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Re F (2006)

(2007) 1 FLR 627; [2006] EWHC 2199 (Fam)

25/07/2006

Barristers
Henry Setright KC

Court
Family Division

Summary
A child who had been born and lived all her life in Israel with her mother, who had left Wales for Israel while pregnant, was not habitually resident in England and Wales whether or not the mother had intended to return to the jurisdiction, since some element of physical presence was required in order to establish habitual residence.

Facts
The court was required to determine a preliminary issue in proceedings brought by the applicant father (F) who was seeking the return of his child (J) to the jurisdiction. J's mother (M) went to Israel while pregnant and did not return to South Wales to live with F, as F alleged had been agreed. F maintained that M had never intended to return to live with him, despite leading him to believe that she would. The family court in Israel exercised a welfare jurisdiction in relation to J, and F was involved in those proceedings. He also had a claim before the Israeli court for a summary return of J to the jurisdiction of England and Wales under the Hague Convention on the Civil Aspects of International Child Abduction and had requested the English courts to assist him in those proceedings, notwithstanding the fact that a stay had been imposed. The court agreed to consider as a preliminary issue whether there could have been a wrongful removal of J by M within the meaning of Art.3 of the Hague Convention. F argued that, although J was born in Israel and had lived there all her life, she was habitually resident in England and Wales at the time of her birth because that was M's habitual residence at the time; therefore J had been wrongfully retained in Israel from the date when M stated her intention to remain there. M argued that since J had never been physically present in England and Wales, she could not have been habitually resident there; moreover, the question of habitual residence was a matter for the family court of Israel and not for the English courts.

Held
HELD: (1) It was not possible in law to abduct a foetus, which had no independent rights or status, so that there was no wrongful removal within Art.3 of the Convention. (2) Habitual residence was essentially a question of fact and required some degree of physical presence, Al-H (Rashid) v F (Sara) (2001) EWCA Civ 186, (2001) 1 FLR 951, and M (A Minor) (Abduction: Habitual Residence), Re (1996) 1 FLR 887 CA (Civ Div) considered. If F was correct in his assertion that M had never intended to return from Israel, M would

have lost her habitual residence in England and Wales at the time of leaving, and it could not be asserted that J had habitual residence there. Even if M had intended to return but subsequently changed her mind, it would still be wholly artificial to assert that J was habitually resident in England and Wales, given that she had never left Israel. (3) The Hague Convention operated such that the issue of habitual residence was one for the courts of the requested, not the requesting, state. In the instant case, the requested state was Israel. The Israeli court had already addressed itself to the issue and it followed that no declaration could be made in relation to the Hague Convention proceedings in the English courts.

Permission

Lawtel