

**RE D (STAY OF CHILDREN ACT PROCEEDINGS)
[2003] EWHC 565 (Fam)**

Family Division

Bracewell J

20 February 2003

*Children Act proceedings – Stay – Principle and factors to be considered
when applying Family Law Act 1986, s 5*

An English mother and American father married and settled in Virginia. Shortly after the birth of their daughter the couple separated. Both parties applied for custody with joint custody in the interim. An expert psychological evaluation recommended primary custody to the mother and extensive staying contact to the father and a final order was agreed. Difficulties arose with contact and a further professional was involved to undertake family therapy. In October 2001, the order was further varied by consent, allowing the mother to relocate to England with extended staying contact to the father. The order included a declaration that the court in Virginia retained jurisdiction until further order. Following the relocation of the mother and child to England, the father alleged that his contact was being reduced by the mother and applied to the court in Virginia for enforcement. In August 2002 contact was enforced. The father subsequently reported child protection concerns and a s 7 report was ordered in England. No concerns were found justified. In December 2002 the father came to England to collect the child for contact. The mother issued an application seeking a declaration that the English court had primary jurisdiction based on habitual residence and applied for residence, a prohibited steps order to prevent the father removing the child, and defined contact. The father applied in Virginia for enforcement of the order for contact and applied to the English court to stay the mother's applications.

Held – finding Virginia to be the proper forum and staying the proceedings in this jurisdiction –

(1) A choice between international jurisdictions is not a question with respect to the upbringing of a child and therefore the welfare of the child is not the paramount consideration, nevertheless it is a very important consideration (see para [21]).

(2) In cases involving children, the habitual residence of the child is a very important factor to weigh in the balance, although it is not conclusive (see para [22]).

(3) It is not desirable, as a matter of general principle, that the English courts should pay little or no regard to court orders that jurisdiction be retained in a foreign court following leave to remove. However, retention of jurisdiction is not something that applies in perpetuity. It is a balancing of factors. Greater weight is attached to a reservation of jurisdiction, where that court has a great deal of information already available to it. Further, where the court has exercised jurisdiction as recently as 6 months ago and therefore a hearing in that court would be speedier (see paras [23], [25], [28]).

Statutory provisions considered

Family Law Act 1986, s 5

Children Act 1989, ss 1(1)(a), 7

Cases referred to in judgment

H v H (Minors) (Forum Conveniens) (Nos 1 and 2) [1993] 1 FLR 958, FD

S (Residence Order: Forum Conveniens), Re [1995] 1 FLR 314, FD

Spiliada Maritime Corp v Cansulex Ltd The Spiliada [1987] 1 AC 460, [1986] 3

WLR 971, [1986] 3 All ER 843, [1987] 1 Lloyd's Rep 1, HL

Richard Harrison for the father
Marcus Scott-Manderson for the mother

Cur adv vult

BRACEWELL J:

[1] This case concerns a little girl, H, who was born on 22 January 1998 and who is, therefore, 5 years of age.

[2] On 16 December 2002, the mother issued proceedings in this jurisdiction under the Children Act 1989 seeking an order for residence to her, and other ancillary orders. The father now seeks a stay of those proceedings, relying on the jurisdiction which is set out in s 5 of the Family Law Act 1986.

[3] In essence, the father's case is that all issues concerning the child should be determined in the jurisdiction of Virginia, US, which has been seized of various proceedings between the parties since 1999 after a consent order was made on 25 February 2002, with a declaration that the court retained jurisdiction over the child until further order.

[4] The mother opposes the father's application, and she seeks directions and timetabling in the Children Act proceedings in this jurisdiction.

[5] The background to the case is that the father was born in the US and is a US national, having been born in 1951. The mother was born in 1967 in England and is a British citizen. The parties met in London in 1990 and they resumed a friendship in 1996, which led to their marriage in England in April 1997. Immediately after the marriage they moved to Virginia, where, after an initial period staying with the parents of the father, they made their own home in Virginia and lived there together until the breakdown of the marriage.

[6] H was then born and she had dual citizenship. Sadly, the marriage broke down very soon after H's birth, and by January 1999 the mother had filed for divorce in the Virginia court. In February 1999, the mother moved out of the matrimonial home with H, and the father continued to reside at that property. Both parents applied for custody of H, and by a consent order on 12 February 1999 there was an agreed interim order giving the mother physical custody on the basis of joint legal custody, and contact was set out so that on week 1 the father had contact from 10.00 am to 10.00 pm on Tuesdays and Thursdays with staying contact from Saturday to Sunday and on week 2 there were similar arrangements, but a slight variation in times. A mediation order was granted in April 1999 and mediation took place, whereby there was an agreement in relation to various other periods of contact which the father was to have.

[7] In July 1999, as a result of a consent order, Dr Zuckerman was appointed as a psychological evaluator of the family. He is plainly a doctor of some distinction, who is highly regarded by the courts in Virginia. He assessed the family at length and eventually produced a very detailed and extensive report on the dynamics of the family, and in respect of welfare considerations of H.

[8] On 14 July 1999, there was a further order when the contact schedule was amended, by agreement, to increase H's contact with her father.

[9] On 24 September 1999, there was the final custody decree by consent, which, on the basis of Dr Zuckerman's recommendations, ordered that the mother was to have primary physical custody with joint legal custody, and

extensive stipulations were made as to contact; both daytime and staying contact. It is plain from the terms of the order that it was anticipated that the father would have a considerable involvement in the life of his daughter.

[10] From then on there were some communication difficulties between the parents. Each blames the other, and I, of course, have not heard any evidence, being concerned today with jurisdiction only. As a result of their problems the parties attended co-parenting family therapy with Dr Van Syckle. It appears that the mother attended only some of the sessions and that not much progress was made. However, in August 2000 by agreement the visitation schedule was amended because the father's working hours had increased and the mother was working for a shorter period of time.

[11] In September 2001, the mother filed a petition for relocation to England and modification of the custody order to give her sole custody. On 17 October 2001, there was an agreed order for relocation and modification of custody with contact to the father as follows: staying contact in Virginia in 2001 to 2002, 3 weeks at Christmas, 3 weeks at Easter and 6 weeks in the summer; staying contact to the father in Virginia in the year 2002 onwards, 2 weeks at Christmas, 2 weeks at Easter and 5 weeks in the summer, with additional contact with H whenever the father visited England, and provision was made for contact for serious events such as death, illness or family weddings. An order was made for unmonitored telephone contact twice a week. That order is set out commencing at D64 of the bundle, and by that order jurisdiction of the case was retained by the court in Virginia.

[12] Before the mother relocated to England, she again consulted Dr Van Syckle and the reply from the doctor to the mother is to be found at B85. The father has contended that the mother was thereby seeking to upset the contact arrangements even before they had commenced, but it seems to me from the first paragraph of that letter that the mother was trying to establish what would make the transition easier for H so that the relationship could thrive between father and daughter.

[13] The mother, in accordance with the consent order, moved to England with H on 6 November 2001.

[14] At Christmas 2001, there was the first period of staying contact in the US. The father contends that the mother shortened the visit by setting travel dates somewhat less than the 3 weeks which had been stipulated, and he complains of this again in respect of the second contact at Easter 2002. Unknown to the father, and by reason of her concerns in respect of the effect of contact on H, the mother had referred H to a play therapist who has made a report for these proceedings. I shall refer to that again later in this judgment.

[15] A third period of staying contact was in the summer of 2002. The mother sought to shorten the period of contact from 6 weeks to 5 weeks. This resulted in an order, which is to be found at D65 onwards of the bundle. It is plain from that order, and the transcript of the proceedings, that the mother was represented by an attorney, although she did not attend herself. According to the mother she had no knowledge of these proceedings, but I find it extraordinary that her attorney took part in the proceedings without seeking an adjournment if he was without any instructions. At any event, there is no doubt that the court dealt with the matter on this occasion, both sides being represented, as a result of which the order for 6 weeks' contact was enforced.

[16] During that summer visit H made some comments to her father which gave rise to the possibility in the father's mind that she had been the subject of

sexual abuse by the maternal grandfather in whose house she lived in England. The husband contacted his legal advisers, as a result of which there was an investigation by the police and Birmingham Social Services Department in the autumn of 2002. There is a s 7 report, and the father has indicated to this court that he accepts the contents.

[17] The father anticipated that he would next see H for the Christmas visit, and he arrived in England on 15 December 2002 with a view to collecting H for Christmas contact in the US on 20 December in accord with the order of 17 October 2001. Whilst he was in this jurisdiction the mother issued a without notice application on 16 December seeking a declaration that the English court has primary jurisdiction based on habitual residence, seeking a residence order, a defined contact order and a prohibited steps order that H should not be removed from the jurisdiction of England and Wales or the mother's care. The matter came before Johnson J on 16 December, and on that date he prohibited the removal of H from England and Wales, or from the mother's care, listed the matter for further directions, and accepted jurisdiction on the basis that H was habitually resident in England and Wales and the court had jurisdiction pursuant to the Family Law Act 1986. Matters were subsequently timetabled for a hearing today. In the meantime, there was some visiting contact between the father and H on 24 December and 28 December, on the 29th and 30th, and on New Year's Eve the father returned to the US.

[18] On 12 February 2003 the father issued proceedings in the court in Virginia to enforce the order for contact, and there is a return date of 22 March.

[19] There are many disagreements between the parents as to factual matters. The mother states that contact has not gone well and has been detrimental to the welfare of H. The father, on the other hand, says that contact has been extremely successful. The court cannot determine these issues today, but it is plain that there is hostility and mistrust and parental conflict. On the factual basis alone of Joy Bailey's report, it is demonstrated that there are some concerns about contact and the effect upon H, and certainly the issue of contact and its extent and where it is to take place needs to be revisited. The question which I have to determine is where.

[20] The jurisdiction of the court is founded by s 5 of the Family Law Act 1986. Section 5(1) provides that:

'A court in England and Wales which has jurisdiction to make a Part I order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales.'

Section 5(2) of the Act provides that:

'Where at any stage of the proceedings on an application made to a court in England and Wales for a Part I order, or for the variation of a Part I order other than proceedings governed by the Council Regulation, it appears to the court—

- (a) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales, or
- (b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales,

the court may stay the proceedings on the application.’

[21] This is a case which I have not found easy to decide. There are various factors which have to be balanced and considered in determining which is the appropriate forum, and the onus of establishing the need for a stay is upon the father. There has been a judicial divergence of first instance opinion as to whether the welfare of the child is the paramount consideration on an application for a stay of proceedings. The view that it is has been expressed by Waite J (as he then was) in *H v H (Minors) (Forum Conveniens) (Nos 1 and 2)* [1993] 1 FLR 958. However, in *Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314, Thorpe J (as he then was) came to a different conclusion. I accept the reasoning in the case of *Re S (Residence Order: Forum Conveniens)* that a choice between international jurisdictions is not a question with respect to the upbringing of a child, and therefore falls outside the ambit of s 1(1)(a) of the Children Act 1989. However, it is a very important consideration.

[22] It has also been decided that in cases involving children the habitual residence of the child is a very important factor to be weighed in the balance, although it is not conclusive. It is now established by the two cases I have referred to that the principles set out in the House of Lords’ decision in *Spiliada Maritime Corp v Cansulex Ltd The Spiliada* [1987] 1 AC 460 are to be applied in this division in respect of the case such as I am hearing today.

[23] I am conscious of the fact in balancing the factors that if I decline to stay the proceedings it would be an erosion of the principle of international comity. It is not desirable, as a matter of general principle, that English courts should pay little or no regard to court orders that jurisdiction be retained in a foreign court following leave to remove children permanently to England and Wales. That could well deter courts from agreeing to relocations to England, and at least might make foreign courts more wary of permitting such relocations if the courts were not confident that orders made would be respected. On the other hand, retention of jurisdiction is not something which applies in perpetuity. Circumstances change and time elapses. It seems to me that there has to be a balance in the consideration of the significance of the retention of jurisdiction by the court in Virginia.

[24] It is to be noted that the court in Virginia exercised its jurisdiction as recently as August 2002; some 6 months ago. That is very recent, and nothing of significance has happened since that time except that the mother has decided that she does not wish to comply with the terms of the original order for contact. It is to be noted that her attorney participated and accepted the jurisdiction of the Virginia court in August 2002. It would have been open to the mother then to have sought a declaration that now the child was habitually resident in England, it would have been appropriate for the English courts to take over the jurisdiction. She did not do so, and she submitted to that

jurisdiction at a time when, undoubtedly, H's habitual residence had changed from that of the US to England.

[25] In the case of *H v H (Minors) (Forum Conveniens) (Nos 1 and 2)* [1993] 1 FLR 958, Waite J did not attach a great deal of weight to the fact that the court in Wisconsin had retained jurisdiction. He emphasised that the weight to be attached depended upon the type of proceedings, and he was dealing with a fundamental matter of where a child should reside and with whom. He postulated that there would be greater weight if, for example, the question was of enforcing a maintenance order. It seems to me that greater weight is to be attached to the reservation of jurisdiction in a case where the court has had a great deal of information made available to it in the form of an extensive and in-depth report from Dr Zuckerman, and in the light of those recommendations has made detailed findings as to the appropriate level of contact between the father and daughter. The fact that it was an agreed order does not in any way detract from that.

[26] The argument is raised on behalf of the mother that it would be very difficult for the court in Virginia to review contact in the light of the fact that the child lives here and goes to school here. However, on the other hand, there is already extensive material available in Virginia which would need updating, and it is plain from the papers that Dr Zuckerman would be available to see both parties and to assess contact between H and her father. That is particularly significant within the home circumstances of the father because by reason of distances it is, of course, inevitable that contact in the US will consist of staying contact in the home of the father. It would, in my judgment, be very artificial for a CAFCASS officer to see the father and daughter in this country, which would be quite different from the reality of H visiting the US. The fact that Joy Bailey is based in this jurisdiction is not a detriment because her report can be supplied to any expert, and she is not a person who is qualified to evaluate the factual matters about which she reports. All the experts who have knowledge of this case are in Virginia. It would be necessary to start afresh within this jurisdiction.

[27] I think both parties concede that contact needs to be looked at again, and it is essential that the father's relationship with the child is assessed within the father's home environment in Virginia, if his proposal is that H is to spend significant periods with him. Other witnesses are involved, some may be able to travel to the US or vice versa, some may not, but in these days of video conferencing that is not a difficulty which it once represented.

[28] The other matter which I weigh in the balance is that it appears from the information provided to me that a hearing would be speedier in Virginia than it would be in this jurisdiction. In the first place the experts are already in the background with a need to update, whereas in this country they have to be sought afresh. The expert in Virginia anticipates that the case could be dealt with in between 2 and 4 months from now. I anticipate that a fully contested case in the High Court in relation to this issue would be much more delayed, having regard to the state of listing in the Family Division.

[29] There are some neutral factors. Neither party can claim legal aid in either jurisdiction. There is some evidence before me that proceedings will cost less in Virginia. The mother disputes that, but she has not provided any detailed evidence about it. It is as convenient for the mother to go to Virginia as it is for the father to fly to England. They are accustomed to doing it. The mother has accompanied H to the US on contact visits; likewise the father has

come to collect her. H has experience of flying across the Atlantic, so that it is not something that weighs in the balance of the need for her to go there in order to assess her relationship with her father.

[30] For all those reasons, I find that the proper forum for determination of this matter is the court in Virginia, and I, therefore, stay the proceedings in this jurisdiction.

Order accordingly.

Solicitors: *Stephenson Harwood* for the father
Dawson Cornwell for the mother

FAY ELIZABETH BAKER
Law Reporter