevada made an order that the report, findings and recommendations of the Domestic Relations Referee should be affirmed and adopted.

Before that order was made - to wit, on 9 November 1992 - the mother left Nevada with O, in breach of the 'recommendation' -- for want of a better word for the moment - made by the referee that O should stay in Nevada until being handed over to her father. The mother went with O to some other location, the identity of which I do not know and is not material for present purposes, within the USA but outside Nevada.

On 10 November 1992 she came to this country with O and has been here since. Her coming here has been the cause of the issue of the originating summons presently before me by the father, in which he seeks an order under the Child Abduction and Custody Act 1985 that O should be returned forthwith to the jurisdiction of Nevada.

It is plain - and this is accepted by Mr Everall on behalf of the father, as well as relied upon by Miss Henderson on behalf of the mother - that by virtue of the provisions of Arts 3 and 12 of the Hague Convention, incorporated into English law by the Child Abduction and Custody Act 1985, the father can only be entitled to the order he seeks if he can establish that O was wrongfully removed from Nevada on 9 November 1992, and he can only establish that she was so wrongfully removed if he can establish that (a) her removal was in breach of the orders made by the Nevada court, and (b) immediately before the removal of O from Nevada on 9 November 1992 she was habitually resident in Nevada. The father seeks an adjournment of his originating summons to enable him to adduce expert evidence from an expert in the law of Nevada in an attempt to establish that the order made by the district judge on November 1992 affirming the recommendations of the referee took effect as from 6 November 1992, the date on which the referee made the recommendations. He wishes to establish that proposition in order to seek to make good his case that the removal of O from Nevada on 9 November 1992 was in breach of that order.

It is not plain, says the plaintiff, on evidence at present available, whether in accordance with Nevada law the referee's recommendations, once approved on 10 November 1992, took effect as from 6 November 1992, or whether they took effect as from 6 November 1992 unless and until they were not approved by the district judge on a later date, or quite what the position is.

The father therefore seeks an adjournment of these proceedings until the first day of next sittings, to enable him to adduce expert evidence in that regard. The mother opposes that application for an adjournment on the basis that, even if the father were given such an adjournment and adduced expert evidence to prove that the recommendations made by the referee took effect, as an order of court, from 6 November 1992, he would still be bound to fail in his application under the Child Abduction and Custody Act because immediately before O's removal from Nevada on 9 November 1992 she was not habitually resident in Nevada. The mother also submits, through Miss Henderson, that in any event no adjournment ought to be granted because the father has had time in which to adduce the expert evidence he now seeks to adduce, and no adequate explanation has been given as to why it was not made part of his case originally.

The proper construction of the words 'habitually resident' in Art 3 of the Hague Convention, for the purposes of giving effect to the Child Abduction and Custody Act, has been the subject matter of consideration by the courts on various occasions, but has now been authoritatively considered by the House of Lords in Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction: Illegitimate Child) [1990] 2 FLR 442. At pp 578 and 454 respectively appears a passage in the speech of Lord Brandon of Oakbrook, with which the other members of the Judicial Committee of the House of Lords sitting agreed, in which Lord Brandon says this:

'In considering this issue' [that is the issue of habitual residence] 'it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in Art 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age . . .'- J, in that case, was a very young child, certainly younger than the child in the present case -

'is in the sole lawful custody of the mother, his situation in regard to habitual residence will necessarily be the same as hers.'

It is submitted on behalf of the father by Mr Everall that the true analysis of the habitual residence of O on 9 November 1992, when she was removed from Nevada, was this: she was physically present in Nevada. The court, he says – if he can establish that the referee's recommendations took effect as from that date, 6 November 1992 - had directed that O should be in the 'primary physical custody' - and I use the terms of the recommendation - of the father. The court had directed further that until 13 November 1992 in any event O should not be removed from Las Vegas, and had further directed that the actual handover to the father should take place on 10 November 1992. The father was habitually resident in Nevada throughout. Mr Everall argues that as from 6 November 1992 - assuming he can prove that the recommendation took effect from that date as an order - O was as a matter of law in the custody of her father, and that the court had ordered that she should not leave Nevada until 13 November 1992, when it was anticipated that a further hearing should take place, although it did not in fact take place. Accordingly, as from 6 November 1992, O, being a child unable to have a settled intention of her own, having regard to her age, was present in Nevada with her father's settled intention to remain residing in Nevada. Therefore, says Mr Everall, she was habitually resident in Nevada within the meaning of the words 'habitually resident' in the Hague Convention.

The mother on the other hand, by Miss Henderson, submits that the true position was this: the mother was not required to hand over O into her father's custody, even on the basis that the recommendations made by the referee on 6 November 1992 took effect from that date, until 10.30 am on 10 November 1992 - see the actual terms of the recommendation. Therefore, argues Miss Henderson, on 9 November 1992, immediately before O was removed from Nevada, she was still in the sole lawful custody of her mother. Her mother's habitual residence, it is not disputed, was at that time in the UK. In the terms of Lord Brandon of Oakbrook's fourth point in his speech in Re J, sub nom C v S, which I have cited, O, being in the sole lawful custody of the mother, took the habitual residence of the mother. Therefore, immediately before the removal from Nevada on 9 November 1992, O's habitual residence was still in the UK.

In my judgment the submissions put by Miss Henderson are to be preferred. It seems to me that, even on the assumption upon which Mr Everall seeks an adjournment, that as from 6 November 1992 there was some binding direction of the district court in Nevada to the effect that on 10 November 1992, O should be handed over at 10.30 in the morning into her father's custody and that he should thereafter have something akin to what we know in this country as 'sole custody' of O, the fact remains that immediately before O was removed from Nevada she was still in the sole and lawful custody of her mother. She, O, was not of an age at which she could form her own intentions relevant to acquiring habitual residence in any given place. Accordingly, her habitual residence was the same as the habitual residence of the mother, in whose sole and lawful custody she was on 9 November 1992, and it follows that on that date O was not habitually resident in Nevada.

In the light of that conclusion it would avail the father nothing to grant him an adjournment to enable him to prove the assumption which I have already made for the purposes of explaining my conclusion - namely that the recommendations of the referee took effect as from 6 November 1992, and not only as from the date of the district judge's order on 10 November 1992.

Accordingly, I refuse the adjournment because in my judgment the plaintiff has failed to establish and would, even with the benefit of producing any such further expert evidence as he seeks to adduce, still be bound to fail to establish that O was habitually resident in Nevada immediately before she was removed therefrom by her mother.

The originating summons fails, and I shall dismiss it.

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