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[25/08/1998; High Court (Northern Ireland); First Instance]
In re CL (a minor); J.S. v. C.L.

In re CL (a minor) and in re the Child Abduction and Custody Act 1985; JS v CL

High Court

Family Division

25 August 1998

Higgins J

HIGGINS J: This is an application under the Child Abduction and Custody Act 1985 for the return to the Republic of Ireland of CL who was born on 27 December 1994. This Act incorporates into domestic law the Convention on the Civil Aspects of International Child Abduction 1980 referred to as the Hague Convention. The applicant is the child's father and the respondent the child's mother who have never married. Both of them are citizens of the Republic of Ireland. A relationship began between them in June 1993 and in August 1994, they commenced cohabitation in Dublin. The relationship was beset by various difficulties and for periods of time the child was cared for by the applicant's family and the mother had daily contact with him. The couple finally separated in September 1996 when the mother and child moved to bed and breakfast accommodation in Dublin. Thereafter until a date in April 1997 the applicant had almost daily contact with the child and maintained him. The respondent formed a relationship with JT and in April 1997 moved to reside with him in Belfast, taking the child with her. The applicant alleged this took place early in April 1997 while the respondent alleged that it was later, at the end of April 1997. The father was not asked to consent to this removal of the child to Northern Ireland. Following this move to Northern Ireland the father made no application for the return of the child to the Republic of Ireland. Subsequently difficulties arose over access. Negotiations led to an agreement that the applicant have access with this son from Friday to Tuesday in Dublin. On 7 August 1997 the child's name was placed on the Child Protection Register following a Social Services case conference in Belfast. Further difficulties over access arose and after negotiations new access arrangements were agreed between the parties. It was agreed that the child would spend alternate weeks with the applicant in Dublin. This commenced in November 1997 and the handover of the child was supervised. On 8 January 1998 the Social Worker witnessed inappropriate chastisement of the child by the mother and informed the father. On 13 January 1998, the applicant collected the child for weekly access. He noticed bruising on the child's body. On 14 January, a Doctor in Dublin examined him. On 15 January, the applicant informed the Social Worker in Belfast that he intended keeping the child in Dublin. The child then remained with his father in Dublin and was enrolled in a local private school. The father is a citizen of the Republic of Ireland and has lived there all his life. He resides with his parents in Dublin and his mother who is 70 years of age helps him to care for the child. Following negotiations arrangements were made for the mother to have access in Dublin once per week for one hour on a Friday in a Social Service office. The mother was

due to have access with the child in Dublin in Friday 20 February 1998. The evening before the parties spoke on the telephone. The father offered to permit overnight access in Dublin provided the mother undertook to return the child on Saturday. The mother gave the undertaking required. On Friday afternoon shortly after 4 pm the father handed the child over to the mother on the understanding that the child would stay the night with her mother either at her sister's house in Dublin or at certain bed and breakfast accommodation in the City. Contrary to her undertaking the mother returned to Belfast that same evening bringing the child with her. On Monday morning, the father contacted his solicitor and the Social Worker in Belfast and on the following day, he contacted the Central Authority in Dublin with a view to having the child returned to Dublin. The child has remained with his mother in Belfast ever since.

On 28 April 1998, the father commenced these proceedings for the return of the child to the Republic of Ireland. An application for leave to call oral evidence was granted but limited to the events of 20 and 21 February 1998. The case made on behalf of the applicant is that the child was wrongfully removed from the Republic of Ireland on 20 February 1998 and also in April 1997. The mother claimed that when the father handed over the child on Friday afternoon he said that he was fed up listening to the child whinging and that she should take him back to Northern Ireland. The respondent has not established that the father did make this remark or that he consented to his son's removal to Northern Ireland. There is no reason to doubt the father's commitment to either his son or his desire to care for and maintain him. The date in April 1997 when the child was removed to Northern Ireland may be significant as an application for the return of a child 12 months or more after the child's removal has certain consequences for the operation of the Convention.

Over the years the applicant has obtained a number of court orders in Courts in the Republic of Ireland. On 21 November 1996, he obtained a Personal Protection Order against the respondent. On 17 December 1996 the District Court for Dublin Metropolitan District (Dun Laoghaire) made the following order: "by consent; access as arranged by the parties." Jane Barron is a barrister of eleven years standing who specialises in family law in the Republic of Ireland. She has sworn an affidavit on the law relating to parental rights and habitual residence in that jurisdiction. At paragraph 3 of her affidavit, she recites that the applicant was appointed Guardian of the child by order of the District Court on 17 December 1996. The order of 17 December 1996 put before this Court does not reflect that assertion made by Miss Barron. Rather in its preamble the Order acknowledges that the applicant is the child's guardian. It reads -- "On the hearing of an application by the abovenamed Applicant of XX, Co Dublin in the District Court District aforesaid being a Guardian of Cameron an infant for direction under Section 11(1) of the said Act, the Judge then sitting at Court at Dun Laoghaire, Co Dublin on the 17 December 1996 being satisfied that the Welfare of the Infant so requires ordered that: etc "In her affidavit Miss Barron states -- "This (order) gave the applicant certain right with regard to the said child. A guardianship order automatically resulted in the Applicant becoming a joint guardian of the said child with the mother". Section 6 of the Guardianship of Infants Act 1964 (ROI) states that the father and mother of an infant shall be guardians of the infant jointly. Section 2 of the Act defines 'father' and excludes the natural father of an illegitimate child, which this applicant is. Section 8(1) empowers a court to appoint a guardian where an infant has no guardian. The respondent, the child's mother, remains his guardian. Section 11 of the Act of 1964 does not provide for the appointment of guardians but empowers the Court to give directions on certain matters. The order of 17 December 1996 relates to Section 11(2), and refers to the order of the Court on an application for directions affecting the welfare of infants. Section 11(1) of the Act of 1964 permits any person being a guardian of an infant to apply to the court for its directions on any question relating to the welfare of an infant. Such a guardian will be either a father or mother (as those terms are defined in the legislation) or

one appointed by the court. Under Section 11(2) the court may by order give directions regarding the custody of an infant or the right of access of the father or mother (as defined and excluding the father of an illegitimate child). Section 11(4) extends the right to make an application for directions regarding the custody and right of access to an infant to the natural father where the infant is illegitimate. The order of 17 December 1996 is made under Section 11(2) and by consent provides for access to be as arranged by the parties. It does not appear that the court order of 17 December 1996 appointed the applicant as guardian. The order granted access to be arranged between the natural father and the mother and appears to be based on the premises that the applicant was guardian. There is no evidence before this court that the applicant is a guardian of the child or that he was ever so appointed by the court. It may be that the applicant is a guardian of the child, but this has not been demonstrated. According to the affidavit of Miss Barron the appointment of the applicant as guardian has certain legal implications. A person appointed guardian becomes a joint guardian of the child and where no application for directing under Section 11(2) is made, the guardians ('parents') are joint custodians of the child. This order relates to access and whatever be the true legal position it is of historical significance only in the context of this application.

On 17 June 1997 a further order was made by the District court. This states:

By consent access order every weekend Friday 3pm to Tuesday at 3pm; collection Park Centre Belfast (Entrance at Lobby) and return to Royal Marine Hotel, Dun Laoghaire.

This access arrangement was superseded by a further agreement made between the parties with the assistance of Social Services. The latter agreement, which was not the subject of a court order, was that the child would spend alternate weeks with the applicant in Dublin and the respondent in Belfast. On 20 January 1998 the applicant applied ex parte in the Dublin Family Circuit Court for relief under the Guardianship of Infants Act 1964. The Court granted leave for the applicant to serve a notice of motion on the respondent returnable on 23 January 1998 and ordered that in the meantime the child 'shall remain with the applicant'. On 21 January 1998 the respondent applied to the Central Authority in Dublin for the child to be returned to Northern Ireland. No further action was taken on foot of that application to the Central Authority. On 23 January 1998 the Circuit Family Court adjourned the notice of motion to 6 February 1998 and ordered and that the child remain with the applicant. On 6 February both parties were represented by counsel. The court again adjourned the notice of motion and ordered that the interim order made on 20 January 1998 should continue. On 19 February 1998 the matter came before the Circuit Family Court. Both parties were represented and the case was adjourned to 10 June 1998 for mention and the court directed "that the infant child CL shall remain in the custody of the applicant pending further hearing of this matter". During this period the respondent requested access to the child. Following negotiations between the parties it was agreed that access would take place in Dublin on Fridays for one hour at an office of the Social Services. Such access did take place on Fridays prior to the events of 20 February 1998.

Article 3 of the Convention provides:

'The removal or the retention of a child is to be considered wrongful where -

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.' Article 4 provides:

'The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.'

Article 5 provides:

'For the purposes of this Convention -

- a. "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;**
- b. "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.'**

Article 14 provides:

'In ascertaining whether there has been a wrongful removal or retention within the meaning of article 3, the judicial or administrative authorities of the requested state may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the state of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.'

Thus Article 14 is intended to assist a court to ascertain the law of the other contracting State, insofar as that law is relevant to whether the removal or retention was wrongful within the meaning of Article 3.

In defence of this application to return the child to the Republic of Ireland it was submitted on behalf of the respondent -

- i. that the child was at all material times not habitually resident in the Republic of Ireland;**
- ii. that the applicant acquiesced in the retention of the child in Northern Ireland in 1997;**
- iii. that the applicant consented to the removal of the child to Northern Ireland on 20 February.**

I preferred the evidence of the applicant on the latter issue and concluded that the applicant did not consent in the manner alleged to the removal of the child to Northern Ireland on 20 February 1998.

In order for the applicant to succeed he must establish that the removal of the child was in breach of the rights of custody attributed to him under the law of the state in which the child was habitually resident immediately before the removal or retention. The applicant is a putative father and ordinarily, in the absence of rights attributed under a court order or an agreement between the parties, he (as the natural father of an illegitimate child) would not have the right to determine where the child should live. The mother of an illegitimate child has the sole right to determine where her child should live. Furthermore unless otherwise agreed or ordered an illegitimate child acquires the habitual residence of its mother, wherever that may be and whenever she has acquired it. On 20 January 1998 and subsequently the Circuit Family Court in Dublin directed that the child should reside with

the applicant. Thus it is said the applicant has acquired rights of custody with the meaning of those words in the Hague Convention. The rights of custody referred to in the Convention may arise by operation of law or by reason of judicial decision in a contracting state and these rights include rights relating to the care of the child and in particular the right to determine where the child should live. Under Article 14 this court may take notice of judicial decisions made in other jurisdictions but only if those decisions are made by an authority in the State in which the child is habitually resident. Mr Long QC for the respondent has not sought to argue, correctly in my view, that the applicant did not have rights of custody attributed to him by the law of the Republic of Ireland. What Mr Long QC submitted was that whatever rights of custody the applicant may have had under the law of the Republic of Ireland that jurisdiction was not the child's habitual residence. Therefore one of the necessary proofs for a removal to be considered wrongful under Article 3 was absent and the application must therefore fail. Mrs Dinsmore QC who appeared on behalf of the applicant submitted that the child was habitually resident in the Republic of Ireland on 20 February 1998 and that prior to 20 January 1998 he had what she described as a sequential residence in each jurisdiction; and under the agreement made between the parties in November 1997 whereby the child would spend alternate weeks with each party, he acquired habitual residence in each jurisdiction for the week in which he was resident there.

In Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562,[1990] 2 FLR 442 Lord Brandon at pp 578 and 454 gave some guidance relating to the meaning to be attributed to the words 'habitual residence':

"In considering this issue 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 is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

In Kapur v Kapur [1984] FLR 920 Bush J held that the expression 'habitual residence' had the same meaning as 'ordinary residence'. In R v Barnet London Borough Council [1983] 2 AC 309 Lord Scarman considered the phrase in the context of education grants for students. He equated the phrase as having the same meaning as 'ordinary residence'. At page 344D said:-

"All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

In Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495 Balcombe LJ said at page 499:-

"Habitual or ordinary residence refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of regular order of his life for the time being, whether of short or long duration."

He went to say at page 500:-

"Where the habitual residence of a young child is in question the element of volition will usually be that of the person or persons who has or have parental responsibility for the child."

In Re V (A Minor) (Abduction: Habitual Residence) [1995] 2 FLR 992 Douglas Brown J held that a child had habitual residence in two jurisdictions namely England and Greece. For many years the family spent the summer months in Corfu and the winter months in London. The Judge held that a sufficient degree of continuity in the residence in each area had been established for habitual residence to arise in two different places though at different times of the year.

In Re A (Abduction: Habitual Residence) [1998] 1 FLR 497 Stuart-White J commented on Re V in these terms:- It is of course not in doubt that a person, including a child, may have a habitual residence in two different countries at different times of the year. This was plainly established in R v (A Minor) (Abduction: Habitual Residence) [1995] 2 FLR 992 and has not been the subject of dispute or argument in this case. Thus the fact that the child may have been habitually resident in England before being taken to Greece and may have been going to be habitually resident in England after return from Greece would not of itself prevent his being habitually resident in Greece during the intervening period. The question is whether on the facts as I find them to be and on established principles of law he did become habitually resident."

The question whether a person is or is not habitually resident in a particular country is a question of fact to be decided by reference to all the facts of the case. It is not necessary for a person to remain continuously present in a particular country in order for him to be habitually resident here. The purpose for which he is there as well as the time he spends there are both relevant and important.

Until April 1997 CL was habitually resident in the Republic of Ireland with the respondent. The respondent is a native and citizen of the Republic of Ireland and herself was habitually resident there as was and so remains, the applicant. In April 1997 the applicant had rights of access with his child. When the respondent moved to Belfast and commenced to live with JT her habitual residence eventually changed to Northern Ireland and the child's habitual residence changed also. This arose through her settled intention to remain in Northern Ireland with JT. Recently she gave birth to a second child and JT is the father of that child. From June 1997 the child enjoyed access with his father from Friday to Tuesday. Such an access arrangement did not displace the child's habitual residence in Northern Ireland. From November 1997 the arrangement was that the child would spend alternative weeks with the applicant in Dublin. Such an arrangement could lead to the child having habitual residence in Northern Ireland when he was with his mother and habitual residence in the Republic of Ireland when he was with his father. From 13 January to 20 January 1998 he was living with his father on foot of the arrangement made between the parties (although by 15 January the father had already evinced an intention not to return the child to his mother because of the bruising he had observed on 13 January). From 20 January 1998 the child remained with his father on foot of the court order of that date which was subsequently renewed and he so remained until 20 February 1998. Between 20 January and 20 February 1998 his residence was not sequential but continuous. It arose through retention of the child

in Dublin contrary to the agreement reached in November 1977 but under an order of the Circuit Family Court directing that custody of the child should remain with the applicant. The respondent failed to pursue her application under the Hague Convention and agreed to access arrangements for herself in Dublin. Thus it could be said that she gave more than tacit approval to the child remaining with the applicant. It is not without significance that the respondent failed to proceed with her application in Dublin for the return of the child or that she was legally represented in the proceedings in the Circuit Family Court which led to the final order to which I have referred.

Mr Long submitted that this 5 week period was insufficient for the child to lose his habitual residence in Northern Ireland or to gain habitual residence in the Republic of Ireland. Lord Brandon in *Re J supra* referred to an appreciable period of time. What that period will be must depend on the particular facts of the case. In *Re F* [1992] 1 FLR 548 Butler-Sloss LJ said at page 555 that month could an appreciable period of time. In *Nessa v Chief Adjudication Officer* [1998] 1 FLR 879 Morritt LJ said at page 895:-

"What is an appreciable period will depend on the facts of each individual case for all that is required is what is necessary to give to the fact of residence the quality of being habitual in accordance with the normal meaning of that word."

In a strong dissenting judgment Thorpe LJ doubted whether an appreciable period of residence was an absolute requirement in all cases in which the residence in issue was in its inception. He had in mind cases under the Hague Convention in which habitual residence was in issue and was concerned that the requirement of an appreciable period of time in every case might be an undesirable restriction.

The agreement between the parties for the child to reside alternate weeks in each jurisdiction was made in November 1997 and thereafter implemented. Therefore by 20 January 1998 this arrangement had been in force for some time. The 5 week period which followed that date cannot be looked at in isolation. It was 5 weeks in a jurisdiction in which the child was accustomed to stay for alternate weeks with his father who was himself habitually resident there.

Article 3 of the Convention states that the relevant residence is the habitual residence immediately before the removal or retention. After April 1997 the child's habitual residence changed to Northern Ireland. The agreement in November 1997 to permit the child to spend alternate weeks with his father was a significant alteration in the child's life. This was not simple access for one party for a limited and lesser period, rather an equal sharing of the care and control of the child's upbringing in two different jurisdictions. The child had been habitually resident in that jurisdiction from birth until his mother moved to Belfast. This was not a home which was new to him. He had lived there in the past for appreciable periods of time while he was in the care of his father who had responsibility for him, among relatives who were not strange to him. In *Re M (Minors) (Residence Order: Jurisdiction)* [1993] 1 FLR 495 Hoffman LJ (as he then was) made some helpful observations on the significance of the place in which the child may be and the person or persons with whom he resides:-

"Until the mother changed her mind, the children's presence in Oxford was for a temporary or transient purpose, namely for a holiday from Scotland. Once she decided that they should stay, they became resident and because they were in the mother's settled home and she intended they should remain there, I think they became at once habitually resident. In a case like *Re J* in which mother and child arrive in a new country together and have to find a settle home, it may be that although they have lost their old residence it is necessary for some time to keep an open mind on whether their new residence is habitual. But where a child

comes into a home which is undoubtedly the habitual residence of the parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual."

The decision to share the responsibility for the upbringing of the child on an alternate week basis in the jurisdictions was a major step in the child's life. It is also significant that the week in Dublin was spent in a home which was the habitual residence of his carers for that week and with whom he was familiar. It was not intended that his stay there on an alternate week basis would be either "merely transient or temporary". Thus residence solely in Northern Ireland was broken and the respondent agreed to that. The continuance of this new arrangement must inevitably lead to the child having that degree of continuity in the other jurisdiction, which is required for habitual residence in that jurisdiction when he is residing there. Thus by January 1998 the child was habitually resident in whichever jurisdiction he was living for a particular week. Therefore between the 13 and 20 January 1998 he was habitually resident in the Republic of Ireland. Should he remain longer than a week in one jurisdiction his habitual residence would not change so long as he remains there. Where his continued residence in that jurisdiction coincides with a court order which directs that he resides there, then his habitual residence remains the same.

The facts in this application are unusual if not unique. None of the cases to which I have been referred are factually comparable. My own researches have not revealed any similar cases. It is probable that alternate week arrangements in two different jurisdictions are extremely rare. It may be that such are more easily achieved between two contiguous jurisdictions like Northern Ireland and the Republic of Ireland.

In arriving at a conclusion on the issue of habitual residence it is helpful to follow the approach suggested by Waite J (as he then was) in *Re B (Minors) (Abduction) (No 2)* [1993] 1 FLR 993 when he said at page 989:-

"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* (11 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 characterise domicile proceedings is inappropriate when the court in 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."

In *Re A (Abduction: Habitual Residence)* [1998] 1 FLR 497 this general approach was adopted by Stuart-White J. It is sufficient to refer to part of the headnote, which reads:-

"When determining 'habitual residence' it was normally sufficient for a court to take a general view towards settled purpose continued for an appreciable period of time. The common intention of the parties had to be considered. The court should look to what was overtly agreed between the parties and discount the uncommunicated and mental reservations or an uncommunicated change of mind by one of the parties."

Applying those principles and after a consideration of all the facts in this application I conclude that on 20 February 1998 the child was habitually resident in the Republic of Ireland. His removal from that jurisdiction was in breach of the rights of custody attributed

to the applicant by the law of the Republic of Ireland and was wrongful under Article 3 of the Convention.

Article 12 of the Convention provides:-

"Where a child has been wrongfully removed in terms of Article 3 and at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."

Thus where a child has been wrongfully removed or retained in terms of Article 3 the judicial or administrative authority of the Contracting State where the child is, shall order the return of the child if, at the date of the commencement of the proceedings before such authority, a period of less than one year has elapsed from the date of the wrongful removal or retention. A period of less than one year has elapsed since the removal of the child in February 1998. Exceptions to the obligation on the requested State under Article 12 are contained in Article 13. The exception relied upon by the respondent was that the applicant had consented to the removal of the child to Northern Ireland. That issue no longer arises in view of my earlier findings of fact that the applicant did not consent to the removal of the child to Northern Ireland. Therefore the court is enjoined under Article 12 to order the return of the child CL under Article 12 of the Convention. The other issues relating to his removal in April 1997 do not require critical examination in this judgment. Suffice to record that if were it necessary to do so I would have held that the applicant acquiesced in the child's retention in Northern Ireland after his removal to this jurisdiction in April 1997.

I therefore declare that the removal of the child CL to Northern Ireland on 20 February 1998 was wrongful and in breach of the rights of custody attributed to the applicant under Article 3 of the Convention and I order his return under Article 12 of the Convention. Costs will be taxed in accordance with the Schedule to the Legal Aid Order and I certify for Senior Counsel.

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