Neutral Citation Number: [2021] EWFC 26

Case No: ZC20C00330

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2021

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

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Between :

London Borough of Enfield	**Applicant**
- and -	
K	**1st Respondent**
-and	
T	**2nd Respondent**
(by the Child's Guardian)	

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Austen Morgan (instructed by) for the **Applicant**
Natalie Wood (instructed by) for the **1st Respondent**
Ruth Cabeza (instructed by **CAFCASS)** for the **2nd Respondent**

Hearing dates: 3 February 2021

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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.

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THE HONOURABLE MRS JUSTICE JUDD DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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.

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30am on 12 March 2021. A copy of the judgment in final form as handed down will be automatically sent to counsel shortly afterwards

The Honourable Mrs Justice Judd :

1. This is an application within conjoined public and private law proceedings for a declaration as to the habitual residence of a five year old child who I shall call T. T is represented by her Guardian. The other parties to the proceedings are the London Borough of Enfield, and the first respondent (K) who is hoping to be able to adopt T. The first respondent is not directly related to the mother, but they grew up together in the same household for about six years and saw each other as sisters. K lives in the United States of America.

2. Until she was three years old, T was cared for by her mother. T did not have a relationship with her birth father, and he does not have parental responsibility. Very sadly, T's mother died in 2018. For a number of months after the mother's death, T was cared for by a close friend of the mother, financially supported by K. In March 2019 K made an application for a child arrangements order. A section 7 report prepared on behalf of the local authority supported T's placement with K and on 5th November 2019 the court made a s. 8 order together with an order under s. 13 that K be permitted to take T to the US for a period of six months. In the meantime, K was to file and serve counsel's advice in the UK in relation to permanently adopting T. On the making of the order the court expressed concern (which is set out on the face of the order) as to why the local authority had not made an application for care proceedings to protect T's welfare. An order was made requiring the local authority to file a statement as to why this had not happened.

3. The order permitting K to retain T in the US has been extended a number of times whilst the investigation as to her adoption in the US has continued. T has been brought over to the UK on some occasions but this has not been possible since the start of the Covid pandemic. Legal advice has been sought from a US expert, Dr. Steffas who has recommended that the local authority should apply for a placement order to enable the making of a Convention adoption order.

4. In order for this court to make a Convention adoption order, T must be habitually resident in this jurisdiction (Adoptions with a Foreign Element Regulations ("AFER") 2005, Regulation 50) , and K must be habitually resident in the receiving state (the US). There is no question as to K's habitual residence but an issue has been raised as to T's.

5. The local authority submits that T is no longer habitually resident in England and Wales. T's Guardian, supported by K, submits that she is.

Habitual Residence – the law

6. The question of habitual residence has been considered by both the Supreme Court and the Court of Appeal on numerous occasions. A very helpful summary of the various authorities has been set out by Hayden J in *Re B (A Child)(Custody Rights: Habitual Residence) [2016] EWHC 2174 (Fam), [2016] 4 W.L.R. 156*, at paragraph 17

i) *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 (A v A , 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 emphasized that the factual inquiry must be centered throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence (A v A , In re L).*

iii) *In common with the other rules of jurisdiction in Council Regulation (EC) No 2201/2003 ("Brussels IIA") 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": A v A , para 80(ii); In re B , para 42, applying Mercredi v Chaffe (Case C-497/10PPU) EU:C:2010:829; [2012] Fam 22 , 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 (In re R).*

v) *A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her (In re LC). The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. 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 not determinative (In re L , In re R and In 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 (In 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 (In re B —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 the child into the environment rather than a mere measurement of the time a child spends there (In re R and earlier in In re L and Mercredi).*

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 (In re R) (emphasis added).*

xi) *The requisite degree of integration can, in certain circumstances, develop quite quickly (article 9 of Brussels IIA envisages within three months). It is possible to acquire a new habitual residence in a single day (A v A ; In re B). In the latter case Lord Wilson JSC referred (para 45) to those "first roots " which 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 focused 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. There was no requirement that the child should have been resident in the country in question for a particular*

period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (In re R).

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" (In re B supra).

7. In the case of *Re M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* 2020 EWCA Civ 1105 Moylan LJ endorsed this summary but suggested that bullet point (viii) should be omitted as it might distract the court from the essential task of analysing the situation of the child.

8. In *Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4* Lord Wilson stated at ¶46:
"The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub rules but expectations which the fact finder may well find to be unfulfilled in the case before him:

a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state;
b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day to day life in the new state, probably the faster his achievement of that requisite degree; and
c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

9. In *Re L (A Child)(Custody: Habitual Residence: Reunite International Child Abduction Centre Intervening)* [2013] UKSC 75 Baroness Hale stated at paragraph 26;
'*on the other hand the fact that a child's residence is precarious may prevent it from acquiring the necessary quality of stability'.*

10. In the case of *Re M and T (Proposed Convention Adoption) Habitual Residence* [2015] EWFC B239 (16 July 2015) the court was concerned with children who had been in the care of their paternal aunt for 2 years. There were numerous legal irregularities relating to the placement in the first year and half of that placement. Keehan J decided that there had been no change in the children's habitual residence during the period of time they had been living with their aunt and was satisfied that the children remained habitually resident in this jurisdiction. He also concluded that the children would not lose their habitual residence in this jurisdiction while the process for a Hague Convention Adoption was taken to the point of an Article 17 agreement. Given the similarities between that case and this (albeit I must note that

the children in this case were subject to a placement order), it is instructive to set out what Keehan J stated below:-

"31.Ms. Cabeza on behalf of E submits that the facts of the cases in Re CM and Re S and T are very different to the facts of this case. I agree. The principle which I derive from those cases, and from the case of Re R, is that it is not sufficient simply to have regard to whether the children have achieved some degree of integration in a social and family environment. The stability of that placement is another factor to be considered. Moreover the court must take account of the duration, regularity, conditions and reasons for the stay in the territory of a member state.
32.I readily accept that the issue of habitual residence is a matter of fact. Accordingly, the mere fact that a child is a ward of this Court or is subject to orders requiring his return to this jurisdiction if the court so orders when, for example, granting permission pursuant to Section 28 of the 2002 Act to remove a child from the jurisdiction, that cannot of itself prevent the child from acquiring habitual residence in another country in which he stays with the leave of the Court. Thus a court order is not a trump card which precludes a child losing habitual residence in this country and/or acquiring habitual residence in another country.
33.In my judgment there are clear public policy considerations in respect of a child, whom the Court has given permission to stay with a family member or other person in another country for the purposes of an assessment, but over whom the court intends to retain jurisdiction, against him losing habitual residence by the mere effluxion of time when present in that other country. These considerations cannot prevent that child in appropriate circumstances as a matter of fact acquiring habitual residence in the other country. They are however factors to be considered when analysing the factual matrix.
34.I accept that since their arrival in the United States of America in August 2013 the children have undoubtedly achieved a degree of integration in the social and family environment of E. No doubt to a very considerable degree. There are, however, other factors which I must consider and in particular the stability of that placement, the reasons for their stay in the United States of America and the conditions of the same.
At paragraph 45 he concluded:

45. In all of the circumstances I am not satisfied that the children's stay or placement in the care of E has achieved or will during the currency of these proceedings achieve a significant degree of stability that results in the children, as a matter of fact, having acquired or acquiring habitual residence in the United States of America. Furthermore, their placement in her care is for the purposes of securing an adoption order in her favour which has not yet been approved or granted by this Court.

46. Accordingly I am entirely satisfied that the children are and remain habitually resident in this jurisdiction.

The position of the parties

11. Dr. Morgan, for the local authority submitted that T's habitual residence is now in the United States. With reference to the case law, including *Mercredi v Chaffe (*Case C-497/10PPU [2012] Fam 22, *A v A*, *In Re R*, *Re S and Re T (Intercountry Adoption: USA* [2015] EWHC 1753 (Fam), *Re M (Children)(Habitual Residence: 1980 Hague Child Abduction Convention* [2020] EWCA Civ 1105 and *Re M and T (Proposed Convention Adoption)(Habitual Residence)* [2015] EWFC 239, he submitted that T had

attained the necessary degree of integration into a social and family environment following her move to the USA after the making of the order of DDJ Orchover on 5th November 2019. Indeed, in oral submissions he stated that her habitual residence changed almost immediately at that point. He contrasted this case with that of ***Re S, Re T*** where Sir James Munby, the President of the Family Division concluded that two children who had been cared for by a maternal aunt in the US for two years had not become habitually resident there due to the fact that their presence had been intermittent and lacking in stability in particular because of the way in which the orders in that case had been expressed (and it is true that the judge referred to this in paragraph 62). Dr. Morgan referred me to paragraph 6 of the judgment where the wording of the orders of Sir Peter Singer were set out. The recitals included undertakings by the maternal aunt to return the children to the jurisdiction when called upon to do so, that the children remained wards of court, and that they were habitually resident in the United Kingdom. The orders in this case have not contained those recitals. He submitted that despite the orders permitting K to retain T out of the jurisdiction being time limited on each occasion, and needing to be renewed, nobody has ever raised the possibility of the child coming back to this country.

12. Dr. Morgan set out a number of factual matters upon which he relied in support of his case that T had acquired habitual residence, namely that it has been K's home for a number of years and that she is settled and working there, K has friends there and so now does T, that K has obtained parental responsibility, that T has attended pre-school and school, that another aunt is in the US and T has had counselling and therapy, and is registered with doctors and dentists. T has been in the US (apart from a very few days), continuously since November 2019, and she also spent some weeks there between June and August 2019. Extensions to the permission to remain there have always been granted. The intention is, and has always been, for T to stay in the US being cared for by K. From T's perspective – which is the perspective from which the court must view things, the USA is her home.

13. Ms Cabeza for T, supported by Ms Wood for K, argues that T's situation means that she has not achieved habitual residence in the USA. Whilst it is true that she has been with K throughout and has become very attached to her, that she has indeed made friends, attended school, had counselling, and is registered for health and dental care, her situation has been precarious. Focussing on the child's situation does not mean only looking at what the child is consciously aware of, but all the circumstances surrounding her presence in the US. The orders in this case may not have precisely declared that T's habitual residence remained in this jurisdiction, or contained specific undertakings that she should be returned to the UK 'on demand' as in the case of ***Re S, Re T***, but a reading of the orders and a consideration of the circumstances make it abundantly clear that T's situation had not achieved either permanence or stability. This court retained jurisdiction and did not give K open ended permission to keep T in the US. Indeed Ms Cabeza pointed out that orders granting and extending permission for T to be in the US temporarily included a standard recital that removal from the jurisdiction without an order of the court could be a criminal offence. At no point was an order extending permission ever, or ever intended to be, a 'rubber stamp' exercise. Other individuals made applications for orders at various points, challenging the proposal that K care for T in the long term. The local authority made a public law application in August 2020. T has no permanent leave to remain in the US (the section 8 order here is not sufficient for the US immigration authorities) and indeed now she is an overstayer.

T's habitual residence

14. In order to determine T's habitual residence I must focus on her situation. After the death of her mother in late 2018, T was first looked after by a family friend, before being cared for by K. T first went to the US with K on 23rd June 2019 where she stayed for about six weeks. She then returned to the UK in August 2019 and stayed until November when DDJ Orchover made a child arrangements order in favour of K, an order giving her parental responsibility and authorised T's removal from the jurisdiction for six months. T left for the US on that day, then returned to the UK again in January 2020 for a few days. In the meantime, there were other applications before the court relating to T's long term future. Her maternal grandmother made an application in March 2019, and her stepfather made one in May 2020. These have since been dismissed by agreement as all the family now support K's wish to care for T long term. On 13th August 2020 the local authority made applications for a care order, which were transferred to the Family Division in September. Since the original order by DDJ Orchover there have been orders extending K's permission to keep T out of the jurisdiction. The current order is due to run out next week and I have renewed if for another short period.

15. T has been living with K at all times since June 2019 (I think there has been one house move), and she has attended school. She has had counselling, and been registered with a doctor and dentist. She has formed a strong attachment to K, and made friends. She has been on a three month visa, and until the current restrictions she had been brought back to the UK regularly to avoid going outside its terms. Because this has not been possible in recent months, T's presence in the US is now unauthorised. At all times since 12th February 2019 T has been the subject of proceedings in this country.

16. The background to this young girl going to live on the other side of the world is the tragic death of her mother. It is wonderful to read how T's attachment to K has developed, but not much more than eighteen months ago this was a relatively new relationship, following the loss of T's primary carer. The events of the last two years will have had an effect on T's psychological stability, added to everything else. During the course of this hearing, I noticed that T had come into the room where K was attending the hearing (it must have been about 7am US time). T sat on K's lap. K dealt with this with the greatest of skill and tact, but I could not help note a concern that a child of her age is quite capable of understanding that something is going on which relates to her future and her future care. I myself was worried that being able to hear some things being said could make T anxious and insecure. The hearing adjourned for a while and T went to school. Of course care is taken to avoid T being exposed to the litigation about her, but she must be aware of conversations going on, and meetings between her carer and other people.

17. T's removal from this jurisdiction has only been permitted on a temporary basis. There have been no undertakings requiring K to return T to the jurisdiction if called upon to do so, but I do not accept Dr. Morgan's submission that this or the lack of the type of wording used in the case of *Re S, Re T* or *Re M and T* is significant. T does not have a right of residence in the US and at present she is present there without authorisation. The US is not obliged by any international agreement or treaty to recognise and enforce the current residence order, and as noted by the US expert, Ms Steffas, it cannot be relied upon to gain a lawful immigration status for T in that country.

18. At all stages, T's status and therefore the stability of her placement with K has indeed been precarious. There have been numerous court hearings since the private law proceedings commenced in February 2019 (looking at the chronology there appear to have been about 14 hearings to date). Other family members have made with a view to caring for T themselves. The last one of these was dismissed in July 2020, having been made in May 2020. No party questioned the jurisdiction of the court to make orders relating to T's care and welfare, including (until very recently), the local authority. In the section 37 report compiled by the local authority in July 2020 the social worker stated '[T] is still habitually resident in the UK. Although she has been living in the USA with [K] since November 2019, she is obliged to keep re-entering the USA in order to renew her ESTA visa. We are therefore of the view that she is at risk of significant harm'. Following that report the local authority made an application for a care order on 13th August 2020, and the application is still outstanding.

19. Although nobody apart from K has had parental responsibility for T since the death of the mother, neither this order or the child arrangements order has anything like the security of an adoption order, or even a Special Guardianship order.

20. Taking into account all the matters set out above, I do not consider that T has lost her habitual residence in this country and become habitually resident in the United States. I accept the submissions made on behalf of T by Ms Cabeza, supported by Ms Wood,

Conclusion

21. Having set out my findings as to habitual residence above, it is now necessary to determine how T's obvious need for stability, security and permanence can be realised, hopefully by means of an adoption pursuant to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 19th May 1993 as scheduled to the Adoption (Intercountry Aspects) Act 1999. There is an issue as to whether or not this can be done as an agency adoption or one as a non-agency adoption. The routes contain a number of technicalities which I will not set out here, save to express my hope that all parties, working together will identify the best way of achieving this in a t space of time.