Case No: FD12P00524
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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London. WC2A 2LL
Date: Thursday, 19 April 2012

BEFORE:
MR JUSTICE MOOR

BETWEEN:
K Applicant/ Claimant
- and -
L Respondent/ Defendant

MR J ROSENBLATT (instructed by **James Maguire & Co**) appeared on behalf of the **Claimant**
L was unrepresented

Approved Judgment

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(Official Shorthand Writers to the Court)

1. **MR JUSTICE MOOR:** This is an application by a father dated 23 February 2012 for a declaration as to the habitual residence of his son, F, who was born on 10 March 2009 and is therefore three years of age.

2. The mother does not attend. She is not represented in this jurisdiction, although briefly she did instruct a lawyer here in March who eventually proved to be conflicted, but she has, via her US attorney, sent submissions to me by letter. The primary submission was that I should stay this application pending a decision of the Kansas court in relation to the father's application in that jurisdiction pursuant to the Hague Convention. I have formed the view that I should proceed with this application. The matter has been brought before this court by the father perfectly properly. The mother has had every opportunity to put her case. It seems to me that, given that the father has constituted this application properly and invites me to give a declaration, I should do so.

3. I am satisfied that I have the jurisdiction to do so, although it is right that Article 15 of the Hague Convention states that:

> "*The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."*

4. On the face of it, it would need the judicial or other administrative authorities to make the request of me. However, the Child Abduction and Custody Act 1985, which incorporates the Hague Convention into English law, provides at section 8 that:

> *"The High Court ... may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention."*

So it is quite clear that Parliament intended the operation of Article 15 to be wider than its strict definition and to allow any person appearing to the court to have an interest in the matter to apply. It is absolutely clear to me that this father does indeed have an interest in the matter. I conclude that I therefore do have jurisdiction to make the declarations that he seeks.

5. I therefore turn to consider whether I should do so on the facts. To do that, I need to give some of the background of the case. The father is British; the mother is American. They met in July 1995 in London where the father was a tour guide and the mother was a tourist. They commenced a relationship. F was, as I have already indicated born on 10 March 2009 in Bury, Lancashire. On 28 October 1999, the parents married in New York. On 14 September 2009, the mother and the child went to New York for a visit and the father was there with them from 23 October 2009 to 1 November 2009. He says that the mother delayed returning F, but eventually she did so on 18 December 2009. It matters not because it is quite clear from the American proceedings that the mother herself accepts that F was habitually resident in this jurisdiction during that period.

6. On 3 August 2010, the mother and child went to Kansas in the United States of America to see the mother's mother (in other words the maternal grandmother) who lives there. As I understand her case from the American proceedings, she states that F's habitual residence changed to the United States on that day. The father's case however (and he appears in front of me today) is that the child was to return in October 2010; this was merely a holiday, and that F's habitual residence remained in this jurisdiction. He says that, at the expected time, the mother failed to return to this jurisdiction in performance of their agreement, but eventually did so on 11 May 2011. The father however had visited F for various periods on three occasions between August 2010 and May 2011.

7. So, in any event, on 12 May 2011, all parties are back in this jurisdiction. They go to mediation in this jurisdiction. That may in my view be quite important; the mediation did not take place in the United States of America. On 26 July 2011, an agreement was recorded by the mediator Maggie Wilson, and a letter was sent on that day to, certainly the father, but

clearly it must also have been received by the mother as well, because on 27 July 2011 the mother and the father both signed the agreement.

8. The agreement says the following:

> "*Further to your joint meeting with our service on 25th July 2011, below is your joint agreement in respect of your son F.*
>
> *August 4th - L will fly back to America with F. K will visit F between 22nd October to 2nd November.*
>
> *December 10th - L will fly back to England with F. L can stay at X Street during the visit.*
>
> *1st February 2012 - L and F will return to America till 1st May. During this time K will visit in March for F's birthday and this visit will last for approximately 1 week.*
>
> *1st May 2012 - L will return to England with F till [originally it says 1 August, but it is then amended to 14 August 2012 in manuscript]."*

There was an indication that there would be some flexibility about these dates because of problems with the London Olympics. The agreement then says:

> *"To enable the above to happen K will return F's passport to L on this agreement being signed by both parents."*

As I already indicated, it was indeed so signed.

9. It seems to me that there was an agreement as to the arrangements for F for the year between 1 August 2011 and effectively 1 August 2012; a one-year agreement. Nowhere in that agreement does it say that F's habitual residence has changed to the United States of America.

10. Clearly the father was nervous about the mother's intentions. He went to see a solicitor. I am told the solicitor drafted a letter dated 1 August, but the letter, although it was not sent by the solicitor, was copied by the father and he tells me that he showed it to the mother. The letter says the following:

> *"We are writing in order to make it clear that my client is giving his consent to F being removed from the country on a temporary basis only and in accordance with the agreement attached hereto. He is not giving his agreement to F being removed from the jurisdiction permanently and his consent to temporary removal is subject to you complying with the terms of the attached agreement."*

It goes on to say:

> *"Our client is pleased that you and he have been able to reach agreement in relation to arrangements for F's care over the next 12 months. He very much hopes that matters in relation to F can continue to be resolved by agreement in the future. He reserves his position, however, in relation to arrangements for F's care beyond August 2012 and his*

agreement to F being removed on a temporary basis for periods in the next 12 months should not be taken as an indication that he would agree to a further removal or periods of removal thereafter."

In my view that is an extremely important document.

11. The mother was in fact driven by the father to the airport on 4 August. In my view, that is of no assistance to the mother because the removal on 4 August was in accordance with the agreement that was signed in July. She went to an apartment in Kansas. On 9 December, she commenced divorce proceedings in Kansas and applied that day for an *ex parte order*, which gave the parties joint legal custody, but gave primary residence of F to her and gave parenting time to the father at any time he travels to Kansas. There was also a non-removal order from Kansas. It is quite clear to me that this application by the mother was in flagrant breach of the agreement that she herself had signed on 27 July.

12. On 10 December, she was due to fly back to this country with F. She did not do so. That again was a flagrant breach of the agreement reached on 26 July. She sent an email to the father that day saying:

"It is with great difficulty I have decided to postpone our trip to Manchester ... I plan to reschedule our flights after assurances have been made that our return to America will not be impeded."

13. The father then sent an email on 13 December. It is right to note that this email does talk about a postponement of F's "trip to England". However, the mother then replied to that saying:

"Although I appreciate the considerable efforts you have now made to assure me of our safe return to America, I remain firm in the decision to remain in America with F until the divorce is finalised."

14. The father in fact went to America over Christmas, but he realised by now that the mother had reneged on the agreement and therefore on 23 February 2012 applied to this court for a declaration as to habitual residence and wrongful removal and for an order for return of F to this jurisdiction. Baker J made such orders *ex parte* on 24 February 2012 . The order included a declaration that F's habitual residence appeared to be England and Wales, and it appeared that he had been unlawfully retained in Kansas.

15. The matter came back before Hedley J on 5 March when he effectively adjourned this application to me. On 16 March, the mother's solicitors wrote to this court saying that Kansas has jurisdiction as a result of the fact that F's habitual residence had been the state of Kansas since 4 August 2010. That was repeated in a letter to me dated 18 March. I therefore have to look at the evidence, which is available, and in particular the agreement reached on 26 July, which was confirmed by letter of 26 July, and the father's letter from his solicitors.

16. It seems, on the balance of probabilities, to me that F was indeed habitually resident in this jurisdiction on the date of 26 July 2011 when the agreement was reached. It follows that he was habitually resident her on the date on which he left this jurisdiction on 4 August 2011. The mother was unable to change the habitual residence unilaterally. She could only do so either by an order of this court or by the written agreement of the father. I am quite satisfied,

from the letter that he asked his solicitors to draft and that he showed to the mother, that he was not giving any such consent. It follows that F's habitual residence has never (in my judgment) changed from this jurisdiction and F remains habitually resident in this jurisdiction as at today's date.

17. I am therefore prepared to grant the father an application that, on the basis of the information set out within the sworn statement of his solicitor, James Maguire, that, as I have indicated in this judgment, the place of habitual residence remains that of England and Wales.

18. I now turn to the second part of the application. In my view, that is far easier for me to decide, namely whether or not F is retained unlawfully in Kansas. It is clear that the mother is completely in breach of the agreement signed by her on 27 July, and it therefore follows, as sure as night follows day, that F is retained in Kansas unlawfully. I do not agree with the father that the removal on 4 August was itself unlawful as that removal was pursuant to the agreement signed on 27 July. It is the retention following 10 December that is in my considered opinion unlawful.