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[21/08/1992; High Court (England); First Instance]
Re B. (Minors) (Abduction) (No. 2) [1993] 1 FLR 993, [1993] Fam Law 450

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

21 August 1992

Waite J

In the Matter of B.

Jeremy Rosenblatt for the mother

Heather MacGregor for the father

WAITE J: These proceedings under the Child Abduction and Custody Act 1985 and the Hague Convention arise from the breakdown of the marriage between a British father and a German mother. They have young children aged 3 and 2.

The family lived in Britain until January 1992 when they moved to Germany. In July 1992 they came to England for a short holiday and the father, taking the view that the marriage was at an end, used that as an opportunity to start matrimonial and family proceedings in this country in which he has obtained a temporary injunction restraining the children's return to Germany until those family proceedings are heard.

There is some dispute as to whether that step amounted to retention of the children for the purposes of Art 3 of the Convention, but the principal debate in this case has centred on the question whether, assuming that it did, the children were habitually resident in Germany immediately before such retention took place. If they were then there is no dispute that German law would render the retention wrongful within the terms of the Convention as a breach of the joint custodial rights which both parents enjoy under the German legal system.

The concept of habitual residence has been the subject of a considerable body of authority, much of it recent. Those cases are Re P (GE) (An Infant) [1965] Ch 568; R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309; Kapur v Kapur [1984] FLR 920; 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; V v B (A Minor) (Abduction) [1991] 1 FLR 266 and Re F (A Minor) (Child Abduction) [1992] 1 FLR 548.

Three principles relevant to this case emerge from those authorities.

1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.

All that the law requires for a 'settled purpose' is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v S (above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.

That is the legal background against which I now turn to describe the facts of the present case. The father is a financial consultant. He and the mother met in 1984 and began to live together soon afterwards. She became an active employee in the consultancy. In 1985 they moved their home and the business to Glasgow where the business continued to prosper through their joint efforts. Early in 1988 the mother became pregnant and on 9 July of that year the couple married. Their elder son, J, was born on 27 November 1988. With the help of a child-minder, the mother was able to continue working in the business, although now only upon a part-time basis. On 27 April 1990 their second son, K, was born.

By the summer of the following year the marriage had become sufficiently unhappy for the mother to take a drastic step. On 1 September 1991 she took the children, without prior warning to the father, to Frankfurt, where a self-contained flat had become available on the ground floor of her parents' home there following the death of its former occupant, the mother's grandmother.

The father was, understandably, very upset, and determined if he could to keep the family together. He telephoned the mother and they talked for 4 hours. A few days later he came to Frankfurt to continue their discussions.

This has been one of those cases where oral evidence of the parties (by no means necessarily to be encouraged in Convention cases for the reasons given by the Court of Appeal in Re F (above)) has enabled the court to gain insight into the personalities of the parents. Both are intelligent and articulate, but their conversational styles are very different. She is laconic and non-committal. He is voluble and discursive. How far, on that occasion or any other, they managed to achieve a clear meeting of minds must remain in doubt. A measure of agreement was, however, reached. She succeeded in making it clear to him that she could no longer live in Scotland. He succeeded in making it clear to her that he could not happily live in Germany, where he found the language difficult and his in-laws unbending and remote.

The couple agreed to return to Scotland and sell up the house and business there. They agreed also that they would thereafter go to live for a time in Germany, while they charted a new course for their family's future. There is a conflict of evidence as to whether any time-

limit was set for that exercise. The father's evidence was that he mentioned a maximum of 3 months, to which the mother did not raise any objection at the time. Hers was that while no question of an indefinite stay in Germany was discussed, they contemplated a longer period lasting at least until August 1992.

My finding is that the discussion ended without any positive agreement as to the projected length of their stay in Germany. There was simply a mutual understanding that at that stage there would be no commitment to an indefinite stay in that country. The primary objective of both was that they would use the period in Germany as a breathing space to resolve their differences and plan a fresh course for their future family life.

The parents returned upon that basis to Glasgow, where they spent the remaining months of 1991 in selling up their home there and also in disposing of the father's business. He was able to arrange that on sufficiently favourable terms financially to leave him with a prospective liability for capital gains tax, a liability which he might be able to avoid if he was able to achieve an overseas residence for tax purposes for the financial year 1992/3.

In January 1992 they moved to Germany to take up occupation of the Frankfurt flat in the mother's parents' home. They brought with them their own bed, and a bed and cot for the boys as well as a portable television and video and the father's personal computer. The German flat was otherwise already sufficiently furnished, and their own remaining furniture and effects were therefore put into store in Britain. They spent the remainder of the winter and spring of 1992 in the German flat apart from a 2-week skiing holiday.

During this period, while they were living on the proceeds of sale of the business, the father tried to interest the mother in various projects, for going to live in the USA or France or Eire; but her response was always discouraging or non-committal. For his part, the father was unwilling to go along with the mother's suggestions that he might set himself to studying the German language and obtain work in that country. In May 1992 they made a short visit to England to stay with the father's mother in a flat in Clapham, which is registered in the father's name but in his mother's occupation. For the purpose of that trip they borrowed a friend's van into which they loaded the television and video and the father's computer for return to this country. The television was of limited entertainment value in Germany because it could pick up the vision of programmes only without the sound, but it was capable of relaying their stock of video cassettes which were returned on the same journey.

The father had retained his bank accounts in Britain from which their living expenses in Germany were funded by bank transfer. The May trip lasted only a few days, after which the family returned to the German flat where they stayed until July 1992. The mother had in the meantime registered the children as German residents. That was a step which she believed was necessary to comply with German immigration requirements. She had initially sought the father's agreement to that course but he had resolutely refused. I am satisfied that she thereafter let the subject drop, carried out the registration of her own initiative without his knowledge, and did not disclose it to him until shortly before, or shortly after, the crisis which has given rise to these proceedings had broken in England.

Early in July 1992 the mother made arrangements to take employment in Frankfurt as a kindergarten teacher. The father felt threatened by this step. He saw it as an attempt on the mother's part to give the German stay a permanence which he had neither agreed to nor intended. He took legal advice in England and in Germany. On 19 July 1992 the family came to England, on what was intended to be a 10-day holiday to be spent with the father's mother in Clapham. In fact, the father had already privately resolved to use this as an occasion to force the mother's hand, provided the legal advice he received here enabled him to take such

a step. He told her, untruthfully as he now admits, that he was proposing while in London to attend a job interview with a computer company which had a branch in Germany. What he in fact did was to consult immediately his London solicitors, with the following result.

On 22 July 1992 he firstly presented a petition for the dissolution of the marriage; secondly, he applied for and obtained an ex parte order restraining the removal of the children from England with a return date on 30 July 1992; and thirdly, he issued an application in family proceedings for a residence order and associated custodial relief.

The mother's immediate response, upon being served with this process which came as a complete surprise to her, was to take out her own family proceedings application in England for equivalent relief. On 30 July 1992 the mother issued her Hague Convention proceedings for an immediate return order. At 2 pm on that same day her counsel made an application ex parte for a declaration that the children's retention in England was unlawful. That was refused upon the ground that such relief ought to be applied for at a hearing inter partes. That same afternoon at 3.30 pm the parties were before the district judge for directions on their cross- applications for relief in the family proceedings. An order was made by consent for the transfer of those proceedings to the High Court, for the expedited filing of evidence, and for a court welfare officer's report.

The ex parte embargo on the removal of the children from England was, also by consent, continued until the hearing of the cross-applications for which a date was fixed of 17 November 1992. The hearing of these Hague Convention proceedings began before myself on Tuesday, 18 August 1992 and it is now being concluded on its fourth day. At the outset of the hearing the father applied to strike the proceedings out as an abuse of the process, claiming that the mother had debarred herself from continuing with them by her consent to the orders made in the family proceedings on 30 July 1992. I rejected that submission for reasons which I need not repeat because they are set out in the separate judgment which I gave on that issue.

In the light of that ruling, the father's counsel does not rely in these proceedings on the consent order made in the family proceedings against the children's removal from England as presenting any ground for refusing an immediate return order under Art 12 of the Convention if, upon a consideration of the Child Abduction and Custody Act 1985 proceedings on their merits, a case for such an order is found to be established. Counsel accepts that in that event the embargo would have to be lifted. She does, however, rely on it for other purposes which I shall mention later.

This has been a hearing at which the past words and action of the parties have been explored in evidence and in argument in relentless detail. In addition to the matters already set out in this judgment, attention was devoted to the exploration of such minutiae as the parties' motives for selling a right-hand drive car in Britain and buying a left-hand drive equivalent in Germany and for sending the father's two-seater sports car back to be garaged in England after it had been used for a spell in Germany. A family friend was called to testify that the mother, as she was leaving for Germany in January 1992, told him, as I accept that she did, that the couple had not yet decided where they were going to live, but that they were going to Germany to stay for a while with her parents to give them space away from the pressure of life in Scotland to sort things out and to decide what they were going to do and where they were going to live eventually. The former child-minder in Scotland had to make a long journey from Glasgow to be cross-examined on her affidavit deposing to the impression given to her - and she acknowledged that it could be no more than an impression - that both parents had intended the move to Germany to be permanent.

I do not propose in this judgment to follow counsel down that path of minute investigation, seizing upon a word here or an action there and allocating to each its due weight in the scale of presumed intention. I refrain from that advisedly, for two reasons. The first is jurisprudential. Domicile and habitual residence are essentially different concepts. The acquisition of a domicile of choice requires a combination of residence and intention of permanent or indefinite residence (see Dicey and Morris, Conflict of Laws (11th edn), p 128). A far more wide-ranging inquiry is needed to establish those elements than is appropriate or necessary when the court is dealing with the much simpler concept of habitual residence. That is a concept which depends solely upon showing a settled purpose continued for an appreciable time. It follows, therefore, that the detailed type of inquiry into presumed intention which characterises domicile proceedings is inappropriate when the court is dealing with issues of habitual residence. In the latter case it is normally sufficient for the court to stand back and take a general view. A settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.

The second reason is administrative. Hague Convention proceedings are, by their nature, summary. High priority is accorded to their urgent hearing in the Family Division. Human nature assures, unfortunately, that there will never be any shortage of Convention cases coming forward for disposal. If they are all to be dealt with fairly and expeditiously, there must be an element of peremptoriness in the court's approach to their hearing. Time does not allow for more than a quick impression gained on a panoramic view of the evidence.

When the present case is examined in that way from its commanding heights, the impression which emerges is, in my judgment, a clear one. This was a couple fighting commendably to save their marriage, for their own sake and that of the children. They shared the common objective of a limited sojourn in Germany as a platform from which to agree, if they could, a future pattern of life and work which would not clash with the misgivings which each of them felt about living permanently in the other's home country. Since that platform was sited in the mother's own home territory it was natural that she should hope, as she clearly did, that as his surroundings in Germany became more familiar to him her husband would find them more tolerable. She was disappointed in that hope, but it led her to stall and adopt a non-committal attitude towards the various suggestions which he advanced from time to time for an alternative home. That may explain why, in the end, he took the action he did in retaining the children in England against her will.

It does not, however, in the least affect, in my judgment, the essential nature and purpose of the sojourn in Germany, namely to provide a base for reconciliation and for planning a fresh start. That purpose was a settled one, and, despite the father's impatience at its failure and private resolve to bring it to an end, it remained a settled purpose in my view right up to the time when the mother came to England for what she supposed to be a short holiday. It was a purpose, moreover, which remained settled and continued for a period which can readily be described, for the purpose of the authorities mentioned at the outset of this judgment, as appreciable.

I therefore reject the argument of the father's counsel, Mrs MacGregor, that these were children who, having as she concedes lost their habitual residence in Scotland, had failed to attain an habitual residence anywhere else by the date of their arrival in England in July 1992. I hold that they were, for the purposes of Art 12 of the Convention, and Art 3, habitually resident in the Republic of Germany immediately before the date of their retention in this country.

Mrs MacGregor argued in the alternative, though understandably with less conviction, that the children were never retained in this country in any literal sense of that term at all. It is the order of the court, she says, and not any action of the father that inhibits their return to the land of their habitual residence. I reject that argument also. The Convention is not, in my view, an instrument to be construed semantically but purposively. Full and sensible effect can only be given to it if the term 'retention' is construed as wide enough to comprehend not only acts of physical restraint on the part of the retaining parent but also juridical orders obtained on his initiative which have the effect of frustrating a child's return to the jurisdiction of its habitual residence.

Mrs MacGregor argues, finally, that the mother's consent to the order of 30 July 1992 prohibiting the children from leaving the English jurisdiction until the hearing of the cross-applications in the family proceedings next November amounted, notwithstanding that such consent was given on the very same day that she launched the child abduction proceedings, to an acquiescence on her part in the retention of the children in this country for the purposes of Art 13(a). That argument, despite its ingenuity, is demonstrably unsound for two reasons.

The first is that the mother's consent to the direction given for trial of the family proceedings in England can be relied on only for the purpose of demonstrating that she has so far, and without prejudice to any issue of forum conveniens that may arise in this case in the future, agreed that the courts of England shall be the forum in which issues of future residence and parental responsibility or contact in regard to these children are to be decided. It could not possibly be interpreted as a consent on her part to the children remaining in the meantime in a country in which they have been wrongfully retained within the terms of the Convention.

The second is that the Convention, if it is to operate effectively, must do so in harmony, and not in conflict, with the courts whose task it will be, in one jurisdiction or the other, to deal with the long-term issues of child welfare which always arise in such cases but lie, by definition, outside the Convention's own very limited scope. Parents should, as it seems to me, be encouraged to do what both parents have done in this case, and proceed as rapidly as possible with family welfare proceedings designed to settle the children's future at the earliest achievable date. It would be very injurious to that encouragement if a parent's participation in family proceedings involved the risk of depriving him or her of a right to the children's return in the meantime, which would otherwise be theirs under the terms of the Convention, merely as a result of the Convention's references to 'acquiescence' being construed as extending to instances where the applicant has issued or defended family proceedings in the court of the requested State.

For all these reasons I am satisfied that the mother is entitled to an order under Art 12 for the return of the children to Germany forthwith.

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