OUTER HOUSE, COURT OF SESSION

[2019] CSOH 4

P1143/18

OPINION OF LADY WISE

In the petition of

JDTK

Petitioner

for orders under the Child Abduction and Custody Act 1985

against

SJS

Respondent

Petitioner: Ennis; Morisons LLP
Respondent: Speir; Brodies LLP

12 December 2018

[1] The parties in this case are husband and wife, having married in Ireland on 21 August 2010. The petitioner, the husband, is Irish. The respondent, the wife, is Scottish. They have one child, a daughter, who I will call Freya, a fictitious name to protect her identity. Freya was born in Ireland on 7 November 2016. The parties lived in family in Ireland until 5 December 2017 shortly after Freya's first birthday. At that time the respondent came with Freya to Edinburgh to spend time with her parents for an anticipated period of one week. The purpose was a pre-Christmas visit with Freya's maternal grandparents.

[2] Shortly before the respondent and Freya came to Edinburgh for the planned visit, Freya had become unwell. Her right leg became swollen and she was taken to a local hospital in Ireland. She was examined and an insect bite was diagnosed. As will become apparent, that diagnosis was wrong. However the swelling subsided initially and so the respondent's trip to Edinburgh with Freya commenced as planned. On 6 December 2017 it became apparent that Freya's leg was again swollen and seemed to be getting worse. The parties agreed by telephone that she should be taken to hospital in Edinburgh. Following examination and an MRI scan there, Freya was diagnosed as having a tumour within her pelvis. She required immediate admission and treatment, including chemotherapy. The petitioner travelled to Edinburgh as soon as reasonably practicable arriving on 7 December 2017. Since that date Freya has been under the care of a consultant paediatric oncologist, Dr S, in Edinburgh. The nature of Freya's residence in Edinburgh during that period is the subject of some dispute between the parties.

[3] On 7 November 2018 the petitioner raised these proceedings seeking an order for Freya's return to Ireland, which he contends continues to be the country of her habitual residence. It is not disputed that the parties share parental responsibilities and rights in respect of Freya and it is agreed that the provisions of the relevant Irish law, as set out in the Affidavit of Brendan Curran, solicitor and the opinion of Colman Fitzgerald SC, Nos 6/5 and 6/19 of process respectively) would not permit the respondent to remove Freya out of that jurisdiction and/or retain her here in Scotland without the consent of the petitioner. The central issue between the parties, however, is whether by 3 October 2018, or possibly at an earlier date, 4 September 2018, Freya had become habitually resident in Scotland such that her retention here from that date was not unlawful. The petitioner's position is that Freya remained habitually resident in Ireland until 3 October 2018 (or 4 September 2018 when the

respondent made an unequivocal declaration in the presence of Dr S that she and Freya would not be returning to Ireland) and that her retention here from that date has been wrongful in terms of article 3 of the Hague Convention on the Civil Aspects of International Child Abduction. The respondent's position is that Freya became habitually resident in Scotland over the course of 2018 and became settled here relatively quickly and certainly no later than the summer. The respondent's fall-back position is that even if the retention of Freya in this jurisdiction was wrongful the petitioner acquiesced in that. However, it was agreed at the hearing before me that, if the date of wrongful retention was 3 October 2018, the petitioner had not acquiesced or delayed at all. There was significant dispute about what was going on in the parties' relationship between May and the end of August 2018. Had the petitioner claimed that Freya was being wrongfully retained at any time during that period, it was accepted that in those circumstances the acquiescence plea would have more significance. Counsel for the petitioner confirmed that it was not the petitioner's case that Freya was retained in Scotland wrongfully any earlier than 4 September 2018. Although the petitioner's written case pinpoints 3 October 2018 as the date, the submissions made on his behalf tended to focus on 4 September as being the relevant date of alleged wrongful retention.

[4] The hearing before me took the form of submissions made by counsel for each side under reference to a number of affidavits and related documentary material. Although the parties' affidavits illustrated a clear dispute between them in relation to what occurred in the summer months of 2018, there is sufficient extraneous material to allow me to reach conclusions on the various matters in dispute without the need for parole evidence.

The petitioner's position

[5] Counsel for the petitioner relied on a report and affidavit provided by Dr S, numbers 6/18 and 14 of process respectively. Both parties had sought input from Dr S in these proceedings, the petitioner by way of a report and the respondent through an affidavit. Following initial emergency chemotherapy, Freya underwent four cycles of further chemotherapy to March 2018. A central line for medication and a feeding tube were inserted. Dr S discusses the impact of chemotherapy on this young child. In essence her immunity was compromised by the treatment. She had to be readmitted to hospital on several occasions and initially her exposure was limited to everyone other than immediate family. On 7 December 2017 Dr S had contacted the specialist children's hospital in Dublin because she expected that the parties would want to take Freya home for treatment. The parents agreed that Freya should not return to Ireland until the conclusion of her treatment. They had no confidence that Freya would receive good treatment in Ireland because of the initial failure to diagnose, albeit that parties do not live in Dublin and the doctor who thought that the swollen leg was attributable to an insect bite was one working in their local area and not in the capital city. In her report and affidavit Dr S explained chronologically the treatment that Freya underwent. Although the chemotherapy that ended in March 2018 had shrunk the tumour, the parties were told that Freya would still require surgery and that was planned for 19 April 2018. However, during the initial stages of the operation the surgeon decided that the growth was too deep into Freya's pelvis and, on a risk/benefit analysis, it was decided that the surgery would be too aggressive and a biopsy was carried out instead. Thereafter Freya underwent two more cycles of chemotherapy, the last of those being on 6, 7 and 8 June 2018. Since then Freya has been on oral medication and her central line was removed on 3 October 2018.

[6] There was a dispute about how frequently the petitioner came across to Scotland to support the respondent and be with his daughter. He is a farmer and at the end of March required to go home to Ireland for lambing. He returned to Scotland for Freya's planned surgery. He had prepared a spreadsheet of how often he was present in Scotland during 2018, number 6/23 of process. The blue shading indicates that he was in Scotland and the green that he was in Ireland. The petitioner rejects the contention of the respondent that during some periods his absence was inexplicable or that he had failed to be there to support his wife and child. There were specific reasons for his absences. The petitioner's mother's partner of 21 years died on 14 July 2018 of a heart attack. It was a sudden death and the funeral was on 17 July. The petitioner stayed in Ireland for a while to support his mother. The respondent did not attend the funeral. The petitioner's position is that he always told the respondent when he was coming over to Scotland and that they were in frequent contact by text messages. Ms Ennis submitted that the extraneous evidence was, almost without exception, supportive of the petitioner's position. He had consented to Freya staying in Scotland for treatment on the basis that she would return when her central line was removed on 3 October 2018. Although she had made clear on 4 September 2018 in the presence of Dr S that she would not be returning to Ireland, the petitioner would not have regarded her retention as wrongful until the end of the time at which he had agreed to her staying in Scotland namely until the central line was removed. Dr S's affidavit (paragraph 17) contained the consultant's recollection that it was on 4 September 2018 that, with the parties both present, she was told that they had separated and that the respondent was not moving back to Ireland. Her affidavit records that the petitioner did not express any surprise at that. Counsel for the petitioner pointed out that the respondent's affidavit

claims that this discussion took place with Dr S on 27 July 2018 but Dr S had no recollection of that. Dr S's recollection was consistent with the notes in her medical records.

[7] The petitioner's position in response to the respondent's affidavit evidence that she had started thinking about not returning to Ireland as early as March and had told the petitioner by early July that the marriage was over was said to be inconsistent not just with the affidavit of the petitioner but also that of the respondent's mother ES (number 15 of process). There was an issue about the circumstances in which the parties went to view a property together in Edinburgh. The petitioner agreed that they did so on 27 July 2018 after an appointment with Dr S. His supplementary affidavit (at paragraph 39) states that the house would have been "fine as a temporary measure". He states that this was in the context of the parties still being a couple and would be somewhere they could stay together when he was over from Ireland. The respondent's position (paragraph 80 of number 13 of process) was that she did visit a property with the respondent on that date, on the basis that he could stay there a couple of nights a week when he came to Scotland to visit Freya. A dispute arose according to the respondent when the petitioner told her that he wanted her to pay half of the rental costs. Counsel for the petitioner submitted that the respondent's position was not consistent with other evidence. In any event, it was agreed that the parties had attended marriage counselling which came to an end in early July 2018.

[8] The next significant event was on 27 August 2018 when the petitioner was served with an initial writ intimating to him that the respondent had raised proceedings in Edinburgh Sheriff Court for divorce and for orders in relation to Freya, including an interim interdict against her removal from Scotland. The initial writ (number 6/3 of process) avers that the respondent and Freya have been habitually resident in Edinburgh, Scotland since at least May 2018. Counsel highlighted the contrast between the respondent's affidavit

(number 13 of process at paragraphs 18 and 83) and the petitioner's supplementary affidavit at paragraph 48 together with the affidavit of his sister RK (number 23 of process at paragraph 20). In essence, the petitioner's position was that in September 2018 he was at the respondent's parent's home playing with Freya when he saw a letter addressed to his wife dated some time in August. The letter was from her solicitors, Brodies, and the petitioner's position was that the content of the letter advised the respondent that her husband may contest that Freya was habitually resident in Scotland and so suggested that she raise proceedings for divorce in Edinburgh Sheriff Court. Apparently the letter then outlined the weaknesses in the respondent's case in relation to proving that Freya was habitually resident in Edinburgh and tendered some advice on how to strengthen that. RK gives hearsay evidence confirming that her brother told her at the time he saw the letter that the respondent's solicitor appeared to be advising her about how to prove she had "roots in Scotland". Ms Ennis submitted that by raising proceedings in Scotland the respondent was seeking to establish jurisdiction here, having received information that it was in doubt. She could be regarded as trying to defeat her obligations under Irish law and UK law to have the issues relating to Freya's residence and contact dealt with in a country other than that of her habitual residence.

[9] Counsel submitted that the nature of Freya's residence in Scotland required examination. She was here initially through medical emergency and her presence was temporary and, it was submitted "wholly involuntary" given her medical condition. The need to stay in Scotland for treatment for a grave illness precluded the putting down of roots required for acquisition of habitual residence. Counsel accepted that the law in relation to whether the acquisition of habitual residence required to be involuntary was slightly unclear. She referred to Anton *Private International Law* at paragraph 7.75 and contrasted the

two cases referred to therein namely *Dickson* v *Dickson* [1990] SCLR 692 and *Cameron* v *Cameron* [1996] SC 17. In *Dickson*, Lord Hope had indicated that the acquisition of habitual residence is a voluntary state whereas in *Cameron* the contrary was suggested, albeit *obiter*. It was accepted that these decisions required now to be read in light of more recent authoritative pronouncements on habitual residence including the appeal from this jurisdiction to the UK Supreme Court in *AR* v *RN* [2015] SC (UKSC) 129. There was no dispute that habitual residence was a multifaceted concept. The inability of an infant child to make choices resulted in the intention of the parents as to her residence being a factor but only one of many facets of the case. Counsel reiterated that her position was that the parents were effectively compelled to stay in this jurisdiction until Freya's treatment was concluded as they had no other reasonable choice. The situation could be distinguished from one where the child and her mother put down roots in Scotland and became integrated. There was no desire for Edinburgh to become a residence for the family. Freya was excluded from her extended Irish family by being here. Although from April 2018 she started to have a slightly wider social circle than immediate family the risk of infection remained.

[10] Ms Ennis submitted that the respondent's desire to establish her life in Edinburgh and seise jurisdiction here did not arise until about August 2018. Such evidence as the respondent had produced in relation to integration was illustrative of a contrived effort to evidence the putting down of roots for the child. Examples included activities such as "Jo Jingles" and "Tumble Tots" in August of this year. It was important to note that Freya was unable to attend nursery until she had received vaccinations. While it was accepted that the respondent was the primary care giver for Freya over the period under discussion, the petitioner was also a significant care giver throughout that time. The parties had made all decisions about Freya's care together and any argument that Freya had acquired habitual

residence here because the respondent had did not bear scrutiny. Neither of them could really put down roots because of the difficult circumstances that had arisen.

[11] It was accepted, however, that there were one or two examples of the respondent putting down roots in this jurisdiction. For example from 9 July she had a gym membership and in August she began looking at houses. She arranged for Freya to attend toddler groups and have some play dates. However, in counsel for petitioner's submission this was all consequent upon the legal advice she received that her habitual residence was uncertain. The situation was different from that of an organic growth of habitual residence in a new jurisdiction. Reference was made to the established authorities on habitual residence including *A* v *A and another* [2013] UKSC 60 paragraph 54 and *In re B* (a child) (Reunite International Child Abduction Centre and others intervening) [2016] UKSC 4. It was submitted that uprooting from one country and setting down new roots in another takes longer if one is fully rooted in the previous country. Accordingly the fact that Freya's social and family environment was firmly and fully rooted in Ireland should weigh heavily. These parents had specifically chosen for their child an environment where she would live on a farm, be close to cousins, aunts and uncles and be settled in Ireland. In contrast, the respondent's apparent intention to settle here was promoted to achieve a particular outcome. The respondent's material illustrated that there had been play dates with second cousins and a friend who lives in Hong Kong. This was not enough. A legitimate factor to consider was the amount of pre-planning for a move to the new jurisdiction. In this case there had been no pre-planning at all and was as a result of an emergency situation. Accordingly habitual residence in Ireland continued.

[12] On any fall-back position that might be advanced in relation to acquiescence and under reference to Wilkinson and Norrie (3rd Edition) at page 398 and the cases cited therein

including, *In re H and others (minors) (abduction: acquiescence)* [1998] AC 72, it was submitted that there were no facts from which it could be inferred that the petitioner had acquiesced in Freya remaining in Edinburgh from 4 September 2018. He first attended at his solicitor in Ireland on 27 August and received advice to raise proceedings in that jurisdiction. He has been renting a property here simply so that he can see his daughter. Although his family had come to visit, that was against a background of texts with the respondent who indicated that his family should come. Until at least June/July the parties had been in an emergency treatment situation. Although it was denied that the petitioner had acquiesced in any retention of Freya here in Scotland, even if that point was decided against him, there remained a discretion whether to grant or refuse the petition. That should be exercised in favour of a return of the child to Ireland against the background of the policy of the Hague Convention and there being no suggestion either that the Irish courts were not well placed to make decisions about her welfare or that she would not receive proper medical treatment there.

The respondent's position

[13] Counsel for the respondent made a number of propositions dealing with disputed issues chronologically. First, it was agreed that the initial purpose of the trip was a holiday and that the extended stay began with emergency medical treatment including chemotherapy. That took place on 8 December 2017 for three days and Freya improved quickly thereafter. She was discharged from hospital and started treatment as an outpatient. The most significant event in the first stage of the chronology was in January 2018 when the treatment ceased being emergency life-saving necessary treatment and a planned course of medical care began. It was noted that in the petition it was stated that travel with Freya

would not have been possible except to hospital in Dublin. That was not supported by Dr S's report or affidavit.

[14] The next phase in the chronology was when the second chemotherapy began in January as part of the planned course of treatment. At that time the parties agreed as a family that the respondent and Freya would remain in Scotland up until the conclusion of that planned treatment. Importantly, the treatment plan was not time limited and the parties had a choice as to whether it should take place in Ireland or Scotland. They chose to have the treatment in Scotland despite Freya being well enough to have her care transferred to Ireland. Dr S records in her affidavit (at paragraph 15) that she had been quite surprised at the couple's decision that they did not want to go back to Ireland for treatment but equally she was happy because it meant she could continue to treat Freya. Dr S was very clear that it had been a choice made by the parents that Freya stay here in Edinburgh to complete that treatment. It was clear from the initial letter Dr S had written to her counterpart in Ireland (6/18/7) in December 2017 that the couple had not taken a final decision at that time about staying in the UK for treatment, just that it was being considered. That letter, coupled with paragraphs 14 and 15 of Dr S's affidavit negated any suggestion that the acquisition of residence here was somehow involuntary. The parties had a clear choice and they made a decision. The benefits of staying in Scotland included increased family support in Edinburgh where the respondent's parents live in the same house that she had been brought up in. In Ireland, the situation was rather different. The petitioner's family did not live close by and the parties' affidavits showed that in the initial months of Freya's life the respondent had required to pay for any assistance with childcare. There was no need for the respondent and Freya to return to Ireland for financial reasons. There was no compulsion about the circumstances of remaining here. Reference was made to the

affidavits of the respondent (at paragraph 11), her mother ES (number 15 of process at paragraphs 12 and 31) and her father MS (affidavit number 16 of process at paragraph 10).

[15] The third stage was that once the decision had been made for Freya to remain here for planned treatment, roots inevitably started to be put down in this jurisdiction. There had been organic growth from those roots consistent with Freya's age and stage of development. The breakdown of the parties' marriage was not synonymous with the respondent putting down roots but it was not an irrelevant factor. Even if it could be said that parties felt compelled emotionally to stay in this jurisdiction for treatment, that would not exclude the possibility of integration here.

[16] During the period from January to March 2018, although the principal focus of family life was the planned treatment, especially the chemotherapy, it was noteworthy that the pattern was for Freya to spend 5 out of each 21 day period in hospital. Outside of hospital stays family life took place at the respondent's home. A bond was established with the medical team and although Freya's social circle was very restricted initially that was not on the basis of clear medical advice contrary to the petitioner's initial suggestion. It was clear from Dr S's report at page 2 (at paragraph 8) that this was really a matter of parental choice and certainly by the three month mark there was no reason at all to keep children from socialising. Mr Speir also noted that arrangements had been made to obtain a UK passport for Freya in December 2017 which is confirmed in paragraph 14 of the petitioner's first affidavit.

[17] In the period after March 2018 it was submitted that the primary focus of Freya's life being on medical treatment began to shift. An increased social life was organised for her and she was introduced to more people. Although the surgery was attempted on 20 April 2018, she had been strong enough before that to start the shift in her settled residence

pattern. It was agreed that the results of the attempted surgery were not positive and more chemotherapy was then planned. The parents were at that stage both still involved and to a large extent operating as a couple. However, in March 2018 the respondent had cancelled her entitlement to child benefit in Ireland, entitlement to which is based on residence in that jurisdiction. Further, her father took steps to include the respondent on the council tax register in the Edinburgh home (paragraph 24 of number 16 of process). The next stage leading up to May 2018 was a gradual increase in social activity on Freya's part again consistent with her tender age. The respondent's position is that in May 2018 due to difficulties in the marriage the respondent told the petitioner she was not going to return to Ireland. However at that time she may not have been making a clear statement that their marriage was over. Her position is that the petitioner's response was to say that he would move to Scotland. Mr Speir contrasted the respondent's affidavit (number 13 of process at paragraph 71) which states very clearly that she told the petitioner at the start of May 2018 that she and Freya would not be returning to Ireland with the petitioner's affidavit (paragraph 21) which was to the effect that the whole ordeal with Freya's diagnosis and treatment took a significant toll on the parties' relationship but that he thought that he and the respondent could work things out until 27 August when he was served with divorce proceedings. His affidavit referred to marriage guidance which had commenced in June 2018. He stated that the counsellor had emailed him in August to say that the respondent had terminated the counselling. However, the relevant email exchange (number 6/14 of process) produced by the petitioner illustrated that on 24 August the petitioner had written to the counsellor stating that his wife wanted to end it.

[18] More importantly, there was extraneous evidence supporting the respondent's position. A friend of the respondent, LAH, had provided an affidavit (number 20 of

process), paragraph 10 of which confirms that the respondent had sent her a message on 30 May 2018 referring to her decision not to return to Ireland. In that message (produced at 7/22 of process) the respondent stated that the petitioner wanted to move to Scotland in that event but that the respondent herself was not sure if that would work. Mr Speir submitted that this supported a position that the respondent was unclear at that time that the marriage was completely over and was open to the possible option of the family living here. Further, another friend of the respondent, HWFE, who now lives in Hong Kong having moved there in April 2018 was in Edinburgh in early July 2018 and joined the parties for a walk with their daughter. In paragraph 16 of her affidavit she states that when the respondent was helping her into her car with one of her own children, she said to the petitioner "who knows when we might see each other again". She states that the petitioner in response said something like "you might see me sooner than you think; I might be returning soon and moving to Edinburgh". Counsel submitted that it was clear at that stage that the whole family plan had shifted such that by July 2018 it was clear that the respondent would not be returning to Ireland and the petitioner knew that. Mr Speir acknowledged that the position of the respondent's parents ES and MS did not coincide completely with the respondent's account (paragraph 31 of ES' affidavit in 18 of A of MS affidavit), but only to the extent that they had formed the impression rather earlier that the respondent would not be returning to Ireland. In essence, what had occurred was an incremental shift between May and August 2018 when the respondent and Freya became more settled in Edinburgh and the petitioner telling the respondent and her friend HWFE that he could retire and come to live here. Thereafter by July 2018 the marriage was completely breaking down. The very latest date by which the petitioner had been told unequivocally that the respondent would not be returning to Ireland was 27 August on service of the initial writ which had been warranted on 24 August.

[19] Looking at the matter slightly differently it could be noted that Freya's last chemotherapy took place in early June 2018 with some follow up tests the following month. The parties last counselling session was on 9 July and by 27 July when the respondent states that she said in the presence of Dr S and the petitioner that she was not going to return to Ireland there was no more treatment planned other than removal of the central line and subsequent review. It was acknowledged that Dr S could not remember whether anything was said on that date. However it was significant that the petitioner in his supplementary affidavit (at paragraph 34) seemed to recall some sort of conversation in front of Dr S that day, albeit that his account is that when asked when Freya would be returning to Ireland the respondent stated "not just yet". It could be seen, therefore, even on the petitioner's own account that there was no suggestion that in late July Dr S was indicating that there was a reason why Freya could not return to Ireland at that time. Further, there was nothing in any of the affidavits or other material to suggest that the petitioner had been pushing either the respondent or Dr S to ascertain if Freya was well enough to travel. By 27 July the petitioner was exploring his own options for establishing a residence in Scotland at least to exercise contact with Freya. He did exercise contact with her thereafter, in a manner consistent with the change in the dynamic such that the parties were now offering care separately to Freya. The respondent's mother's affidavit (at paragraph 26) confirmed the viewing of a property in Edinburgh by the parties together at the end of July. The petitioner accepted that he would do so (paragraph 39 of the petitioner's supplementary affidavit). This indicated that the petitioner was prepared to settle for a while in Scotland at a time very late in Freya's treatment and after her last chemotherapy.

[20] Mr Speir submitted that by August 2018 Freya was well integrated into social and family life here in Edinburgh and that sometime before the service of the writ for divorce.

The respondent's position on this was supported by the affidavit of her friend HWRE at paragraphs 17-22 which narrates a number of social activities involving Freya and other children over the summer. The respondent's position is that thereafter the contact arrangements became increasingly problematic and she raised an action in Edinburgh Sheriff Court because the petitioner threatened to remove Freya from the jurisdiction. Since then contact arrangements have settled down to some extent and the petitioner sees Freya at the property he has rented to the west of Edinburgh.

[21] Against that whole background Mr Speir submitted that it was for the petitioner to establish that Freya was habitually resident in Ireland as at 3 October 2018 the date of the alleged wrongful removal stated in the petition. He submitted that he had failed to do that and in a gradual process between Spring and September/October 2018 it was clear that Freya had become settled here. The breakdown of the marriage and arrangements being put in place for contact were part of that picture. Freya's medical care has all been in Scotland, her health is now stable and she is part of a close network in the respondent's home jurisdiction. It was not necessary to pinpoint any particular date prior to 3 October when Freya became habitually resident here. Whether the date was September or October, the position was the same. None of the affidavits from the petitioner's family did anything other than confirm that there was less family support in Ireland than in Edinburgh. The person within the petitioner's family with whom the respondent had a close connection when in Ireland was his sister J from whom no affidavit had been provided. The petitioner's sister RK had not visited Edinburgh until 28 August and then again in September and so had not seen Freya at all during the period when she was becoming settled in Scotland.

[22] Counsel for the respondent made clear that although a fall-back position of acquiescence had been pled in the answers, that would only apply if any earlier date of an

alleged wrongful retention was identified but as the petitioner had confirmed that no date earlier than 4 September would be relied upon, he could not contend that the petitioner had delayed or acquiesced at that point. On the respondent's account, of course, he had in a sense acquiesced in the whole move to Scotland from about May onwards. In any event, even if wrongful retention was established but with acquiescence, the exercise of discretion should weigh heavily in favour of the respondent who is the primary carer of the child. Even if the prayer of the petition was ultimately granted some time would be required to organise a return standing the continuing ongoing medical appointments for the child.

The applicable law

[23] The Hague Convention on the Civil Aspects of International Child Abduction is incorporated into domestic law in this jurisdiction by the Child Abduction and Custody Act 1985. Article 3 of the Convention provides:

> "The removal or the retention of a child is to be considered wrongful where –
>
> a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Article 12 provides that where a child has been wrongfully removed or retained in terms of article 3 and less than 1 year has elapsed from the date of the wrongful removal or retention the authority concerned shall order the return of the child forthwith. There are certain limited defences to a return where wrongful removal or retention is established and of those only acquiescence is pled in this case. The central issue between the parties is whether Freya

was habitually resident in Scotland on either 4 September 2018 or 3 October 2018. There was no real dispute between the parties as to how the law in relation to the issue of habitual residence in the context of international child abduction has evolved in recent years. An issue about whether habitual residence is necessarily a voluntary state was raised by the petitioner on the basis of a perceived conflict between some of the earlier authorities of *Dickson* v *Dickson* [1990] SCLR 692 and *Cameron* v *Cameron* [1996] SC (UKSC) 17.

[24] In *A* v *A and another* (children): habitual residence (Reunite International Child Abduction Centre and others intervening) [2013] AC 1 the UK Supreme Court examined the traditional view of habitual residence as that had been interpreted in England and Wales against guidance from the European Court of Justice following the implementation of Council Regulation (EC) No 2201/2203) "Brussels II *Bis"*). At paragraph 48 of the judgment Baroness Hale of Richmond, citing the case of *Proceedings brought by A* [2010] Fam 42 decided by the CJEU and other relevant authorities drew together all of the threads of the previous case law and made eight relevant points (at paragraph 54). These included that habitual residence is a question of fact and not a legal concept such as domicile; that the test adopted by the European court for habitual residence was "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned; that it is unlikely that such a test produces different results from that previously adopted in the English courts and that the test adopted by the European court is preferable to that earlier adopted by the English courts. A focus on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors should now be the test adopted and the previous test derived from *R* v *Barnet London Borough Council Ex Parte Shah* [1983] 2AC 309 should be abandoned when deciding habitual residence of a child. Importantly, Baroness Hale confirmed also that the social and family environment of an

infant or young child is shared with those (whether parents or others) on whom he or she is dependent. The essentially factual and individual nature of the enquiry should not be glossed with legal concepts which would produce a different result from that which the factual enquiry would produce.

[25] In the subsequent case of *In re B* (a child) [2016] AC 606 Lord Wilson in the UK Supreme Court expressed the following view on the way in which the loss of one habitual residence and the acquisition of another operates:

> "45 I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it.
>
> 46 One of the well-judged submissions of Mr Tyler QC on behalf of the respondent is that, were it minded to remove any gloss from the domestic concept of habitual residence (such as, I interpolate, Lord Brandon's third preliminary point in the *J* case), the court should strive not to introduce others. A gloss is a purported sub-rule which distorts application of the rule. The identification of a child's habitual residence is overarchingly a question of fact. In making the following three suggestions about the point at which habitual residence might be lost and gained, I offer not sub-rules but expectations which the fact-finder may well find to be unfulfilled in the case before him: (a) the deeper the child's integration in the old state, probably the less fast his achievement of the requisite degree of integration in the new state; (b) the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement of that requisite degree; and (c) were all the central members of the child's life in the old state to have moved with him, probably the faster his achievement of it and, conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement of it."

In the most recent Scottish 1980 Hague Convention case heard by the UK Supreme Court of *AR* v *RN* [2016] AC 129 various passages from Lady Hale's judgment in *A* v *A* were cited with approval. Lord Reed also emphasised the following:

> "…parental intentions in relation to residence in the country in question are a relevant factor, but they are not the only relevant factor. The absence of a joint parental intention to live permanently in the country in question is by no means decisive. Nor, contrary to counsel's submission, is an intention to live in a country for a limited period inconsistent with becoming habitually resident there. As was explained in *A* v *A*, the important question is whether the residence has the necessary quality of stability, not whether it is necessarily intended to be permanent." (paragraph 21)

Application of the law to the facts

[26] This a particularly poignant case, in which this family has suffered enormously as a result of the unforeseen and dramatic diagnosis of Freya's cancer in December 2017. Whatever the dispute on points of detail and in particular on timing, it is indisputably the case that the breakdown of the parties' marriage arose in circumstances where the family was under great strain. It is not in dispute that, unless Freya was habitually resident in Ireland at the time of the respondent's unequivocal statement that she would not return to Ireland with the child, her retention in Scotland by the respondent is not wrongful in terms of article 3. The determination of habitual residence in this case requires an assessment of the particular events over the period of December 2017 to September 2018. I am prepared to take the date of 4 September 2018 as that on which the petitioner claims that retention in Scotland became wrongful, albeit that his written case has it at 3 October. It seems to me that what he relies on now is some form of repudiatory or anticipatory wrongful retention as at 4 September 2018, notwithstanding that he would have condoned retention in terms of what he saw as the parties' agreement, until 3 October. Such as position would appear to be competent (see the UK Supreme Court decision, *In the matter of C (Children) [2018] UKSC 8)*, albeit that I would have thought that as a matter of fair notice it should normally be pled. In any event, in the present case it does not ultimately affect the central determination on the

issue of habitual residence as will become apparent. I will deal with the issues chronologically to some extent as the parties did in submissions.

[27] The first matter to be addressed is the nature of the parties' agreement that Freya remain in Scotland throughout her treatment. Counsel for the petitioner described her presence here with her mother as "wholly involuntary" and on that basis sought to argue that habitual residence could not be established in this jurisdiction. I have concluded that the facts of the case illustrate that, albeit in difficult circumstances, the parties freely agreed that Freya should live here in Scotland with her mother, the respondent, throughout the duration of her treatment. They took that decision in January 2018. It was not known at that time how successful the treatment would be or exactly how long it would take and so the agreement that she remain here was not time limited. The anticipation was, initially, that on the happening of a specified event, the end of treatment, she and the respondent would return to Ireland. I have found the evidence and report of Dr S to be the most significant adminicle in relation to this first matter. She had taken the step, in December 2017, of contacting a colleague in Dublin so that treatment could be arranged there if that was the parties' decision. In her Affidavit at paragraph 15, Dr S expresses surprise that, between the first and second rounds of the initial chemotherapy, the parties had chosen instead that Freya should remain here. While the decision was an emotional one, there was no compulsion about it at all and the child's presence here and that of her mother cannot be said to have been involuntary in any sense. It is clear that Dr S would not have objected to a transfer of care at that point. Accordingly, I need not address the perceived conflict in the earlier case law on whether habitual residence requires to be voluntary. I note in passing only that the whole approach to assessing habitual residence has evolved, as already discussed, in light of both Brussels II Bis and the particular emphasis in cases of this sort in

recent decisions of the UK Supreme Court on a multifaceted approach that looks at the whole social and family environment of the child. The circumstances in which Freya came to be here for a lengthy period are simply one aspect to be taken into account in that multifaceted approach.

[28] The next matter is whether the question of habitual residence in this case can somehow be determined by reference to the agreement that the parties reached in January 2018 about the purpose and duration of Freya's residence here. The petitioner's case was initially founded upon a date on which, by reference to the removal of Freya's central line, he understood she would be returned to Ireland and as indicated this was later modified to the date on which Dr S was told in terms that the parties were divorcing and that the respondent and Freya were staying in this jurisdiction. However, the fact that the parties did not originally intend permanent settlement in this jurisdiction is, while relevant, by no means determinative. A proposition that an agreed stay in another jurisdiction for a limited period negated the possibility of the acquisition of habitual residence there was very clearly rejected by Lord Reed in *AR* v *RN* [2016] AC 129 at paragraph 21 in the passage cited at paragraph [25] of this opinion. An agreement that a child who is already present in the new jurisdiction remains here for a particular purpose or until the happening of a specified (although uncertain) event is similarly not inconsistent with the acquisition of habitual residence. The issue that I must address is the nature of Freya's residence here with her mother in terms of integration in this jurisdiction in the relevant social and family environment. As Freya is still an infant child the circumstances of the mother's integration are inextricably linked with those of the child.

[29] During the first three or four months of 2018 the focus of the parties was on the chemotherapy and subsequent surgery that Freya required to undergo. The petitioner had

to return to Ireland for lambing and for some other farming duties but I accept that he was just as concerned and involved as the respondent in doing what was best for Freya. He could not be present all of the time but the parties were operating as a couple in supporting their daughter and ensuring that she received appropriate treatment and care. Had the attempt at surgery in April 2018 been more successful and the tumour removed, matters might have taken a different turn. However, in addition to the inevitable strain on the parties' marriage, the respondent was clearly coming to the view by May this year that she did not wish to return to Ireland. She has benefited from the support of her parents to whom she seems close and with whom she and Freya have been living in their family home. I accept that in May 2018 she decided that she did not wish to return with Freya to Ireland. What is less clear is whether she conveyed that to the petitioner in the clearest terms. What she did do is tell her close friend, LAH that she was not going to return. LAH is an important witness because she is a close friend who knew SJS before the respondent lived in Ireland, she visited the parties at the farm there and she has been in regular contact with her friend throughout the material period. In her Affidavit No 20 of process, LAH states that she had seen the parties together at her own daughter's communion ceremony on 12 May 2018. She had observed an absence of closeness between the couple but it was not until the respondent sent her a "Whatsapp" message on 30 May 2018 that she learned that her friend was not going back to Ireland. Importantly, the message was produced in these proceedings (No 7/22 of process) and stated that *" …its quite serious cos he knows that I am not going back to Ireland …he wants to move here but just am not sure if I want that or if it would work.."* I consider that this message is significant in two respects. First, it does suggest some equivocation on the part of the respondent in relation to the future of her marriage but secondly, it is evidence of a clear intention that she and Freya would settle in this jurisdiction from that

point. The petitioner denies that the respondent told him in May that she was not going to return to Ireland. However, the parties were attending marriage guidance counselling by June and until 9 July and in early July the petitioner met with the respondent's friend HWRE and told her in terms that he might be retiring and moving to Edinburgh (affidavit of HWRE number 18 of process at paragraph 16). That evidence sits very uneasily with the petitioner's stated position that it was not until 4 September that the respondent made an unequivocal statement that she would not return to Ireland. I conclude that it is likely that what occurred over the months of May, June and July was that the respondent indicated a desire to settle here in Scotland with Freya and the petitioner did not initially see that as a signal that his marriage was over and so was prepared to at least discuss a change in location for them as a family. Thereafter, he knew that the marriage was in some trouble and marriage guidance counselling did not go well. On 27 July he and the respondent went together to look at a property in Edinburgh. It is not too important whether, as the petitioner now states, that was for them to be in as a couple when he was across or, as the respondent would have it, that he would stay there when in this jurisdiction to visit Freya. What matters is that it is illustrative of an acceptance on the petitioner's part at that time that, going forward, Freya's environment would be in Edinburgh for the foreseeable future. Significantly, chemotherapy had ended by then. There is no evidence of the petitioner pressing for dates at that time when she might return to Ireland but rather an acceptance of roots being put down in this jurisdiction.

[30] There was a dispute also about the nature of a discussion with Dr S on 27 July 2018. The respondent claims that she told Dr S in the presence of the respondent on that date that she would not be returning to Ireland. Dr S has no such recollection and although her affidavit indicates that the absence of a recollection does not mean that such a conversation

did not take place, it seems to me that it would be surprising for Dr S not to recall what would have been a significant discussion given her own earlier understanding that the parties would return to Ireland at some point after the conclusion of Freya's treatment. Again, although the parties' positions on this seem to be diametrically opposed, nothing much turns on it as I have found that by 27 July the petitioner was well aware that the marriage was in very serious trouble and that the most likely option if things could yet be salvaged would be for him to come and live in this jurisdiction where the respondent had indicated she wanted to remain with Freya. Accordingly, I consider it likely that 27 July was not a date that was significant in terms of intimation to third parties of future intention as by that date discussions about the future between the parties had already taken place and that against a background of the respondent's stated intention to remain here with their daughter.

[31] There is a considerable body of evidence supporting integration of the respondent and Freya in Edinburgh by the end of July 2018. Such integration, where it involves a very young child, must be understood in the context of her tender age, her dependence on her primary caregiver and in this case the relatively limited social activity that was initially considered appropriate standing her illness. It is clear that the respondent has done what she can to see to it that Freya engages in as many normal activities, commensurate with her young age, as reasonably practicable. These include simple matters such as playing in the garden with family, play dates with relatives and friends' children and simple outings to swing parks, the museum and a local city farm. The details are all narrated in the respondent's affidavit and in those of her supporting witnesses, particularly her friends LAH and HWRE. Freya's maternal grandparents have also been involved on a daily basis with their granddaughter. Regrettably, their relationship with the petitioner deteriorated

along with that of the parties' marriage and they are supportive of their daughter seemingly at the cost of the previously good relationship they had with their son in law. However, putting to one side the criticisms they now seek to make of the petitioner, their affidavits do support some of the facts relevant to integration. The respondent's mother, ES, recalls that her daughter was looking for property to purchase here in Edinburgh from around the start of the summer and that she and the respondent had visited a playgroup on 3 May 2018 which the respondent was keen for Freya to attend but that she was unable to do so whilst ill at that stage in her treatment. The respondent's father confirms the various activities that his daughter has been engaging in with friends and family together with Freya. In terms of family support on the petitioner's side, while his sisters do not live in close proximity to his farm in Ireland, I have no reason to doubt that they would have continued to develop a close relationship with Freya had she remained in Ireland and would intend maintaining that relationship wherever she is settled. The petitioner and his mother are also close, but her Affidavit and those from two of the petitioner's sisters contribute little to the issue of how settled the respondent and Freya became in Scotland during the material period. That is understandable as they did not see either Freya or the respondent during that time. However, from the perspective of a very young child, immediate surroundings are particularly important. Although her residence here in Edinburgh with her mother started as being for a particular purpose, there is no doubt that Freya has enjoyed a stable and settled existence in this jurisdiction surrounded by very close family ever since her initial hospital stay in December 2017. Since the end of April 2018 her illness has restricted only slightly the type of activities in which as a toddler she is able to participate.

[32] Freya's integration in Ireland was short lived and comprised just short of the first year of her life. The focus of her life was home and immediate family. The respondent's time

in Ireland was of course far lengthier and she had settled on the farm, had purchased property and embarked on important life stages there. However, while her move to Scotland was unplanned, she was able to revive her life here in the city in which she was brought up quickly and with ease. The respondent has been the central and constant feature of Freya's life throughout these first two years of her life. Moving to Scotland involved no change of primary care giver for this child who will have had no real conscious link with Ireland, only with her parents. Although only one of those parents is settled here, Freya did not see her father other than in this jurisdiction from December 2017 onwards and until at least the end of July 2018 her mother was also always present when she did. Freya's settlement here with her mother was gradual and natural.

[33] In the circumstances of this unusual and rather sad case, Freya has now spent as much of her life here in Edinburgh as she did in Ireland. Her retention here in Edinburgh was not wrongful at the outset. It would have been wrongful had she been retained in Edinburgh inconsistently with the petitioner's rights of custody which he was exercising at any time before she became habitually resident here. I find, however, that she was habitually resident here by about the end of July and certainly by early August 2018. The service of the divorce proceedings later that month was the clearest possible statement conveyed to the petitioner that in the respondent's view not only had the marriage broken down irretrievably but also that she considered that she and Freya had been habitually resident in this jurisdiction from May 2018. I have given little weight to what the petitioner now says he saw in a letter from the respondent's solicitors to her dated 2 August 2018. He accepts that this was a privileged communication that he should not have read. In any event, his evidence (paragraph 48 of number 21 of process) was that the letter referred to a meeting the respondent had had with her solicitors on 2 August 2018. It coincides with the

view I have reached of the time at which the respondent and Freya had already become habitually resident in Edinburgh. The respondent then took advice in relation to the consequences of her marriage breakdown. Whatever advice she received in relation to the issue of habitual residence, the initial writ that was ultimately served on the petitioner avers that she and Freya had been habitually resident in Scotland since May, when the respondent states she told the petitioner that she would not be returning to Ireland. The petitioner's position in relation to the period between May and the service of the writ in August is rather opaque. He accepts that there was marriage guidance counselling and that the last session was on 9 July. He was then in Ireland from mid-July to mid-August some of which was taken up with supporting his mother in her bereavement. Thereafter he had to cover for his farm manager who takes an annual holiday at the same time each year. It is clear from his supplementary affidavit at paragraph 38 that by then the respondent was reluctant to even agree arrangements for him to visit Freya in Scotland. When the petitioner did come to Edinburgh on 21 August he stayed at a bed and breakfast premises near to where the respondent's parents live. He states in his affidavit that that was because the respondent's parents had made him very unwelcome at their home on the previous visit, but it seems to me to be another indication that the situation between the parties was by that point irreparable and that against the background of the respondent and Freya having settled here.

[34] As I have concluded that Freya was habitually resident in Scotland by about the end of July 2018 and certainly by early August, the petitioner's argument that Freya was habitually resident in Ireland on 4 September 2018 fails and the petition must be dismissed. I would add, however, that it does seem that the petitioner has attempted to be involved with his child as much as possible since the respondent decided not to return to Ireland and

to settle here. He has rented accommodation not far from Edinburgh and comes across to exercise contact every week. There have been some restrictions placed by the respondent on the duration of his contact with Freya. Now that her central line has been removed and in the hope that she will continue to be in good health, I trust that the parties will be able to find a way to enable Freya to enjoy more extensive time with the petitioner and with her extended family in Ireland in due course.