Neutral Citation Number: [2013] EWHC 850 (Fam)

Case No: FD13P00483

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2013

Before :
MRS JUSTICE PAUFFLEY
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Re FT and NT (children)
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Miss Mehvish Chaudhry for the **Applicant**, mother, instructed by **Dawson Cornwell** solicitors
Mr Jeremy Rosenblatt for the **Respondent**, father, instructed by **Zermansky & Partners** solicitors

Hearing dates: 10th and 11th April 2013
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Judgment

THE HONOURABLE MRS JUSTICE PAUFFLEY

This judgment is being handed down in private on 11th April 2013. It consists of 43 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mrs Justice Pauffley :

The issue

1. This fully contested application for the summary return of two young children to Canada turns upon the question as to whether by February 2013 they had acquired habitual residence in that country as the mother maintains or, instead, remained habitually resident in England and Wales which is the outcome sought by the father.

Legal principles

2. Habitual residence is a question of fact to be determined by the trial judge. He or she should normally stand back from the evidence and take a general view rather than conducting a microscopic search. An appreciable period of time and a settled intention will be necessary to enable a person to become habitually resident in country B as opposed to country A.

3. The requisite period of time is not fixed and will depend upon the facts of each case. Bringing possessions, doing everything 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. Habitual residence may be acquired despite the fact that the move may only have been temporary or on a trial basis. A month has been held to be 'an appreciable period of time' though that has been described as 'the high water mark' in a case where the Court of Appeal upheld the trial judge's finding that six weeks was sufficient to result in the acquisition of a new habitual residence.

4. In relation to 'settled intention' it has been said that there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general.

5. The habitual residence of young children of married parents all living together as a family is the same as the habitual residence of the parents themselves and neither parent can change it without the express and tacit consent of the other or order of the court.

6. So much then for the relevant legal principles and guidance derived from the authorities. I turn to the facts.

Essential background

7. The two subject children are FT who was born in December 2008, so now four years old, and NT who is only two – she was born in August 2010. Their mother is JT, their father GT. Both parents are British nationals and were born in the United Kingdom.

8. They were married in 2007 and applied for permanent residency in Canada in April 2008. Their application was granted in September 2009 when they came to be considered as 'landed immigrants'. In May 2010, confirmation was given to the parents of their permanent residence.

9. In August 2012, the parties relocated permanently to Canada; and it is accepted by the father that it was intended to be a permanent move though he says he had reservations and "had always made (the) decision conditional upon (them both) finding jobs, being settled and happy." He also maintains that if "it didn't work out" they would return to the UK together with the children.

10. On 3rd November 2012, according to the mother, the parties separated. The father suggests the date of the separation was 9th October 2012. Thereafter there was an agreed arrangement for looking after the children. Each parent assumed responsibility for them for one week on an alternating basis living within the family home.

11. In late January, according to the mother, the father took the children's passports from her handbag – a move which caused her considerable alarm. She consulted the police who apparently reassured her that one parent would not be able to leave Canada with the children unless there was written notarised agreement from the other parent.

12. The mother confronted the father in relation to the passports. He sent her a text message on 1st February in these terms – "*I would never take off anywhere without the correct paperwork. You will just have to trust me or get the court order. Sorry.*" On 2nd February, Mr T sent the mother another message by text, "*Like I said before, I am not going anywhere without a court order that says I can take them home so you have nothing to worry about. If I try to take the girls without your permissions I could go to jail!!!*"

13. As other text messages between the parents reveal, the father said he would investigate lodging the children's passports in a safety deposit box. He then asked the mother if she would mind him taking the children to Lake S for contact on 17th February. She readily agreed. The text messaging between the parents on that day was not only cordial it was friendly.

14. At 10.52 on 18th February, the mother received a text from the father in these terms – "*I'm back in England… I need some time to sort my head out. I don't intend to take the girls away from you. We have a return flight in 10 days. I know the girls will have a better life with you I just can't let you throw the house away. I need you to put my name on the mortgage. Pls (sic) don't flip out over this I just couldn't see another way…*"

15. On 25th February, he emailed the mother saying the girls would "only return to Canada if and when (his) solicitor instructs (him) to but until that time they will stay in the UK."

16. The mother's application for summary return was begun on 6th March 2013. She has travelled over to England on two occasions. Firstly for the initial inter parties hearing on 15th March and then again for this final part of the process.

The defence

17. The defence to the application prepared in advance of the hearing on 15th March is essentially this – that it had always been the parties' intention to live in Canada but there was an agreement that "if one of them was unsettled or did not feel it was working, they would return to the UK with the children." It is also suggested that in circumstances where the parties retained a property in England and had separated less than three months after the move to Canada, the children's habitual residence remains in England. Thus, it is argued, there has been no abduction.

18. In his written argument, Mr Rosenblatt contends that the family never became settled in Canada because although it had been their intention to settle that was never achieved. He asserts that the mother's motivation to settle was not to be with the father but with the new man in her life; and that I would find it very hard to conclude there was an intention from the beginning to settle permanently in Canada and thus to establish habitual residence there.

19. In his oral submissions, Mr Rosenblatt took me to the detail of one particular text message written by the mother on 22nd January suggesting it would be proper to construe the contents as revealing an absence of settlement on her part. Mr Rosenblatt argues that the words speak for themselves. He also submits I should exercise great caution in attaching importance to the extant documentary material relied upon by Miss Chaudhry.

Discussion and overall conclusion

20. In arriving at a decision I consider the totality of the evidence so as to take a general view. Having done so there really can be no other conclusion but that these two children were indeed habitually resident in Canada at the time of their removal to this country on 18th February. On any objective analysis of what has happened in the life of this family taken together with the supportive documentary evidence provided by the mother any other result would be simply perverse.

21. The case advanced by and on behalf of Mr T, even at its highest, does not begin to establish that the children's habitual residence remained in the UK; and I agree with Miss Chaudhry when she suggests it is 'unarguable' that the children had indeed acquired habitual residence in Canada by the time of the father's unilateral and clandestine decision to remove them in mid February.

22. If she will permit me to say so, Miss Chaudhry's Skeleton Argument is quite excellent. It contains not only a concise and very useful summary of the law and key facts but also an impressive, cross referenced analysis of the evidence. I was wrong yesterday to challenge her use of the word 'unarguable' for which I apologise. It is, to

use another word, indisputable that the children had acquired habitual residence in Canada.

The substantiating material

23. The evidence which supports and substantiates the mother's case is really quite overwhelming. I mention it in headline form which is all that's necessary given the lack of any real challenge to it. Mr Rosenblatt urges caution for reasons I fail to follow – the documents from a wide variety of sources tell their own story.

24. Over a period of several years, the parents had successfully engaged in a process of applying for permanent residency in Canada. Thus, emigration has to be viewed as their combined and agreed long term plan. Extracts from the inter-party text messages reveal that the mother's motivation, at least in part, was so that the girls should have dual nationality and be raised and educated in Canada. It must be fair to assume that the father shared those ambitions at the time he relocated from England believing the family and especially the children would have a better quality of life in Canada.

25. In advance of the move, the parents resigned from their jobs, sold their car and shipped all of their possessions (clothes, books, furniture, bicycles and even a Christmas tree) to Canada. There was a leaving party so that the family could say goodbye to friends and relatives. The father left this country a few weeks before the mother and children. They were all in Canada by 12th August 2012 which is where they remained for 6 months until the father's unilateral actions of 17th February 2013.

26. The family home in Yorkshire was put up for sale in March 2012, six months before the move.

27. The mother attained employment in Canada as a teacher. The father was in the process of trying to establish a construction business there and accepts he had business cards printed. Benefits received and Council tax payable in this country were terminated prior to the move. The father opened a bank account in Canada and acquired a credit card there.

28. The older child, F, was enrolled in and attended at school in Canada. The younger, N, was at nursery. Schooling in this country had been wound up when the parents sent notification of departure. Both children were registered with healthcare professionals in Canada. The mother has a dental and medical plan there provided as part of her employment package. N's medical needs have already resulted in calls upon that medical insurance policy.

29. Both parents and F have permanent residency rights in Canada. N was born after the time when the mother became a 'landed' immigrant. An application for permanence for her is in process.

Parties' intentions as to settlement

30. The parties' intentions as to settlement in Canada have aroused the greatest controversy because of the father's suggestion they had agreed that if either of them felt unsettled or felt it was not working then they could return with the children. The mother rejects that assertion and makes the entirely valid point that in none of the

communications passing between them in the period leading up to the children's removal or subsequently was there any mention whatever of such an agreement. It is only within these proceedings, says Mrs T that the father has sought to suggest some form of pre-existing agreement of relevance to the habitual residence question.

31. Thus it becomes necessary to examine the text messages between the parents so as to determine whether there is substance in the father's claims or in the mother's rejection of them.

32. On 21st January, the father said this – "*Pls (sic) I just want to go home. Have a think about it. You can choose wherever you want to live I don't mind. If you can find it in your heart. When my claim money comes through you could use that to set yourself a house up at home. You would get a job no trouble and we can get on with our lives. I would have so much respect for you if you will do this for me and the girls. You know deep down it's the right thing to do.*"

33. The mother's response the following day, 22nd January, was as follows, "*We need to come to an arrangement which works for both of us. I will never agree that England is the right place to raise and educate the girls…. I think that moving back is a knee-jerk reaction and once things settle down we will find a way to make this work… Let's just give it til summer like you said and see how you feel. I know you have C (a girlfriend) waiting for you at home which motivates you even more but deep down I'm doing this for my girls and the opportunities they will have here. We will find a solution….*"

34. The father's reply was in these terms, "*I have been up all night trying to think of a solution and I'm sorry I said I would give it until summer. I will give it as long as it takes to get these girls home. I don't have the money to go through the courts so I am going to start legal aid and hope they let me take them home. If I start the processes at home who knows how long it will take. I really don't know how you could live with yourself knowing how much they mean to me ☹ (sad face symbol).*"

35. Later on that day, in a subsequent text message, the father said this – "*Did it honestly get that bad for you that you thought I don't even want to give it another try. Because what we're doing now is going to hurt the girls more than anything. It's not going to be a stable life for them with no family. My Mum told me today if we go home everyone on my side of the family will be fine with you".* Still later and in another text message, the father said he loved the mother, had never said he did not and wanted her to know that he wished to be with her.

36. A number of proper inferences may be drawn from those exchanges it seems to me. First, that by the time the messages were sent, the parents were wrestling with the likely consequences of their relationship breakdown and had very different ambitions as to the country in which they and the children should be living. The father, self evidently, wanted to go 'home' to England and would seem to have been utilising a variety of strategies to secure his aims. He was literally pleading with and pressing the mother to agree to return to England, appealing to her better nature, making any number of promises to her as to the advantages of so doing as well as threatening legal action if his ambitions were thwarted. How real those promises and / or threats were remains to be seen but they exemplify the strength of the father's desire to return

to England with the children. He was trying every ruse at his disposal to secure his goal.

37. By contrast, Mrs T was making it plain beyond peradventure that she would never contemplate England as the appropriate country in which to raise and educate the children. By the end of January this year, it was transparently clear that the mother and the father were pursuing entirely divergent trajectories.

38. Is there any support for the notion of a pre-existing agreement so heavily relied upon by Mr T? The answer to that question is that there is none – no vestige of any suggestion from the father's messages that a return to England should occur because of some earlier agreement. If there had been such a consensus it may have had some, perhaps limited, relevance to the habitual residence question considered alongside everything else drawn from the evidence. In that regard, it is worth reiterating that habitual residence may be acquired despite the fact that a move may only have been temporary or on a trial basis.

39. As it is, I am in no doubt at all; there was no such agreement between the parents. If there had been anything approximating to such an understanding, it would have been writ large across the text message exchanges of January and February. There is no trace.

40. I have no way of knowing precisely what was meant by the mother when she said, "*Let's just give it til the summer like you said and see how you feel…"* but it seems to me very likely she was suggesting to the father that his desire to return to England should be put on hold for several months so as to allow a good solution for the children in Canada to be found. Within the same message the mother was saying the father's idea of moving back was 'knee-jerk' and that she would never agree to raising the children in England. I find no support for the notion that the parents had failed to settle in Canada as the result of a microscopic examination of the text messages.

41. But when I revert from the minutiae to consider the macroscopic picture, as I've said already, the inevitable outcome is against the solution argued for on behalf of the father.

42. It's often the case that parents like Mr T have a rude awakening when they come to know how the Hague Convention operates. He may have been surprised by the pace of these proceedings which, from the children's perspective have been mercifully swift – 5 weeks from the application's launch to final hearing. But Mr T was under no illusions, as his February text messages show, as to the illegality of his actions.

43. My message for him is that in a situation of the kind he faced earlier this year parents always have choices. There is a right way to resolve differences about how, where and with whom children should be raised and there is a wrong way. Mr T chose to take the law into his own hands by unilaterally removing the children from Canada and from their mother. He had no right to take the decision to bring the children here. In so doing he has caused the mother immense distress and enormous anxiety as surely he must have known he would. There will have been a considerable emotional cost as well for the children who have never before been away from their mother for such a protracted period. The sooner he is able to see the harm he has done and to express

real remorse for his actions, the better will be the prospects of rebuilding trust between himself and the mother. Unless he embarks upon that exercise very soon, the chances for him of continuing his warm and loving relationship with the children almost certainly will suffer.