Neutral Citation Number: [2018] EWFC 64 (Fam)

IN THE FAMILY COURT
Sitting at the Royal Courts of Justice

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2018

Case No: RG1800014

Before:

MRS JUSTICE THEIS

- -

Between:

KD	**Applicant**
- and -	
AM	**1st Respondent**
- and -	
T	
(Through his Children's Guardian)	**2nd Respondent**

- -
- -

Mr Jonathan Sampson (instructed by **Clifton Ingram LLP**) for the **Applicant**
Ms Nicola Martin (instructed by **Turpin Miller**) for the **1st Respondent**
Ms Jasbinder Dail (instructed by **Rowberry Morris**) **for the 2nd Respondent**

Hearing date: 8th August 2018
Judgment: 10th August 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. The issue the court is required to determine is whether it has jurisdiction to make orders concerning parental responsibility in respect of a child, T, age 4, the son of the applicant mother ('the mother') and first respondent father ('the father') T is a party to these proceedings through his guardian, following the direction on 14 February 2018.

2. The competing live applications are the mother's application to continue her interim leave to remove T from the jurisdiction and for leave to remove T from the jurisdiction to live permanently in the US (having been given leave in March 2017 to go for a year) and the father's application for a child arrangements order, or (probably more realistically) for shared care/defined contact.

3. For reasons which are set out below, T has been in the US since March 2017 and save for a few occasions (once prior to going to the US in March and a few days in September 2017 in the US) he has not seen his father regularly since October 2016 when the parties separated, although it is right to record he has had twice weekly skype contact since March 2017.

4. Before turning to the detail in relation to the court's decision I would like to record that at the start of this hearing I referred the parties to the mediation resource that is available in this court to assist parties with family disputes that cross jurisdictions, as this case does. I would urge the parents in this case to continue with the resource. Whilst the court is always there to make decisions it is recognised that in appropriate cases decisions about children reached with the agreement of both parents often have a more secure and enduring quality than those after long drawn out litigation.

Relevant Background

5. The mother is originally from the US, the father is British. She met the father here in 2012, returned back to the US later that year, returning here in September 2013 following the parent's engagement in the US. The mother came here with her daughter E, then age 9, but returned to the US with E in November 2013. The parties dispute the reasons; the father says due to financial pressure the mother alleges the father sought to pressure her to have an abortion. The mother did not return to the UK until August 2014 following their wedding in the US. By then T was 6 months old.

6. The parents lived together with the two children until October 2016, when they separated. The mother alleges domestic abuse and went to a refuge with the children. The father denies any abusive behaviour. The father sought an order in November for disclosure of the child's whereabouts and a prohibited steps order preventing the mother from removing the child from the jurisdiction. Those orders were granted by DJ Harrison. The mother sought non-molestation orders and that application was resolved by undertakings in January 2017. The father's application came before the court on 1 February 2017 when DJ Jones adjourned the matter until 22 April 2017 pending further evidence regarding the parents mental and physical health via their GPs.

7. Very tragically, on 21 February 2017, E was diagnosed with terminal cancer, with only a limited life expectancy. The mother wished to return to the US for E to receive medical treatment, to be near her birth father and for them all to have the support of the wider maternal family. The father did not agree to T going, resulting in the mother making an application to the court. The mother was unrepresented, the father and the child were legally represented.

8. The matter came before HHJ Oliver who made an order on 6 March 2017 giving the mother conditional leave to remove the child from the jurisdiction until 6 March 2018 on condition that the father sought a mirror order in X US State, which he did. On 9 March 2017 HHJ Oliver gave the mother permission to remove T from the jurisdiction *'in accordance with the terms of the order made on 6 March 2017'.* That order records the parties as being in person, and there having been telephone hearings on 7, 8 and 9 March and that the mother had signed the necessary documentation for the order to be secured in X US State.

9. In the order dated 6 March the following recitals are recorded:

*3.And the mother and father agreein*g *and the court declaring that the court of England and Wales are the courts with primary jurisdiction to consider matters relating to the exercise of parental responsibility in respect of T on the basis that (i) T is habitually resident in England and Wales and (ii) the Courts of England and Wales are best placed to make decisions about T's upbringing and welfare;*

4.And upon the court declaring that the mother and father both have rights of custody in relation to T for the purposes of Articles 3 and 5 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction'

10. In addition, the mother gave undertakings

11.Not to initiate or issue proceedings in any court in [X US State] or elsewhere in the United States of America in relation to T.

12.Not to challenge (and will not seek to challenge before any court in [X US State] or elsewhere in the United States of America) the fact that T lives in the jurisdiction of England and Wales

13.To return T, or cause the return of T, to the jurisdiction of England and Wales forthwith on or before 6.3.18 with liberty to apply to court of England and Wales, no later than 6.2.18, to extend the time if permission from the applicant father is not given.

11. The order dated 6 March 2017 set out in a schedule provision for skype contact twice per week and daily supervised contact in the US for periods up to 6 days in May, September and December. There has been some skype contact and only the September direct contact has taken place.

12. Very sadly, E died in June 2017 and is buried near the maternal family home in X US State

13. On 5 December 2017 the mother signed a C100 application seeking, in effect, to extend the time to remain in the US. In the C1A form dated 20 December 2017 she sets out the domestic harm and violence she alleges has taken place and the severe anxiety she states T is suffering, in part due to what is described as being *'the forced interaction with his father'.* In that application she seeks a temporary break in contact between the child and the father.

14. Following receipt by the father from the court on 5 January 2018 of the mother's application he filed a C7 acknowledgement on 16 January 2018, in which he sought sole or joint custody.

15. The application was heard by DJ King on 14 February 2018. Both parties were represented by counsel. The order records the father's agreement to T remaining in the US until 7 days after the next hearing. He directed the matter should be listed before the DFJ, joined the child as a party, both parties to re-file and re-serve documents and evidence they wish to rely on by 21 February. The Guardian was directed to file an initial analysis by 28 February.

16. The next hearing was on 8 March 2018 before HHJ Moradifar. The parents were in person and the child was represented by Ms Dail. The order records the application as (a) the applicant has applied for a child arrangements order (CAO) and permission to extend paragraph 13 of the order dated 6 March 2017 and the child's removal permanently from the jurisdiction to the US and (b) the father seeks a CAO and in the alternative shared care/defined contact order. The order also records the father's continuing agreement until the next hearing for T to remain in the US and twice weekly skype calls are recorded as being agreed. The local authority were directed to attend the next hearing on 26 March 2018. That hearing was further adjourned twice as the parents were seeking public funding for legal representation and was next effectively listed on 17 May 2018. The Children's Guardian made a part 25 application for an expert assessment on 17 May, to instruct a psychologist in the light of the information that had been filed by the mother with her application in December which set out that the child was suffering from stress. The purpose of the report was to determine whether the child's presentation is as a result of his current situation or whether there are any underlying psychological issues, as well as assessing the child's relationship and attachment with each parent. UK based psychologists were put forward who could report within 13 to 22 weeks.

17. The matter was listed before HHJ Marshall on 17 May. The mother was in person and joined the hearing by telephone, the father attended in person and the child was represented. The local authority attended and are recorded as stating they were unable to undertake any assessment if the child remained out of the jurisdiction. The parties were directed to file any revised applications and statement by 11 June 2018 addressing the child's interim placement. The matter was listed for a contested hearing to consider the child's interim placement and whether the mother should continue to be given permission for the child to remain in the US.

18. At the hearing on 25 June both parents were legally represented, the matter was adjourned until 12 July with directions for the filing of evidence about the interim arrangements and the mother about hers and T's health.

19. At the hearing on 12 July the mother raised for the first time the issue of jurisdiction, that the child was habitually resident in the US. The matter was re-allocated to me and listed on 31 July 2018 for directions. Further directions were made at that hearing and the matter was heard on 8 August. I reserved judgment until 10 August.

Legal Framework

20. There is limited issue between the parties about the essential legal framework, the issues centre on the application of the relevant principles. Both Ms Martin and Ms Dail rely heavily on the helpful legal analysis in Mr Sampson's skeleton argument.

21. Jurisdiction in respect of Part 1 orders (including s.8 orders under the Children Act 1989) is derived from two sources: The Family Law Act 1986 as amended and Council Regulation (EC) No 2201/2003 ('BllR') of 27 November 2003 'concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility'.

22. The Family Law Act 1986 was amended to recognise the primacy of BIIR and provides at s.2(1) that:

A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless:
(a) it has jurisdiction under the Council Regulation (Brussels IIA) (or the 1996 Hague Convention); or
(b) the Council Regulation (Brussels IIA) does not apply but:
(i) the question of making the order arises in or in connection with matrimonial proceedings and the condition in section 2A of this Act is satisfied or
(ii) the condition in section 3 of this Act is satisfied."

. In *I (A Child) [2009] UKSC 10* Lady Hale noted at para 15: '*if Brussels II Revised applies, it governs the situation. If some other EU country (excluding Denmark for this purpose) has jurisdiction under the Regulation, then this country does not. But if Brussels II Revised applies and gives this country jurisdiction, it will give jurisdiction even though the residual jurisdictional rules contained in the 1986 Act would not. Only if Brussels II Revised does not apply at all will the residual rules in the 1986 Act come into play'.*

Re I (supra) is authority for the proposition that the 'other' country need not be a member state itself where considering the issue of prorogation under Article 12. It is sufficient that this country is a member state. This is further clarified in respect of the wider ambit of BIIR's application in the Supreme Court decision *In the matter of A (Children) (AP) [2013] UKSC 60* in particular paragraphs 20, 25, 30 & 31.

23. Article 8.1 of BllR provides

"(i)The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

24. The issue of habitual residence has been the subject of five decisions of the Supreme Court starting with *Re I* in 2009 and most recently *Re C [2018] UKSC 8*. It is essentially a fact-based enquiry. In *Re B (a minor: habitual residence) [2016] EWHC 2174 (Fam)* at para 17 Hayden J provides a helpful non-exclusive list of the key factors the court needs to consider:

> '*The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment (Re A (children), adopting the European test);*
>
> *(ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (Re A (children), Re KL (a child));*
>
> *(iii) In common with the other rules of jurisdiction in BIIA, its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned' (Re A (children) (para [80](ii)); Re B (a child)[6] (para [42]) applying Mercredi v Chaffe at para [46]);*
>
> *(iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent (Re R sub nom AR v RN (habitual residence));*
>
> *(v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (Re LC (children) (no 2)). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focussed. It is the child's habitual residence which is in question and, it follows the child's integration which is under consideration.*
>
> *(vi) Parental intention is relevant to the assessment, but is not determinative (Re KL, Re R and Re B);*
>
> *(vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one (Re B);*
>
> *(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (Re B[6] –see in particular the guidance at para [46]);*
>
> *(ix) It is the **stability** of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of a child into the environment rather than a mere measurement of the time a child spends there (Re R and earlier in Re KL and Mercredi v Chaffe);*
>
> *(x) The relevant question is whether a child has achieved **some degree** of integration in social and family environment; it is not necessary for a child to*

be fully integrated before becoming habitually resident (Re R, AR v RN) (emphasis added);

(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Art 9 of BIIA envisaged within 3 months). It is possible to acquire a new habitual residence in a single day (Re A; Re B). In the latter case Lord Wilson referred (para [45]) those 'first roots' represent the requisite degree of integration and which a child will 'probably' put down 'quite quickly' following a move;

(xii) Habitual residence was a question of fact focussed upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. (Re R, AR v RN)

(xiii) The structure of Brussels IIA, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence; as such, "if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former" (Re B).'

25. The clear message from the cases is that the child is at the centre of the exercise in evaluating the child's habitual residence. This will involve consideration of the child's day to day life and experience, family environment, interests and routine.

26. If the court reaches the conclusion that T remains habitually resident here it is accepted this court has jurisdiction, even though T may remain in the US pending the determination of the competing applications.

27. If the court concludes T's habitual residence has changed then it is agreed the court will need to consider prorogation under Article 12, the relevant parts of which are set out below:

Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child…

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.'

28. There is no issue between the parties that the child has a substantial connection with the member state and the father is habitually resident here. Also, the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner. This is supported by the recitals in the March 2017 order and the fact that the mother issued her application here in December and has submitted to this court's jurisdiction until relatively recently.

29. In relation to when the court *'is seised'* Article 16 provides as follows:

'(1) A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court'.

30. Where subsequent proceedings have been issued (whether fresh proceedings or for variation / enforcement of existing orders under the original case number) the court must consider whether seisin refers back to the issue of the original proceedings or refers to the subsequent application. In *E v B Case C – 463/13* the ECJ held that '*prorogation of jurisdiction, on the basis of Art 12(3) of BIIR, is valid only in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seised and that that jurisdiction comes to an end, in favour of the court benefiting from a general jurisdiction under Art 8(1) of that regulation, following the final conclusion of the proceedings from which the prorogation of jurisdiction derives'* [para 49] pursuant to which jurisdiction '*ceases following a final judgment in those proceedings'* [para. 50].

31. The issue of pre-emptive prorogation whether by an undertaking to apply back to the courts of England and Wales and / or not to seek to litigate in the country to which the child is to be taken, have been considered in a number of cases (see Baker J in *X v Y and Another - [2015] 1 FLR 1463*, following Parker J in *AP v TD (Relocation: Retention of Jurisdiction) [2010] EWHC 2040 (Fam), [2011] 1 FLR 1851* and again

by Baker J in *Re ED (jurisdiction: undertaking to return child) [2014] EWHC 2731 (Fam), [2015] 2 FLR 1019.*)

32. These decisions need to be considered in the light of the ECJ decision in *E v B.* The situation in this case is that the mother undertook to return the child at the end of the period of the temporary leave and agreed not to issue any proceedings in the US. As Baker J concluded in *Re ED (supra)* an undertaking to return a child, which amounted to a condition precedent to the granting of temporary permission by this court amounted to unequivocal acceptance of this court's ongoing jurisdiction for the purposes of Article 12.3.

33. The focus has been on the last part of Article 12 (3) (b), namely whether prorogation is *'in the best interests of the child'.*

34. This issue has been considered in a number of cases, in particular *Re I (supra)* and *E v B (supra)***.** The question is whether '*it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere'.* As Lady Hale has made clear, this is quite different from the substantive issue in the proceedings.

35. Holman J considered this issue in *B v B (Brussels II Revised: Jurisdiction) [2010] EWHC 1989 (Fam).* The fact that a child had been resident in Germany for nearly a year and a welfare investigation of his current circumstances was best carried out in Germany was a relevant factor in Holman J's finding that the best interests limb of Art 12.3 was not satisfied and that, accordingly, the court should decline to exercise its jurisdiction, meaning that litigation would move to Germany where the child was habitually resident by that time.

Submissions

36. Mr Sampson's attractive and comprehensive written and oral submissions make the following points.

37. The relevant time for the court to consider whether T was habitually resident here was when the court was first seised. He submits that was January 2018 when the father received her application to extend the temporary leave to remove, which was then deemed by the court as including an application for leave to permanently remove the child from the jurisdiction (see paragraph 7 (a) order dated 8 March). He submits the earlier application in March 2017 had been determined with the orders made by HHJ Oliver on 6 and 9 March 2017.

38. He submits when considering the factual situation in January 2018 T was well integrated in into life in the US. The evidence establishes that he is settled in the care of his mother and with the wider maternal family, embedded in the local community and receives pastoral, therapeutic and educational input. Whilst it is accepted when T left in March 2017 he was then habitually resident in England and Wales, by January 2018 the position had changed. Mr Sampson relies on what is stated in *AR v RN* [2015] UKSC 35 that in order to establish habitual residence there was *'no requirement that the child should have been resident in the country in question for a particular period of time.'* [para 16]. As to the state of mind of the parents and the impact this has on the acquisition of habitual residence earlier in that paragraph Lord

Reed states *'…it is the stability of the residence that is important, not whether it is of a permanent character'.*

39. Mr Sampson submits during the time T has been in the US and by January 2018 he has become settled, integrated and living not only with his mother but in an environment into which he had fully integrated and was living in the centre of a wider family and community.

40. If the court accepts his submissions regarding habitual residence he accepts the child has a substantial connection with the England and Wales and that the acceptance of the jurisdiction was expressly accepted by the parties at the time the court was seised of the proceedings on the basis that the undertakings given in March regarding jurisdiction were a condition precedent to the granting of temporary permission by this court and amounted to unequivocal acceptance of the court's ongoing jurisdiction for the purpose of Article 12.3.

41. Mr Sampson submits it is the final consideration, namely the best interests of the child, that is the focus of his submissions on Article 12.

42. He submits the principles that can be drawn from the authorities in relation to the application of the review of best interests is as follows:

'(i) not attenuated but is limited to a review of best interests on the issue in question (that of whether to assume jurisdiction) and not a pre-emptive review of the potential outcomes available;

(ii)not to assume that one member state is better able than another (or in this case the US) to consider the child's welfare interests (save for the exception in respect of non-Hague Convention countries under Article 12.4).

(iii)an appropriately comprehensive consideration of the fact-specific issues on examining whether prorogation of jurisdiction is in the best interests of the child. That is, as a matter of logic, a comparison of whether actual litigation here or potential / proposed litigation (for none has been issued) in the US would be in the best interests of the child. It is accepted that this court must factor into that exercise as relevant matters: (i) the fact that the parents have to date acceded to the exercise of this court's jurisdiction and (ii) that there is no litigation in the States as yet. Additional matters such as availability of assessments, funding, access to lawyers will fall to be considered.'

43. As a consequence, applying those considerations in this case, the relevant factors are summarised by him as follows.

44. The relocation application requires careful analysis of the home environment, wider family support available in the US and evidence relating to T's welfare. That is best assessed in situ, where it will be most accurate and reliable. T's specific and psychological needs are such that his assessor must have knowledge of the services and support that are available locally to him. The mother and T have experienced a profound loss and are navigating ongoing bereavement. It is simply not realistic to require a newly bereaved mother to conduct international litigation at arm's length. In reality the father is not seeking a change of primary residence. Issues in relation to

contact and relocation are again best litigated in the United States. Whilst it is recognised there is the availability of public funding in the UK that is not determinative, it is a factor to weigh in the balance. Both parents are potentially able to obtain pro bono representation in the US and the mother has, through solicitors, obtained names and details of expert assessors able to undertake assessments in the US, if required.

45. Mr Sampson candidly recognised that it is unusual for an application for permanent relocation to be conducted in the state to which a parent wishes to move but the reality here is that the court is charged with determining welfare issues relating to a child who has been resident in the US for over a year, in circumstances where that child has suffered a bereavement and whose family still reel from the loss of a sibling. It would be contrary to T's best interests for litigation to determine his welfare to be conducted in a jurisdiction so far away from his day to day life. The father's future involvement in T's life and the mother's ability to support that can be fully determined within litigation to determine these issues in the US. The mother is willing to undertake, whilst these proceedings are stayed, to issue an application in the US to determine her application to relocate and determine the father's contact with the child.

46. Ms Martin, in her full and helpful written and oral submissions on behalf of the father, resists any finding that T is habitually resident in the US and, in the event that he is, submits that all the criteria under Article 12 require this court to retain jurisdiction.

47. Although in her written submissions she seeks to suggest the date the court should be looking at in relation to habitual residence should be March 2017 as that was *'when the court was first seised',* she was less forceful on this in her oral submissions recognising that the orders of HHJ Oliver in March 2017 effectively determined the applications that were before him at that time.

48. In relation to the issue of habitual residence she submits that the fact that T has been in the US since March 2017 is not in dispute *'However, this time cannot, in the face of clear orders, in both the courts of England and [X US State], usurp the habitual residence in this jurisdiction and which continues'.* In oral submissions she recognised that even on her analysis there must come a time when habitual residence could change, and it would depend on the facts. She recognises that *'T has undoubtedly formed bonds with his relatives in the USA, but that integration was temporary both factually and intentionally'.* She submits he has bonds with his father here which have been disrupted by the mother's actions, by retaining him in the US and not being supportive about contact, relying in particular on the suggestion by the mother than the child's PTSD diagnosis is due more to the way the father behaves during contact, rather than being due to the other matters such as the loss of his sister and moving to another jurisdiction.

49. Ms Martin relies on the terms of the US mirror order, in effect, determining that habitual residence is here. She submits that *'until that order is successfully appealed, revoked or otherwise discharged it stands.'*

50. She submits that to determine that T's habitual residence has changed to the US would

'a) fly in the face of the orders of the courts both here and the USA;

b) sanction and permit the mother to breach the orders of the court and her undertakings given to the court;

c) leave T in potential limbo given the orders made here and in the USA stating that habitual residence remains here and the courts in this country should deal with this issue; and

d) leave a situation where T is being alienated from his father with little realistic recourse for the father who lacks the funds to pursue a case in the US (M asserts the availability of pro bono legal services for F in US but this is unsubstantiated) where there would be no recourse to legal aid for either of the parties.'

51. Ms Dail on behalf of the Children's Guardian takes a pragmatic approach in her skeleton argument. She doesn't specifically address the issue of habitual residence but submits this case has proceeded, until very recently, on the basis that this court has jurisdiction. It was expressly conceded in the recitals to the orders made in March 2017 that this court retained jurisdiction. The mother made her application to extend the leave in December 2017 and, in effect, submitted and acceded to this court's jurisdiction until July 2018. The Guardian does not understand that the father seeks to change T's residence and the mother's wish is recorded in the order in May 2018 to *'put forward a one-year plan for the care and contact arrangements in respect of T acknowledging T needs to develop his relationship with his father. After which contact will be kept under review'.* She confirmed the Guardian does not seek T's return to the jurisdiction *'although a short visit might become necessary once assessments commence'.*

Discussion and Decision

52. The first question the court has to consider is the question of habitual residence. There is no issue that at the time T left to go to the US his habitual residence was here. That accords with the recital agreed by the parties in March 2017, notably recital 3 records that the child ***'is'*** habitually resident here.

53. It seems inescapable that when HHJ Oliver made the orders on 6 and 9 March 2017 the applications that were before him at that time were determined and concluded by the orders made. There were no further hearings and no reviews.

54. As a consequence when the mother made her application in December 2017, that was issued in January 2018, the court was seised afresh, with the result that the question of the court's jurisdiction is required to be considered at that time.

55. Was T's habitual residence still in England and Wales? At that stage he had been out of the jurisdiction for 8 months. He had been living with his mother in the maternal family home and all the evidence points to him having become integrated there in the sense of the wider maternal family, his involvement with the local community and the other wider support he was receiving. His father remained living here, he had some direct contact in September and retained twice weekly skype contact with him, but apart from that link, the history of his habitual residence here together with the recitals in the March 2017 order and that the leave to remove was expressed as being time limited (albeit with provision to extend) there was little else that connected him

with this jurisdiction or could found that he was integrated in a social and family environment here.

56. Ms Martin's submissions regarding habitual residence are anchored on the terms of the March order, coupled with the terms of the mirror order in the US. That view in my judgment is too blinkered when undertaking the factual review the court is required to undertake. What took place in March is clearly relevant but T's life has not stood still. The court is bound to consider the matter afresh in December.

57. One of the difficulties in this case is that despite the fact that the mother was represented by previous counsel in February before DJ King no issue about jurisdiction was raised and it does not feature on the order then or subsequently until raised for the first time on the order dated 12 July, some six months after the mother had made her application and prior to then had fully acceded to the court's jurisdiction, engaged with the hearings and complied with the court directions. However, that, in my judgment is more relevant to issues in relation to Article 12 than habitual residence of the child.

58. Having considered the relevant considerations and looked at the helpful matters summarised by Hayden J in *Re B (supra)* I have reached the conclusion that in January 2018 when this court was seised with the current application T's habitual residence was in the US for the following reasons:

(1) Whilst recognising that T's father remains here the reality for T's day to day life is that he is integrated in the social and family environment in the US and that is where his stability lies.

(2) Weighed in the balance is the fact that the leave to remove was time limited, but it was expressly open to the mother to apply to extend it, which she did.

(3) T's connection with this jurisdiction largely focuses on his father and his connection with him, whilst important, has to be weighed with other aspects of his life.

(4) It is factored in that the intention of the parents in March 2017, as recorded in the recital, was that T's habitual residence then was England and Wales. The recital is expressed in the present tense, perhaps recognising the reality that it is probably not possible to bind in an unlimited way what is essentially a fact-based inquiry at the relevant time when the court is later seised. As the relevant authorities have repeatedly made clear it is not necessarily the length of time that determines habitual residence, but the determination is guided by factors such as the stability and the degree of integration.

59. Having reached that conclusion, the court is then required to consider the question of prorogation under Article 12, focussing on the issue relating to the superior or best interests of the child, the other requirements, for the reasons outlined above, not being in issue.

60. The focus of this is not the welfare issues raised by the substantive application, but more deciding on the most appropriate forum for those issues to be determined.

61. I have reached the conclusion that the balance when considering the interests of the child come down on this court retaining jurisdiction. This is for the following reasons.

(1) Between December and May the mother unconditionally acceded to the court's jurisdiction. Whilst it is recognised she was a litigant in person during much of that time she was legally represented by previous counsel in February and had the benefit of legal representation from 25 June 2018.

(2) There is a structure in place here, the applications have been ongoing for over six months, detailed statements have been filed and all parties have the benefit of public funding and experienced legal representation.

(3) There is no litigation on foot in the US, there is no guarantee of legal representation, neither parent have the financial resources to fund it and there would inevitably be further delay in reaching any decisions regarding T's welfare.

(4) It is recognised that the analysis of the home environment and wider family support available in the US may be better assessed within proceedings there, but the same would apply in reverse to some extent in relation to the father if the proceedings were in the US. The reality of this case is whichever jurisdiction is involved there will need to be significant enquiries made in the other jurisdiction.

(5) The impact on the mother of recent events has been considered, but she has the advantage of the availability of the support of her family and the benefit of experienced legal representation here.

(6) There appear to be funding and practical arrangements in place here that can be put in hand for any assessments of T and/or the adults the court considers to be 'necessary'. With the benefits of electronic and other communication it will be possible for this court to understand what support and services are available locally in the US.

62. In my judgment the issue of jurisdiction having now been determined the focus now should be effective case management leading to a hearing where all outstanding issues can be determined.

63. Before considering further case management issues all I can do is return to where I started and encourage these parties to engage in mediation. The adults being able to reach agreement about T's future care arrangements in whole or even part would no doubt meet T's welfare needs.