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[18/03/2002; High Court (England); First Instance]
Re G. (Abduction) (Rights of Custody) [2002] 2 FLR 703, [2002] Fam Law 732

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

18 March 2002

Sumner J

Re G. (Abduction: Rights of Custody)

COUNSEL: Marcus Scott-Manderson for the applicants; Michael Nicholls for the Official Solicitor.

SOLICITORS: Reynolds Porter Chamberlain for the applicants; Official Solicitor.

SUMNER J:

[1] I am concerned in Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) proceedings for D who was born in South Africa on 14 December 1998. She is 3. She is the daughter of LM, 'the father' who is 25 years old, and L, 'the mother' who is 21 years old. They were born, brought up, and lived together in South Africa. They have not been married.

Background

[2] The mother and father separated in February 1999, 2 months after D was born. The father left after an incident. The father had little contact with D until he moved to the UK on 20 October 1999 where his family had settled.

[3] The mother had difficulty looking after D on her own. She considered adoption in South Africa. However she was persuaded to come to the UK with D. She arrived on 9 December 2000. About 3 days later she left D with D's paternal grandmother, Mrs M. On 1 March 2001 the father joined D at Mrs M's home in Hastings, the mother remaining in London.

[4] On 30 June 2001 D was placed with her mother for the purpose of a 10-day holiday in England. The mother took her without notice to South Africa on 5 July. She placed her for adoption, and then returned to the UK. Proceedings followed.

Proceedings

[5] On 12 July 2001 the mother commenced proceedings in a magistrates' court in South Africa for D to be adopted. On 16 October 2001 the father applied in a county court in England for a residence order in respect of D. He was unaware where she was at that time. He believed that she may have been taken abroad for the purpose of adoption.

[6] On 26 October 2001 the father issued an application for disclosure of D's whereabouts. On 31 October His Honour Judge Coltart made an order stopping either party removing D from the jurisdiction of the court. He further ordered social services to disclose all relevant information that might disclose D's whereabouts. On 26 November 2001 the application was transferred to the High Court.

[7] There was an interlocutory hearing on 11 January 2002 before Bracewell J. Both the mother and the father were present and represented by counsel. It was directed that the father's application was to be heard on 24 January 2002. Mrs M was given leave to be joined as a party to the proceedings. Other consequential orders were made.

[8] On 21 January 2002 the father and Mrs M jointly issued an originating summons under the Child Abduction and Custody Act 1985 and the court's inherent jurisdiction. They sought a declaration that the removal of D from the jurisdiction of England and Wales to the jurisdiction of South Africa was wrongful.

[9] There was a further hearing on 24 January 2002 before the President of the Family Division, Dame Elizabeth Butler-Sloss. The mother was not present or represented. Counsel appeared for the father and Mrs M. The deputy official solicitor also addressed the court.

[10] The father and Mrs M undertook to issue an application within 24 hours under the Hague Convention. Upon that being issued, the Family Division of the High Court requested the magistrates' court in South Africa not to proceed with an adoption application in respect of D until:

(a) determination of the application for a declaration for wrongful removal in the Family Division of the High Court of Justice; and

(b) conclusion of the Hague Convention application in the Republic of South Africa.

[11] The hearing was adjourned to come before a High Court judge on 7 February 2002. The request from the High Court was submitted to the South African Central Authority by the English Central Authority on 29 January 2002 seeking a stay under Art 16. The magistrates' court in South Africa kindly responded to the request on 1 February 2002. They confirmed that 'no further steps would be taken in the adoption proceedings pending the outcome of the Hague Convention proceedings'.

[12] The case was duly listed on 7 February 2002. Regrettably there was insufficient time for a hearing on that occasion. The case was accordingly adjourned until 13 February.

[13] It was in those circumstances that the matter came before me on that date. The mother was neither present nor represented.

[14] I heard argument from counsel, Mr Scott-Manderson, for the father and Mrs M. I also heard from Mr Nicholls as advocate to the court. There was time to hear the main points made by both counsel. They provided helpful skeleton arguments and added to them in argument though there was insufficient time for detailed consideration of all the authorities.

[15] Since then I have received further helpful information from Mr Nicholls and a further authority. Finally a few days later I came across an article entitled 'Habitual Residence of Children under the Hague Child Abduction Convention -- Theory and Practice' written by Rhona Schulz, a lecturer at Bar Ilan University, Israel. It was published in (2001) 13 Child and Family Law Quarterly 1.

[16] It appeared relevant to the issues before me and I referred it to counsel. I invited their comments orally or in writing within 2 weeks if they wished to advance any. It took a little longer as I was on circuit. I have now heard that they do not wish to add further argument.

Issues

[17] There are a number of issues for me to address. The first is whether I have jurisdiction on the application of the father and Mrs M to make a declaration under the Hague Convention that the removal of D by her mother from this country to South Africa in July 2001 was unlawful. Secondly, if I have such jurisdiction, Mr Scott-Manderson invites me to rule only on the legality.

[18] Mr Nicholls argued that it was difficult to do so without considering at the same time the question of D's habitual residence at the time of her removal. He accepted that this might be an issue which would be further considered by the courts in South Africa. However given the close relationship between legality and habitual residence under the Hague Convention, it was appropriate for me to express views about that if I was so minded.

[19] These points turn on a proper construction of the Hague Convention. It was incorporated into English domestic law under the Child Abduction and Custody Act 1985 (the 1985 Act). Since that time the practice has been that all applications under the Hague Convention heard in England and Wales are reserved to one of the 17 High Court judges in the Family Division.

The Hague Convention

[20] Both the UK and the Republic of South Africa are signatories to the Hague Convention. The UK became a signatory on 1 August 1986 and South Africa on 1 October 1997.

[21] I now set out the Articles under the Hague Convention relevant to the issues which I have to determine:

Article 1

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Hague Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

(a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

(b) where available, the date of birth of the child;

(c) the ground on which the applicant's claim for return of the child is based;

(d) All available information relating to the whereabouts of the child and identity of the person with whom the child is presumed to be.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Professor Perez-Vera

In her explanatory report on the Hague Convention, Professor Perez-Vera said:

General observations

Article 3, as a whole constitutes one of the key provisions of the Convention, since the setting in motion of the Convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the Convention. Now, in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, this article indirectly brings into clear focus those relationships which the Convention seeks to protect. Those relationships are based upon the existence of two facts, firstly, the existence of rights of custody attributed by the State of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal. Let us examine more closely the import of these conditions.

The juridical element

As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, ie by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense.

The second question which should be examined concerns the law which is chosen to govern the initial validity of the claim. We shall not dwell at this point upon the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile. Moreover, the choice of the law of habitual residence as the factor which is to determine the lawfulness of the situation flouted by the abduction is logical.

From a different viewpoint, our attention should also be drawn to the fact that the Convention speaks of the "law" of the State of habitual residence. Of course, in such cases, the word "law" has to be understood in its widest sense, as embracing both written and customary rules of law -- whatever their relative importance might be -- and the interpretations placed upon them by case-law. However, the adjective "internal" implies the exclusion of all reference to the conflict of law rules of the particular legal system.

The foregoing considerations show that the law of the child's habitual residence is invoked in the widest possible sense. Likewise, the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned. In this regard, paragraph 2 of Article 3 takes into consideration some -- no doubt the most important -- of those sources, while emphasising that the list is not exhaustive. This paragraph provides that "the rights of custody mentioned in subparagraph (a) above may arise in particular", thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. Now, as we shall see in the following paragraphs, these sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.

Jurisdiction

[22) There has been no request by the Central Authority of South Africa for a declaration under Art 15 for a determination of whether D's removal was lawful. The question therefore arises whether there is authority for me to make that declaration. If there is authority I then consider the lawfulness of the removal, and whether I should also consider the question of habitual residence.

[23] The issue of authority is determined by Art 15 and s 8 of the 1985 Act. That section provides:

'The High Court or Court of Session may, on an application made for the purposes of Article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the UK was wrongful within the meaning of Article 3 of the Convention.'

[24] Two cases, Re J (Abduction: Ward of Court) [1989] Fam 85, sub nom Re J (A Minor) (Abduction) [1990] 1 FLR 276 and Re P (Abduction: Declaration) [1995] 1 FLR 831, are relevant to this issue. They establish I am satisfied that I do have jurisdiction to make the declaration that is sought.

[25] In Re J the court was concerned with a ward of court in England whose parents had been divorced. The mother was granted interim care and control of the ward with weekly access being granted to the father. In 1987 the mother took the ward to the USA without the consent of the court and stayed there.

[26] The father sought to invoke the provisions of the Hague Convention. The father applied to the Lord Chancellor's Department as the Central Authority. They required proof that the

father's custody rights had been breached. The father therefore applied to the court for a declaration to this effect.

[27] The father conceded that he did not have custody rights under Art 3. However because the child was a ward of court rights of custody were, he argued, attributable to the court.

[28] Having set out s 8 of the 1985 Act and Art 15, Swinton-Thomas J as he then was said:

'Section 8 of the Act is, in my judgment, permissive and not restrictive, permitting the courts to make declarations in the particular circumstances envisaged by the section and Art 3 but the section does not in any way preclude the court from making a declaration in the circumstances which arise here. It was suggested that I should deal with this problem by making a finding of fact and not making a declaration. That seems to me to be a distinction without a difference. I have no doubt that the court is empowered to make the declaration sought.'

[29] In Re P (Abduction: Declaration) [1995] 1 FLR 831 the child had an American mother and English father. The mother was given permission to remove the child from England to live in California, USA. After an 18-month reconciliation the mother together with her sister by deception took the child back to the USA. In the light of the earlier permission given to the mother by the English court, the Central Authority in Washington was not inclined to accept that the Hague Convention application applied. The Central Authority in England suggested that the father apply for a declaration under s 8 of the 1985 Act and Art 15.

[30] The father applied. Douglas Brown J ruled that the child had been wrongfully removed, holding that the earlier order had lapsed after 6 months by virtue of s 11(5) of the Children Act 1989. The court also held that the child was habitually resident in England immediately prior to her removal. The mother appealed.

[31] The Court of Appeal upheld the decision of Douglas Brown J. Butler-Sloss LJ as she then was said at 835-836:

'Should such a declaration be made? Section 8 presupposes that this court will tread the path which will also be trodden by the Californian court and we would not presume to do so unless asked. The purpose of Art 15 goes to the obligation of the State to comply with the request. In a situation falling directly within Art 15 the requested State may have made a firm or provisional finding or made an assumption that the habitual residence is English . . . The issue properly to be the concern of the English court under the Convention is whether an applicant parent had rights of custody according to English law at the time of the removal. In order to make a declaration however under s 8 that the removal or retention was wrongful, the English court would also have to make a provisional decision about breach, although that too is a matter within the jurisdiction of the other State.'

[32] Millett LJ, at 838, explained the mother's case in these terms:

'Her concern is that the concept of wrongful removal under the Convention means removal in breach of rights of custody attributed to a person under the law of the State where the child was habitually resident immediately before the removal; that the judge's declaration necessarily involves a finding that the child was habitually resident in England immediately before her removal; and that although, as she recognises, this will not operate as res judicata, nevertheless it may embarrass her in the Californian courts where she wishes to argue, on fuller evidence than was available in England, that the child was already habitually resident in California at the time of her removal from England in February 1994.'

[33] He went on to explain that on the question of habitual residence that would be determined according to English domestic law or according to the meaning which English law ascribes to the expression in the Hague Convention. Likewise, the Californian court would have to decide whether she was habitually resident in England according to the meaning which Californian law ascribed to that expression in the Hague Convention. He added:

'I can see no reason why the finding of the judge below should embarrass the Californian court or impede the mother in putting forward her case in that court.'

[34] I am satisfied that the father and Mrs M plainly have an interest in the matter within s 8 of the 1985 Act and accordingly I have jurisdiction. I can give my reasons shortly. He is the father of D. He was with the mother when D was born. He lived with both of them for a short time thereafter. Mrs M was entrusted with D's care for a significant time. Finally the father was with Mrs M providing for her care immediately prior to D's removal from the UK.

The lawfulness of the removal

[35] I should therefore on the application of the father consider the lawfulness of the mother's removal of D in July 2001. There is a request by the father. The mother has been represented at an earlier stage.

[36] Mr Nicholls has questioned whether the court can make the declaration claimed when there has been no request from South Africa. I am satisfied that this is open to the father under s 8 of the 1985 Act. The power to make such an application is in clear language. It is an essential element in his Hague Convention application in South Africa. It is a path which has been adopted in the two cases to which I have referred. I have the power to hear the application and it is right to do so in this case.

[37] The next issue before me is whether the removal is wrongful in English law. It is therefore appropriate for me to consider that matter. I turn to the question of habitual residence later.

[38] As will appear the background facts are not agreed in all respects. I cannot resolve many of the differences. However on the essential points I am satisfied the position is clear.

[39] The father is 26 years of age. He was born in Cape Town. His parents are British. He holds dual citizenship. His parents separated when he was about 11. In due course all his siblings and his mother came to live in the UK. He lived in South Africa prior to 20 October 1999, though he visited the UK on at least one prior occasion.

[40] He met the mother in March 1997 in South Africa. He was 21 and she was 16. She is a dual citizen of South Africa and Italy. They started living together in South Africa in February 1998.

The father's case

[41] Both parties have filed statements. According to the father, before the separation he and the mother had agreed to go to live in England. They felt South Africa was not a good place to bring up a child. The father visited England in late 1998 returning and being present when D was born. He says he put down a deposit on a flat for them all in South Africa.

[42] There was an incident he says on 17 February 1999 when the mother found him smoking cannabis. She was angry and told him to leave. She pushed him and he smacked her. He left. Subsequently the mother obtained a non-molestation order. The application had not been served on the father.

[43] He says he was prevented from seeing D. He rang the mother however 3 or 4 times a week.

[44] In October 1999 the mother said she would never let him see D again. She would not however pursue any charges arising out of the February incident if he left them alone for good. A week later he left to stay with his sister in London.

[45] He says that he kept in touch with the mother. His father sent regular money. In September 2000 his sister visited the mother in South Africa. She reported back to the father that the mother was thinking of placing D for adoption. She discussed with the mother coming to England with D and starting a new life.

[46] With his family he sought to persuade the mother to come to England. This was successful, his father paying for the airfares. The mother and D arrived on 9 December 2000.

[47] Before that the parties had exchanged emails. In October the mother told the father that his daughter was giving her a hard time. She said he must look after D whilst she was gone. She added:

'I need to assign someone guardianship of D whilst she is over there. You are going to need to organise money for the lawyers as well.'

[48] The father replied expressing his love for D. The mother emailed on 29 October:

'I am totally exhausted. I can't look after D anymore, not now anyway. I want my life back, actually I need my life back. I can't do this on my own anymore ... I had this baby, I have to take the responsibility otherwise I must do what is best for her and give her up for adoption. Maybe that is what I should do. I can't bear to have to give her away but she has needed me and relied on me, I've tried so hard to keep her and now its just all odds against me ...

I don't mind if you have her at least she will be with one part of her family, until we can be re-united. I am not going to take her away from you should you decide to be a part of her life which you justifiably should . . . But decisions need to be taken quickly.'

[49] In November she emailed:

'No matter what has happened I know you loved her and always will. Know that I am fighting a battle to get you to be with your daughter. Once again I am putting my family's opinions second and placing you as a priority.'

[50] Shortly before she left in December 2000, in two different emails she said:

'My main concern is you though -- she is going to attach to you very quickly out of all of us and you will be replacing my role of being mom and dad.

What is the plan of action regarding looking after D etc over there? You are also lucky you have the support of your family although I am sure they will want you to get on with it on your own, but you know they will be more than willing to help you if you help yourself . . . I know you can do it and would be really proud of you when you are settled down. It would be better for you and D anyway. Do it for her.'

[51] The mother and D arrived on 9 December. They stayed with the father's brother and his wife. On 12 December the father says the mother took D to Mrs M's home. She left her there.

[52] She returned to London and moved in with the father's sister on 6 January 2001. She obtained employment. She remained there until she left on 7 July. It was the same sister who had seen the mother in South Africa in September 2000.

[53] The mother saw D on about four occasions between December 2000 and the end of June 2001. According to the father's sister the mother was changing her mind all the time about what she wanted for D. Judging from the number of visits to see D and the money she was spending with her friends, the father's sister had doubts about her commitment to D.

[54] On 1 March 2001 the father moved in with his mother and D. He remained at home for the first month to get to know D and then obtained employment locally.

[55] In May 2001 according to the father the mother raised the question of adoption again. He was strongly against it. In the end they agreed that the father would move to London and that they would have a shared-care arrangement. This did not happen.

[56] A month later on 30 June the father delivered D to the mother for a holiday. She had objected to him joining a family group for a boating holiday on the Norfolk Broads with D. He was told to pack clothes for her for 10 days. The mother was due to stay with friends in Essex. He expected D to be returned to him and Mrs M after the holiday. The mother said nothing to indicate otherwise.

[57] On 7 July without notice the mother flew with D to South Africa. She placed her for adoption. Having done that she returned to the UK. That was within a week or two. She confirmed her actions to the father when he telephoned her in London on 21 July. The father says that the mother's actions caused him to have a breakdown.

The mother's case

[58] The mother has filed a lengthy affidavit dated 6 February 2002. In it she states that she did not marry the father because of his drug and alcohol addiction and outbursts of temper. He promised when he returned for D's birth that he was no longer drug taking and mastered his temper. She says this proved not to be so.

[59] The relationship ended after two incidents in January and February 1999. In the first she says the father shook D violently. In the second he kicked and punched her, threw her into a wall, and tried to strangle her. She took proceedings in a magistrates' court in South Africa and returned to her parents' home.

[60] The father subsequently harassed her until he went to the UK in September 1999. She found life as a young single mother extremely difficult. She attributed it to lack of money. She made her first approach to a social worker about adoption in August 2000.

[61] Shortly afterwards she was approached by the father's sister suggesting a visit to the UK. She found the prospect very attractive. Her fare was paid by the paternal grandfather. She states:

'My daughter and I left for the UK in December 2000. As my intention was to visit the country for a limited time period, I took only a few of my and my daughter's possessions with me, this amounted to two large suitcases and few items of hand luggage. Items of

sentimental value together with my photographs and photograph albums were left at my parents home.'

[62] She saw the father at the home of his mother where she stayed. He wanted to be registered as D's father. She wanted him to show he was drug free. He reacted aggressively she said to this request.

[63] A decision was taken that she would seek work in London. Mrs M would look after D. This took place in January. She stayed on for a few days to ensure D was settled. She refused an offer of financial support to see more of D. She did not want to be further indebted.

[64] She says Mrs M knew she did not approve of the father having unrestricted contact. Had she known this might happen she would not have agreed to Mrs M's care. She did object to this.

[65] Limited finances prevented both as many visits as she wanted and her ability to pay maintenance. She was upset to hear that the father was living with his mother and D. She was not in a position to change this.

[66] There was an aggressive telephone call she says on one occasion with the father. She realised it was better to return to South Africa and place D for adoption. She left on 5 July and D went to prospective adoptive parents known to her.

[67] She only told the father of her actions on her return to the UK. The father reacted abusively. His sister threatened to injure her.

[68] Proceedings began in a magistrates' court in South Africa on 12 July 2001 and subsequently in a county court in England. She did not believe it was in D's best interests to leave South Africa. She attended court once unrepresented and once represented in England.

[69] Because of the high cost of living here and the expense of litigation she returned to South Africa on 21 January 2002. She is living with her parents.

[70] She claims her removal of D was not wrongful. The father had not exercised any rights of custody. In South Africa he has no rights of custody or access save those she confers or the court orders. The court would only do so taking into account a series of factors.

[71] She disputes any discussion with the father about coming to the UK prior to her departure. The father had never provided financial support. He did not try to obtain access in South Africa because of lack of interest and because of his assault on her.

[72] She did agree to drop charges if he left her alone. It was his family who persuaded her to reconsider adoption and visit them in the UK.

[73] She told Mrs M she did not want D placed in school only to be moved soon afterwards. She agrees she objected to the father's proposed boating holiday with D. D was placed with her on 30 June.

[74] She does not accept that the father has been drug free for the last year and a half. She did not have other than sporadic financial help from the father and his family. She gives no further explanation for her removal of D from the UK and why she did it in secret.

[75] Her mother in an affidavit also of 6 February confirms her daughter's affidavit where it relates to her. She had some disputes with the father which left her fearful.

[76] The mother she says was traumatised by the father's assault. She took over D's care from her. Later she became aware that the father was stalking the mother.

The father's reply

[77] The father replied to these affidavits. He accepts he took cannabis but no other drugs. The mother's account of the assault is exaggerated. He denies violent outbursts.

[78] He says of her coming to the UK:

'When L and D arrived in England in December 2000, L was intent on a fresh start and not simply a "sojourn". L's emails exhibited to my first affidavit (LM1) provide a contemporaneous account of L's plans and intentions regarding her move to England and my involvement in D's life. L's move to England was for an unlimited time period analogous with an intention for a fresh start and not just a holiday. Prior to their arrival L resigned from her job and tendered notice on her lease, which was not due to expire until March/April 2001. L also applied for an Italian passport so that she could work in England when she arrived and not be subject to the same immigration restrictions as other South Africans. L and D arrived in England absolutely laden with luggage.'

[79] He concludes that the mother's return to South Africa in January 2002 was to frustrate his proceedings. She had been required to attend court 2 weeks later.

[80] Mrs M in a further statement states that D came to her on 11 December 2000 not a month later as the mother says. She says the father and D developed a close and loving relationship.

Adoption report

[81] There is with the papers an adoption report prepared for the magistrates' court in South Africa of 2 November 2001 by a social worker. It shows that the mother prior to coming to the UK had placed D with the prospective adopters for some 3 or 4 weeks. She came to the UK because the father's family had offered to help her care for D.

[82] She recounted being compelled to arrange for Mrs M to look after D. The mother said this was in February 2001 when she could not find accommodation for both her and D. She placed D with the prospective adopters within a day or so of her return in July 2001. The report, drawn on the mother's account of events alone, concludes that there appeared to be grounds for dispensing with the father's consent to an adoption.

Conclusions on the facts

[83] From these accounts a number of relevant details emerge:

(a) By the time the mother met the father's sister in September 2000 she was seriously considering placing D for adoption.

(b) It was the offer of help from the father's parents that stopped this.

(c) Before she left for the UK the mother's emails envisaged the father or his family taking care of D.

(d) The mother is probably incorrect in saying it was either January or February that D went to Mrs M. It was likely to have been in December shortly after her arrival given the precision of detail by the father and his family and the mother's uncertainty on the month.

(e) D was with Mrs M I shall assume for about 6 1/2 months, of which she was with Mrs M and the father for some 4 months.

(f) D's return to South Africa was not disclosed to the father or his family beforehand. The mother returned very shortly afterwards to the UK.

(g) The father was always opposed to adoption, as the mother knew.

Rights of custody

[84] There can be no declaration of wrongful removal by the mother in July 2001 unless there was a breach of some person or person's 'rights of custody' under Art 3. That concept has been the subject of a number of judicial decisions.

[85] I am concerned in this instance with one concept only. At the time that the mother removed D from the UK on 5 July 2001 did either Mrs M or the father or both of them have rights of custody as recognised by English courts in Hague Convention proceedings?

[86] The following matters are relevant. In English law when the mother arrived in the UK she alone had rights of custody both de lege and de facto.

[87] This is because of a number of factors. The father was not married to the mother. D was about 2 years old. He had not seen her, maintained her, or exercised any other rights in respect of her at any time other than in the first 2 months of her life, save for arranging for her journey to the UK.

[88] He had maintained he says an interest. It was his father who paid for D to come to the UK. That is not I hold sufficient to establish rights of custody under Art 3.

[89] Within a very short time the mother left D with Mrs M. Judging by her affidavit this was voluntary. This followed a time when she felt she could not cope alone with D's care.

[90] The mother handed over care of D to Mrs M as she had intended. She was in regular contact but only as an occasional visitor after the handover.

[91] I consider those events in the light of the fuller picture which I have summarised. The question is whether in law they give rise to rights of custody to Mrs M or her and the father.

The law

[92] The leading authority on this is the Court of Appeal judgment in Re B (A Minor: Abduction) [1994] 2 FLR 249. It is of course binding on me.

[93] In that case the parents were Australian. They were not married. They had a boy of 6 1/2 years of age. In April 1992 the mother came to the UK leaving the boy with the father and maternal grandmother. In June 1993 the grandmother took the boy to the UK for 6 months. Before leaving the grandmother had entered into a written agreement with the father to ensure the boy's return after 6 months. The mother did not return him at the end of that time.

[94] The father applied for an order for the boy to be returned to Australia. He was granted this by Connell J. The mother appealed. The Court of Appeal by a majority dismissed the appeal. Waite LJ said at 260-261:

Conclusion

The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

There is no difficulty about giving a broad connotation to the word "custody". Attention was drawn by Lord Donaldson in Re C to the width of its dictionary meaning, and by Sachs LJ in Hewer v Bryant [1970] 1 QB 357 at p 373 to the diversity of the "bundle of rights" which it incorporates in legal terminology. The same is no doubt true of the word "garde", which (in the phrase "droit de garde") provides the translation for "rights of custody" in the French language version of the Convention.

The difficulty lies in fixing the limits of the concept of "rights". Is it to be confined to what lawyers would instantly recognise as established rights -- that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as "rights of custody" within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian.

When that approach is applied to the particular circumstances of the present case, the answer reached by the judge was in my judgment unimpeachable. The father who saw off this young boy at Perth airport on 25 August 1993 was the child's primary carer, sharing his upbringing with the maternal grandmother as his secondary carer . . . It was a status which falls properly to be regarded as carrying with it rights in the Convention sense, breach of which by unauthorised removal would be rendered wrongful within the terms of Arts 3 and 5.

[95] In the case of Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702 Cazalet J followed that decision in respect of a claim by German grandparents. The background was shortly as follows.

[96] The mother was also German. She had a daughter J born in May 1992. The father played no part in the proceedings. She started another relationship with an English man. In August 1995 the mother and J went to live with J's maternal grandparents in Germany. The mother said this was temporarily. In October 1995 the mother left after a row taking J with her.

[97] In May 1996 J returned to her maternal grandparents when the mother was injured in a road accident. The mother later told her parents that she was moving to England taking J with her.

[98] As a result in October 1996 the grandmother started custody proceedings. They were not served. In December the mother took J for the weekend but brought her to the UK. She did not return her.

[99] The grandparents obtained an interim care order and promptly brought Hague Convention proceedings. They were not heard for 2 1/2 months. Cazalet J, at 708-710, having referred to the passage quoted above from Re B (A Minor: Abduction) [1994] 2 FLR 249 said:

'I return to the passage in Re B. With respect to Mr Hollow's succinct argument, I do not consider that the court there was seeking to bring itself within the strict provisions of Art 3 by holding that there was a legal agreement in being under the law of the State in question. If one goes to the passage, which I have read, at 261C of Waite LJ's judgment, he was clearly basing his finding that rights of custody existed on a consideration of the extent of the actual privileges enjoyed and duties carried out by the particular parent. He held that it was a question of fact in each case. Indeed, if one considers the submissions made by Mr Holman, for the father, at 259, he was there asserting in terms that the father had been functioning in the fullest sense as a parent, and that that was the fact on which he sought in particular to rely. Furthermore, in his judgment Waite LJ did not make the qualification which Mr Hollow invites me to make, namely that it was the legal agreement which brought the case within the provisions of Art 3. The test which the judge propounded was whether the individual concerned was exercising functions of a parental or custodial nature without the benefit of any official custodial status . . .

I turn to consider -- and I believe this to be the correct approach whether there was an agreement, following the passage in Waite LJ's judgment, whereby either the mother can properly be said to have agreed to J making her home with the grandmother, or alternatively, whether some situation arose whereby the grandparents were carrying out duties and enjoying the privileges of a custodial or parental character which the court would be likely to uphold in the interests of the child concerned. I bear in mind what Mr Hollow has submitted; he emphasises the mother's contact, the fact that she was short of funds and so lacked a home, the difficulties arising from the second defendant's motor car accident and her view that the placement of J with the grandparents was a temporary one. Against that, Mr Setright, on behalf of the grandparents, submits that there was an agreement which can be spelt out from the parties' conduct and exchanges; alternatively, there was a commitment and involvement by the grandparents whereby they earned out the duties and enjoyed the privileges of a custodial or parental character which came within Waite LJ's definition in Re B. He submits that the grandparents were the actual physical carers of J for 14 months without the mother, and for 16 months in all with some assistance from the mother for 2 extra months. J made her settled home with them. They, over more than a year, made parental decisions about her. Their care was not challenged by the mother until the mother removed J on 14 December 1996. Mr Setright emphasises that there were occasions when the mother did not have contact because the grandparents declined to permit it; they also say that the mother was away for periods when they did not know where she was and so they were in sole charge of J, not just looking after her on a day-to-day basis but making essential decisions about her. In these circumstances, Mr Setright submits that J should properly be seen as having been placed unequivocally with the grandparents, not on a temporary basis but on a long-term, longstanding agreement with them. Indeed, they appear to have started her off at her kindergarten, which she must first have attended in about September 1996. He

indicates how the grandparents' care was brought to an end abruptly, unilaterally and secretively, by the deceit of the mother in the way indicated. By this time they had already started custody proceedings in proper form in the German court, that that court became fully seized of the matter and, indeed, following J's removal on 16 December 1996, the German court acted quickly, making a provisional transfer of custody to the grandparents. Of course, I accept that this must be qualified by stating that the mother's case is that she had not had notice of the proceedings; in any event the mother has not been heard in such proceedings.

I also bear in mind that this is a case where there is a real issue as to the mother's ability to care for J and as to where J's welfare may best be provided for in the long term . . .

Mr Setright invites me to say that an agreement can be spelled out from the conduct of the parties or the exchanges that have taken place between them to the effect that the grandparents should have full custodial rights. Whilst I have reservations as to whether any such agreement came into being, I have no hesitation in coming to the conclusion that the grandparents held joint custodial rights within the provisions of Waite LJ's definition. In the circumstances to which I have already made detailed reference, they carried out full parental responsibilities over a substantial period of time, and accordingly must be taken to have established their joint rights of custody within Art 3.

That being so, Mr Hollow has appropriately indicated that there is no point which he can further take on the Hague Convention, and an order under that Convention accordingly follows.'

[100] In the later case of Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146 Hale J, as she then was, considered the Court of Appeal judgment in Re B and the judgment in Re O to which I have referred. The headnote reads:

Per curiam: unmarried parents should be advised that removal by the mother of a child who is habitually resident here will be wrongful under the Hague Convention if:

(a) the father has parental responsibility either by agreement or court order; or

(b) there is a court order in force prohibiting it; or

(c) there are relevant proceedings pending in a court in England and Wales; or

(d) where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.'

[101] She noted at 156D that both cases were examples of:

'. . . courts doing their utmost to protect children from being taken away from their primary carers, the classic case of abduction in the public mind.'

Conclusions

[102] It is fundamental to a proper analysis of Mrs M's rights of custody, if any, to consider three particular elements. They are the circumstances in which D was placed in her care, the mother's intention at the time, and the length of time and manner in which Mrs M exercised that care. Those matters chiefly determine whether Mrs M was by the end of June 2001 exercising 'functions of a parental or custodial nature'.

[103] The mother had before she came to England considered adoption for D seriously. She did not go ahead because of the offer to come to England. She envisaged before her departure that the father or his family would take responsibility for D's care. She was in fact placed with Mrs M.

[104] She remained there for 6 months, probably a little longer. Mrs M during that time made all the necessary arrangements for D. She arranged for doctor's appointments, schooling, and day-to-day care. She was unequivocally in Mrs M's care.

[105] The mother knew this. She kept in regular contact and made visits on average every 6 weeks or so. Her objection to the presence of the father for the last 4 months or her acceptance is in dispute, though it is not said she showed it. It is also not clear whether she considered shared care with the father nor at what stage she decided to return D to South Africa.

[106] She knew of the father's objections to D's adoption. She did not tell him or his family of her proposal to return D to South Africa nor that it was for the purpose of placing her for adoption. She did not stay herself, returning to England very shortly afterwards.

[107] I am satisfied that by the end of June 2001 Mrs M had rights of custody. D had been placed with her with the mother's agreement. Whether that agreement arose because it was the mother's wish or because there was little realistic alternative does not in my judgment matter. It was not a situation to which the mother was objecting.

[108] Mrs M thereafter did not just look after D on a day-to-day basis. She was taking essential decisions for her future, in all likelihood with the mother's knowledge and approval because of the frequent telephone contact.

[109] The care only came to an end after a significant period of time as a result of the unilateral act of the mother who deceived the father and Mrs M. She knew neither would agree to D being adopted. The mother had to mislead them in order that she should be given even temporary care of D.

[110] One difference between this case and those that have been reported is that this mother did not regain the care of D in order to look after her. She did so in order that D's future should neither be with her nor the father and his family. I regard that as important, though not decisive.

[111] After placing D with Mrs M, the mother never sought until June to exercise her own rights of care. As the events unfurled the question was more likely whether D was going to remain with Mrs M, or possibly shared between her and the father.

[112] The mother may have debated shared care with the father. That is not clear. It never came to pass.

[113] On that analysis the mother did not intend to resume D's care after she was with Mrs M. It gives the placement a greater degree of permanence. It gives added emphasis to the mother handing over her parental rights. That is her right to determine how D was to live and to take decisions about her immediate and long-term care as I am satisfied she did. This covered medical, schooling, and other areas.

[114] If I am wrong in seeing the mother as having decided from an early stage not to resume D's care, nevertheless I find that by the end of June 2001 Mrs M had acquired rights of custody. It arose from the circumstances in which D had been placed with her namely,

long-term, with the right to make decisions which she was given (and to the mother's knowledge exercised), and the length of time that she did so.

[115] By the time D left Mrs M's care, the court would have recognised her duties and privileges. They were of a parental nature. She would have needed leave of the court to apply for orders to stop the mother removing D from her care. These would have been either by an interim custody or a specific issue order under s 8 of the Children Act 1989 backed by injunctive relief.

[116] I am in little doubt the court would have given her the right to make those applications. The court, I am confident, would have acted swiftly and decisively to prevent D's departure. If necessary it would have prevented the mother leaving the jurisdiction of the court with D without prior notice to her.

[117] This would have been to protect Mrs M's rights of custody pending a full hearing. This is without consideration of the fact that the mother was removing D not to look after her, but to place her outside of her family for adoption. That would have added greatly to the strength of Mrs M's and the father's case on a full hearing.

[118] The court would have been concerned with two factors. The first is the fundamental right of a child to be brought up within her own family. That is enshrined both in common law, in wardship proceedings, under the Children Act 1989, and in Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. That Convention has since 2 October 2000 been part of English domestic law under the Human Rights Act 1998.

[119] Secondly, where one parent disagrees with a child being placed outside the family, that cannot lawfully be done by the other parent without the court's approval. It extends to preventing a local authority from removing a child from one or both parents unless the child has suffered significant harm or is at risk of doing so in the care of his family and it is in the child's best interest to be separated from them, s 31 of the Children Act 1989.

[120] In this instance I cannot say that, on a disputed hearing, D's future would definitely have been confirmed with Mrs M or with the father rather than being placed for adoption in South Africa. I can say it is highly likely. Furthermore the courts would not have permitted either parent unilaterally to place D away from her family without a full hearing and the court's approval.

[121] It is right to note that the father did not have parental responsibility in respect of D under English law in July 2001. That is because he was not married to the mother, and he had not been granted those rights by agreement with the mother nor by court order. But his involvement with D over the last 4 months would be considered by the court. I am confident that his right to apply for this and a parental responsibility order would have been readily granted. The same applies to Mrs M.

The father's rights of custody

[122] I should consider separately the father's rights of custody. They arise because he lived with D and Mrs M from 1 March 2001. They can be shared with Mrs M, be solely his rights, or they may not exist.

[123] On the facts as I have set them out I consider it unrealistic to regard those rights as other than arising jointly with Mrs M. The alternative is that they do not arise at all.

[124] I do not regard the mother's objection to the father's involvement which she now claims as carrying much weight if it is established. Permitting a state of affairs to continue with knowledge of it is more important than deciding whether it arose by agreement or because there was little the mother felt she could do about it.

[125] The father went to Mrs M's home because of D. He spent a month getting to know her. He then obtained local employment leaving D's day-to-day care with his mother but otherwise sharing responsibility with her. In doing this he was I am satisfied exercising parental rights.

[126] The only question is whether in those circumstances 4 months for exercising parental rights can and does amount to rights of custody. In my judgment it does.

[127] I accept that a significant time should pass before that can be established. But it is not just the time. It will depend also in part on the age of the child, the nature of the care, and how the father came to be exercising those rights.

[128] D was very young. The mother's role in her life was limited to occasional visits and frequent telephone calls. Mrs M alone and then jointly with the father took over parental privileges and duties. I am satisfied that, in the circumstances I have set out, by the end of June 2001 he had rights of custody.

[129] Furthermore there was no suggestion that they were not to continue. The mother knew the father would object to her proposals. The court would have supported his objection and prevented D leaving England if an application had been made in time. He was denied this by the mother's deliberate deception. It led him to have a breakdown.

Habitual residence

[130] Mr Scott-Manderson does not press me to make any findings under this heading. Mr Nicholls does. Rightly in my view he points to it as an essential element in determining wrongful removal under Art 3. Furthermore for the reasons given by Butler-Sloss LJ in Re P (Abduction: Declaration), [1995] 1 FLR 831, which I have quoted, I am not prevented from so doing by the prospect that a South African court may also have to consider the same question.

[131] It is fundamental to the decision about whether the removal was unlawful under Art 3. It does not prevent further consideration if this is required at a later hearing. It is a necessary consideration at this stage.

[132] It may be considered again by a South African court. I now express my view in the light of the authorities to which I have been referred, the article by Rhona Schulz, and the submissions I have heard.

The law

[133] The essential issue is as follows. Until D had arrived in England she was under her mother's care at all times save for short periods when she was with the prospective adopters. Accordingly her habitual residence was the same as her mother's, namely in South Africa (Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442).

[134] The question is whether when her mother took her back to South Africa on 5 July 2001, D had acquired habitual residence in England. This could arise in one of two ways.

First, because her mother had by that time acquired habitual residence in England. Secondly, because she had been placed in the care of a person or persons with an intention that she should remain here. She had therefore acquired a habitual residence here or acquired that of her principal carers.

[135] The relevant law on this topic is to be found in a number of different cases. It starts with the speech of Lord Scarman in Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah [1983] 2 AC 309. In his speech Lord Scarman described habitual residence as follows, at 343:

'. . . a person's abode in a particular place or country which he had adopted voluntarily and for settled purposes (which could include education) as part of the regular order of his life for the time being, whether of short or long duration.'

[136] In Re J, Lord Brandon of Oakbrook said at 578 and 453 respectively:

'It is not in dispute that, immediately before his removal, J was habitually resident in Western Australia. It was argued for the father that J remained habitually resident in Western Australia despite his removal to and retention in England by the mother with the settled intention that he should reside there with her on a long-term basis. It was argued for the mother that, once she reached England with J on 22 March 1990 and retained him there with the settled intention to which I have just referred, J ceased to be habitually resident in Western Australia and in particular ceased to be so resident well before the date of the order of Anderson J.

In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in Art 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in the country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.'

[137] In Re M (Minors) (Residence Order: Jurisdiction) [1993] 1 FLR 495 the Court of Appeal was concerned in respect of two children who had gone to live with their grandparents in Scotland which is a separate jurisdiction from this court. There was a dispute between the parties about how long it was agreed the children should stay. After 10 months the mother decided not to return the children to Scotland.

[138] The grandparents appealed against a decision that the English courts had jurisdiction to hear and decide the mother's applications. The grandparents said it was agreed that the children should stay with them for a minimum of one year.

[139] In the course of his judgment Balcombe LJ said at 501E:

'From September 1991 until sometime after 4 July 1992 . . . the children were habitually resident in Scotland. Their physical presence in Scotland was for the settled purpose of living with their grandparents, and attending school, for at least a year, and was with the agreement of the mother who alone had parental responsibility for them. It seems to me quite artificial to say that in those circumstances the children remained habitually resident in England and Wales.'

[140] At 503C Hoffmann LJ, as he then was, said:

'But where a child comes into a home which is undoubtedly the habitual residence of the parent or other person to be responsible for his care and the intention of the parent or parents with parental responsibility is that the child's stay should not be merely transient or temporary, I do not see why the child's residence should not forthwith be treated as habitual. This appears to have been the view of this court in Re S (A Minor) (Abduction) [1991] 2 FLR 1, where a child previously resident with its mother in Canada was sent with her agreement to live with the father in his home in Minnesota with the intention that she should reside there for the school year 1988-9. "This must be", said Purchase LJ, "more than a sufficient substantial period of time to effect the transfer of habitual residence with effect from the transfer of actual physical custody to the father, so that at the material time (3 months later) she was habitually resident with him.'

[141] In Nessa v Chief Adjudication Officer [1999] 1 WLR 1937, [1999] 2 FLR 1116, having quoted from the speeches of Lord Scarman in Akbarali v Brent London Borough Council; Abdullah v Shropshire County Council; Shabpar v Barnet London Borough Council; Jitendra Shah v Barnet London Borough Council; Barnet London Borough Council v Nilish Shah [1983] 2 AC 309 and Lord Brandon in Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442, Lord Slynn of Hadley said at 1121:

'I do not consider that when he spoke of residence for an appreciable period, Lord Brandon meant more than this. It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence, and many other factors have to be taken into account.

The requisite period is not a fixed period. It may be longer where there are doubts. It may be short (as the House accepted in Re S . . . and Re AF (A Minor) (Child: Abduction) [1992] 1 FLR 548, 555 where Butler-Sloss LJ said "A month can be . . . an appreciable period of time").'

[142] In Al Habtoor v Fotheringham [2001] EWCA Civ 186, [2001] 1 FLR 951, Thorpe LJ listed a number of considerations. First of all he said that habitual residence was a question of fact to be decided by reference to all the circumstances of the case. He went on:

'Secondly, there is an important distinction between the loss of an habitual residence and the acquisition of a substitute. A person may cease to be habitually resident in a single day if he quits the country with a settled intention not to return but to take up habitual residence elsewhere. By contrast habitual residence in the second country is not acquired on arrival but only after a period that demonstrates that the residence has become habitual and is

likely to continue to be habitual depending upon the relevant facts and circumstances. The period of residence after arrival may be brief but it still must be appreciable.'

[143] Whilst conceding that inchoate rights may well arise here, Mr Nicholls argues that the consensual return of D to her mother on 30 June 2001 means she was the only parent with parental responsibility. She therefore had the right to take decisions about D.

[144] Mr Nicholls recognises that that lies uneasily with the concept of rights of custody even if they are inchoate. This is important he says because of the need for the law to be ascertainable. I do not share his concerns nor accept his argument.

[145] Once rights of custody arise in respect of a child, they have force. They can be exercised against any other person including a parent who otherwise in law can alone exercise parental rights. If it was not so those rights are of no value. Those rights exist and can be enforced by a court.

[146] Such rights do not disappear or otherwise lose their force when the child returns to the care of the sole parent with parental responsibility. That could happen for instance if the return is agreed to be permanent. It cannot happen I am satisfied when all parties agreed as here that the return was to be so limited in time. It would not happen if the mother by agreement took D out for a day. No more would Mrs M's and the father's rights of custody be lost because they agree that the mother can take D for a short holiday as here.

Rhona Schulz's paper

[147] In her article to which I have referred, Rhona Schulz pointed out that no attempt had been made in the Hague Convention to define the concept of habitual residence. The omission she said was deliberate and:

'. . . designed to prevent the concept becoming too rigid and technical so that it can be applied by judges of all legal systems as a factual test.'

[148] In answering the question how long was an appreciable period of time, she pointed to an article by Smart which suggested that the minimum period was 3 months. However she referred to V v B (A Minor) (Abduction) [1991] 1 FLR 266, where a period of 2 months was sufficient to have a degree of continuity. In Re AF (A Minor) (Child Abduction) [1992] 1 FLR 548 where Butler-Sloss LJ said that where there was a settled intention, one month could be an appreciable period of time.

[149] Furthermore when it came to settled intention she referred to a decision of Waite J in Re B (Minors) (Abduction) (No 2) [1993] 1 FLR 993. He found that the parties' intention to stay in Germany while they tried to work out where they should live was sufficient.

[150] She then analysed three models for determining the habitual residence of a child. The first was, at p 7, the dependency model where the habitual residence of a child was dependent on the habitual residence of the parents whether or not the child itself satisfied the criteria for acquisition of habitual residence in the country in question. Where the parents do not have a common habitual residence, the habitual residence of the child followed that of the parent with whom it had a home at the time.

[151] At p 10 she looked at the parental-rights model. This holds that the child's habitual residence should be determined by the parent who has the right to decide where the child lives, irrespective of where the child is actually living. Therefore the parent who unilaterally

changes a child's place of habitual residence does so lawfully if they have the sole right to determine where the child lives.

[152] Finally at p 13 she considered the child-centred model. In those circumstances children are treated as autonomous individuals, the quality of whose residence in a particular country does not necessarily depend on the quality of their parents residence in that country. The child's habitual residence therefore depends on its connection with the country and not that of its parents nor their intentions.

[153] In her conclusions at p 20 Rhona Schulz considered that though the dependency model might be unattractive from a theoretical point of view:

'. . . it is a practical approach which will produce appropriate results in most cases, without the need to resort to artificial reasoning.'

[154] She considered that the parental-rights model which had been adopted by the English courts was inconsistent with the modern approach to the child-parent relationship. Finally she pointed to the fact that the child-centred model had been supported in the USA and was she considered consistent with modern thinking. She concluded:

'Where the child in question is too young to have a settled purpose, habitual residence can only be acquired by residence for an appreciable period of time. The phrase "appreciable period" should be interpreted in accordance with the objectives of the Convention. In other words, what is required is sufficient time that, in the light of the respective connections with the relevant countries, the new country becomes the forum conveniens and/or removal therefrom is likely to cause the child the sort of harm usually associated with international child abduction.'

Findings and final conclusions

[155] I find that the mother came to England in December 2000 for more than a visit. She stayed for over one year. It appears to have been financial considerations which caused her to leave in January 2002, rather than any predetermined decision to stay for a limited time only.

[156] The purpose of the visit for the mother was in all likelihood to enable the father or his family to care for D which she had found too much. Alternatively it was for decisions to be made about D's future care.

[157] Within a short time D was with her paternal grandmother. She became her primary carer, firstly alone then with the father. This was not a transient or temporary arrangement. The mother stayed for a few days with Mrs M and was then content to leave D with her for a significant period.

[158] The mother kept in touch. Her infrequent visits from London to Hastings suggests she was not concerned about the quality of Mrs M's care or its continuation.

[159] If she objected to the father's presence after March it does not seem she actively addressed this. When she planned the removal is not known.

[160] If it is the mother's habitual residence that I should consider under the dependency model, then a number of points are clear. The mother regarded her stay as more than a visit. She placed D in Mrs M's care. She found accommodation and obtained employment. When she removed D they had been in England for just short of 7 months.

[161] She had I consider formed an intention to settle here judging by her declared wishes and her actions. It had been for an appreciable time which I take into account.

[162] Her subsequent return from South Africa after leaving D adds weight to that conclusion and can be considered. It points to the fact that she was at all times intending to settle here. It was in fulfilment of that intention that she returned.

[163] She therefore had the necessary intention from December 2000. The time here was sufficient for a change of habitual residence by July 2001. Subsequent history supports that.

[164] I do not consider the parental-rights model as propounded because both the mother and D were in the UK together. The result is therefore the same as under the dependency model; that is the approach adopted by the Court of Appeal and the House of Lords.

[165] I do however add a few comments on the child-centred model. By July 2001 D had been settled with Mrs M for an appreciable time. Her life revolved around her and latterly her father as well. Decisions about her future were on the basis of her remaining in the UK. There was no reason for Mrs M and the father, D's primary carers, to think otherwise.

[166] Accordingly her connection was by then with the UK where she was settled. She had been here an appreciable time. Decisions for her everyday care and her future were being made, her mother knew, on the basis that she would remain here. The only question was whether she might come into the shared care of her parents.

[167] I conclude on that ground also it would be right to hold that D's habitual residence was in the UK when she left. Fresh facts might throw more light on this but I am able to reach a preliminary conclusion with a degree of confidence. Accordingly I shall make the declaration sought by the father. I am satisfied on the facts and in law that that is a proper order to make.

[168] I do so with some relief. The mother's act in removing D from the established care of her father and mother against their wishes and without their knowledge was contrary to basic concepts of family rights and responsibilities. That she did so to place D for adoption only adds to that. D has rights. One of them is to be brought up by her family. It is not one lightly to be removed without the knowledge of her father or a decision of a court. It is to be hoped that decision can soon be given.

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