Habitual residence in the context of international adoption (Enfield London Borough Council v K and another)

This analysis was first published on Lexis®PSL on 01/07/2021 and can be found here (subscription required).

Family analysis: In Enfield London Borough Council v K, the court was concerned with a child who was in the care of a family friend in the US following the death of the child's mother, as a prelude to an application under the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption (the 1993 Hague Convention). Complications arose due to the coronavirus (COVID-19) pandemic in relation to the child's immigration status, and following submissions by the local authority that the child was now resident in the US, the court was asked to determine the child's habitual residence. Ruth Cabeza, barrister at Harcourt Chambers, examines the issues.

Enfield London Borough Council v K and another [2021] EWFC 26, [2021] All ER (D) 134 (Mar)

What are the practical implications of this case?

This decision highlights a number of issues for practitioners, including that:

- when advising a client with a child as to the making of a Will, consideration should be given to the appointment of a testamentary guardian who will have parental responsibility from the moment there is no living parent with parental responsibility (or if parental responsibility is shared with a living parent, when the testator cares for the child under a child arrangements order as to with whom the child is to live or a special guardianship order)
- a testamentary guardian is entitled to apply to adopt the child pursuant to section 92 of the Adoption and Children Act 2002, and
- the US is not a contracting state in relation to the 1996 Hague Convention, and therefore orders made under sections 8 or 13 of the Children Act 1989 (ChA 1989) are not recognised under US law for immigration purposes

In addition, if a party suggests that it is the best interests of a child to be placed in the permanent care of a connected person (who is not their parent) who is habitually resident outside of the UK, preferably before, but in any event no later than the first hearing, consideration should be given to:

- immediate liaison with the Family Division liaison judge to consider the reallocation of the case to a judge of circuit judge or High Court level, and
- obtaining advice from counsel with specialist knowledge of the relevant international law to advise on the most appropriate legal framework under which the proposed placement can be assessed, and if appropriate at the conclusion of the case, supported by final orders

Finally, the decision also brings to the fore that:

- the issue of a child's habitual residence in the context of adoption is a question of fact—in this case the court considered and adopted the ratio in *M and T (Proposed Convention Adoption) Habitual Residence)* [2015] Lexis Citation 1564, and
- when considering whether a child's habitual residence had changed during the course of legal proceedings, the existence or absence of undertakings and/or recitals in an interim order would be relevant but not determinative to an issue concerning the child's current place of habitual residence

What was the background?

The court was concerned with a child who had been cared for by her mother and did not have a relationship with her birth father, who did not have parental responsibility. Very sadly, the child's mother died in 2018. For a number of months after the mother's death, the child was cared for by a close friend of the mother, financially supported by the first respondent. In March 2019, the first respondent made an application for a child arrangements order. A report prepared under ChA 1989, s 7 on behalf of the local authority supported the child's placement with the first respondent and on 5 November 2019 the court made orders under ChA 1989, ss 8 and 13 that the first respondent be permitted to take the child to the US for a period of six months. In the meantime, the first respondent was to file and serve counsel's advice in the UK in relation to permanently adopting the child and a report from a US attorney on the appropriate immigration process.

The first respondent was a US citizen who was habitually resident in the US and the child was a British citizen habitually resident in the UK. In November 2019, the first respondent took the child to the US on an electronic system for travel authorisation (ESTA) visa, the case was adjourned and directions were given for a report to be obtained in to address the immigration issues for the child. The first respondent returned the child to the UK in January 2020 and took her back to the US under a fresh ESTA visa. As a consequence of travel restrictions imposed due to the coronavirus pandemic, the child became stranded in the US with the first respondent, resulting her overstaying her visit on her ESTA. In May 2020, the case was reallocated to a circuit judge following advice from an US immigration expert that the first respondent would need to adopt the child under the 1993 Hague Convention. A report under ChA 1989, s 37 was directed and the local authority issued care proceedings in August 2020. The case was then reallocated to Mrs Justice Judd DBE. In December 2020 the local authority changed its position and asserted that:

- threshold was not met, and
- a 1993 Hague Convention adoption was not possible as the child was now habitually resident in the US

The delay and the unhelpful structure of orders made at district judge level were significant factors relied upon by the local authority in support of its argument that the child's place of habitual residence had moved the US. The children's guardian disagreed with this analysis and asserted that habitual residence has not changed, the threshold was met and that a care and placement order to facilitate that would facilitate a 1993 Hague Convention adoption and were in the child's best interest. There was no dispute as to the factual matrix, the issue was whether, on the facts, habitual residence had transferred to the US. The court found it had not.

What did the court decide?

The court determined that as a matter of fact the child remained habitually resident in the UK, notwithstanding the fact that she had been living in the US with the first respondent for a continuous period of just over a year. Significant factors underpinning this decision were:

- the ongoing nature of the welfare enquiry with which the English court remained seised
- the fact that the parental responsibility held by the first respondent was not recognised in the US
- that the child's immigration status in the US was not resolved and she was a legal overstayer, and
- while the child was undoubtedly forming an attachment to the first respondent, she was still grieving the loss of her mother and this was also a factor to consider in terms of her integration into her new life with the first respondent

The case was adjourned for a case management hearing to timetable the care proceedings in the light of the court's determination on habitual residence.