

B (A Minor: Habitual Residence) [2016]

[2016] EWHC 2174 (Fam)

24/08/2016

Barristers

Michael Gration KC

Court

Family Division

Practice Areas

International Children Law

High Court decision on habitual residence; very helpful summary of the legal principles applicable; consideration of preparation of habitual residence cases by lawyers.

This was an application by the mother of B (a girl, aged 3½) for B's summary return to the jurisdiction of New York State, USA. The father opposed the application. The father asserted that B was habitually resident in England and Wales, and in any event by 1st July 2016 was no longer habitually resident in New York.

The judgment of Hayden J sets out in detail the circumstances leading to B's birth and her care arrangements which involved movements between numerous different countries with different carers.

Paragraph 17(i)-(xiii) of the judgment sets out a very helpful summary of the law on habitual residence, analysing the case-law.

Hayden J considers that if there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence. This will involve a real and detailed consideration of (inter alia): the child's day to day life and experiences; family environment; interests and hobbies; friends etc. and an appreciation of which adults are most important to the child. The approach must always be child driven.

Hayden J expresses some concern about the preparation of these types of cases, with statements focusing predominantly on the adult parties. He considered that if lawyers followed this approach more assiduously, the very discipline of the preparation was most likely to clarify where the child is habitually resident and to lead to a reduction in enquiries in the courtroom. Habitual residence is essentially a factual issue and ought therefore in the overwhelming majority of cases to be readily capable of identification by the parties.

Paragraph 18(i) to (iv) is therefore important reading for lawyers preparing cases involving habitual residence issues:

i) The solicitors charged with preparation of the statements must familiarise themselves with the recent case law which emphasises the scope and ambit of the enquiry when assessing habitual residence, (para 17 above maybe a convenient summary);

ii) If the statements do not address the salient issues, counsel, if instructed, should bring the failure to do so to his instructing solicitors' attention;

iii) An application should be made expeditiously to the court for leave to file an amended statement, even though that will inevitably result in a further statement in response;

iv) Lawyers specialising in these international children cases, where the guiding principle is international comity and where the jurisdiction is therefore summary, have become unfamiliar, in the judge's opinion, with the forensic discipline involved in identifying and evaluating the practical realities of children's lives. They must relearn these skills if they are going to be in a position to apply the law as it is now clarified.

Hayden J considered that the simple message must get through to those who prepare the statements that habitual residence of a child is all about his or her life and not about parental dispute. It is a factual exploration.

In the circumstances of this case, Hayden J came to the firm conclusion that B was habitually resident in the UK.

Permission

 **Family Law Week**