Neutral Citation Number: [2020] EWHC 1964 (Fam)

Case No: FD20P00052, FD20P00070

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 22 May 2020

BEFORE:

MRS JUSTICE LIEVEN

BETWEEN:

FATHER

Applicant

- and -

MOTHER

Respondent

MR G CROSTHWAITE (instructed by Lyons Davidson) appeared on behalf of the Applicant
MR N ANDERSON (instructed by Rix & Kay) appeared on behalf of the Respondent

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JUDGMENT
(Draft for Approval)

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(Official Shorthand Writers to the Court)

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.

1. MRS JUSTICE LIEVEN: This is an application by the father for the summary return to Australia of two children: A, aged 8 years and 11 months, and B, aged 5 years and 7 months. The children had both lived in Australia prior to April 2019. The facts of the case is that the mother is British; the father holds Australian and European passports but has, I believe, lived in Australia all his life.

2. The parties met in 2002 and married in November 2006. The father's family live in Australia. The couple have lived in Australia throughout their marriage up to April 2019, and I think that both children were born in Australia and have lived there up until April 2019. The mother and the children, sometimes accompanied by the father, have made frequent trips to the United Kingdom to see the mother's parents, who live in England, and there have also been roughly annual holidays with the maternal grandparents, often in East Africa.

3. There have been difficulties over the years in the marriage, and the parents have been to marriage counselling in the past. It is not disputed that the father has had problems with alcohol throughout the marriage. It seems that the mother had been keen to move to England, particularly after August 2018, when she returned to England for her grandmother's funeral. When she went back to Australia, she was keen for the family to move to England. Her father, who gave evidence before me, had become unwell in 2018. Initially, his condition was undiagnosed, and then in around November 2018, it was diagnosed as essential thrombocytosis. This is a condition of the blood platelets which, as I understand it, is itself cancerous but, more critically, can lead to leukaemia, if not properly controlled.

4. The mother had urged the father to move to England in late 2018, but he was resistant (indeed, I think, from his evidence, strongly resistant) because he had a job that he enjoyed in Australia, the children were settled in Australia, his family were in Australia, and it is clear that he enjoyed the lifestyle and believed the rest of the family enjoyed the lifestyle in Australia. But the position changed somewhat in January 2019, because the father was made redundant from his job. The mother, it is clear, saw this as a good time to move and ultimately the father agreed.

5. I heard oral evidence from the mother and the father. The father's evidence was that he now says he was pressurised into agreeing to the move, and was misled by the mother both as to her intentions and as to the seriousness of her father's ill health. The question of what was agreed between the parents in January 2019 is hotly disputed and I will return to it below. The factual position is that their house in Australia was rented out, and that some of their possessions were put in storage and some were brought to the United Kingdom (and when I say some were brought to the United Kingdom, that is more than suitcases; as I understand it, there were storage crates brought to the United Kingdom).

6. Many of the children's possessions were brought to the United Kingdom, and the children's pet rabbits were rehomed. A, the older boy, left the school he was in, and my understanding of the position, having seen an email from the school, is that his place was not formally kept open, but there seems to have been an assumption that he could go back to that school if and when he returned to Australia. No reservations were made in respect of B's schooling, because he was not in school at the time. I have had witness statements from various members of the father's family who say that they thought the move was for two years. I will come back to the evidence as to what was agreed, and my conclusions on that below.

7. The family moved in April 2019, and I think it is fair to record that it is clear that the father accepted the move at that stage and talked to the children about it in positive terms. He bought into the move, to that extent, in April 2019. The family moved to England in April 2019, and initially lived with the maternal grandparents. In June, they rented a house in the same village. A and B both took up places in the local village school, and have been there since; so, must now be into their third term. A has shown some behavioural problems at school, and I have seen evidence that he is receiving help for those problems through the school and, indeed, the NHS. The evidence is that the children do sports and normal school and out of school activities in the village, both through the school and in local groups.

8. The mother fairly quickly got a part-time job with a charity. The father's position was that the mother had agreed that she would get a full-time job on a higher salary, but the mother told me in evidence that she tried to do so and failed, and she took up a part-

time job. The father sought employment and got a job in October with an international software company. He travels widely in Europe and the Middle East and the USA, and I am told that it is a permanent job, in the sense that it is not on a limited time frame.

9. The evidence is clear that, contrary to what certainly the mother had hoped, the relationship remained or resumed being rocky when the parties came to England, and the mother went to a divorce solicitor (indeed, the solicitor she now instructs) in November 2019. On 15 December 2019, the mother went out to the local shops, and when she came back, the boys told her that the father had hit them with his belt. The father accepts he did this. He says that the boys were misbehaving and he did it to make them pay attention; he said that he did not lose his temper. Within days of this incident, the mother left the home with the boys and moved back in with her parents. She, the children and her parents (the grandparents) went to East Africa in January 2020, and she filed for divorce when she returned on 18 January 2020. The father then made this application at the end of January.

10. I turn to the father's case and his evidence. The father's case is that the mother had deceived him and that he now believes she had always intended to remain in England with the boys. So, in law, his case is that, firstly, there was an unlawful removal from Australia in April 2019, because his consent was vitiated by the mother's dishonesty; and, secondly in the alternative, that there was an unlawful retention in England in January 2020 or at some earlier date, when the mother made an unequivocal decision and declaration that she would not return to Australia. He says that the mother effectively misled him and hatched a plan to persuade him to go to England with the children, with the clear intent that she would then divorce him in England and that her position would be improved because she was in England.

11. A principal basis of this allegation is that the father found a note on the mother's iPad, which was dated 18 September 2018, i.e. before they decided to come to England. In this note, the mother has recorded various instances of where she thought the father had behaved badly, such as him threatening to lock the children out of the house, speaking rudely to her, swearing at somebody in the street, and then records the following:

> "Alcohol issue. Counselling. Too violent. Casino. Drunk driving. Dismissed. My rights re the UK. Diary [question mark] record of drinking [question mark] bank account [question mark] passports [question mark] offset account changed to need joint signatures super [question mark] amounts. Future needs. Dollars. 10 per cent. 60/40 assets."
> (Quote unchecked)

12. The father says that this is evidence of a plan to divorce him in England and shows that the mother never intended to return to Australia to live. He also says that the mother misled him over her father's ill health and told him, before he agreed to go to England, that her father was terminally ill. The father says that he was very sympathetic to the mother on this point because he appreciated how important it was to her for her to spend what he thought were her father's final days in England with him.

13. The father then says that the agreement was to move to England for two years or (I think this is what he assumed) until the maternal grandfather died, but definitely not longer, and that there was an absolute intention to return to Australia after the period had expired. The father then says that when they did get to England, the mother's attitude to him changed, and she became cold and inattentive. He says that the incident on 15 December 2019, when he hit the boys, was merely an excuse which the mother used as a basis for the divorce.

14. I have to say at this point that I found his case on this slightly troubling, because he said that the mother had overreacted to the incident because she was not there, there were no marks on the children and she had recorded the children telling her about the incident. So, his case was that she was simply seeking to amass evidence to use against him.

15. Finally, the father says that the children are not habitually resident in England, that they are not settled here and that A, in particular, is unhappy here, and both children want to return to Australia. For the father's argument on being misled to succeed, his case is that the mother was pursuing what Mr Anderson described as “a cunning plan”. She deleted part of the iPad note subsequently, and the father says that she did that to cover her tracks, and the father relies on the fact that she went to a divorce solicitor in November 2019 before the incident on 15 December 2019.

16. The mother's evidence was that the marriage had had its ups and downs over the years, partly, at least, because of the father's problems with alcohol. She says that they had been contemplating separation in late 2018, which is why she wrote the note on the iPad as an aide memoire. The father agrees that they had been contemplating separation, but he does not agree that that is why there was the note on the iPad. The mother says that she wrote herself notes in order to remind herself of events and because she tended to blame herself for problems in the marriage, and wanted a record to look back on. She said (and this is what the father accepts) that they discussed splitting up in December 2018 when on a holiday with the grandparents in East Africa, and that was partly again because the father had been drinking too much and had been behaving badly on holiday. To some degree that is supported by the grandfather's evidence. But she says that the parents had decided to try to make a go of it and had agreed to go to counselling or to seek help when they got back to Australia at the end of 2018. She had gone to counselling, but the father had changed his mind and had not done so. The mother accepted that she had wanted to move to the United Kingdom in late 2018, but she denied any intention to split up from the father. She said she was committed to trying to make the marriage work, and she thought a move to England would give them a fresh start.

17. In terms of the agreement they reached, it was the mother's evidence that the agreement was that they would move for two years and would then assess the situation, but she did accept that there was no agreement that they would move permanently. She absolutely denied misleading the father over her father's illness and said that she had never suggested it was terminal. She said that when they got to England, she had a lot on her plate and that might be why the father felt that she was less attentive than she should have been. It was her evidence that she had continued to try to make the relationship work, partly because she continued to love her husband but also because she did not want the family to split up and the children to grow up in a separated family. However, and she was extremely clear on this after being asked questions on it on a number of occasions, it was her evidence that the incident on 15 December 2019 was decisive. She said in terms that it was simply not acceptable to hit a 5 and 8-year-old child with a belt. But she says she did not make the final decision to leave until she was on holiday in January 2020 when the father was not there. She said she had

deleted part of the iPad note about going to England because she no longer thought it had any relevance.

18. Mother was asked about a note in June 2019 on her iPad, which makes reference to $50,000 (I assume it is US dollars) and to arrangements being made about investing it. She said she had simply no memory of this note, and had no idea what it was about. I have to say, at this stage, that note remains slightly mysterious, because it is surprising that if she wrote it, she has no memory of what it is about. But both she and the grandfather were adamant that there was no legacy from her grandmother and that she had absolutely no idea that she would be given or had or any contemplation of $50,000. I note at this stage, in case this issue ever arises again, that I had expressly pointed out to her that in divorce proceedings she would have to give full disclosure of her financial position, and she said she fully understood that and understood the consequences if she lied to this court. So, I have no reason to believe she lied about this matter.

19. The mother's evidence is that the children are well settled here. She accepts they miss aspects of life in Australia, including their friends and the paternal family, but it is her evidence that they are fully integrated here.

20. Against that background, the issues I have to consider are as follows. Firstly, did the father give clear and unequivocal consent to move to England? Secondly, was that consent gained falsely by the mother because she always intended to remain in England? Thirdly, what were the terms of the agreement? Fourthly, was there a repudiatory retention by the mother when she said in terms that she would not return to Australia? Fifthly and closely related, what is the date of that alleged repudiatory retention? Sixthly, by the time of the alleged repudiatory retention, were the children habitually resident in England? Finally, should I use the inherent jurisdiction to order the children to return to Australia in any event?

21. I will deal with the law as I deal with the various different issues, rather than setting out the law in its totality first. Before I deal with that, I have some comments on the evidence. Looking at the evidence overall, it is plain that both parents do much love these children and want what they both perceive to be the best for them. I do not think

that either parent deliberately lied. Most of the disagreements in the evidence probably have more to do with different perceptions of discussions and actions than anyone seeking to actively mislead the court. But I do not accept that the mother had hatched a plan to trick the father to come to England and that she was lying to me about her intentions. The mother struck me as an honest witness who conceded points against her case and was seeking to tell the truth. The father's case involves me concluding that the mother had very deliberately schemed against him and then lied to me, and I make it clear that that is certainly not how she appeared to me in evidence.

22. I do not think the father deliberately lied, but I do think he saw things very much from his own perspective. Two examples: first of all, that the mother's inattention to him when she came to England was because she had misled him, rather than the position being as the mother perceived it, and seems to me wholly reasonable, that having moved to England, having two young children to settle, living with her parents and worried about her father's health and indeed having to deal with a husband who was probably not very happy and had alcohol problems, she may have been somewhat less attentive than he might have desired. A second example of his focus on himself was that when faced with the fact that he had hit a 5 and 8-year-old with a belt, the mother was horrified. The father's view, in evidence, was that this was merely an excuse for her to leave. In my view the Mother's response was a wholly reasonable one, and indeed one that many would share.

23. Turning from that overview of the evidence, issues one and two are the agreement to move and what the terms of the agreement were. The leading case on consent is in *Re P-J* [2010] 1 WLR 1237. The passage I need to read is at paragraph 48 in the speech of Ward LJ:

> "In my judgment the following principles should be deduced from these authorities.
>
> (1) Consent to the removal of the child must be clear and unequivocal.
>
> (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.

(3) Such advance consent must, however, still be operative and in force at the time of the actual removal.

(4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which is too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, 'Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child.' The event must be objectively verifiable.

(5) Consent, or the lack of it, must be viewed in the context of the realities of family life or, more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract.

(6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.

(7) The burden of proving the consent rests on him or her who asserts it.

(8) The enquiry is inevitably fact-specific and the facts and circumstances will vary infinitely from case to case.

(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?"

There is then further consideration of the question of whether or not consent was gained by deceit or misunderstanding in the case of *T v T* [1999] 2 FLR 912, a judgment of Charles J.

24. The father's case here turns on the mother having decided to get him and the children to England, and then to divorce him in England. In my view, the evidence does not support this analysis. First of all, as I have already said, it involves the mother engaging in a degree of scheming and pre-planning, for which there is very little evidence and which does not accord with my impression of her as a witness. Secondly, in my view, her account is very much more likely. She saw the move to England as being a fresh start in the relationship. She wanted to go to England to be with her father who was unwell, and there was a good opportunity to go in early 2019 because the father had lost his job. That divorce was a possibility is obvious and was accepted

by the father. This is a couple who had been discussing only the previous month whether they should split up. But I completely accept the mother's evidence that she hoped that they would stay together and intended to try to make this happen.

25. In terms of the iPad note, I accept the mother's evidence that that was her thinking about her position; no more, no less. We know, and it is accepted, that she was contemplating separation and divorce in 2018. I accept her evidence that she thought going to England was a fresh start. Critically, in terms of the submission that there was a cunning plan, the plan does not actually work, because it is not clear why, if that was the case, the mother waited until January 2020 to file for divorce but did not wait until April 2020, when the children would have been here for a year and her position would have been much stronger under the Hague Convention.

26. Mr Crosthwaite's analysis involves me assuming that the mother was a highly scheming person who deliberately waited six months because it would improve her position for divorce, but did not realise she should wait 12 months, and thus undermined her position under the Hague Convention. In my view, that makes little sense. If the mother was the schemer that the father suggests and Mr Crosthwaite submits then she would have gritted her teeth and waited for 12 months. In my view, it is much more likely that the event on 15 December was indeed the straw that broke the camel's back and, in my view, that is perfectly understandable. Hitting a 5 and 8-year old with a belt is not acceptable parenting. It is, indeed, abuse and it is, in my view, hardly surprising that the mother took it so seriously. It seems to me highly unlikely that she was simply using it as an excuse. The fact that she recorded what the children said does not mean she was amassing evidence against the father; it means that, in a fairly modern way, she was trying to keep a record.

27. Mr Crosthwaite cross-examined on the basis that there was a misrepresentation that would vitiate the father's consent if the mother had failed to tell the father about her thought processes in the iPad note, as to possible permutations on divorce. This is an appropriate moment for me to comment on the approach to Hague Convention cases. There is, in my view, an unfortunate tendency to try to analyse parents' relationships as if they were contractual agreements. In the passage I have just read from *In re P-J*, Ward LJ expressly deprecates this approach, and I entirely endorse what he said. In

many of these cases, the relationships are already under stress, nothing is written down, and there is obvious scope for misunderstanding or for different parties to hear and understand what they want to hear and understand. It would be to depart from reality to take the approach that the mother who does not sit the father down and say, "I am considering the possibility that one day, I might divorce you and, if I did so, I would be better off in England" has made a material failure to disclose that would vitiate any consent under the Convention. His argument seemed to be that a failure to disclose by the mother that such thoughts might have gone through her head, would then be found to be a material misrepresentation, which would then be found to have vitiated an agreement to move or consent under the Hague Convention. In my view, this is a wholly unreal analysis. This is not a contract and it is certainly not a contract of **uberrimae fides**, or complete disclosure. The father knew perfectly well that the relationship might fail, and he must have known that it could fail when they moved to England. In my view, there was no vitiation of the consent here by the mother misleading the father, and the father plainly consented to moving to England.

28. The next issue is what were the terms of the agreement to move to England. In my view, similar considerations arise in my analysis of the evidence here. There was no formal agreement with all the caveats and detailed terms of a contract. Both parents, in my judgement, thought they were moving for a significant time, probably around two years. The mother appears to have thought that they would probably return. The father thought they would definitely return. It was not a fixed-term agreement such as one might have with an academic going for a sabbatical year, for example. If the parents had sat down in a quasi-contractual situation and tried to turn their mutual thoughts into a legal agreement, the mother would probably have said, "We'll have to see how it turns out." The father might have said, "I'm only going if you promise you'll come back.", but in the circumstances where the mother was trying to give the relationship another chance he might not have said. It is not possible to know what would have happened next in those negotiations. In my view, the terms of the agreement were simply that they would move to England for a probably limited but indefinite period, and how that period would come to an end was not set out.

29. The next issue is whether there was a repudiatory retention of the agreement and, if so, when. Repudiatory retention has been a controversial issue in these cases, and is now

subject to a detailed judgment in the Supreme Court in the case of *Re C and another* (C*hildren) (International Centre for Family Law, Policy and Practice intervening)* [2018] UKSC 8, where Lord Hughes deals with repudiatory retention, and I need to read paragraph 51. I will start at 50:

> "For all these reasons, the principled answer to the question whether repudiatory retention is possible in law is that it is. The objections to it are insubstantial whereas the arguments against requiring the left-behind parent to do nothing when it is clear that the child will not be returned are convincing and conform to the scheme of the Abduction Convention. The remaining question is what is needed to constitute such repudiatory retention."

30. I note at this point that in *Re C* there was a left-behind parent, whereas here, the factual position is, of course, different because both parents had travelled with the children. 51:

> "As with any matter of proof or evidence, it will be unwise to attempt any exhaustive definition. The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left-behind parent. Some markers can, however, be put in place.
>
> (i) It is difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent <u>not</u> to return the child (or not to honour some other fundamental part of the arrangement). The spectre advanced of a parent being found to have committed a repudiatory retention innocently, for example by making an application for temporary permission to reside in the destination State, is illusory.
>
> (ii) A purely internal unmanifested thought on the part of the travelling parent ought properly to be regarded as at most a plan to commit a repudiatory retention and not itself to constitute such. If it is purely internal, it will probably not come to light in any event, but even supposing that subsequently it were to do so, there must be an objectively identifiable act or acts of repudiation before the repudiation can be said to be wrongful. That is so in the case of ordinary retention, and must be so also in the case of repudiatory retention.
>
> (iii) That does not mean that the repudiation must be communicated to the left-behind parent. To require that would put too great a premium on concealment and deception. Plainly, some acts may amount to a repudiatory retention, even if concealed from the left-behind parent. A simple example might be arranging for permanent official permission to reside in the destination State and giving an undertaking that the intention was to remain permanently.

> (iv) There must accordingly be some objectively identifiable act or statement, or combination of such, which manifests the denial, or repudiation, of the rights of custody of the left-behind parent. A declaration of intent to a third party might suffice, but a privately formed decision would not, without more, do so."

Then (v) concerns the date of the repudiation.

31. In my view, this case well illustrates the problems of trying to bring something close to a quasi-contractual analysis into the Hague Convention. The parents here did not reach a clear agreement as to the precise terms on which they moved to England, they did not put anything in writing and they did not agree, whether expressly or impliedly, what would happen if there was a material change of circumstance, such as the father assaulting the children and the mother deciding to divorce the father. Most importantly, as I have already said, in my view, they had somewhat different but unexpressed views as to what they were agreeing to. This does not mean there was no agreement, but it does mean that some elements of the agreement were not set out.

32. As I have already said, it was probably the case that the father thought that there was some kind of term of a maximum of two years or sooner; the mother thought two years and then review. If there had been a contractual negotiation, the mother would have sought to negotiate a review clause with extensions. But equally, so might the father, if he got a very good job in England, if he was happy in England, and if the marriage had improved. In my view, there was no repudiatory retention here, because the terms of the agreement were insufficiently clear to establish that the mother's decision to apply for divorce and to say that she would not go back to Australia at this stage, certainly not to live, is not a repudiation of the agreement to move to England. This is not because the mother's decision not to return is not clear and unequivocal, but because the terms of the agreement are themselves not clear and unequivocal in all respects.

33. Mr Anderson argued that there was no repudiatory retention because the agreement was to stay for two years, and it is the father's application under the Hague Convention to try to force the mother to return earlier which is itself repudiatory of the agreement. In my view, this yet again shows the problems with being too legalistic. Technically, if this was a contract, Mr Anderson might be right. But it is perfectly clear on the evidence that the mother has no intention to go back to Australia to live, certainly at the

present time, and there is no reason to believe that that intention would not remain the same in April 2021, i.e. when the expiration of two years arises. The more realistic analysis, in my view, is that there is no repudiatory retention because there was no clear term to the agreement as to how long they would stay and whether they would decide to remain in England.

34. But further, in any event, and I should emphasise that this finding on habitual residence will make everything I have said on repudiatory retention unnecessary, the next question is whether or not the children were habitually resident in England at the date of any alleged repudiatory retention. It is clear from *Re C* that even if there is a repudiatory retention, if the children are habitually resident in the new country as at the date of that repudiatory retention, then the court in the new country (here England) has jurisdiction. If there was a repudiatory retention, then, in my view, it could only have been in January 2020 when the mother decided to divorce. I reject any argument that there could possibly have been a repudiatory retention before that, because before that we were merely dealing with the mother's potential thoughts or possibilities as to divorce.

35. As at January 2020, these children were clearly habitually resident in England. There is a plethora of authority on habitual residence and I will use the summary of that authority given by Hayden J in *Re B (A child) (Custody Rights Habitual Residence)* [2016] 4 WLR 156, at paragraphs 17 and 18. Paragraph 17:

> "I think that Ms Chokowry's approach is sensible and adopt it here, with my own amendments.
>
> (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 emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life and that is most likely to illuminate his habitual residence (*A v A, Re KL*).
>
> (iii) In common with the other rules of jurisdiction in (EC) 2201/2003 (Brussels IIA) its meaning is 'shaped in the light of the best interests of the child, in particular on the criteria of proximity.' Proximity in this context

means 'the practical connection between the child and the country concerned': *A v A* (para 80(ii)); *Re B* (para 42) applying *Mercredi v Chaffe* ...

(iv) It is possible for a parent unilaterally to cause a child to change habitual residence [that does not apply here] ...

(v) A child will usually but not necessarily have the same habitual residence as the parents who care for him or her ... 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.

(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 ...

(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*, see in particular the guidance at paragraph 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 measure of the time a child spends there ...

(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 ...

(xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Article 9 ... envisages within three months). It is possible to acquire a new habitual residence in a single day (*A v A*; *Re B*). In the latter case, Lord Wilson referred (paragraph 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 is a question of fact focused upon the situation of the child, with the purpose and intention of the parents being merely among the relevant factors."

36. Mr Crosthwaite also referred me to *Re L* [2014] AC 1017 and, in particular, paragraph 20 and the reference to the test in *Mercredi v Chaffe*, although that is reflected in what Hayden J has said in any event. It appears from that list and from the

cases overall that, probably, the most important factor is integration. These children have been at school in England since April 2019. They undertake normal young-child activities in the village and at the school. They have friends. Both parents have been living here as do the maternal grandparents.

37. In terms of whether they are settled here (not settled in a legal sense; settled emotionally) the father says no and the mother says yes. It is important to bear in mind that these are young children who have left the home they have known all their lives in Australia, left their school and left their friends. So, it is not surprising that they have or may have taken some time to settle. But also, very importantly, they may well be very unsettled by the parental conflict that has been going on, and that may well have made it more difficult for them to feel happy and settled in the UK. It is hardly surprising that they miss Australia, their friends, the parental family and the school.

38. The father says that A is unhappy in England and has behavioural problems and that both children want to go back to Australia. However, in my view, that does not begin to show that he is not integrated, or the children are not integrated, for the purposes of habitual residence in England. It is more than possible that A's behavioural problems have as much, if not more, to do with difficulty and tensions in the parental relationship than they do about not being integrated in England. I am simply not in a position to reach a view as to the degree to which the children are happy in England. But, secondly and equally importantly, even if the children are unhappy, that does not mean they are not integrated. They are completely different concepts. In my view, the evidence is absolutely overwhelming that these children are integrated in their daily lives in England with their family here and with their schooling and their activities here. The question of parental intention gets one nowhere in this case, because it merely takes one back to the fact that the parents have no joint intention. But what the children do have here are strong family roots. So, my judgment is that these children were habitually resident in England as at January 2020.

39. The final issue is that of inherent jurisdiction. Mr Crosthwaite argues that if even if I am against him on the Hague Convention, I should order the return of the children under the inherent jurisdiction, and he points to the fact that in the case of *Re NY* [2019] 3 WLR 962, the Supreme Court found that there was the power to return under

inherent jurisdiction, even where the case fell outside the Hague Convention. The Court referred to an earlier case of *Re L*, also in the Supreme Court, [2014] AC 1017, where the child had indeed been returned under inherent jurisdiction, the Hague Convention not having applied. It is worth noting that *Re L* was a slightly unusual situation because the child had come to England pursuant to an order of a Texas court which was subsequently reversed on appeal. However, by the time there was an application to return under the Hague Convention, the child had been in England for over a year and was habitually resident here.

40. In my view, it is clear from *Re NY* that the courts should be slow, if not very slow, to order a return under the inherent jurisdiction where the case would not lead to a return under the Hague Convention. There is the power to do so, but that does not mean that the court should routinely exercise that power. In this case, I do not have the material that would allow me to make a welfare determination that it was in these children's best interests to return to Australia. That is a highly complicated issue which would require considerable evidence both in terms of the children's position, their wishes and feelings, but also further evidence from the parents. In my view, the appropriate way to determine that matter is for the father, if he so wishes and intends, to make an application under the Children Act and then to apply for a specific issues order to relocate to Australia. The matter can then be properly considered on full evidence. I therefore decline to exercise my jurisdiction under inherent jurisdiction.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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