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http://www.incadat.com/ ref.: HC/E/UKe 45
[28/06/1995; High Court (England); First Instance]
Re V. (Abduction: Habitual Residence) [1995] 2 FLR 992, [1996] Fam Law 71

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

28 June 1995

Douglas Brown J

In the Matter of V.

David Bodey QC and Andrew Tidbury for the father

Paul Coleridge QC and Jennifer Roberts for the mother

DOUGLAS BROWN J:

I have before me an originating summons in which the father of two children seeks their return to Greece under the provisions of the Child Abduction and Custody Act 1985 and the Hague Convention. The application is resisted by the children's mother and the matter has given rise to what is said to be a novel point in this jurisdiction, which I can best identify by summarising the history of this family and the competing submissions of the parties.

The father is 50, and the mother is 39, and they are husband and wife. He is Greek and lives in Corfu; she is English and now lives in London with the children. The children are H, born on 13 June 1991, who is 4, and A, born on 3 March 1994, who is 1.

For the last 25 years the father has been associated with an hotel in Corfu. The exact ownership may fall to be decided in ancillary proceedings now pending between the parties, but it is common ground that it is a successful enterprise, recently valued by Savilles at œ12m, although the actual realisable value may be rather less. That is one of the matters which will have to be considered if the ancillary proceedings continue. The father is the general manager of the hotel and a director of the company which owns it. He met the mother in 1975 in Corfu and she began to work for him in his business. They began to live together as if man and wife in 1981. They married in 1991 shortly before H was born in Athens. A was born in London. They last lived together in March 1995 in London. The pattern of their lives had for 10 years or more been that during the tourist season they would live in Corfu and from 1988 that was in a luxurious villa adjoining the hotel. During the winter, they lived for the most part in London, with occasional short visits back to Greece and other parts of the world. The length of the stay in Corfu and London, and particularly the stay in London, has been disputed and I have had to consider a considerable amount of documentary evidence and I have also heard some oral evidence.

The father's principal case is that the villa in Corfu was their home and their habitual residence was Corfu and therefore the children, taking their habitual residence from the parents, have an habitual residence in Greece and the house they lived in in London was not a family home but an investment property which they and many Greek friends made use of, the friends usually paying rent or some financial contribution. It is therefore the father's case that after he had returned to Corfu in March 1995 the failure of the mother to adhere to the agreed plan and follow with the children on 17 April 1995 amounted to wrongful retention of the children in the UK in breach of the father's rights of custody under the Hague Convention.

It is convenient before summarising the mother's case if I refer to Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980. This in its relevant part reads:

'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.'

Article 5 provides in its material part:

'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; ...'

It is common ground that under Greek law each parent has joint custody of the children. If the father is right and if the children were habitually resident in Greece when the mother failed to travel to Corfu with them in April 1995, the children were without doubt wrongfully retained and should be returned to Greece without delay. It is for the father, in the circumstances, to establish these grounds and in particular that the children were habitually resident in Greece.

It is the mother's case that they were a couple who were habitually resident in both Greece and in the UK concurrently, that the pattern of their lives for many years had been for them to live in two family homes: one from the spring until the autumn in Corfu and the other in London from about October until April. The alternative submission put forward is not that the habitual residence was concurrent but that it was consecutive: changing as the parties changed from one country to another according to the season. That is a subsidiary submission which Mr Coleridge QC for the mother has not given great weight to, impressing upon me his first submission that there was here concurrent or simultaneous habitual residence in both countries.

This pattern of life continued until March 1995 when the mother decided that the marriage was at an end. The mother, as I have said, was due to fly to Corfu on 17 April 1995 with the children and she in fact saw solicitors on 1 March 1995 about a divorce and the petition based on adultery and unreasonable behaviour is dated 5 April 1995. The intention was that that petition would be served personally on the father on or before 17 April 1995, in other words, before or on the date when she was actually due to travel.

The mother went - she does not hide this - to considerable lengths to conceal from the father her intentions and in the course of that, for example, she led the au pair that they employed in London to believe up to the last moment she was in fact going to Corfu. Unfortunately, service was not effected until the following day, by which time the father knew that the mother was not returning to Corfu with the children and considerable animosity has arisen as a result.

In the meantime, the mother had obtained ex parte from Hale J a worldwide Mareva order and a non-molestation order. I need only mention briefly the present state of the proceedings in England and in Greece. The mother has applied for ancillary relief and she has in Children Act proceedings obtained an interim residence order with the father having an order in his favour for contact now at alternate weekends at a nearby house supervised by an au pair and there is also telephone contact.

The father has applied for a stay of these proceedings under the Domicile and Matrimonial Proceedings Act 1973. The father has also brought proceedings in Corfu for the return of the children. Those were heard recently at an inter partes hearing and judgment from the Greek court is awaited.

I will return to the parties' submissions and how the case is put for each of them when I have considered and, insofar as I have to, decided the factual issues.

Although, as I have said, I have had available a considerable body of evidence sworn in these and in other proceedings and have had the benefit of hearing the father and mother carefully cross-examined by leading counsel, I will follow the practice of judges of this Division and will not decide this matter on a detailed examination of the life of this couple or the evidence that they have adduced in the various sets of proceedings. I will gratefully emulate the approach of Waite J in Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993 where, amongst other reasons for not following counsel down a path of minute investigation, Waite J (as he then was) said this at p 998G:

'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.'

Although both leading counsel cross-examined they did so economically and, if I may say so, skilfully and the oral evidence did not assume a disproportionate level in this case. Both of them invited me to approach the decision in the broad way suggested by Waite J.

There are issues between the parties about which I have heard evidence and which will more conveniently fall to be decided in the ancillary proceedings. There are, of course, even in these matters questions of some relevance to the matter which I have to decide, but they are not essential. For example, the precise ownership of the properties in London where successively the parties lived. It seems to me not to matter so much as to who owned the properties as the use to which they were put. I make no finding, therefore, whether the father beneficially owned the flat in London W8 from 1972 to 1987 or whether it was his father or whether it was an off-shore company.

After the mother and father began to cohabit, this flat was used in the winter months by them as their home. During the summer, for various periods, the flat was rented out, usually for short periods, but under a formal tenancy agreement. In 1986 the father bought in

addition to this flat a flat in London W2, purely, it is accepted, for investment purposes. The couple did, however, live there for a few weeks in the interval between the sale of the London W8 flat and the purchase of a five-bedroomed house in south-west London in 1987. This house was bought originally by a Panamanian company, said by the father to be owned by his father. I again make no concluded finding as to whether that is correct and in the circumstances of what I have to decide it does not matter.

In 1993 the property became the joint property of the mother and father, subject to a substantial mortgage to the Royal Bank of Scotland. The father says that that property was bought purely for investment purposes and was not intended as a family home. There may well have been an investment element in the decision to buy the house. The flat in London W8 had produced a spectacular profit in the 14 or 15 years or so it was owned by whoever owned it. The flat in London W2 was sold at a profit and the property market was still buoyant in 1987 and 1988. However, I accept the mother's evidence that this was the home of this couple in London and the family home in London after H's birth. It is not unusual for affluent couples to have more than one home in different parts of the world. That may or may not give rise to a change of individual residence when they move from one property to another: it depends entirely upon the individual circumstances of the individual case.

A Corfu villa adjoined the hotel. The hotel, it is common ground, is the family's principal source of income. The villa, which is well illustrated in photographs in the documents, is clearly a substantial and attractive property. But the UK house is a substantial house in an agreeable part of London and the family moved into that house for the winter months. It is agreed that the mother and father kept their clothing and personal effects there and travelled light when they came from Corfu to London.

When H was 2 she was entered at a London nursery school, and she attended there from 24 November 1993 regularly until 30 March 1994, shortly before returning to Corfu. Then after the summer in Corfu, from 31 October 1994 she rejoined the school and she is still there.

There has been some controversy as to the extent of education or schooling that H has had in Corfu. I am certainly prepared to assume that she has had some tuition in Greek in the summer of 1993 and 1994, although the mother vehemently and with reasoned argument denies that she was taught by a lady who is the wife of the water-ski franchise holder of the hotel. The vehemence of that denial prevents me from making a concluded view on exactly what happened. I would have to hear further oral evidence, which is not possible or, I think, necessary. If, as I accept, the child had two homes, it would not be surprising at her age if she had some schooling whilst at each home, if only nursery schooling or elementary Greek lessons.

For the father, it is stressed that the villa is a beautiful and comfortable home which had, for example, attracted the attention of President Yeltsin and the prime minister of Greece, both of whom want to rent it as a summer retreat. This is mentioned by the father as being some indication of the regard which he has for the villa as a family home, that he refused, even for a substantial remuneration, to give up the villa to either of these gentlemen.

In these circumstances, says the father, a terraced house in London is a poor substitute and could not be regarded as the family's home. In addition, the father says that large numbers of Greek nationals use the premises on payment. There were 25 separate sets of keys, including 25 alarm keys. This is not, it is said, the occupancy expected of a family home. Here I think the father is exaggerating and overstating the position. There were, without doubt, two young Greeks, children of family friends, who lodged there whilst attending college. I am also prepared to accept that for a time a substantial number of friends stayed

for short or sometimes long periods, often when the mother and father were in residence. They would be given keys for obvious reasons of convenience. I accept the mother's evidence that there were no more than six sets of keys. The provision of 25 alarm keys would be most unusual.

The mother took a large number of photographs over last weekend of the outside and many of the inside of the house and they have been before me in evidence. They show the house and contents, largely as they would have been in March 1995 when the father left. I need not refer to them in detail; they show, however, a typical family home in a typical family state. It is clearly a very well-equipped and furnished house and full of the everyday clutter of family life. There are a considerable number of family photographs on display and those remained there when the family was back in Corfu, where there was an equally, if not more extensive, collection of photographs on display. A car was always available, garaged locally, for when the family were in London. One minor detail is that the parties had headed stationery printed with the address of the house upon it.

When I come to look for evidence pointing the other way, the father is entitled to say that some of the documentary evidence supports his contention. The mother has declared herself to banks as being non-resident for taxation purposes. She has obtained export cars free of duty by similar representations. This she accepts. It certainly does not redound to her credit. She says this was done on her husband's instructions.

The father also relies on an affidavit from the paternal grandfather exhibiting a schedule of meetings of the hotel company, which he says the mother attended and signed the minutes. This purported to show that the mother attended meetings in Corfu, for example, in October, November, December 1993 and January 1994 and again regularly throughout the summer. The mother's answer is that she would, as a matter of general practice, sign minutes in batches at different times, but she was not in Corfu in the winter on the days that are shown on the schedule. Again this is not an easy matter to resolve without having heard the grandfather, but I have heard the father and I accept the mother's evidence on this: I thought she was a far more satisfactory witness than he was. He sought to persuade me that most of the dates shown were not in fact dates of the meetings but dates when the father wrote up the minutes. I thought his evidence on this was particularly unsatisfactory, but I go no further than that.

The mother, on the other hand, is entitled to rely on two recent affidavits of the father. In one, sworn on 26 April 1995, he said in a paragraph which was dealing with his views about reconciliation: `On Saturday, 22 April 1995 I slept overnight at the matrimonial home'. By that he meant the London house. When cross-examined about that he said that that was a mistake on the part of his solicitors.

On 12 May 1995, the day he began his Hague Convention application, the very same experienced solicitors, also acting in the Hague Convention proceedings, made exactly the same mistake in an affidavit sworn in answer to the Mareva application: `I have an interest in the following assets: (a) the former matrimonial home, [the London house]'. I do not think this was a mistake by these knowledgeable solicitors. I have not been told that they have recognised that this was a drafting blunder by them, which I would have expected to happen if it was a mistake by them. In both affidavits the father was recognising, in my view, the reality, namely, that the London home was indeed the matrimonial home in the UK and not just a holiday stopover accommodation. He is a shrewd and intelligent man and fluent in English and knew exactly what he was deposing to in these affidavits.

On the whole, although I do not embark upon a general or even a detailed assessment of issues of credibility, I was not impressed with the father and on any issue to do with residence I prefer the evidence of the mother.

In his originating application, repeated in an affidavit later, he said for a 3-month period during the winter of each year the parties resided in London, where they own a property in joint names. The evidence of the mother, based on her recollection and for a number of years on stamps in her passport up to 1988, when the stamps were no longer put in, is that for the most part they lived from October to April in London, an average of 5 months. The father may well have gone back in March to open the hotel up, but she would stay in London until April. The pattern, particularly after the children were born, was for her to leave in April when direct flights on charter planes became available, avoiding the difficulty with young children of changing planes at Athens.

I accept her evidence and find that they spent in fact the longer period that she says they did in the UK. I do not think that it matters greatly for the purposes of this case whether it is 3 months or 4 months or 5 months that they lived in London but as I have heard the evidence and I have considered the dispute between the parties that is my finding.

I have little doubt that the father relied on a 3-month period with a careful eye on the English Inland Revenue, who prescribe a 90-day period after which visitors may be liable for tax. The father claimed when cross-examined that he was unaware of any such tax rule. This is shown to be untrue when contrasted with his first affidavit, where he remembered a conversation with the mother: 'At which we discussed the length of time we could remain in the UK without being subject to tax'. The father, understandably, relied on the affidavits and oral evidence of a former woman friend of his, who has from time to time been his business associate, particularly in relation to the sale of horses. She also lives in the same street as the London house and as both mother and father were friendly with her the proximity of her house was a factor in the choice of the London house.

In her affidavit and in her evidence she said that she had the clear impression that for both mother and father the time in London was a holiday and that their real home was in Corfu. The mother had told her that it was their intention that the children should be educated in Greece. The mother's evidence denied that she had given that impression and could not recall any conversation about schooling. She had, in fact, seen very little of the father's woman friend in the last year or two.

I do not think that the father's woman friend has come to this court to tell deliberate untruths. She is, I have to say, uniquely beholden to the father. She and her current man friend and business partner, she says, have borrowed L20,000 from the father. The father denied that he would have lent any money at all to a man he does not know well and says the loan was purely to her, but be that as it may it is said to be an interest-free loan with no terms for repayment. But, as I have said, I do not think that she has come deliberately to tell untruths to advance the father's case. I do, however, prefer the mother's evidence to hers. I think that the father's woman friend is mistaken and I think it is likely that she is remembering conversations she may have had at some time over the last 10 years with the father but not with the mother.

If I do not mention other evidence and the contentions relied upon by the parties, it is not because I have not considered them; in particular, although I need not read them out, I have paid particular attention to the factual arguments in Mr Bodey's second skeleton argument. I have considered them. However, the broad view of the material that I have taken

establishes to my satisfaction that this family had two homes: part of the year spent in one country and part of the year in another.

Mr Bodey QC for the father submits in these circumstances I should still find that there was one place of habitual residence and that was Corfu for the detailed reasons that he has advanced. In summary (this was the main argument), the parties have a strong Greek connection. If, on the other hand, I was against him on that and found that there were alternating habitual residences on the facts of this case, changing twice a year on the move of the family back to Corfu and back to London then he submitted the father was still entitled to say the children were wrongly retained by the mother in April 1995. The argument runs in this way. Assuming, contrary to his case, habitual residence in England in the winter, the father returned to Corfu on 11 March 1995 in ignorance of the fact that the mother had already decided that the marriage was at an end, that she had instructed her solicitors to start divorce proceedings and had decided not to bring the children to Corfu in April 1995. In those circumstances, the father gave his consent to the mother and the children staying in London after he left in ignorance of the real facts. His consent to the mother and children not accompanying him on 11 March 1995 was vitiated and habitual residence of the family should be taken as reverting to Greece with the father on 11 March 1995. Her retention of the children on 17 April 1995, the date when they should have travelled together, was in breach of the father's joint rights of custody in Greece because, by s 2(1) of the Children Act 1989 both these married parents had parental rights and the mother was under a duty not to act unilaterally. He referred me to a judgment of Hale J in Re A (Wardship: Jurisdiction) [1995] 1 FLR 767. It is not necessary to refer to the circumstances in that case. The passage that he relied upon was at p 771E and it was a passage where the judge accepted a series of propositions which had been put forward on behalf of the Official Solicitor:

'First, if the parents are together the habitual residence of the child is that of the parents unless there is a settled agreement between them to the contrary. It seems to me that that proposition must be right. It flows logically from the parents' shared parental responsibility which entitles them to determine where the child lives. Habitual residence cannot, for this purpose, be identical to domicile, which is still dependent upon the father (although it is by no means impossible that the law on that point will be changed in the not too distant future). Of course, normally, where both parents have parental responsibility each can act alone without the agreement of the other, but in a matter such as this, although one parent would be able to send the child abroad, I would not agree that one parent could unilaterally change the child's habitual residence without the agreement of the other unless circumstances arose which, quite independently, would point to a change in the child's habitual residence. I draw that proposition, albeit in a case where parents were in different countries, from a decision of Wall J in the case of Re S (Minors) (Child Abduction: Wrongful Retention) [1994] Fam 70, [1994] 1 FLR 82. This approach has been quite frequently adopted in the context of Hague Convention cases. It stands to reason that that Convention could not operate were one parent to be able, unilaterally, to change the habitual residence of the child because the whole purpose of the Convention is to stop parents doing just that.'

In other words, Mr Bodey says, by deceit the mother has concealed her intention to retain the children and prevented the children from reverting to their habitual residence in Corfu. So that the Hague Convention is not frustrated, children are deemed to have their habitual residence with the father from a date in this case before the planned flight to Corfu in April 1995.

Mr Coleridge, for the mother, put the matter in this way. There are old authorities from taxation and other fields which show that a man can have ordinary residence in more than one country at the same time, and he referred to Cooper (Surveyor of Taxes) v Cadwallader

[1904] 5 TC 101; Re Norris (ex parte Reynolds) (1888) 4 TLR 452; and Pittar v Richardson (1917) 87 LJKB 59. Further, he submits that the case of V v B (A Minor) (Abduction) [1991] 1 FLR 266, a decision of the President, is authority for the proposition that habitual residence equates to ordinary residence. Therefore, says Mr Coleridge, the periods spent at the two family homes give rise to concurrent habitual residence in both the UK and in Greece. It is not possible to fit these circumstances into the framework of the Hague Convention. And Mr Coleridge submitted that in a case where a family has dual residence and maintains houses in more than one country there can never be wrongful removal or retention for the purposes of the 1985 Act, provided that at the material time the child or children are present in one or other of the 'home' jurisdictions. In such cases the Hague Convention procedure is inappropriate and misconceived and the appropriate occasion to decide where the children's future should be decided is in the forum conveniens hearing already underway. Alternatively, there should be a hearing in England with welfare considerations to decide whether the children should live in Greece with the father or in England with the mother.

If habitual residence was, in this case, consecutive rather than concurrent, Mr Coleridge said this about the father's alternative argument. He said it was based on a fallacy: the essential ingredient missing from the father's argument was that the marriage had in fact broken down and once that had happened then the original parental agreement as to where the children should live in the summer no longer existed. The children were habitually resident in the UK at the moment the mother failed to return them.

Those, in summary, are the competing arguments. It is for the father to establish that at 17 April 1995 when the mother did not take the children to Corfu they were habitually resident in Greece. In my judgment, he has failed to establish this. The principles as to habitual residence derive from the leading authorities, including Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, are conveniently summarised by Waite J in Re B [1993] 1 FLR 993 to which I have already referred. At the top of p 995, the judge said this:

'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 (A Minor) (Child Abduction) [1992] 1 FLR 548 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.'

It is possible (and this was accepted by Mr Bodey) for habitual residence to change periodically if that is the intended regular order of life for the parents and the children. There obviously would not in those circumstances be habitual residence in more than one place at the same time. I have considered the older cases cited and the dicta of the President in V v B (above) and, of course, there are strong similarities between the concept of habitual residence and that of ordinary residence. However, concurrent habitual residence does not fit easily into the aims of the Convention. The preamble to the Convention begins:

'Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence ...'

In my view there is, to use the phrase found in many of the habitual residence cases, a sufficient degree of continuity in the residence in London for habitual residence on the part of the parents to arise and an equally sufficient degree of continuity in their residence in Corfu for the same result to arise. Therefore for part of the year the parents and the children were habitually resident in London and for the remainder of the year habitually resident in Greece. At the time when the mother was due to take the children to Greece they were habitually resident in London and had been since the previous November 1994. Accordingly, the father has failed to show that they were habitually resident in Greece at the relevant date.

The father's ingenious argument based on the deception of the father fails for the reasons canvassed by Mr Coleridge. Another fallacy is that there never was any intention of the parties that the children would go with the father on 11 March 1995. The deception, for such it undoubtedly was (because she concealed her plans), did not persuade him to travel without the children on 11 March 1995: there was no question of them travelling on that date. They were planning to go when direct flights were available in April 1995 and not before.

Further the father cannot, by a process akin to relation back, antedate the children's habitual residence to the day he left. They remained in London until 17 April 1995 as planned. The mother could have changed her mind; the father could have discovered what was happening earlier and come back to England. But all of these events and other speculative events which might be thought of are a fragile case on which to hang habitual residence. The plain fact is that the children resided with the mother up to 17 April 1995 and were not habitually resident in Greece at that stage: they were habitually resident in London.

In the circumstances, the application is refused.

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