http://www.incadat.com/ ref.: HC/E/UKs 351
[19/06/2001; First Division, Inner House of the Court of Session (Scotland); Appellate Court]
D. v. D.

FIRST DIVISION, INNER HOUSE, COURT OF SESSION

Lord President

Lord Coulsfield

Lord Cowie

P306/01

OPINION OF THE COURT

delivered by LORD COULSFIELD

in

RECLAIMING MOTION FOR RESPONDENT

in

PETITION

of

E.D.

Petitioner;

against

S.G.D.

Respondent:

for

An Order under the Child Abduction and Custody Act 1985

Act: Sheldon; Skene Edwards, W.S. (Petitioner)

Alt: Wylie; Brodies, W.S. (for MacDonald Garvie, Dundee) (Respondent)

19 June 2001

[1] The petitioner is the father and the respondent is the mother of a child, S., born in Scotland on 19 December 1995. During 1999 and the earlier part of 2000, the parties and the child were living in the area of Konstanz in Germany. In September 2000 they moved to a flat in Kreuzlingen, which is part of the same conurbation as Konstanz but is in Switzerland. On 11 October 2000, the respondent left Switzerland with the child and came to Scotland. The petitioner did not take immediate steps to locate the respondent or the child but eventually the Swiss authorities, at the petitioner's instigation, made an application to the Scottish

Ministers. That led to the present petition under the Child Abduction and Custody Act 1985. The first order in the petition was made on 6 March 2001. Affidavits and productions were, in due course, lodged and on 4 May 2001 the Lord Ordinary ordered the return of the child to Switzerland forthwith. The respondent now reclaims against that decision.

[2] The Lord Ordinary dealt with three issues. The first was whether the child was habitually resident in Switzerland at the time of his removal to Scotland; the second was whether the petitioner had acquiesced in the removal of the child from Switzerland; and the third was whether there was a risk that the child would be put in an intolerable situation if an order for his return to Switzerland was made. The Lord Ordinary also had to deal with certain submissions made on behalf of the respondent in regard to the procedure which had been followed and the use of certain documents and affidavits. The Lord Ordinary decided all these issues in favour of the petitioner. In the reclaiming motion, the respondent sought to challenge the Lord Ordinary's decision on the question of the habitual residence of the child but did not reclaim against his decision on the questions of acquiescence or the risk of an intolerable situation. So far as the procedural matters are concerned, some reference was made to them in the course of the hearing on the reclaiming motion, but it became clear that these issues had no material bearing upon the reasons for the Lord Ordinary's decision.

[3] The Lord Ordinary narrates the history of the parties' relationship and marriage in detail. Most of that history was not a subject of dispute in the reclaiming motion and it is not necessary to rehearse all of it. In summary, the petitioner is 42 years of age and is a German national. He is now employed as a senior registrar in cardiothoracic and vascular surgery at two hospitals, both owned by a Swiss company, one of which is situated in Konstanz in Germany and the other in Kreuzlingen in Switzerland. The respondent is 36 years of age and Scottish. She had a difficult childhood, being brought up in homes and foster care, but qualified as a nurse and later obtained a University degree, and is now employed as a staff nurse in a care home in Scotland. She was previously married but divorced in 1995. The relationship between the parties began when they were both working at a hospital in Northern Ireland in September 1994. The parties stayed briefly in Germany but then moved from Ireland to Scotland in August 1995. The child was born on 19 December 1995 and the parties married on 31 May 1997. The petitioner worked first as a house officer and later as a registrar in hospitals in Scotland. He also had two spells of employment in Germany, although the respondent did not move there for any significant period.

[4] The parties moved to Konstanz on 1 May 1999 when the petitioner became employed by his present employers. He is employed in a permanent contract to work in the two hospitals. The Lord Ordinary explains that Konstanz and Kreuzlingen really form part of one urban area stretching across the German/Swiss frontier. The parties initially lived in a room in the hospital in the German part of the city but in September 1999 they moved to a one bedroom flat in Mainaustraasse, also in the German part of the city. They remained there, subject to some episodes to be narrated in a moment, until they moved on 1 September 2000 to a flat at 6 Gartenstrasse in Kreuzlingen. On 22 September, the petitioner left that flat and moved in with a girlfriend, M.D., in accommodation in the German part of the city. As we have already said, on 11 October, the respondent left Kreuzlingen with the child.

[5] As we have mentioned, the respondent had a difficult childhood and upbringing and during the course of the parties' relationship there were episodes of self-harm and other problems. In about April 1998, while the petitioner was in Germany, the respondent left the family home for a few weeks. In November 1998, she spent some time as an in-patient following a suicide attempt. She did not settle well in Germany when the parties went there. She did not learn German and could not obtain employment. During September 1999, the parties were in England while the petitioner was trying to find work. This visit led to the petitioner being offered a job in Oxford, but the respondent again attempted suicide, and was in hospital for some weeks. During that period the child was sent to his paternal grandparents, who were living in Spain. The respondent again tried to kill herself in about May 2000. The Lord Ordinary remarks that this was at about the same time as the petitioner told her that he was in love with a new girlfriend, and finds that at that time the petitioner asked the respondent to leave the house, then in Mainaustraasse in Konstanz. This part of the Lord Ordinary's findings will, however, require further comment. In any event, as the Lord Ordinary says, despite the new girlfriend, the parties moved to the flat in Kreuzlingen on 1 September 2000. The Lord Ordinary says:

> **"The reason for the move across the border was that the petitioner's employers required their employees to be Swiss residents because of the more advantageous employment regime in Switzerland. The petitioner also wished to move for tax purposes, i.e. to avoid double taxation. He obtained the appropriate residence permit for himself and this also covered the child but not the respondent. He obtained an authorisation to use his German registered car in Switzerland**

without paying additional excise duty. The family did not register with a doctor, dentist or kindergarten in Switzerland. The respondent did not obtain any residence permit."

[6] The Lord Ordinary says that the move had the appearance of one to set up a family home and that some furniture was bought. He then narrates the parties' different views of the situation at this time. He says that the petitioner perceived the reason for the respondent moving with him to the Swiss flat to be at least in part that she had nowhere else to go. At the time of the move the petitioner saw the marriage as effectively at an end and he expected the respondent to move out of the new flat at some stage. On the other hand, the respondent thought that she might be continuing married life with the petitioner, as she understood that he was still in the process of deciding whether to stay with her or join his girlfriend. The Lord Ordinary also says:

"One question was what was to happen to the child in the event of a separation. Although the petitioner asserted that he expected the child to stay with him, such an arrangement could have been no more than an expectation. No concrete plans had been made."

[7] In coming to a decision on the issue of habitual residence, the Lord Ordinary cites a number of authorities. It is accepted that, in general, the Lord Ordinary directed himself correctly as to the tests to be applied in the determination of habitual residence. It is, however, necessary to quote in full what the Lord Ordinary says when he comes to apply the tests. He says:

"[25] The parties and the child moved to Konstanz because of the petitioner's work. The work was not of a temporary nature but upon a permanent contract as a Medical Registrar. Although there was the strong possibility, perhaps even the probability, that the family would at some time move from Konstanz should the petitioner have obtained another, especially a promoted, post such as that of consultant, the parties did have the settled intention to live in Konstanz. By the time of their move to Kreuzlingen, they had lived in Konstanz, albeit at two different addresses, for an appreciable period of time. They were habitually resident in Konstanz and hence in Germany. When they moved to the flat in Kreuzlingen, they did so for various tax and administrative reasons relating to the petitioner's employment and tax situation and also because the accommodation was bigger and better. It was effectively a substitute residence in the sense that it did not involve any intention to leave the general area in which they were living. On the contrary, the parties were remaining in the same vicinity as they were in already, albeit they had crossed an international border. Their settled intention did not change except in so far as it involved the decision to move across that border. When looking at whether an 'appreciable' period of time has elapsed, the fact that they were only moving a few kilometres and remaining in what is essentially the same urban conurbation cannot be ignored. The move was a short one in terms of distance but, once the family were settled into their new home in Gartenstrasse (i.e. within a few days of moving in), I am of the view that the period of their residence was enough for them to be classified as habitually resident there. Although this can be analysed as meaning that they acquired habitual residence in Switzerland within days, just what is an 'appreciable period' must be a question of circumstances too.

[26] The family had lost their German habitual residence shortly after moving from the flat in Mainaustraasse. It is true that the petitioner subsequently left Gartenstrasse to live in the flat of his girlfriend which was back in Germany. However, this was only a temporary arrangement and he planned to return to the Gartenstrasse flat in the not too distant future. He had obtained his Swiss residency and work permits and all of this points to his continuing to have his habitual residence at Gartenstrasse and hence Switzerland. In relation to the respondent, one peculiarity of the case is that the petitioner was of the view that she would not be staying long in Switzerland but moving out of the flat and going to the United Kingdom. If this had been the understanding of the respondent when she moved to the Gartenstrasse flat then it might have been difficult to fix her with a settled intention to remain in Switzerland 'for some time'. However, that was not her view. Rather she looked upon the new flat as replacing the old and in which she might, or might not, continue married life with the petitioner depending on the outcome of his meditations. In any event, given that both parties and the child moved into the flat and remained there together for some time before the petitioner temporarily moved out, in the absence of any plan by the parties that the child was also to leave the Gartenstrasse flat and go to the United Kingdom, it seems reasonable to conclude that this flat had been chosen for him by the parties as his habitual residence in that both parties had a settled intention that he should stay there for some time. In all the circumstances, I must conclude that, despite the short time span involved, the child was habitually resident in Switzerland as at the date of his removal."

[8] It is clear from those two paragraphs (and from some other, less significant, passages in his opinion) that the Lord Ordinary required to contend with significant differences between the affidavits of the parties. His findings, in some respects, reflect those differences, but in other respects, such as his finding that the petitioner told the respondent about his affair with M.D. in May 2000, he has accepted one version rather than another. He has proceeded to draw inferences as to the settled intention of the parties. It was, however, submitted on behalf of the respondent that the Lord Ordinary was not entitled to proceed in this way, and that where there were contradictions between affidavits, and no other evidence to support a conclusion one way or another, no conclusion could be drawn. That submission was supported by reference to *Re A.F. (A Minor)* [1992] 1 F.C.R. 269, and seems to us to be sound. It follows that it is necessary for us to consider what was said by the parties in their respective affidavits.

[9] There were two affidavits lodged by the petitioner. The first is No. 6/2 of process in which the petitioner said, in paragraph 3:

> **"I have explained that my wife and I moved to Switzerland on 1 September 2000. We did move as a family, although I asked her to leave on many occasions in the past because of her behaviour. I wanted to separate. She came with me to Switzerland by agreement because there was nowhere else for her to go. She moved into the flat I had obtained and I stayed with my girlfriend. [It was agreed that this was an error, subsequently corrected]. The plan was that she would move out eventually once she found herself somewhere. I did not want to press her because in addition to her suicide attempts she suffers from fibrotic lungs which means that she cannot walk very far without becoming breathless. This was caused by a reflux of her stomach contents into her lungs during two of her suicide bids. The arrangement for S. was that he would stay with me."**

[10] In a later affidavit, 6/7 of process, the petitioner describes the move in paragraph 10. His narrative includes a description of buying furniture for the flat along with his wife and an explanation that, although there were some items of furniture stored in Glasgow, the parties' life had not been "nomadic". He then states:

> **"There are some things in Glasgow - shelves, stereos, tv's etc. but I was waiting until we got a decent flat before shipping it over. I was going to do that when S.G.D. left. I have some personal items with my parents and the things she refers to in Belfast are hers. I never lived there. I stayed with my wife in the flat from 1 September to 22 September 2000. I then moved out and stayed in M's flat. This was to give my wife room. She was by then planning to move away. I was quite happy to give her time to get herself organised. I realised I loved M. in around May 2000 and told my wife that. I asked my wife numerous times to leave. In effect the marriage had been a sham for years but we stayed together for my wife's sake and for S's sake. Once I met M. I could not continue the sham any longer. My wife and I had always agreed that S. would stay with me."**

[11] Again, in paragraph 12, the petitioner states:

> **"I have said that I let my wife stay in our flat in Kreuzlingen to give her time to sort herself out. I realised that it would take a while. I knew she was planning to go back to the U.K. and I eventually, and I even offered to pay for a flat in the U.K. for her. We discussed divorce and I wanted to have financial matters and S's residence agreed before raising divorce proceedings. We discussed the situation fully. It was never my intention that S. should be taken to the U.K. even temporarily."**

[12] On the other hand, in an affidavit dated 12 March 2001, No. 9 of Process, the respondent says:

> **"Then in the September of the year 2000 that we moved to Gartenstrasse, Kreuzlingen. Within two weeks of having moved to that flat E. stopped coming home and moved in with a nursing auxiliary from his clinic. He didn't tell me straight out but it became quite apparent when he would only pop back for clean clothes. I guessed which female it was and he told me at that time he was undecided as to what he wanted. He asked me to hang on whilst he made up his mind. I stayed for a short while as due to my lack of friends and family I felt I didn't have any option."**

[13] A little later in the same paragraph, paragraph 13, she says:

> **"E. told me that he would see how things went with the girl but if it didn't work out he would come back to me. This was the last straw and I got back in touch with my family. We left**

> **Switzerland on the 11th of October 2000. E. had very little contact with myself or S. from when he moved out around the middle of September 2000. By that stage we had been in Switzerland for five weeks. Given that E. was still applying for jobs abroad there was no suggestion that we had settled there. I tried to discuss, for example, enrolling S. in a kindergarten there but E. had refused to do this."**

[14] In a supplementary affidavit, No. 10 of Process, the respondent states, in paragraph 2:

> **"With regard to the discussions I had with my husband about leaving Switzerland with S. I discussed this with my husband face to face in early October 2000. He told me about the affair he was having towards the end of September. The first night he didn't come home was the 21st of September so as far as I am aware that is the start of it. We had only moved to Switzerland on the 1st of September 2000. Around the beginning of October he said he wanted some time to get his head together. I said that I was struggling to cope also and he had made a comment that it was a shame we didn't have any friends or family to visit with S. to give him some time to sort his head out. I said to him that I could still do that and I could go to Shona's in Dundee."**

[15] In a later paragraph, paragraph 11, the respondent states, with regard to the residence in Kreuzlingen:

> **"We did not even have the appropriate forms to fill in from City Hall to register our residence there. As far as I am aware there were other administrative requirements that should have been done but were never attended to. We were very much just 'camping out' at the flat at Kreuzlingen. We had not got any of our things out of storage to make a home. White goods in the kitchen came with the flat. We did buy a bed for S. to sleep on. There was, however, no sofa and we were sitting on deck chairs in the livingroom. We only had the very basics of what a household needs. We had no wardrobes for example. Our clothing was hanging on rails. The whole situation was completely transient."**

[16] In a second supplementary affidavit, the respondent repeats that it was in about the second or third week in September that the petitioner confessed to his affair with M.D.

[17] From these documents it is, in our view, clear that there are several salient points of disagreement between the parties. Firstly, the petitioner says that he told the respondent about the affair with M.D. in May 2000 while the respondent says that she was ignorant of it until late September or October 2000. Secondly, the petitioner says that his wife came to Kreuzlingen because she had nowhere else to go but that the plan was that she would move out. The respondent does not accept there was any such plan and says that what happened was that the petitioner asked her to "hang on" while he made up his mind about the affair with M.D. The petitioner says that his intention was to stay in Kreuzlingen while the respondent says that he was still applying for jobs elsewhere. The petitioner says that the parties took steps to set up house in Kreuzlingen. The respondent says that they were only camping out with the minimum of necessary possessions, that there was no arrangement for her to obtain a residence permit and that the petitioner refused to discuss kindergarten arrangements for S. The petitioner says that it was intended that S. should stay with him in Switzerland and that the respondent should leave. The respondent says there was no such intention and that certainly there was no intention that S. should stay with the petitioner. Apart from these direct contradictions, it seems to us that it is necessary to take into account the petitioner's actings. He moved to Kreuzlingen with the respondent but apparently when the respondent did not leave, as he expected, he left Kreuzlingen and returned to Germany to live with M.D.

[18] There is no other evidence to assist in resolving the marked differences between the information given by the respective parties. On the information as it stands, in our view, it is impossible to arrive at any conclusion as to any shared intention of the parties in respect of the move to Kreuzlingen or in relation to the residence of the child. The Lord Ordinary recognises, in paragraph 26, that there is a peculiarity because of the different intentions to which the parties spoke but he proceeds to draw an inference from the fact that the parties and the child moved into the flat in Kreuzlingen and remained there "for some time before the petitioner temporarily moved out" and says that in the absence of any plan that the child was also to leave the Gartenstrasse flat and go to the United Kingdom it is reasonable to conclude that the flat had been chosen for him by the parties as his habitual residence in that both parties had a settled intention that he should stay there for some time. In our view, that inference is unsound. It is, in a sense, true that both parties, reluctantly or not, concurred in the move to Kreuzlingen in the sense that they actually moved along with the child. They were, however, completely at odds in their understanding of the basis on which the move was being made. Further, the fact that the petitioner explained his return to M.D. as a temporary return does not take away from the fact that his actings show that he did not intend to live in Kreuzlingen

with the respondent and the child. The truth may well be that this was, by September 2000, a wholly dysfunctional marriage on the point of breaking up and that there was little or nothing which could properly be described as a shared or settled intention between the parties in any respect. In any event, there is, in our view, nothing on which to base any inference as to habitual residence apart from the objective facts relating to the move and the parties' residence.

[19] The Lord Ordinary refers to the decisions in *R.J. (A Minor)(Abduction)* 1992 A.C. 562, *Dickson* v. *Dickson* 1990 S.C.L.R. 692 and *Cameron* v. *Cameron* 1996 S.C. 17. It was not suggested that the Lord Ordinary had misdirected himself in regard to the proper approach to questions of habitual residence, and, although some reference was made to the authorities in the argument before us, counsel were, broadly speaking, content to accept that habitual residence is a question of fact; that to acquire a new habitual residence it is necessary to spend "an appreciable period of time" in the State concerned; and that while the existence of a settled intention is an important factor, it is not necessary that the settled intention should be to remain in the chosen State permanently or indefinitely but that the intention need only be to remain there for some time. For the purposes of this case, we are prepared to proceed on the same basis, although we are aware that these propositions are largely derived from the speech of Lord Brandon of Oakwood in *Re. J. (A Minor)(Abduction) supra*, and that it has been suggested that his observations are in part *obiter* and that they give rise to an approach to the question which is unduly technical (see *Clive*: 1997 J.R. 137). We were also referred to the decision of the United States Court of Appeals Ninth Circuit in *Mozes* v. *Mozes* (filed January 9, 2001) which contains an illuminating discussion of the many and varied types of circumstances which can be envisaged and the problems to which they may give rise. For the purpose of the present case, however, what matters is that the question is at bottom one of fact and, therefore, one which has to be judged on the basis of the evidence available as to the facts of the parties' residence or residences and as to their intention.

[20] One aspect of this case, which is fully set out by the Lord Ordinary in the passages above quoted, and which is undoubtedly significant is that, while the move from Konstanz to Kreuzlingen involved crossing an international frontier, from another point of view it was simply moving from one part of a conurbation to another, involving little if any real change in the parties' living arrangements or, in the case of the petitioner, employment. In the reclaiming motion, counsel for the respondent did not dispute that the parties should be regarded as having had a habitual residence in Germany prior to the move. It is, therefore, as the Lord Ordinary recognised, a strong point in favour of the petitioner's contentions that the move had only a limited effect on the real conditions and circumstances in which the parties were living. Nevertheless, the Convention requires us to consider whether there is habitual residence in a state and a move across an international frontier does involve a change of state. In the present case, the move also involved a change of status for the petitioner, who did not have or obtain a residence permit in Switzerland. It also involved a change of jurisdiction since the courts which would require to deal with any questions relating to the child if the petition is granted would be the Swiss courts. Although we do not found on the point, it is not, in our view, altogether irrelevant to observe that, while the family might be regarded as having had some connection with German or Scots law, there has hitherto been no connection with Swiss law, apart from the very brief period of residence in Kreuzlingen.

[21] Weighing up the whole circumstances, the conclusion to which we have come is that, for the reasons earlier given, it cannot be said to have been shown that the parties had any settled shared intention in regard to residence and in particular as to the residence of S. Further, the period spent in Switzerland was substantially too short and the conditions and circumstances of the parties' living there were too unsettled and uncertain to justify an inference that anyone, particularly the child, had acquired a habitual residence there. In the absence of a finding of habitual residence, there is no basis for the petitioner's claim and the reclaiming motion should therefore be allowed and the prayer of the petition refused.

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