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[13/08/1997; High Court (England); First Instance]
Re A. (Abduction: Habitual Residence) [1998] 1 FLR 497

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

13 August 1997

Stuart-White J

In the Matter of A.

Mark Everall QC and Margaret Rylands for the father

Henry Setright for the mother.

STUART-WHITE J: The proceedings before me concern A, born on 12 February 1996, thus now about 18 months of age. He is the child of the marriage of his parents, whom I shall call the father and the mother. The father is a Greek national, whose home and extended family are on the Greek island of Zante. The mother is English.

The father, by his originating summons under the Child Abduction and Custody Act 1985 and the Hague Convention, alleges that on 4 August 1996 the mother wrongfully removed A from Greece, and more particularly from the island of Zante, in breach of the father's rights of custody and thus unlawfully abducted him. He seeks a peremptory return of the child to Greece. In order for him to succeed the father must show that at the time of the alleged abduction the child was habitually resident in Greece. Though a number of other defences have been deployed on behalf of the mother, the issue of habitual residence is central to my decision in this case, and arises in circumstances which, so far as I know, have no precise parallel in any of the numerous reported cases.

The facts are to some extent in dispute. I have heard the oral evidence of both the mother and the father and I have in addition read their statements and affidavits and the statements and affidavits of certain other witnesses which were put in evidence by one side or the other. Before I set out the facts it is necessary that I should say something about the reliability of and the weight to be attached to the evidence of the father and the mother respectively. The father gave evidence through an interpreter. His answers were not always answers precisely to the questions asked. His memory may well, on certain matters, have been less than perfect and may from time to time have been moulded to some extent by what he had wished to be the facts. Whilst it is difficult to form a clear view on this when evidence is given through an interpreter, I gained the distinct impression that clarity of thought was not one of his more outstanding attributes. Nevertheless, I considered that he was doing his best to give me an honest account of events and conversations. He was prepared to make concessions in his evidence on matters that he probably thought were contrary to his interests and he was in my judgment essentially an honest witness.

The mother is a qualified schoolteacher, who works as such. She gave her evidence-in-chief in a clear and

decisive manner and appeared at first sight to be a highly impressive witness. However, when the various affidavits which she has sworn, together with a divorce petition which she signed in November 1996 were examined and she was questioned about them, I regret to say that I was left with the clear impression that both in her affidavits and in her oral evidence she had been, and was, prepared to adjust her evidence to suit what she believed to be her forensic best interests, and in a way which demonstrated that complete truthfulness was not always her principal objective.

It is thus in the light of these views as to the reliability of the parties as witnesses that I set out my findings of fact. In doing so I attempt to follow the advice given by Waite J, as he then was, in Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993, 998E-G:

'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 (Stevens & Sons, 11th edn, 1993), p 128). A far more wide-ranging inquiry is needed to establish those elements than is appropriate or necessary when the court is dealing with the much simpler concept of habitual residence. That is a concept which depends solely upon showing a settled purpose continued for an appreciable time. It follows, therefore, that the detailed type of inquiry into presumed intention which characterises domicile proceedings is inappropriate when the court is dealing with issues of habitual residence. In the latter case it is normally sufficient for the court to stand back and take a general view. A settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression.'

That advice has been cited with approval and indeed followed in numerous subsequent cases.

The mother and the father met in the summer of 1991 when she went on holiday to Zante. A relationship began quite soon. She went back to Zante to see him in the winter of 1991 and he visited her in England in the spring of 1992, at which time there was talk of marriage and, whether or not there was a formal engagement, there was an understanding that marriage was likely to follow in due course.

The mother went to Greece again in the summer of 1992 and February 1993; the father to England in the spring of 1993; the mother to Greece in May and June 1993; and on 18 July 1993 the mother took up residence in Zante. She commenced regular cohabitation with the father and obtained employment locally. In the same month work started to build what was to be the matrimonial home. In the autumn of 1993 the mother's belongings were taken to Greece by her and the father by car. They married in England in February 1994. A marriage service in a Greek orthodox church took place in May 1994 and the parties continued to live together. Thus the mother became resident in Greece in July 1993 and in due course, as I have found, became habitually resident there.

In May 1995 the mother and the father became aware that the mother was pregnant. It was the mother's wish that she should spend the latter part of her pregnancy, and that her child should be born, in England. She wanted to be near to her parents and had greater faith in the National Health Service than in medical services likely to be available to her in Zante. The father did not demur. She travelled to England in July 1995 although the child was not due to be born until early 1996.

Shortly before she left Zante the parties had moved into the new home in which building work finally ceased in the following month. The father, whose working life hitherto had included both work local to his home in Zante and work as an engineer on board ship, took a job on a ship based in the USA. It had always been planned that he should be in England for the birth of the child and he travelled to England on 1 February 1996. The child was, as I have said, born on 12 February 1996. His birth was registered in England on 26 February 1996. On 3 March 1996 the father returned to Zante and began work to adapt the home to accommodate a young child. It was from this stage that difficulties arose and at this stage that the evidence of the parties begins to diverge.

What is plain is that after the birth of the child the mother began to have serious second thoughts about whether she wanted to make her home and her life in Greece. She asked the father whether it would not be possible for him to get work in England. During the frequent telephone calls which took place between the parties following the father's return to Greece the father was urging an early return there by the mother and the child. In

particular he wanted them to be there in Greece not later than the Greek Easter which in that year was 14 April. The mother was saying that she was unwilling to come before the first flights of the summer direct to Zante; that is to say flights without a change in Athens, which began in May 1996.

The telephone calls became acrimonious. Nevertheless on 30 March 1996 the mother booked a flight to Zante to take place on 1 May 1996. However, very soon after that she told the father that she had decided that she was not going to travel to Greece at all. She saw a solicitor at about that time and, it seems, received advice against taking the child to Greece. The precise dating of events at this period is uncertain and I am unconvinced by the mother's evidence that, even by 13 March 1996, she had decided that she was not going to Greece but booked the flight as some sort of holding operation. The flight reservation was cancelled on 7 April 1996 and neither the mother nor the child went to Greece. She had of course, as I have said, by 7 April 1996 told the father that she was not intending to go to Greece at all. The telephone calls continued and it was arranged that the father should visit the UK for a week in June 1996. This would enable him of course to see his child and would enable the parties to discuss how they would in future order their lives so as to enable the child, whatever might be their relationship with each other and wherever they might live, to be brought up knowing both his parents. The mother had been working part-time as a supply teacher and she took time off her work for the purpose of the father's visit. The mother, the father and the child went to a caravan in the Lake District where discussions took place as to the future. There is to some extent, and it is an important extent, a conflict of evidence about what was decided. The father's case is that they agreed that the mother and the child should come to Zante for an extended period that summer and that by the end of September 1996 he would be in a position to know whether it was financially possible for him to do that which the mother had proposed, namely to spend the winter months in England.

The mother's case is that it was agreed that she and the child would live in England where, as I shall relate, she had arranged a permanent teaching job; that the father should spend such part of the winter in England as his seasonal work in Zante and his finances would permit and they (she and the child) would visit Zante in the summer for an extended summer holiday between mid-July and the end of August, which of course were the dates of the school summer holidays at the school at which she was engaged to work. There is a dispute as to whether she told the father about the teaching job. He says that she told him no more than she had been looking for teaching work. She says that she told him that she had been offered and accepted permanent employment due to start on 1 September 1996. She told me that the letter dated 19 June 1996, which I have seen, confirmed this employment and was waiting for her when she and the father arrived back following the visit to the Lake District at her parental home on 21 June 1996. Despite my reservations about the quality of the mother's evidence, I am not prepared to find that she kept the information about the job or the letter concerning it from the father. It may well be that the mother had, as she claimed, private reservations as to whether she would spend even the amount of time in Greece that she said she agreed. However, for the purpose of determining habitual residence, one of the factors that has to be considered is the common intention of the parties. I take such common intention to be evidence by what was overtly agreed between the parties and the uncommunicated and mental reservations or an uncommunicated subsequent change of mind by one party should not affect the court's finding as to common intention.

It is not easy to reach findings of fact on the basis of the evidence of two witnesses each of whom, for different reasons, must be regarded as to some extent unreliable. There is other evidence in the form of statements and affidavits which tend to support either one version or the other. I take this evidence also into account and I make my findings on what I hope and believe is a fair overview of the whole of the evidence.

My findings in relation to the agreement reached as a result of the discussions in the Lake District are these: it was agreed that the mother would bring the child to Zante in mid-July 1996 and would remain until the end of August 1996 and then she would take him to Zante for a similar period in her summer holidays in succeeding years. Nothing was settled at that stage as to any other period of the year, save that it was to be spent by the mother and the child in England. What remained to be discussed was whether the father would himself spend a part, and if so how substantial a part, in England, or as to what, if any, contact the father would be enabled to have with the child if he were not able to spend significant periods in England during the winter.

Unhappily there was a serious altercation shortly before the father's return to Greece which occurred on 23 June 1996. That altercation I find caused the mother to harbour serious reservations, uncommunicated to the father at the time, as to the agreement, such as it was, which had been reached. It also resulted in the father accusing the mother of having stolen his child, a remark which he does not deny having made, although he says that he regrets having made it. If no more, it establishes to my mind that the parties were at arm's length, neither really trusting the other and uncertain as to what the future might hold.

As to that the father has told me that the mother at various times has expressed different intentions and made different proposals, none of which he took seriously. They did not accord with his views as to what was right for his child. Nevertheless the father left the country believing that his wife and child would arrive in Greece in mid-July 1996 and would remain until the end of August 1996. I should note that when he went he took with him some curtains which had previously been ordered and made to measure for the house in Greece.

It is right to mention at this stage that very soon after the child's birth the mother had provided the father with a copy of his birth certificate in order to enable his birth to be registered also in Greece. That form of certificate proved unacceptable for the purpose and during the father's June 1996 visit the parties went together to obtain the full form of certificate to enable the registration to take place and it is argued on mother's behalf that little if any weight should be placed on that fact. She could see no impediment to his being registered in Greece and thought that it was right, since he was half-Greek, that he should be. A possible disadvantage, that it would make him eligible for national service, had not occurred to her. I accept her evidence on this point and draw no inferences one way or the other from her co-operation in his birth being registered in Greece.

The mother arranged to go to Zante and travelled there accompanied by the child on 14 July 1996. She was also accompanied by her sister. They had purchased 14-day return air tickets. That fact alone is insignificant since charter airlines, it seems, only provide return tickets. However, the mother's case is that, although the agreement had been effectively for a 6-week visit, she had, after the altercation which occurred shortly before the father's departure on 23 June 1996, decided that she would visit for only 2 weeks. I accept that she may well have had this in mind. She said that she communicated that fact to the father by telephone about a week before travelling to Greece. I do not accept her evidence as to that, although I do find that the father was told that the mother's sister would be coming for a 2-week holiday.

In fact the child's maternal grandfather joined the party about a week after the mother, her sister and the child arrived in Greece. They all stayed in the house with the father. The sister and the grandfather duly left on 28 July 1996. The grandfather in his affidavit says that they took with them a quantity of the mother's personal belongings and bedding. I find no reason to reject that evidence. The mother did not leave with them but of course on my findings it could very possibly have been in her mind to do so, but she said that she had still not had the chance to discuss the future properly with the father, who was working long hours, and that she believed that it might be easier to do so when her sister and her own father had left. The father concedes that she had been making efforts to talk to him which had come to nothing.

Whilst in Greece the mother applied for, and obtained, maternity benefit. It was argued on behalf of the father that this was a significant fact. I do not regard it as such. I accept that the mother had tried to obtain such benefit when in England but failed because her employment during the years preceding the birth had been in Greece. She was advised to apply in Greece. She did so and was successful.

She in fact left Greece on 4 August 1996. She had told the father on 2 August 1996 that she was going. There had been a major altercation involving some physical violence on 3 August 1996 and she left on the 4 August 1996, taking with her not only the child but some 11 pieces of luggage in which were contained the rest of her personal belongings. These, according to the father himself, included a number of boxes of substantial size. He said that all this had been packed up by the mother on her last day and that until 2 August 1996 he had no idea that she was intending to leave, before what, he said, was the agreed time of departure, namely the end of September 1996. This particular part of the father's evidence I find very hard to accept.

Since 4 August 1996, a period now of just over a year, the child has lived with the mother in England. The

father's originating summons in the Child Abduction and Custody Act proceedings was issued on 15 January 1997. On the previous day the mother had commenced wardship proceedings which, though so far as I know they have not been formally stayed, do stand adjourned pending the outcome of the current proceedings. It follows from my findings that, when the mother left Greece with the child on 4 August 1996, she did so in breach of the agreement which she had in England arrived at with the father.

These then are the material facts as I find them, and I turn now to consider what are the legal consequences of those facts. The crucial question is whether on 4 August 1996 the child was habitually resident in Greece. If he was not, this application must fail by reason of Art 3(a) of the Convention; if he was it must succeed since under both Greek and English law both parents have rights of custody and those rights were being exercised by the father at the time of the removal. It is no longer argued, in view of certain undertakings which have been offered and are accepted, that a defence under Art 13(b) is available to the mother. It is not argued that the father has either consented to or has acquiesced in the removal.

Habitual residence is primarily a question of fact to be decided by reference to all the facts of any particular case, see Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495 per Balcombe LJ at 499H, after citing Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, 454, who said:

'"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 the regular order of his life for the time being, whether of short or of long duration . . .'

He went on to say, at 500C:

'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 that child.'

In the instant case it is plain that both the mother and the father have at all material times had parental responsibility for the child and thus the element of intention and purpose relating to residence in any particular place at any particular time, in this case Greece, from 14 July to 4 August 1996 is represented by the common intention of the parties of which the only evidence is the agreement arrived at in the Lake District, as to the terms of which I have already made a finding.

Accordingly the common intention or purpose when the child arrived in Greece on 14 July 1996 was that he should remain there for approximately 6 weeks; at the end of which time he would return to England with the mother. I hold that until 14 July 1996 the child did not habitually reside in Greece. Not only would it offend against common sense to hold that a child 6 months of age, who had never actually resided in Greece was habitually resident there, it would also be inconsistent with authority. In Re M (Abduction: Habitual Residence) [1996] 1 FLR 887, 895C Sir John Balcombe said:

'Before a person, whether a child or an adult, can be said to be habitually resident in a country, it is clear that he must be resident in that country. Of course, residence does not necessarily require physical presence at all times.'

Millett LJ said this (at 895H-896E):

'This seems to me to be a very plain case. Three principles must be borne in mind:

(1) The question whether a person is or is not habitually resident in a particular country is a question of fact: Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, 578, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, 454 per Lord Brandon. The concept of habitual residence in not an artificial legal construct.

(2) While it is not necessary for a person to remain continuously present in a particular country in order for him to retain residence there, it is not possible for a person to acquire residence in one country while remaining

throughout physically present in another.

(3) Where both parents have joint parental responsibility, neither of them can unilaterally change the habitual residence of the child by removing the child wrongfully and in breach of the other parent's rights: Re J at 752 and 449 respectively per Lord Donaldson MR.

In the present case the child's parents, having joint parental responsibility, determined that the child should reside indefinitely in India. The child took up residence accordingly in India and in due time became habitually resident there. He is still physically present and resident in India. He has not yet returned to this country. How can he possibly he said to be resident in England, let alone habitually resident here? What has happened to change the child's place of residence? The answer given by the judge is that the mother has unilaterally decided that the child should return here and become habitually resident here. Since she does not have sole parental responsibility, even her unilateral act in removing the child from India to England without the father's consent would not effect a change in the child's place of habitual residence in India. A fortiori, therefore, her mere unilateral decision, without any physical change in the child's place of residence, cannot possibly alter the place of his habitual residence, any more than could the father's decision to the contrary effect. But even if the mother had sole parental responsibility, her decision that the child should return and become habitually resident here would not make the child resident here while he remained present in India; if, pursuant to her decision, the child returned here, he would become resident here, and if he remained in England for long enough he would become habitually resident here -- see Re M (Minors) (Residence Order: Jurisdiction) [19931] FLR 495.'

Thus the only period with which I am concerned is that which followed 14 July 1996 in which the child did, in the submission of the father and in the submission of the mother, not acquire habitual residence in Greece; before that period he did not acquire it at all. 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 Re 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 so habitually resident.

It is necessary to look not only at the time which it was intended that the child should spend in Greece but also at the purpose of his visit. The time was a maximum of 6 weeks, the purpose was as I have described. It included a purpose akin to holiday contact, notwithstanding that due to his young age his mother accompanied him. That contact was, as I have said, to enable not only the father but the father's extended family to see the child. Another purpose was to allow the mother and the father to discuss in greater depth than they achieved in the Lake District how they were going to order their lives and that of their child in the future. Whilst, as is established by R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309 and, following Re M (Minors) (Residence Order: Jurisdiction), habitual residence may be for short duration, I find it impossible to hold that the residence of this child in Greece for an intended period of no more than 6 weeks for the purposes that I have described can possibly be regarded as habitual residence within the Hague Convention.

That ruling would be sufficient to dispose of this case. However, were I to have ruled otherwise I would have had to have gone on to consider whether the period in fact spent by the mother and child in Greece, namely 3 weeks, would have constituted the 'appreciable time' regarded by most of the authorities as being necessary to establish habitual residence even when entry of the country alleged to be the country of habitual residence was accompanied by the appropriate settlement intentions. In view of my ruling on what I regard as the principal question in this case 1 find it unnecessary to examine in detail the authorities on 'appreciable time'. It is sufficient to say that the necessary period of time may vary according to the circumstances of each particular case, and had it been necessary to do so I should have ruled that the 3 weeks which were spent by the child in Greece on this occasion was not sufficient time in the circumstances of this case for his residence there to have borne the characteristic of being habitual. Accordingly, the originating summons is dismissed.

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