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LC (Children) [2013]

[2013] EWCA Civ 1058

15/08/2013

Court
Court of Appeal (Civil Division)

□□□This was an appeal from a decision of Cobb J (LCG v RL [2013] EWHC 1383 (Fam)) in respect of four children (T aged 13; L aged 10; A aged 8 and N aged 4). The parents lived in England throughout their relationship, but M, who was Spanish took the children to Spain for the summer holidays each year. The children were Spanish nationals with an extended Spanish family they knew well, and were more or less bilingual. When the relationship ended, the mother (M) returned to Spain with the 4 children in June 2012 to live. The children spent Christmas 2012 with their father (F) in England and were to return to Spain on 5 January. F brought proceedings in England on 10 January to secure protective orders on the basis that the children said they did not wish to return to Spain. M made a Hague Convention application for the children's return to Spain. An application was made on behalf of T for separate representation.
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□□□At first instance the judge refused T's application on the basis that her position would be adequately represented by F and by CAFCASS and the desirability of shielding a child from the court proceedings. The judge found that F had agreed to the children moving to Spain for an indefinite period; they were habitually resident in Spain; they had been wrongfully retained in England (Hague Convention on the Civil Aspects of International Child Abduction 1980 art.3). The judge found that T strongly objected to going back to Spain, and that she was of sufficient age and maturity for her views to be taken into account, but he considered that her views were not determinative and did not amount to an exception to her returning to Spain under art.13 of the Convention along with her siblings.
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□□□There were some difficulties arising from the applications at the appeal stage by T, and by L and A to be joined (paras 15-34). The court upheld Cobb J's decision not to join T for the reasons given. Where the children's positions could be aired fully by M and F, the duplication of effort by adding the children as parties served to obfuscate rather than clarify.
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□□□F appealed on the basis that the judge had wrongly found the children were habitually resident in Spain on the basis that F had not agreed to a change in habitual residence; the children had not integrated into Spanish life; the judge had given insufficient weight to the clear evidence that the children did not consider Spain to be their home. Alternatively, the judge had not given sufficient weight to the right of the children or any of them to choose their own habitual residence. □□

□□□The Court held that existing authorities confirm that a child may have an habitual residence different from his parents, but these authorities are in the context of children not living with their parents. A decision as to whether a child could have a different habitual residence from a parent he was living with must await a case where such a decision is necessary.
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□□□Habitual residence is a question of fact to be decided by reference to all of the circumstances. The starting

point was that the children take their habitual residence from the parent with whom they live.
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□□□F consented to the move to Spain – an unassailable finding of the judge below.
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□□□When considering as a hypothesis (but making no decision on whether this was an established proposition at law) whether the children's perceptions had an impact on the consideration of habitual residence, the Court stressed it was important to be cautious about evidence as to state of mind; and to keep a firm focus on the family as a whole. The Court found that Cobb J had considered the children's perception in reaching his decision on habitual residence.
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□□□The appeal against the judge's finding that the children's habitual residence was in Spain on the operative date was dismissed.
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□□□In respect of the decision to return T to Spain, the Court determined that two matters were not given sufficient weight by the judge below. These were that i) T had spent the whole of her life save for 3 months in England, and ii) T's objections to returning were so robust and determined that returning her to Spain against her wishes was unlikely to resolve the family difficulties.
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□□□There was no evidence before the court to make a decision regarding the remaining siblings; because the impact of splitting up the children was unknown. This question was remitted to the Family Division for determination as soon as possible. □□
□□□Appeal by father in proceedings under the Hague Convention against an order for the return of four children to Spain where it had been held that Spain was the habitual residence of the children. Appeal in respect of habitual residence dismissed but the case was remitted to the Family Division because the judge had failed to give sufficient weight to the length of time the eldest child had spent in England and her objections to returning to Spain. □□

Permission

Permission

Lawtel