OUTER HOUSE, COURT OF SESSION

[2021] CSOH 90

P520/21

OPINION OF LADY WISE

In the petition of

F

Petitioner

against

M

Respondent

For Orders under the Child Abduction and Custody Act 1985

Petitioner: McAlpine; Morton Fraser LLP
Respondent: Hayhow; BTO Solicitors LLP (for Weightmans)

31 August 2021

Introduction and Background

[1] This case involves the impact, if any, of a formal agreement between two parents on a decision about the habitual residence of their children when it is alleged that one of them has wrongfully retained those children contrary to that agreement. The application is by the father, who I will refer to as "F", "the father" or "the petitioner", against the respondent "M" the mother of the parties' children, who I will refer to as "M", "the mother or "the respondent". The parties are UK citizens but left this country in 2009 to live and work in New Zealand. They have two children, both born in New Zealand, in 2014 and 2016

respectively. The older child, a girl, I will refer to as Madeline for the purposes of this opinion and the younger child, a son, I will refer to as Duncan. F and M are both highly qualified and experienced healthcare professionals. Having worked in New Zealand for some years, both acquired citizenship of that country in 2017 and have dual nationality.

[2] By 2019 there had been some difficulties in the parties' marriage and the respondent was keen that the family should relocate to the UK. Both parties consulted solicitors and during the first half of 2020 were engaged in discussions about a trial period during which they would move to the UK and try to resolve the issues that had arisen in their marriage. Following negotiations they entered into a detailed agreement about the circumstances in which they would come to the United Kingdom for a trial period of at least 12 but no more than 15 months. The agreement was signed by both on 23 June 2020. Thereafter the couple and their two children came to the south of Scotland where they lived together. M found work in the area where they lived and F took a sabbatical from his post in New Zealand. By April 2021 the marriage had broken down and the parties separated although continued to live in the same house. On 2 June 2021 M initiated divorce proceedings in this court. She sought and obtained orders the following day in relation to the children including an interim interdict against their removal from the United Kingdom. Thereafter F raised these proceedings for return of the children to New Zealand. F contends that the children are being wrongfully retained in Scotland in breach of the agreement between the parties. He contends that in the particular circumstances of this case the children have not acquired habitual residence in Scotland and remained habitually resident in New Zealand at the time of their retention here. This would make the retention wrongful in terms of Article 3 of the Hague Convention. It is not disputed that the petitioner has rights of custody over the children under the applicable law of New Zealand and that he would continue to exercise

those rights in New Zealand but for any wrongful retention. M argues that the children had become habitually resident in Scotland by 3 June 2021 and so the Hague Convention is not engaged. It is accepted by the petitioner that he has the onus of proving that the Hague Convention is so engaged. Both parties have lodged a number of affidavits and productions addressing the nature and quality of the children's lives in New Zealand and in Scotland.

The applicable law

[3] 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 provides as follows:

> "The removal or the retention of a child is to be considered wrongful where -
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> 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
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> 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 one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith". The central issue for determination in this case relates to Madeline and Duncan's habitual residence as at 3 June 2021. There was no dispute between the parties on how the law in relation to habitual residence in the context of international child abduction has evolved in recent years.

[4] In *A* v *A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2014] AC 1 the UK Supreme Court examined the traditional view of habitual residence as that had been interpreted in England and Wales. Baroness Hale of Richmond, citing various 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 (and so there is no legal rule akin to that whereby a child automatically takes the domicile of his parents); 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; and that it is unlikely that such a test produces different results from that previously adopted in the English courts. Baroness Hale specifically expressed the view that the test adopted by the Court of Justice of the European Union in *Proceedings brought by A [2010] Fam 42* was preferable to that earlier adopted by the English courts insofar as they had focused on the purposes and intentions of the parents rather than the situation of the child. Accordingly, any test that preferred the purposes and intentions of the parents should be abandoned in deciding the habitual residence of a child. Further, the social and family environment of an infant or young child is shared with those (whether parents or others) on whom he is dependent. In any case in which habitual residence is at issue it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. Finally the court noted that it was possible that a child may have no country of habitual residence at a

particular point in time. The possibility of a child having no habitual residence at all during a transitional period was said to be "conceivable in exceptional cases".

[5] 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 … 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.
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> 46 ……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."

An example of a Scottish case heard by the UK Supreme Court on this issue since the focus changed following the case of *A v A supra,* can be found in *In re R (Children)* [2016] AC 76. There Lord Reed emphasised that it was the stability of the residence that was important, not whether it is of a permanent character. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely (paragraph 16).

[6] A more recent exposition of the law of habitual residence in so far as it relates to child abduction under the Hague Convention is provided by Moylan LJ in the case of *B (A*

child) (Abduction: Habitual Residence) [2020] EWCA Civ 1187. In that case a young child was born in Australia but moved to France with her parents, with the parents' intention being that the move would be permanent. The mother subsequently retained the child in England and Wales. An issue arose about where the child was habitually resident. The Court of Appeal overturned the first instance judge's decision that the child had remained habitually resident in Australia. Detailed reference is made in the judgment of Lord Justice Moylan to the authorities referred to above on habitual residence, including his own recent decision in *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105,*("M(Children)").* In that case his Lordship had reiterated that the core guidance remained that set out in *A v A* and that the "see-saw" analogy could not replace the analysis of the child's situation in, and connections with, the state or states in which he is said to be habitually resident. Lady Hale's reference in *A v A* (at paragraph 44) to it not being impossible for habitual residence to change in a single day depending on the circumstances was again relied on. The parents in *M (Children)* had signed a letter of intent that their children's home would remain in Germany notwithstanding a move to England.

[7] An issue of "repudiatory retention" or "anticipatory breach" also arises in this case in that it was before the expiry of the agreed period within the United Kingdom that M made clear that she wished to retain the children here. The decision of the Supreme Court in *In the matter of C (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2018] UKSC 8 is accordingly also in point. There the court held that it was possible for a wrongful retention to arise before the expiry of an agreed period of absence from the state of habitual residence. This would normally require both a subjective intention on the part of the parent retaining the children not to return them or not to honour some other fundamental part of the arrangement together with some objectively identifiable act or

statement or both which manifested the denial of the custody rights of the other parent. As Lord Hughes put it (at paragraph 44):

> "The plain purpose of the Abduction Convention is to prevent the travelling parent from pre-empting the left behind parent. The travelling parent who repudiates the temporary nature of the stay and sets about making it indefinite, often putting down the child's roots in the destination state with a view to making it impossible to move him home, is engaging in precisely such an act of pre-emption."

The parties' agreement

[8] The agreement signed by the parties before they left New Zealand is produced as number 7/1 in these proceedings. It runs to five pages and begins with some background details. The operative part has 13 clauses. For the purposes of my determination, the following clauses are of note:

> "1. The children were born in New Zealand. New Zealand is the place of habitual residence for the children. The period of time that the children remain in the United Kingdom during the trial period shall not affect their place of habitual residence.
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> ….
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> 3. The children and the parties intend to return to the United Kingdom for a period of up to 15 months from August 2020. It is agreed that they will stay in the United Kingdom for at least one year and will extend the time up to 15 months if [M and F] are able to ensure they can return to their jobs in New Zealand after the expiry of 15 months.
>
> 4. The period that they reside in the United Kingdom together pursuant to clause 3 will be referred to throughout this agreement as the "trial period". The reason for their decision to return to the United Kingdom for the trial period is in order to be closer to family and friends, for the children to further develop family connections with grandparents and other extended family members and to experience life in the United Kingdom and access potential work opportunities.
>
> 5. The parties may, by agreement, extend the trial period in clause 3 for a period of another 12 months or longer. The decision as to whether the trial period should be extended shall be made by both parties taking into account the schooling needs of the children, what is in the children's best interests, and the work opportunities for both parties in New Zealand and the United Kingdom.

6. The parties will use their best endeavours, and work together in good faith to determine before the expiry of the trial period whether they will remain in the United Kingdom or whether they will return to New Zealand as a family …

7. Any agreement to remain in the United Kingdom with the children will be a joint agreement between both parties. Both [M and F] will make that decision based upon their genuine belief of what is in the best interests of the children, themselves and their relationship and the family generally. They undertake at all times to give sufficient regard and respect to each other's views.

8. In the event that there is not mutual agreement to remain in the United Kingdom, then the parties agree that they will relocate back to New Zealand immediately after the expiry of the trial period. In the event that the parties have decided to separate then one party may take the children back to New Zealand before the expiry of the trial period. Should this occur then the party that remains in the United Kingdom will have contact with the children on an interim basis …

9. The following provisions shall apply in the case of a relocation back to New Zealand that is not the choice of both parties …

> 9.2 Neither party shall withhold the children in the United Kingdom. Each party will undertake such steps as are necessary to ensure that the children return to their habitual place of residence, being New Zealand, upon the expiry of the trial period in the event that there is no agreement to remain in the United Kingdom.
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> 9.3 Either party is entitled, upon return to New Zealand, or after the children return with one of the parents to New Zealand, to initiate court proceedings in order to relocate the children to the United Kingdom.
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> 9.4 In the event that one party retains the children in the United Kingdom, preventing them from returning to New Zealand when they are obliged to return in accordance with this agreement, then each party recognises that the provisions of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention") will apply. The retaining party shall meet the costs of such proceedings and the costs of return following the resolution of those proceedings.

10. By agreeing to the trial period in the United Kingdom for a minimum of one year, it is expressly recognised that there is not "consent" to the children residing and settling in the United Kingdom permanently. Neither party shall, on the basis of the trial period alone, rely upon a defence of consent or acquiescence to the change in residence of the children.

11. Further, that the children will not be considered to have been "removed or retained" to the United Kingdom as that term is used in Article 12 of the Convention

> and such relevant domestic legislation as shall apply until such time as the children are retained contrary to the provisions of this agreement.
>
> …
> 13. The parties recognise that this agreement is a legally binding agreement that will be used, if required, in court proceedings in the event that any provision of this agreement is breached."

Evidence of the parties' intentions

[9] In addition to the agreement, some insight into the parties' intentions can be gleaned from the affidavits lodged by their respective solicitors in New Zealand. DV, the solicitor advising F, has sworn two affidavits for these proceedings numbers 10 and 48 of process. The first of these confirms F's rights of custody under New Zealand law and as already indicated that is not contentious. His second affidavit confirms that he first met with F in August 2019 to discuss M's proposal that the couple relocate to the United Kingdom. Advice was tendered to F about the Hague Convention and the difficulty of moving back to New Zealand if the children had acquired habitual residence in the United Kingdom. Discussions took place about an agreement that would clearly set out what the plan was in order to mitigate the risk of the children becoming habitually resident in the UK. The context was that the future of the parties' marriage was uncertain at that time. DV states that his instructions from F were clear, which were that the parties intended to remain permanently in New Zealand. They had bought a house and developed careers there and all four family members had New Zealand citizenship. The impetus to return to the UK was very much M's and this was a change from what the couple had originally agreed. DV confirms that M's solicitor actively sought changes to the agreement including an extension of the trial period. F agreed to this on two conditions; (i) that the habitual residence of the children would not change and (ii) if the relationship ended then he could return to

New Zealand with the children. In his dealings with M's lawyer, DV had no reason to doubt whether M intended to honour the agreement. He was clear that his own client had signed it in good faith. DV points to the active negotiations between lawyers on their client's instructions as illustrative of good faith. There had been a roundtable meeting as well as correspondence and M's lawyer had indicated that M wished to reach a fair agreement for a trial period in the United Kingdom.

[10] The solicitor representing M in New Zealand, RD, was also instructed from August 2019. Contrary to F's instructions to his solicitor, M told her solicitor that it had never been the couple's plan to remain permanently in New Zealand but simply to experience life in another country for a few years. M told her lawyer that she was finding it difficult to cope and badly needed the support of her family and friends in the UK. There was also a desire to allow the children to develop their relationship with both sets of grandparents and other relatives in the UK. RD explains that in late October 2019 M sent her a draft agreement from F's lawyer and this was discussed by email and in person. RD suggested a number of changes to the draft agreement including an extension of time to the initial period in the UK and an assessment of the children's best interests prior to any decision to return to New Zealand being taken. M made clear to her solicitor that F would not allow any trip to the UK to go ahead without an agreement being signed and she was desperate for the planned trip to go ahead. RD was apparently concerned throughout that M was under extreme pressure to agree to her husband's demands. She seems to have formed the view that M felt that she had no choice but to sign something that F would agree to.

Evidence on the nature and quality of the children's residence in New Zealand

[11] There was no real dispute that the children had enjoyed a settled existence in New Zealand from their respective births until their departure for Scotland in 2020. A number of affidavits were lodged in support of the petitioner's position on this and I have considered them. In summary, the children appeared to be well adjusted and happy while in New Zealand. Madeline was already attending primary school there. In the affidavit of Dr EM (number 30 of process) a friend of the petitioner who moved to New Zealand in 2016, some details are given of the family's living arrangements and social interaction. Similarly, a doctor RC swore an affidavit number 28 of process. He was another friend of the petitioner and also lives in New Zealand albeit in a different area from the parties. He had visited the couple's home and described it in positive terms as being close to the beach, the playgrounds and within walking distance of the relevant schools. The petitioner's brother, AT had sworn an affidavit number 26 of process. He and his wife had visited the parties in New Zealand and spoke to both the living arrangements there and the supportive network of friends that the couple enjoyed.

[12] The petitioner has lodged a number of photographs illustrating the children's life and activities in New Zealand. These photographs (numbers 6/12-6/21 of process) include a family photograph of the petitioner's citizenship ceremony in New Zealand and of Madeline's first day at primary school. There are also photographs of Duncan on his bike and a family photograph at the zoo. A "welcome back" booklet from Duncan's nursery school is also lodged at number 6/23 of process. In essence, there appears to have been nothing out of the ordinary in these children's lives in New Zealand prior to their departure to Scotland. The agreement entered into by the parties narrating their habitual residence in that country in 2020 is consistent with the various affidavits and adminicals of evidence

provided by the petitioner. Madeline and Duncan had known no other residence during their relatively short lives and although they had enjoyed visits with their UK family on both sides, I have no hesitation in accepting that their residence in New Zealand as at June 2020 had a stable and well settled character. Their roots were firmly in that country.

Evidence on the nature and quality of the children's residence in the UK

[13] No concession was made on the part of F that, but for an application of the terms of the agreement, the children would in fact now be habitually resident in Scotland. While it was acknowledged that they had achieved a level of integration in life here that one would expect in terms of attending school and nursery, the petitioner's emphasis was on the agreed temporary or trial nature of the period of time they had spent here. The respondent produced a number of affidavits and documents in support of her contention that the children had become habitually resident in this jurisdiction. They had settled in a comfortable home in the south of Scotland and had attended school (Madeline) and nursery (Duncan) respectively. Inevitably, their physical attendance at school had been disrupted to some extent by the pandemic. There were about nine weeks of home schooling during the relevant academic year. The children had made some friends and, notwithstanding the restrictions imposed due to Covid 19, there was some affidavit evidence to support that they had socialised with those friends outside school and nursery. Both children appeared to be making good progress in their education. An end of session school report for Madeline dated June 2021 (number 7/10 of process) confirmed her enthusiasm for learning and expressed the view that she had made great progress across all areas of school life. Duncan's end of session summary of the same date (number 7/9 of process) also confirms that he has settled into the routines in nursery and had interacted well with his peers and

friendship group. Affidavits were also lodged from the school's head teacher (Mrs C, affidavit number 23 of process) and two class teachers (Mrs S number 34 of process and Mrs ML number 33 of process) which confirm the sort of integration into school life one would expect. Mrs ML in particular talks of Madeline being more academically advanced than her peers and happy both to read independently but also to play with a group of girls in the classroom and outside. She states that "[Madeline] … was pretty well adapted and well settled by the end of the school year". Mrs S, Duncan's nursery teacher, speaks of Duncan as being part of a "boy group" who enjoy playing "superheroes, rough and tumble play, bikes, scooters and outside play". Duncan's cousin is one of five or so boys within that group. Mrs S describes Duncan as a confident boy who is well settled with plenty of friends.

[14] Further details of the types of hobbies and extra-curricular activities that the children enjoy are provided by the respondent in her very detailed affidavit at paragraphs 41-48. Both children are registered with a local medical practice in Scotland as they had been in New Zealand. There is a large extended family network for the children in the UK. The respondent's cousin her husband and children live in the same street as the parties. That cousin, KH, has sworn an affidavit number 16 of process in which she describes a close relationship with the respondent and the children. It is her son who is in the same nursery class as Duncan. The children's maternal grandparents, Dr MK and Dr DK have provided affidavits (numbers 19 and 20 of process respectively). They live in the west of Scotland and express the view that Madeline and Duncan have integrated really well in Scotland. They are both supportive of the respondent's position and would wish her and the children to be able to stay in Scotland. They have managed as many visits as have been practicable during the period of the restrictions required by the COVID-19 pandemic. Additionally, there is

supporting evidence from other family members and friends who speak to a secure and stable base for the children in Scotland.

[15] The respondent herself is engaged in the work for which she is professionally qualified in Scotland and there are clearly no issues about her ability to continue to reside here in the long term. She had expressed the desire to the petitioner over a period of some years to return to the UK to live in Scotland. All of the evidence and associated material produced by the respondent supports the view that the children's residence in Scotland since July 2020 has had a stable and settled character. They had been living in the south of Scotland in the same home as both of their parents for almost a year before the issue of alleged wrongful retention arose.

Discussion

[16] The starting point for this discussion is the situation of the family in June 2020 when the agreement was entered into. Both parents gave affidavit evidence of some of the difficulties that had arisen in the marriage. The parties had attended mediation prior to entering into the agreement. For his part F states that he felt pushed into agreeing to a trial period of residence in Scotland. For her part, M alleges that she felt trapped and desperate after her husband had dismissed all of her arguments in favour of her returning to Scotland as irrational. I have not heard oral evidence in this case, consistent with the summary nature of the proceedings. It is difficult to determine factual disputes on affidavits of the parties alone, where these contain competing assertions - *D v D* 2002 SC 33, at para 8. In this case, however, there are a number of third party affidavits, including from the parties' solicitors. In any event, it is not necessary to reach any firm conclusions about the parties' respective positions on the matter of why they entered into the agreement number 7/1 of process.

Neither party disputes that it is an *ex facie* valid agreement made following independent legal advice on both sides and after certain adjustments and amendments to it were made on the basis of that advice. The respondent makes certain allegations about her husband's behaviour towards her and the impact of that on her, but she does not suggest that she lacked capacity to enter into the agreement. Her affidavit evidence suggests that the alternative to refusing to sign the agreement would have been to remain in New Zealand, which she regarded as intolerable. However, the affidavit of her solicitor RD, does not support the idea that an application to the New Zealand courts to relocate to Scotland would have had no real prospect of success. It is silent on that issue, but RD does state in terms (at para 11 of her affidavit) that she advised M at various times that she did not have to sign any agreement. I accept the submission made on behalf of the petitioner that this agreement is, on the face of it, a detailed contract entered into by two highly educated professional people with the express purpose of regulating the care arrangements for their children during a temporary or trial period in Scotland. The couple took care also to set out what would occur in alternative scenarios at the end of the trial period, including on separation.

[17] The parties now disagree on the interpretation of certain clauses of the agreement. For the petitioner, Mr McAlpine relied on clauses 1, 8, 9 and 13 in support of the contention that the period of residence of one year in Scotland would not affect the children's habitual residence. He submitted that in the absence of an agreement between the parties to remain in the UK thereafter the children would be returned to New Zealand with whichever party wanted to return there. Clauses 9.2 and 9.4 in particular made clear that the parties' intention was that neither of them should be able to keep the children in the United Kingdom without the consent of the other at the expiry of the trial period. The parties had clearly been advised on the provisions of the Hague Convention and clause 9.4 had to be

understood in that context. Clause 13 was an explicit recognition that the parties would be bound by the terms of the agreement in the event of a breach of it. Mr Hayhow for the respondent contended that the terms of the agreement should not be interpreted in the way suggested by F. He submitted that clause 1 provided only that the period of time in Scotland would not affect the children's place of habitual residence, leaving open that other factors such as the nature and quality of their residence here might well do so. Secondly, the agreement acknowledged that the trial period might extend beyond a year in the circumstances narrated in clause 3. Mr Hayhow submitted further that clause 8 should be interpreted as mandating an immediate return back to New Zealand after the expiry of the trial period only if the parties remained together and agreed not to stay here. The second part of clause 8 dealt with the situation in which the parties had decided to separate. It provided that in those circumstances one party "may" take the children back to New Zealand but that this did not support the argument that either of them could unilaterally remove the children from the UK. Further, Mr Hayhow contended that the parties had not reached the stage where the provisions of clause 9 of the agreement were operative. He contended the situation was not one where there was a relocation back to New Zealand that was not the choice of both parties and that there had not yet been any breach of the agreement. The parties were agreed that any relevant extraneous material could be taken into account to aid interpretation of the agreement.

[18] I have decided that the interpretation of the agreement proposed by the petitioner is to be preferred. The agreement was negotiated against a background of one party, M, being extremely keen to return to Scotland. She had tried to persuade her husband to agree to that and he had been resisting. The agreement represented, in effect, a compromise, where the parties would come to this country only for a trial period. Given the vast distance involved

and the related impracticability of returning for a much shorter period, the selection of a 12-15 month period is unsurprising. The notion that being in the UK was intended not to affect the children's place of habitual residence as being New Zealand is supported not just by clause 1 but also clause 9.2, which talks of the children returning to New Zealand as their place of habitual residence even at the end of the agreed period. Clause 10 also confirms that there is to be no deemed consent or acquiescence to a change in the residence of the children. Further, as the marriage was in some difficulties, it is understandable that the couple should try to anticipate what might happen if they separated before the expiry of the trial period. In my view, the terms of clause 8 are clear enough and to the effect that once the parties agreed that they should separate either of them would be entitled to take the children back to New Zealand before the expiry of the trial period. The provisions of clause 9 would then come into play in the absence of a mutual agreement to relocate back to New Zealand. Clause 9.2 is very clear in its terms that neither party shall withhold the children in the United Kingdom. In other words the parties were agreeing in advance that the default position, in the absence of agreement, was that the children would be returned to New Zealand. There was a clear and explicit recognition of the type of arguments that can arise where parties agree to a temporary relocation. Both parties had information about the Hague Convention and entered into the agreement knowing that it would be used in proceedings of this sort and indeed in the type of proceedings the respondent raised in this court on 2 June 2021. The respondent denies in her affidavit (paragraph 89) that she signed the agreement in bad faith and her evidence is (paragraph 87) that F "… was not willing to return to Scotland at all and only for a brief period of time if there was a legal agreement". These statements fortify my view that the parties' joint intention at the time of a return to Scotland in 2020 was that they were coming to this country for a trial period as encapsulated

in a negotiated agreement. The terms of their agreement included that neither of them should have the ability to retain the children in the UK without the consent of the other.

[19] The determination of the question of the children's habitual residence as at 3 June 2021 has as its starting point, then, a clearly and formally stated joint parental intention. On that date, as indicated, M secured interim orders in divorce proceedings in this jurisdiction. She sought and obtained an order before service of the action preventing the removal of the children from the jurisdiction. She gave the clearest signal that she did not intend to honour the agreement entered into the previous year. Accordingly, if the children were still habitually resident in New Zealand as at that date an order for their return to that country will be mandatory and must be ordered. The question I must answer, however, is whether, as a matter of fact, Madeline and Duncan had, as at 3 June 2021, achieved a sufficient degree of integration into a social and family environment in Scotland such that there residence here was habitual.

[20] I have summarised the evidence about Madeline and Duncan's integration in New Zealand which is the "old state" for the purposes of the analysis. Indisputably the children's integration there ran very deeply. On the other hand, the move to Scotland was pre planned and carefully executed and for children of that age, a change in their place of residence for a year would always have amounted to a considerable alteration of the component parts of their world. The fact that they came to Scotland with both parties with whom they have continued to live even during the present proceedings facilitated a very smooth transition for them from life in New Zealand to life in Scotland. Of course, a number of links with New Zealand have been retained. The parties continue to own a house there that is currently rented out but could be available to them or either of them effectively immediately on a return. F has two cousins who live in New Zealand and retains a network

of friends there. He remains on sabbatical from his employment in New Zealand and confirms in his supplementary affidavit (at paragraph 7) that his employers are content to extend further his leave without pay. However, most of these continuing links are adult centred. From a child focused perspective, while the petitioner speaks of Madeline and Duncan missing their friends in New Zealand and the life there, that is balanced by the abundance of material lodged by the respondent confirming that they are also enjoying a social life in this country in a manner suitable to their respective ages. As the children are too young to have had any real notion of what was behind the move to Scotland, the formal retention of property and the ability to work in New Zealand is of less importance than the circumstances of their lives here. It was agreed that they are not old enough or mature enough to express a view in these proceedings. One of the unusual features of this case is that because the respondent has been in employment throughout the time the parties have been in Scotland and the petitioner is on sabbatical, he has been primarily involved in the routine day to day care of the children. That is unusual in the sense that in proceedings of this sort the "left behind parent" is typically still in the country in which it is claimed there is habitual residence. So both parties have returned to their initial home state and the children have retained daily contact with both parents.

[21] The parties themselves have settled in Scotland, albeit to different degrees. The respondent has returned to the country to which she has wanted to relocate back for many years and is in no doubt that she wishes to remain here where she has valuable work and extended family. The petitioner, who was always keen to remain in New Zealand and for the children to be brought up there, is ready to return to that jurisdiction as had been anticipated at the time of the agreement. That continuing intention does not, however, alter the fact that he had too had been living a stable existence in this country for a significant

period prior to June 2021. The parties' separation will have been upsetting for the adults, but there is no evidence that the children were significantly unsettled by it or that it caused them anxiety. Given the relatively young ages of these children, it is difficult to separate their integration from that of their parents. As Scotland was not in any sense a new or foreign country to either of the parties, there is no sense in which this family's residence here could be seen as a transitory or unsettled presence in a foreign land. In summary, from the children's perspective, there has been nothing remarkable about their lives in Scotland prior to June 2021. They have shared a home with both parents all year, attended school, visited extended family and socialised with friends.

[22] Returning to the starting point of the clearly stated parental intention, I consider that it is a relevant and in this case quite important background factor, but one that is, in the particular circumstances, overwhelmingly outweighed by the undisputed evidence of the children's unremarkably stable routine and existence in Scotland for a lengthy period. The parties cannot contract out of the Hague Convention to avoid their children becoming habitually resident in another state. In *M (Children)*, cited above, the parties signed a letter of intent that their children's home would remain in Germany notwithstanding a planned move to England for about 12 months. The Court of Appeal overturned the first instance decision that the children had remained habitually resident in Germany during that period, reiterating that the key question was whether the children were, as a matter of fact, habitually resident in England at the time of the alleged wrongful retention. The parties' stated intention on Germany remaining their home did not prevail. Similarly, in the case of *In Re R,* cited above, the Scottish mother had moved the children from France to Scotland with the agreement of their French father. The intention was that she would remain here for one year. Four months after she and the children arrived, she indicated an intention to

remain in Scotland. The Inner House allowed a reclaiming motion (appeal) against the Lord Ordinary's decision because he had treated the shared parental intention as an "essential element" in the decision on habitual residence. The father's appeal to the UK Supreme Court failed, Lord Reed stating in terms that there was no requirement that there should be an intention on the part of one or both parents to reside in a country permanently or indefinitely before habitual residence could be acquired there by a child or children. In my view, the converse proposition applies equally, namely that a stated joint intention of parents that their children will not acquire a new habitual residence cannot prevent that occurring.

[23] I conclude that, while the intentions of the parties in June 2020 were to come to Scotland only for a trial period without altering the children's habitual residence, as a matter of fact that habitual residence had changed by 3 June 2021. The outcome may seem counterintuitive at first. Formal agreements entered into in good faith by two adults of sound mind should not be readily ignored or set aside. However, while the unusual feature of this case is the detail of the agreement and its formality, the principle remains the same. It accords with the policy of the Convention that children are not parcels of property whose future can be determined solely by the contracts or actions of adults. An agreement that a child's habitual residence will not change cannot be enforced if, as a matter of fact, that child's residence is found to have changed. I acknowledge that the development of the law on habitual residence as it applies to Hague Convention cases appears to have resulted in parents now being effectively unable to enter into a directly enforceable agreement on the temporary relocation of their children. Such agreements remain relevant as a factor, but will not be adhered to where, as here, the necessary social and family integration of the children in the "new" country is shown to be of a well settled character. It may be that different

views exist in other Hague Convention jurisdictions about the relative significance of a formal agreement entered into with the benefit of legal advice such as that entered into by these parties. In this jurisdiction, however, it is clear that, no matter how formal the agreement, the analysis of the circumstances of the children at the material time must be the primary focus of the discussion. Of course each case is sufficiently fact sensitive that no absolute rules have been laid down. Had the children's settlement in Scotland been shallower, it may be that the nature and terms of the agreement would have had greater weight. On the current understanding of habitual residence as it applies to the Hague Convention, however, the agreement could never have been determinative.

Decision

[24] For the reasons given above, I conclude that the children had become habitually resident in Scotland by 3 June 2021 and so the petitioner has not established that the Hague Convention is engaged. I will sustain the plea in law for the respondent and dismiss the petition. All questions of expenses will be reserved meantime.