

Kelly v Pyres (2018)

[2018] EWCA Civ 1368

14/06/2018

Barristers

Charles Hale KC
Jonathan Rustin

Court

Court of Appeal

Practice Areas

Financial Remedies

In this case domicile was critical to the wife's ability to pursue divorce and financial remedy proceedings. Lady Justice King determined on appeal from Mr Justice Cobb that the evidence could not have led to a decision that the wife was domiciled in England, because the wife had "little if any affection" for England and, "whilst maintaining advantageous fiscal ties", the wife chose "only to visit for medical treatment" (paras 70 and 74).

Lady Justice King recognised the danger of an appellate court interfering or substituting its own view in a case that is dependent upon findings of fact and inferences by the first instance judge. Nonetheless, Lady Justice King found that, "[o]n the evidence before the judge", it "could not possibly have been said about the wife" that "England would truly be 'home'" (para 74).

Background

The wife was born in England to Irish parents in 1972. When the wife was still a baby, the family returned to Ireland, where she lived through university. In 1995 she moved to England and obtained a British passport, staying there for 18 months before moving to Brussels. The wife accepted that 18 months was the longest time she had ever lived in England.

The husband was born in India and educated in England from age 13. Before this marriage, he bought two properties in England and one in Italy. He worked initially in the civil service in England and subsequently moved to the European Commission in Brussels in the 1990s.

The wife and husband met in Brussels in the late 1990s. The wife left Brussels for England in 2001 for a time-limited contract in London of 11 months. Whilst in London she and the husband lived together in a property in Fulham. The wife moved to Albania for newly-found work in November 2002. Her belongings were stored in the Fulham property. The husband joined the wife in Albania in 2005.

The couple married in Italy in August 2005. Before the wedding, they signed a prenuptial agreement which described the parties as "British subjects" but "habitually resident and domiciled in Italy". Lady

Justice King called the prenuptial agreement a “curious document”.

From 2005 on, the couple lived variously in Albania (together and apart), Italy (just the wife), and Bosnia (together and apart). During that time, the wife returned very briefly to London in 2006 to give birth to their first of two children. Whilst living together in Bosnia in 2009, the couple attended marriage counselling in London. The marriage broke down in 2015. It is unclear where the couple were living when the marriage broke down, but neither was in England.

The husband’s domicile of origin was determined to be India. His domicile of choice was determined to be Bosnia.

Mr Justice Cobb at first instance considered a number of other factors, including amongst others, the parties’ emotional attachments, involvement in renovating a London property, correspondence addresses, storage arrangements, medical treatments, family connections, holiday destinations, pension rights, taxes and national insurance payments, and bank account locations. He determined, in the decision that was overturned on this appeal, that the wife’s domicile of choice was England, in that she “has travelled extensively for work but ‘there appears to have been, throughout, an anchor laid in London’” (para 29(i) summarising the judgment at first-instance paras 37-49).

The relevant law and its correct application

The law on domicile can be complex in its layers, albeit it is well-established (see King LJ at paras 32-43, 66-67, and 75-76 of her judgment). For this case, there are three highly relevant legal propositions in relation to the juxtaposition between intention and residence:

- a) Residence for a short period of time, even a few days, may be sufficient to establish a domicile of choice;
- b) Whilst the residence does not have to be long it has to be with the intention of permanent or indefinite residence; and
- c) Residence without intention or intention without residence will not do to establish a domicile of choice.

King LJ concluded Justice Cobb J made an error of law, in treating the period from 1995 to 2000 as a continuum in finding that the domicile of choice was established during that period (para 48). Her Ladyship highlighted that “ultimate intention must be concordant with residence”, in other words, the formation of an intention must occur at a time when the person is living in the country concerned in order to establish a domicile of choice (para 51). On the basis of this finding, King LJ overturned the Cobb J’s judgment (with Newey LJ and MacDonald J concurring).

Permission

 **Family Law Week**