

Re S (A Child) (2009)

[2010] 1 FLR 1146 : [2010] Fam Law 23 : [2009] EWCA Civ 1021

30/07/2009

Barristers

Henry Setright KC

Court

Civil Division

Practice Areas

International Children Law

Summary

A judge had been entitled to find that a child had been habitually resident in England for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction 1980. The child's family had only been in the jurisdiction for some seven or eight weeks, but had been exercising their right to work anywhere within the European Union, and had intended to stay as long as possible.

Facts

The appellant father (F) appealed against a decision (S (A Child), Re (2008) EWHC 1873 (Fam)) that the child of the family (Z) had been habitually resident in England at the time that he had taken her from London to his home in Belgium. F was a Belgian national and the respondent mother (M) was an Australian national. Following Z's birth, they lived in Belgium. F sought job opportunities globally, and had found a job in London. M and Z initially stayed in Belgium, but joined F in London when he began house sitting for a friend there. The friend expected to be away for three to nine months. The family then only visited Belgium to visit relatives or to inspect the property they had there. The house sit ended prematurely after some seven to eight weeks, and at the same time M and F's marriage broke down. Each parent made plans to return Z to his or her home country. F removed Z from the London house without M's knowledge or consent and took her to Belgium. M issued divorce proceedings in England and applied for permission to relocate permanently with Z to Australia. F made an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980. F argued that (1) the judge had erroneously applied the relevant principles of law to the case; (2) the family had retained possession of their home in Belgium where all of their possessions remained, and it was both permissible and important to ask where the child's "real home" was, as shown in J (A Minor) (Abduction: Custody Rights), Re (1990) 2 AC 562 HL.

Held

HELD: (1) There was always, in cases such as the instant, some tension between the intention of the parties, the point of arrival, and the duration of the subsequent period that the court had to label as

being habitual or not. On the judge's findings of fact, there could be no doubt that at the point of arrival there had been a common intention that the family would be united in London so long as that could be maintained. Intention was not sufficiently dominant to enable the "habitual" element to be established without some appreciable period. The length of that period was variable depending on all the circumstances of the case. While there might not have been any authority where as brief a period as six weeks had been held sufficient, what was being considered in the instant case was a family that had moved across only one European border in pursuit of the right of citizens to work anywhere within the European Union, in the context of a Europe that was rapidly creating its own family law. Given the judge's findings of fact, she was entitled, while recognising the balance to be extremely fine, to conclude that there was habitual residence at the material date. (2) F's circumstances were comparable to the life of any family where the breadwinner's career carried him abroad for indefinite periods depending on the nature of the work contract that he was able to secure. In such circumstances, the family's principal home, where the bulk of the family's worldly goods were stored, was a constant. However, the constancy of that primary home did not prevent the acquisition of habitual residence in the country of work if the other elements of acquisition were satisfied. The test was not where the "real home" was, P-J (Children) (Abduction: Habitual Residence: Consent), Re (2009) EWCA Civ 588, (2009) 2 FLR 1051 followed. The distinction between real home and acquiring habitual residence, which permitted a stay of comparatively short time, was important to maintain the proper distinction between the concepts of habitual residence and domicile. Re J had been decided in an allied but distinct area of law, Re J considered.

Permission

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