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20/05/1992; High Court (England); First Instance]
Re F. (Minors) (Abduction: Habitual Residence) [1992] 2 FCR 595, [1993] Fam Law 199

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

20 May 1992

Thorpe J.

In the Matter of re F.

Counsel: S Gill for the Plaintiff; N Watt for the Defendant

THORPE J: This is a father's application brought under the Child Abduction and Custody Act 1985. The originating summons was issued on 16 April this year and seeks an order that the two children of the family be returned forthwith to the care and control of the Plaintiff father in Canada.

The relevant facts have been helpfully summarised in a chronology submitted by Mr Gill who appears for the Plaintiff father. That shows that the parents married in Canada on 23 October 1987. The father has dual nationality, being entitled to a Canadian passport through his birth and upbringing and also to a British passport since his parents are British. The mother has a British passport only, her family living in Coventry. There is in fact some interconnection between the maternal and paternal family, since the mother's step mother is the twin sister of the father's mother, although the father is himself adopted. The children of the parents' marriage are respectively S who is three years of age and K who is one-and-a half.

The mother left Ontario for Coventry with both children. She says that there had been difficulties in the marriage but that at that stage the intention was that she and the children should have a two-month holiday with her parents and accordingly return tickets were purchased for all three. On 5 October, the father joined the family in Coventry and shortly thereafter discussion between the parents resulted in an agreement. The father's evidence in an affidavit sworn on 30 April puts it thus in paras 6 and 7:

"6. After more discussion, we both decided that we wanted the marriage to continue. However, the Respondent wished to life in the United Kingdom where she had grown up, and it was only on those terms that she was willing to make things work out.

7. I agreed that we should move to the United Kingdom on the understanding that we would be together as a family and I never agreed either then or now, that the Respondent and my children could live in the United Kingdom without me."

The mother in her affidavit sworn on 7 May, para 4:

"We did discuss the future in detail when the Plaintiff came to England. The children had already been here for some weeks. I felt that our marriage might work in this country. We did agree that I should look after the children whether or not the marriage worked and that I should do that in England where I have the support of my family and the companionship of friends. I should make it very clear that I always understood that the Plaintiff should be involved with major decisions affecting the children and that he would have access to them. I adhere to that position today."

The parents agreed that they would return to Canada together as a couple to sort out the practicalities of the intended family relocation in the United Kingdom. The father in his affidavit, para 9:

"We anticipated that the Respondent would return to the United Kingdom in April 1992 and that I would rejoin my family in July of 1992 after my release from the Canadian Armed Forces."

On the day before their departure, the parents signed a document:

"We, the parents of S and K, leave them in the safe keeping of their grandparents who will act as guardians with full authority until we return to the United Kingdom."

In fact the mother's return to the United Kingdom came long before the anticipated month of April 1992. She returned on 12 November. The father followed on 11 December and remained with the family in Coventry until the end of his Christmas holidays on 11 January.

In relation to that Christmas month, the father says, para 14:

"Over this holiday period I stayed with the Respondent and her parents. It was a most uncomfortable time but I was happy to be with the children and although there were some difficulties between us, I was hopeful that once I moved to the United Kingdom and we had our own residence, we would work things out."

The mother, para 7:

"The Plaintiff's visit to my parents' home in December was certainly not a success, but I did not at that stage know that the marriage was over."

Plainly after the father's return to Canada on 11 January the mother must have reached the conclusion that the marriage was over for on 20 January she issued an application under the Children Act 1989 seeking a residence order and financial provision.

On the following day the father telephoned. His affidavit, para 18:

"On January 21st, 1992, I telephoned the Respondent and I was advised that our marriage was over. She specifically told me that I could not move to the United Kingdom and stay with her at her parents home because her parents did not wish me to be there. ... Until that point I had not realized that we had separated on a permanent basis."

The mother's affidavit, para 8:

"In the course of the conversation, the Plaintiff told me that he thought that our relationship was over, and asked if I agreed. ... I agreed, but I certainly did not make any unilateral decision to end the marriage."

So there is some difference of emphasis between them but at least it is common ground that within about 24 hours of initiating proceedings the mother told the father that the marriage was at an end.

The father says that he took advice in Canada in that month of January and was advised that he had no legal remedy.

On 10 February the mother issued a petition for dissolution in the Coventry County Court.

In March the father says that he was further advised, on this occasion positively, to take proceedings under the Hague Convention. On 16 April he issued the originating summons to which I have referred and on 30 April he issued a notice of application in the Ontario Court by which he sought a declaration that the habitual residence of the children is Province of Ontario, secondly a declaration that the retention of the children by the mother was wrongful within the meaning of the Convention and, thirdly, a declaration that he was entitled to and actually exercising his rights of custody to the children at the time of their wrongful retention in the United Kingdom. That application was twice adjourned and the parallel application in this jurisdiction was also adjourned. The result of those directions was that the Canadian application was fixed for final hearing on 19 May and the United Kingdom originating summons for hearing on 20 May.

The outcome in Canada is not entirely clear beyond the certain knowledge that the Court dismissed the father's application.

This morning Mr Gill has tried to persuade me that his client is entitled to a peremptory order under art 12 of the Convention. Of course in order to justify his client's entitlement to that relief, he has to show that the children have been wrongfully removed or retained in the terms of art 3. Article 3 shows that the removal or retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person either jointly or alone under the law of the state in which the child was habitually resident immediately before the removal or retention.

So, ultimately refined, the question in this case is were the children habitually resident in Canada as at 21 January 1992, the date upon which the arrangement for shared family life in this jurisdiction finally broke down?

It seems to me quite impossible for Mr Gill to demonstrate that essential foundation. The reality is that in mid-October these parents agreed that their children should be brought up in the United Kingdom by both parents, assuming that the marriage survived the stresses to which it was subjected, or by the mother alone if it did not. That situation had the father's support and approval so long as the prospects for the survival of the marriage survived.

The father in his affidavit, para 21, has asserted that the mother never intended to make the marriage work and deliberately misled him into allowing her and the children to remain in the United Kingdom in October 1991. There is absolutely no particularisation of that assertion and no specific evidence to support it. It seems to me no more than an unfounded suspicion.

The question of the legal route by which the habitual residence of children changes was considered by the House of Lords in the case of C v S [1990] 2 All ER 961, [1990] FLR 442. In the Court of Appeal, the Master of the Rolls had expressed these views on the transition process:

"I think it is a very interesting question whether J and his mother would establish habitual residence in this country as at the moment when they arrived in this country in circumstances in which they had every intention of staying here indefinitely and of settling here.

But I do not think with respect to the argument, that that is the point. The question is: did J's habitual residence in Australia, which certainly existed up to 21 March (1990) continue thereafter? It may take time. I do not say it does, to establish habitual residence, but I cannot see that it takes any time to terminate it. J's intentions must, of course, be those of his mother ... and there is no doubt at all in my mind that the mother ceased to be habitually resident in Western Australia from the moment when she left Western Australia bound for England, with the intention of remaining permanently in this country."

In the House of Lords, Lord Brandon in his speech concurred with that basic proposition. He said:

"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."

He then went on to express a different view as to the speed with which habitual residence can be acquired in the new land. He said:

"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."

Applying those principles to this case, it is absolutely plain that these children ceased to be habitually resident in Ontario on a date in mid-October 1991 when their parents mutually decided that they should remain in this jurisdiction and that their grandparents should have charge of them whilst their parents sorted out the practicalities of packing up family life in Canada and tackled the inherent differences that had arisen between them within the marriage. Whether the children had obtained habitual residence in this jurisdiction between that date and 21 January 1992 is a more open question. For my part, I prefer the conclusion that they had. But in my judgment it is not necessary to determine that question. For Mr Gill does not demonstrate his client's entitlement to relief under the Convention by establishing that the children had failed to acquire habitual residence within this jurisdiction by 21 January. He is only entitled to succeed if he can demonstrate that at that date they were habitually resident in Canada.

For all the reasons which I have given, my inescapable conclusion is that he has completely failed in that task and that these proceedings are misconceived. In the most ordinary language, the proceedings are misconceived because these are not abducted children but children whose centre of gravity has been switched eastwards across the Atlantic by parental agreement in the autumn of last year at a time when the marriage was by no means over, although its future hung in the balance.

Had the Canadian judge determined that the children were habitually resident in Ontario yesterday, I would not have delivered a judgment reaching the opposite conclusion without at least adjourning to obtain a transcript of his findings and conclusions. But since the conclusion that I have reached accords with his, I have not thought it necessary to adjourn this summons for that information. I am satisfied that it is safe to dismiss the summons without further evidence of the basis of his judgment.

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