

P v P
[2006] EWHC 2410 (Fam)

Family Division

Macur J

4 October 2006

Jurisdiction – Wardship – Habitual residence – Temporary removal for purpose of formal education – Child living in country other than that of parents’ habitual residence

The parents were both from Nepal; their first child was born there. When the elder child was a few years old, the father travelled to the UK on a student visa. He established a home in the UK and was joined first by the mother, and some years later by the elder child, who had, in the meantime, been cared for in Nepal by the paternal grandmother. The younger child was born in the UK, but was taken to Nepal before his first birthday, and left in the care of the paternal grandmother for a number of years. During a visit by the mother to the younger child in Nepal, the father arranged for the younger child to be sent to the UK, without the mother’s prior knowledge or consent. The father had taken steps to deprive the mother of her passport, so that she would be unable to follow the child. In the meantime, the father and the two children were granted indefinite leave to remain in the UK. Before returning to the UK the mother needed to obtain a duplicate passport and the necessary entry visa, but eventually she managed to travel back to the UK. On her return, mediation was arranged by members of the Nepalese community; however, the father, without informing anyone of his plans, now removed the children to Nepal, at extremely short notice. The children were eventually returned to the UK in compliance with an order making the children wards of court and requiring the father to return them to the jurisdiction. The father challenged the court’s jurisdiction, given that, at the time of the originating summons, both boys were in Nepal.

Held – upholding the wardship and the order securing the return of the children –

(1) The mother was habitually resident in England; her trip to Nepal had been made with the settled intention to return. Her delay in returning to the UK was not indicative of a change in the mother’s habitual residence by choice, but due to the father’s actions (see para [7]).

(2) The elder child’s habitual residence coincided with that of his parents, both of whom were habitually resident in England. The father’s submission that the parents had agreed that the child would return to Nepal to be educated was weak and could not be sustained; in any event the child’s temporary removal for the purpose of formal education would not have brought his habitual residence in England to an end, even if the removal had been with the mother’s informed consent (see para [9]).

(3) It was at least arguable that the younger child had been habitually resident in Nepal before his arrival in the UK. However, if he was not already habitually resident in England by virtue of his parents’ residency, he certainly acquired habitual residence in England during his stay in England, by the fact of the parents’ habitual residence, his physical presence and enduring stay and process of ‘settlement’ and the joint agreement of the parents (see para [10]).

(4) The jurisdiction of the court over both children was established on the basis of habitual residence (see para [11]).

Cases referred to in judgment

A (Wardship: Jurisdiction), Re [1995] 1 FLR 767, FD

B v H (Habitual Residence: Wardship) [2002] 1 FLR 388, FD

F v S (Wardship: Jurisdiction) [1991] 2 FLR 349, FD; [1993] 2 FLR 686, CA

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M (Abduction: Habitual Residence), Re [1996] 1 FLR 887, CA

Christopher Hames for the mother
Mark Piercy for the father

Cur adv vult

MACUR J:

[1] B now aged 13 and A now 5 were made wards of court on the application of their mother D. Their father, C, challenges the court's jurisdiction to do so. There is no doubt that at the time of issue of originating summons dated 7 March 2006, both boys were in Nepal.

[2] This matter was considered by Wood J, Pauffley J and in the 'Applications' Court by Holman J. Jurisdiction was assumed without prejudice to the further investigation of the court as to the boy's habitual residence at the time of issue of the wardship proceedings. The matter was adjourned to determine that preliminary issue and also such other issues of conduct that had been raised by the mother and father as time permitted – it being understood that only 2 clear days were available commencing 25 May 2006. Wood J, on a subsequent occasion, directed that the court should, so far as possible, also deal with the question of interim contact. As it happens I give this judgment after 6 days of evidence and submissions spread over 4 months. This is hardly ideal but significantly better than the delay which would have been occasioned to obtain a hearing with a 5-day time estimate, projected to be in 2007. Contact in the interim has occurred, despite the initial reluctance of B to see his mother. There has been a large measure of agreement about this. The father has co-operated and has been amenable to the principle of contact between mother and children. Contact to date has remained 'supervised'.

[3] I have found the preliminary issue of jurisdiction to be largely informed by the relevant chronology which is agreed and may therefore be easily described. Both parents were born in Nepal. They were married there and remained living there together until the father travelled to the UK in 1995 on a student visa. By this time B had been born and remained with the mother at the paternal grandmother's house. His mother travelled to the UK to join her husband in 1996 on a tourist visa and remained as a 'dependant', leaving B in the sole care of his grandmother. The mother commenced work soon after and became the couple's main breadwinner. In September 2000, B moved to live with his parents in the UK. His brother, A, was born in the following year. In October 2001 he was taken by the father to Nepal to be placed in the care of the paternal grandmother where he remained until November 2004. The mother visited Nepal for a holiday on 18 October 2004 to coincide with the religious festival of Daeshara. She intended to stay for a month. She saw A at the home of his grandmother during the first 2 weeks of her stay. In November, he was sent to the UK without her prior knowledge or consent. She did not return to the UK until the end of January 2006, due in large part to the illegal intervention of the father who 'conned' her into surrendering her passport to a 'friend' and thereafter appropriated it. In July/September 2005, the father and the two boys were granted 'indefinite leave' to remain in the UK. The mother signed and attested a letter in Nepal supporting the application for the boys. The father travelled to Nepal in

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January 2006, ostensibly to find the mother. He failed to do so and was alerted to her return to the UK by mutual friends/acquaintances. Meetings took place between them in early February 2006, mediated by three members of the Nepalese community who had, certainly in the past, been trusted by both parents. However, as I find, without informing anyone of his plans the father unilaterally decided to remove the children to Nepal at extremely short notice. Whatever the mother had agreed about the arrangements for the children I am satisfied beyond any doubt that she did not agree to them being 'spirited away' in this fashion. The court's order for the children's return to the UK was ultimately complied with by the father and they have remained within the jurisdiction pending my findings.

[4] That is not to say that there are no disputed issues of fact surrounding the parties contemporaneous intent concerning their children at several potentially pertinent points. The mother contends that, in effect, she was a reluctant but biddable wife in terms of her own removal to the UK and B's stay in Nepal. Equally that she was a reluctant but biddable wife in terms of A's removal to Nepal. This she puts into the context of a Nepalese patriarchal society and also domestic violence at the hands of the father towards her and B. Her extended stay in Nepal she explains by reason of her illness, claiming that she contracted typhus on two occasions, and thereafter problems securing a visa. The father, in effect, portrays the mother as a reluctant mother and a manipulator, using every ploy to obtain her own indefinite leave to remain in the UK, including seeking residence of the boys. He accuses her of domestic violence and infidelity. Both have called witnesses intended to support elements of their rival contentions.

[5] I have been referred to *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349 and [1993] 2 FLR 686; *B v H (Habitual Residence: Wardship)* [2002] 1 FLR 388; *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767 and *Re M (Abduction: Habitual Residence)* [1996] 1 FLR 887. From these authorities I derive and will apply the following principles as pertinent to the facts:

- a minor's habitual residence will be determined by the habitual residence of its parents, if married and holding joint custodial rights, unless there is a joint contrary agreement, or else by the parent with custodial rights if divorced or separated or single;
- a minor's physical location is not solely determinative of its habitual residence;
- a parent cannot unilaterally change a minor's habitual residence without the agreement of the other, unless the facts independently establish a change of habitual residence;
- a joint decision reached by parents to separate a minor from their immediate society and, in circumstances where it is right to assume an agreement to change the minor's habitual residence for the time being, must be subject to continued agreement. Either parent may unilaterally revoke their agreement and seek to have any issue effecting the minor determined in the parents' home country where they both continue to habitually reside.

[6] There is no dispute but that at the date of issue of the originating summons the father was habitually resident in the UK. He admits the same

through his counsel. It would be farcical to suggest otherwise. He remained in the UK following his studies which commenced in 1995/1996, established a home for his wife and elder son and purchased property in Middlesex on a mortgage. He successfully applied for indefinite leave to remain in the UK with his children during 2005.

[7] I find that the mother too was habitually resident in the UK at this time. She had travelled to Nepal in October 2004 with the settled intent to return – of this I am satisfied, given the purchase of a return air-ticket and arrangements made with her employer for limited leave. She was prevented from returning at her pre-determined date of travel by the actions of the father in removing her passport by false pretences. The mother secured a duplicate passport in December 2004 but did not secure the necessary entry visa until January 2006. The father has suggested that this delay is indicative of a change in the mother's habitual residence by choice. I am not satisfied that that is so. I find the mother did suffer ill health on at least one occasion, albeit that I am unable to determine during which period of time on the basis of the documents produced by the mother from the Pandey Pathology Laboratory or medical notes of Dr BK Thapa, and in any event accept the evidence of Mr and Mrs D, witnesses called on behalf of the father, that the mother would frequently and consistently telephone them seeking their intercession with her husband to ensure her return to the UK. That her intent has been and is to remain in the UK is used against her when it is suggested that she will cede her rights to the children if she were enabled to achieve permanency here.

[8] At the time of the issue of the originating summons the parents were married and had joint custodial rights over the boys, albeit that their de facto care lay with the father and his relatives.

[9] Mr Piercy, who appears for the father, agrees that it is difficult to argue but that B's habitual residence was the UK, certainly from 2000 to February 2006, when his actual residence coincided with that of his parents. (That his parents obviously felt settled to the extent of seeking his return to them is yet further indication of their own acquisition of habitual residence in the UK. This return of B was not enforced by necessity. I have little reason to doubt but that he was provided with appropriate and at least adequate care by his grandmother.) The submission he makes as to the past agreement of husband and wife that the children would be educated in Nepal leading to a presumed joint agreement that B's habitual residence be changed at some future unspecified time is, he acknowledges, weak. It cannot be sustained. The temporary removal of B for the purpose of a formal education would not bring an end to his habitual residence, even if the removal had been with the mother's informed consent. As I have indicated earlier on in this judgment, I have no doubt that the mother did not agree at the time of removal or otherwise in the most general of terms in past conversations. The jurisdiction of the court is well established in his regard.

[10] A is in a different category from that of his brother by virtue of the change in living arrangements brought about not once but twice by the father in unilateral and peremptory fashion. I have little doubt that A would have remained living in Nepal with his grandmother for a significant period of time. Given that B was 7 when he moved to live with his parents, it may well be that a similar custodial arrangement was in mind for A. I find that his return to the UK was sudden and unexpected. His stay in the UK thereafter

was prolonged and was, I find, likely to become longstanding and beyond his peremptory return to Nepal in February 2006, had it not been for the unexpected return of his mother. A had been enrolled in nursery school and had been included in his father's application for indefinite leave to remain. If he did not already have the UK as his habitual residence by virtue of his parents' residency, I find he certainly acquired it before his departure in February 2006. It is at least arguable that A was habitually resident in Nepal prior to November 2004. His mother and father agreed, or at least acquiesced to his residence and care there. The plan for his return to the UK was ill defined and inchoate. When he moved to the UK he would have retained that habitual residence if his stay had been temporary in fact and intent. However, even if this past deemed agreement did create for him an habitual residence in Nepal, there came a time in the intervening period when mother and father 'agreed' to his remaining in the UK. The mother took no steps to secure his return to Nepal and co-operated in signing a letter dated 25 August 2005 to support the application for his indefinite leave to remain in the UK. The father had requested the mother's help in this fashion. The father, I am sure, wished to retain A, not least to ensure his distance from his mother. Therefore, on whatever basis, I am satisfied that A had acquired habitual residence in the UK by the fact of his parent's habitual residence, his physical presence and enduring stay and process of 'settlement' and the joint agreement of his parents. The jurisdiction of the court is established in his regard.¹

Order accordingly.

Solicitors: *Dawson Cornwell* for the mother
Fisher Meredith for the father

PHILIPPA JOHNSON
Law Reporter

¹ Editor's note: the remainder of this judgment, which is not reported, makes findings of fact in advance of the adjourned hearing of the parents' competing claims for residence.