

RE D (ABDUCTION: HABITUAL RESIDENCE)
[2005] EWHC 518 (Fam)

Family Division

Bracewell J

4 February 2005

Abduction – Habitual residence – Inherent jurisdiction

The father was a US citizen and the mother had dual US and Italian citizenship. The parties' relationship had been marked by volatile arguments, reconciliations and separations. When the mother became pregnant the parties commenced cohabitation in the USA, but the mother returned to Italy for the birth of the child. The mother and child spent some 6 months living with the father in the USA until the father asked the mother to leave and she returned to Italy. The father applied for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), but the Italian court refused to order return because of an issue over paternity. The mother and child were in the USA for about 3 months. Prior to making these visits the mother made clear to the father that they were temporary visits only. It was common ground that the mother was present in this jurisdiction only because the father had lured her to London by engaging a private detective to pose as a modelling agent. The father was awaiting the outcome of appeals against a conviction for fraud and was not permitted to leave the jurisdiction of California. The father sought the return of his daughter under the Hague Convention or under the inherent jurisdiction of the court.

Held – dismissing the application –

(1) When the mother moved the child to Italy from the USA she and the child were habitually resident in Italy. The bases of this conclusion were: the father's lack of credibility; the fact that the mother retained her apartment in Rome throughout and continued to pay rent to the landlady; the fact that the child was enrolled in state-funded day care in Rome; the fact that the visits to the USA were on return tickets and that the mother had been explicit in stating that the trips were visits only; the mother's request that the nursery keep the child's place available for her return; the mother's possession of current valid social security documents for herself and the child relevant to residence in Italy; the father's recognition that the mother lacked strong ties with California (see para [10]).

(2) The inherent jurisdiction should not be invoked as the mother and child had no connection with this jurisdiction and were here purely by deception exercised on behalf of the father (see para [11]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Hague Convention on the Civil Aspects of International Child Abduction 1980,
Arts 3, 13(b)

Case referred to in judgment

Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, CA

Jeremy Rosenblatt for the defendant

Dermot Main Thompson for the plaintiff

Cur adv vult

BRACEWELL J:

[1] The plaintiff father seeks the return of his daughter, A, to the jurisdiction of California under the Child Abduction and Custody Act 1985 or, alternatively, under the inherent jurisdiction of this court. The defendant mother opposes the application on the basis that at the date of removal from the jurisdiction of California, on 14 November 2004, A was habitually resident in Italy. The mother has also raised a defence under Art 13(b) but her counsel has realistically conceded that she cannot demonstrate the high standard required in order to establish that defence and, therefore, the case has been argued in respect of habitual residence.

[2] Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) states 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, 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. The question of habitual residence is to be determined here by an English judge sitting in the court of the requested State, applying English domestic law.

[3] The father's case is that certainly from September 2004 and probably from A's return to California in June 2003 and possibly from April 2003, A was habitually resident in California.

[4] The chronology which I find established on the facts is that the father is a US citizen and the mother has dual US and Italian citizenship. The parties met in September 1997. The mother was a model leading a peripatetic life, and the father was a property developer in the USA. Their relationship started in June 1998 but has been marked by volatile arguments, reconciliations and separations; one of the incidents resulting in the mother requiring hospital treatment for facial injuries. The parties spent time in Barcelona, South of France, South Africa, Zimbabwe, Austria and then in Los Angeles. In August 1999 they rented an apartment in Marina del Ray in California, but the mother took a modelling contract in Korea for 3 months, thereafter returning to the father.

[5] The father was arrested, tried and convicted of fraud in March 2000 and was sentenced to 2 years' imprisonment. He has not served that sentence because he is still pursuing appeals. The outcome has not yet been determined but in the meantime he is not permitted to leave the jurisdiction of California, and he may of course still have to serve the sentence.

[6] In May 2000 the mother left to live in Rome and rented a flat, but returned to live with the father in California at the end of June 2000. It was during this time that the mother sustained her facial injuries. The surgeon's report is exhibited. The mother and father entered into an agreement, after which there was a reconciliation until November 2000 when the mother returned to her apartment in Rome. Between March 2001 and June 2001 the mother returned to California but she went back to Rome in June 2001 as a tour guide. For some 12 months there was no contact between the parties, but the mother went to California for some facial surgery in June 2002, resumed her relationship with the father and became pregnant with A. In October 2002 the mother shipped out to New York from Italy a considerable quantity of household and personal belongings which are itemised in the bundle. This was at a time when the parties were engaged and were discussing where on the American continent they might set up home. By December they were living in

a flat in New York and the mother was 6 months' pregnant with A. It is common ground that the mother, in January 2003, when 7½ months' pregnant, went to Rome where A was born. The mother and child stayed in Rome, and eventually the mother and A went back to Los Angeles where the father was living. They were there between April 2003 and September 2003 when the father told the mother to leave his home.

[7] The mother and A returned to Rome, which gave rise to the father's application under the Hague Convention to the Italian court in autumn 2003 for the return of A to the jurisdiction of California. The matter was determined by the Italian court in March 2004 when the father's application was dismissed by reason of an issue about paternity. By February 2004 the mother and A had moved to her current apartment in Rome, where she stayed until June 2004 when she went to California with A for one month. She then returned to Rome. The mother and A made a further trip to the USA in August 2004, staying until November of that year. There is a significant email from the mother dated 8 April 2004 to the father referring to her plan to visit, 'Bring A for a visit but that is it, a visit!'. The mother's stay with A in the USA was extended beyond the month from August 2004 and during that period the mother became pregnant again by the father but had a miscarriage on 3 November 2004. Thereafter the mother left the jurisdiction with A and returned to Rome on 14 November 2004. On 9 November the father had taken out a summons applying for custody of A. There is within the papers proof of service on the mother of the summons which was backed by mutual prohibition against child abduction pending a hearing scheduled for 22 February 2005.

[8] The mother has no connection with this jurisdiction and so the question arises why she came here from Italy and how did the father know that she was here when there had been no communication between them. Counsel for the father concedes that the court is entitled to conclude, as I do, that father was informed by the private detective he engaged who masqueraded under different names and identities and who entrapped the mother into coming to London. I am satisfied that the father knew of this, was instrumental in occasioning this and his motive was to gain access to a fresh jurisdiction, having once failed in the Italian courts. The father has contended that the mother no longer has any home in Italy and it suits his case to so contend. However, I find that is not the truth, as demonstrated by the evidence of P, the landlady. I find that, through the detective posing falsely as an agent for the mother, the father hoped to engineer the surrender of the tenancy from the landlady but she did not fall for the pretence, and the father's scheme was foiled. I find that the father, on any dispute, does not have credibility in this case. Not only is he a convicted fraudster but the behaviour of the private detective as the father's agent demonstrates his willingness to manipulate the evidence to suit his purpose, as demonstrated by the evidence of AC, a friend, and P and by the mother herself. I do not accept that the mother was viewing houses in which to live in California in the summer of 2004 as alleged by the father and his witnesses. It would have been contrary to her declared intentions of a holiday; the information supplied by her to A's school and to her relatives and friends; and would have made no sense when the father was under threat of imprisonment and the mother had no funds of her own. The mother may well have seen properties but only in the context of the father being a property developer by trade.

[9] I have been referred to the case of *Al Habtoor v Fotheringham* [2001] EWCA Civ 186, [2001] 1 FLR 951. At 963, Thorpe LJ sets out the legal framework. At para [23] he said:

‘Turning to the case-law defining habitual residence, there is little room for disputing a number of relatively straightforward propositions. First, the determination of a person’s habitual residence is a question of fact to be decided by reference to all the circumstances of the case. [He then quotes from various authorities.] ‘Ordinarily resident’ refers to a man’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 long duration. Lord Scarman in *Akbarali v Brent London Borough Council* stated: ‘All the law requires is that there is a settled purpose. That is not to say that the ‘propositus’ intends to stay where he is indefinitely. Indeed, his purpose whilst settled may be for a limited period’. Secondly, there is an important distinction between the loss of an habitual residence and the acquisition of a substitute. A person may cease to be habitually resident in a single day if he quits the country with a settled intention not to return, but to take up habitual residence elsewhere. By contrast, habitual residence in the second country is not acquired on arrival but only after a period that demonstrates that the residence has become habitual and is likely to continue to be habitual depending upon the relevant facts and circumstances. The period of residence after arrival may be brief but it still must be appreciable.’

[10] Applying that test to the current case, I am satisfied that when the mother removed A from California to Italy in November 2004 she and the child were habitually resident in Italy and had been for some period of time and certainly throughout 2004. I reach this conclusion for the following reasons: (1) the lack of credibility of the father and the preference for the evidence filed on behalf of the mother; (2) the mother retained her apartment in Rome and she has throughout continued to pay rent to the landlady; (3) A was enrolled in pre-school day care in Rome on a state-funded place; (4) the visits to California in June 2004 and August 2004 were on return tickets to Rome and the email of 8 April 2004 is explicit about the trip being a visit only; (5) on 19 October 2004 the mother wrote by email to the nursery requesting that A’s place be kept available for when she returned at the end of October; (6) the mother had, and has, state social security documents for herself and A relevant to residence in Italy which are currently valid; (7) on 1 March 2004 the mother had delivered goods out of store in Rome to her flat at Via di Sante Doro; (8) when in California in the summer of 2004 she asked a friend, AC, to check her mail from Italy and to water her plants in her flat; (9) in his application for custody in November 2004 the father stated that the mother ‘does not have strong ties with California’.

[11] I find that the mother had a settled residence in Italy throughout 2004 in an address which was her home. I, therefore, find that A was habitually resident in Italy at the relevant time, and the application under the Hague Convention fails. I do not exercise any jurisdiction under the inherent jurisdiction as the mother and child have no connection with this country and

are here purely by deception exercised on behalf of the father. A, therefore, is free to leave this jurisdiction.

Order accordingly.

Solicitors: *Rosenblatt Solicitors* for the defendant
Dawson Cornwell for the plaintiff

ALISON PERRY
Law Reporter