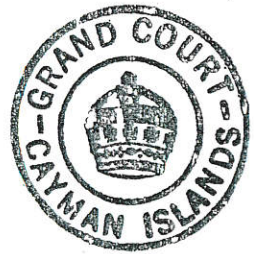


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1 IN CHAMBERS  
2 THE GRAND COURT OF THE CAYMAN ISLANDS - civil.

3  
4 CAUSE NO: 190 OF 2005

5  
6 BETWEEN: IRENE COX PLAINTIFF/RESPONDENT

7  
8 AND: ALFRED COX DEFENDANT/APPLICANT

9  
10 CORAM: RAMSAY-HALE J.

11  
12 **Appearances:**  
13 Ms. Della Campbell of Della Campbell & Associates for the Respondent  
14 Mrs. Sheridan Brooks of Brooks & Brooks for the Applicant

15  
16 **Dates of hearing:** 21<sup>st</sup> February, 2006



17  
18  
19  
20 **RULING**

21  
22 This is a matter concerning the custody of a minor child, resident in the Cayman Islands,  
23 who is the subject of orders for custody and residence made by a competent court in  
24 Harris County, Texas in the United States, which exercised original jurisdiction in the  
25 context of ancillaries to divorce proceedings. The Applicant father in these proceedings  
26 asks this Court to recognise the orders of that Court and to enforce them.

27  
28 In their submissions, Counsel identify the issue for resolution before me to be whether  
29 the Texas court is the proper court to vary orders relating to the child and which Court  
30 has jurisdiction over the said minor child.

31  
32 There is no question that the Grand Court has the jurisdiction to make orders for the  
33 custody of the child. The Court is *parens patriae* of all children who are ordinarily  
34 resident within its jurisdiction. The child has been resident here since November, 2004

1 when his mother and step-father set-up household in Grand Cayman and enrolled the  
2 child in school. He has remained here ever since, apart from visits to his father in the  
3 United States.

4  
5 The real question is not whether this Court has jurisdiction, but whether it should exercise  
6 its jurisdiction or disclaim it, given that issues pertaining to custody of the child have  
7 already been heard and determined by a competent court.

8 I briefly set out the chronology of custody proceedings taken in this and in the Texas  
9 Court:

10

11 In 2002, a divorce decree was made in which the custody of the child subject of these  
12 proceedings was granted to both parents with the care and control to the mother who,  
13 importantly, had the right to establish the child's primary residence. The father had  
14 certain rights of access, which were stipulated therein.

15

16 In October, 2004, the mother came to live in the Cayman Islands and the child was  
17 brought to the jurisdiction in or around November of that year.

18 Once notified that she had removed the child from Harris County, the father took  
19 immediate steps to seek relief from the Texas Court and applied through his attorney for  
20 a "Motion to Restrict Residence."

21

22 The matter was fixed for hearing in Texas in March, 2005. The hearing was adjourned to  
23 June on the application of the mother.

1 On April 22<sup>nd</sup>, 2005, the mother filed her Texas decree with the Court and asked that the  
2 Order be “mirrored” in the Grand Court, save that the reference to the child’s primary  
3 residence reflect that he now lived in the Cayman Islands.

4  
5 On June 6<sup>th</sup>, the father’s Motion to Restrict Residence was heard and granted. That Court  
6 ordered that the child’s residence be restricted to Harris County and that the child be  
7 returned to the United States on the 1st August. All other particulars of the custody order  
8 remained as before. The mother’s applications to that Court to decline jurisdiction was  
9 dismissed.

10  
11 On the July 27<sup>th</sup>, the mother filed an *ex parte* summons for custody in the Grand Court  
12 and was awarded interim custody.

13  
14 The father subsequently obtained an injunction and temporary custody in an order that  
15 required the mother to immediately deliver the child into his care.

16  
17 A Summons was filed in this Court by the mother seeking final orders for custody. The  
18 matter was adjourned to the 23<sup>rd</sup> day of February for the issue of jurisdiction to be  
19 determined.

20  
21 Although the application by the father is not ostensibly made under the Hague  
22 Convention for the return of the child, I must refer to it as both Counsel in their  
23 submissions used terms that evoke, if not invoke, it. Ms. Brooks used the term

1 'kidnapping' in her skeleton argument and raises for the Court's consideration the issue  
2 of whether the mother had taken the child out of the United States wrongfully, in breach  
3 of an implied restriction against her doing so.

4  
5 The Convention is designed to restore children to their habitual place of residence and to  
6 the care of those who have the 'rights of custody'. Where a child is wrongfully removed  
7 from the State of habitual residence or wrongfully retained in another State, the Courts of  
8 that State have continuing jurisdiction over matters concerning the custody of the child.

9 The Convention therefore provides for local Courts to order the peremptory return of  
10 children to their State of habitual residence *without any inquiry into the merits of any*  
11 *custody issue*. In other words, without exercising jurisdiction. This is the only departure  
12 from the common law which provides for the recognition of the decisions of foreign  
13 Courts as a matter of comity. At common law, the Court may order the peremptory return  
14 of a child but only if satisfied that it is in *the best interests of the child to do so*.

15  
16 The first issue, to my mind, is whether the child was wrongfully removed or retained in  
17 Convention terms.

18 Article 3 states:

19 The removal or retention of a child is to be considered wrongful where:-

- 20 (a) it is in breach of the rights of custody attributed to a person ...either jointly or  
21 alone, under the law of the State in which the child was habitually resident  
22 immediately before the removal or retention..."

1 These protected 'rights of custody' are not defined in the Convention, but they include  
2 the rights relating to the care of the person of the child and the right to determine the  
3 child's place of residence.<sup>1</sup>

4  
5 In determining the issue of whether the father had Convention custody rights which were  
6 breached when the mother removed the child from the United States, I turn to a  
7 consideration of the original Orders dealing with the care and custody of the child which  
8 were made in proceedings ancillary to the parties' divorce in 2002. That Order granted  
9 the parties joint custody but gave to the mother the care and control of the child and the  
10 right to establish the child's residence, while the father enjoyed what we would call rights  
11 of access. There was only one restriction on the mother's right to determine the child's  
12 residence expressed in the Agreed Final Decree of divorce and I reproduce the relevant  
13 section below:

14 'The residence of the minor children is and their domicile is restricted to the  
15 school district in which each child is enrolled on the date of entry of this  
16 decree, and remains so restricted so long as child support is due and payable  
17 in relation to Adam Cox, thereafter all such geographic restrictions are  
18 removed."  
19

20 At the time of her coming to Cayman, that geographic restriction was no longer in place.  
21 Counsel for the father has invited me to say that there was an implied restriction on her  
22 removing the child from the United States. No expert evidence has been led to show that  
23 under the law of Texas such a restriction is to be implied and I decline to do so in the  
24 absence of any express provision. Relying on the clear and unambiguous words used, I  
25 find that her right to establish the child's residence was unrestricted. Further, the

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<sup>1</sup> Article 5

1 agreement did not give the father the right to refuse or consent to the removal of the child  
2 by the mother, a provision which has been held in many Convention cases to confer  
3 enforceable custody rights on a father<sup>2</sup>. In the circumstances, I am satisfied that under the  
4 Convention the removal was not wrongful.

5

6 Nor has the mother's keeping the child here been rendered a wrongful retention in  
7 Convention terms by the later orders of the Texas Court restricting the child's residence  
8 and awarding the father temporary custody.

9

10 *Dicey*, in his text Conflict of Laws<sup>3</sup> examining the ambit of the Convention says,

11

12 "Where a child is removed by the only parent with custody rights, the  
13 removal cannot be wrongful. A *later* order of the foreign Court giving  
14 custody rights to the other parent cannot render the continued keeping of  
15 the child "wrongful retention."  
16

17 As Butler-Sloss LJ, observed, in Re G (A Minor) (Enforcement of Access Abroad),<sup>4</sup> the  
18 Convention did not envisage that Orders from a state, which was not the state of habitual  
19 residence, would continue to govern the affairs of a child living permanently elsewhere.

20

21 I conclude then that the child's removal was not wrongful and the Convention does not  
22 apply.

23

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<sup>2</sup> Re P(A minor) cf Thompson v Thompson : "A bare right of veto would not be a 'custody right' in Convention terms as it merely protects a person's rights of access.

<sup>3</sup> Fourth Cumulative Supplement to the 11<sup>th</sup> Edition, 1991

<sup>4</sup> [1993] Fam 216

1 Counsel for the father, in fact, grounded her application, not on the Convention, but on  
2 the provisions of the Matrimonial Causes Law.

3 Section 7(1) of that Law states, *inter alia*, that

4 "The Court will recognise the decree or order of a foreign court with  
5 reference to the *marital status* of the parties..."  
6

7 And at 7(3),

8 "Nothing in this section shall be construed as requiring the recognition of  
9 any finding of fact made in the proceedings of the foreign court *other than*  
10 *the findings of fact upon which the jurisdiction was assumed, which latter*  
11 *findings shall be binding upon the Court.*  
12

13 Counsel submitted that, under that law, the Court is obliged to recognise the jurisdiction  
14 of the Texas Court, as the finding by *that* Court that it had the jurisdiction to make the  
15 order is binding on this Court, per section 7(3), and that this Court should disclaim  
16 jurisdiction and hold that the Texas Court is the proper forum to vary orders concerning  
17 the custody of the child.

18  
19 In my view, the section does not speak to custody orders but only to orders concerning  
20 the *marital status* of the parties and is not relevant to the question in front of me.

21

22 The application is really under the inherent jurisdiction of the Court. As I noted before as  
23 a matter of comity, Courts will recognise and enforce the orders of a competent foreign  
24 Court. This Court has already recognised ('mirrored') the orders made by that Court on  
25 the application by mother.

26

1 But Counsel's application seeks the recognition and enforcement of the later Orders of  
2 the Texas Court. In making the orders in June of 2005, restricting the child to Harris  
3 County the Texas Court expressly found that it had continuing - and exclusive-  
4 jurisdiction on the ground that the child was still habitually resident there, some 8 months  
5 after the child had taken up residence in Cayman. The grant of temporary custody to  
6 father was made some 11 months after his removal from the United States,

7

8 In our law, the child falls to be regarded as habitually resident here. In Re J (A Minor)  
9 (Abduction),<sup>5</sup> it was held that a person who leaves a country with a settled intention not  
10 to return to it loses his habitual residence there immediately. It was also held that the  
11 habitual residence of a child in the lawful custody of one parent (and who on the facts of  
12 the case was in the actual care of that parent) was necessarily the same as that parent's.

13

14 This is the case here. Ms. Brooks' submission, citing the decision of the Court in Re  
15 P(G.E.) (An infant)<sup>6</sup>, that one parent cannot change the habitual residence of a child by  
16 his or her own wrongful act, does not assist as the original removal of the child was not,  
17 on the available evidence, wrongful.

18

19 In my view, the effect of an order for custody that permits the mother of a child to change  
20 the child's habitual residence must be to transfer jurisdiction to the court in the new place  
21 of residence. I must accept that, under the law of Texas, that Court had jurisdiction  
22 because the Court in its findings say so, and that finding has not been challenged on

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<sup>5</sup> [1990]3 WLR 492 (HL)

<sup>6</sup> [1965] Ch. D 573

1 appeal. However, I refuse to recognise the later orders as in our law the Court acted in  
2 excess of its jurisdiction.

3

4 Even if I am wrong, recognising the orders of a foreign Court would not oblige me in any  
5 event to enforce them. The principle to be applied to foreign custody orders was stated by  
6 Simonds LJ in McKee v McKee:<sup>7</sup>

7

8 “The order of a foreign Court...has not the force of a foreign judgment:  
9 comity demands, not its enforcement, but its grave consideration. This  
10 distinction, which has long been recognised in the Courts... rests on the  
11 peculiar character of the jurisdiction and on the fact that an order  
12 providing for the custody of an infant cannot in its nature be final.”  
13

14 In the instant case, even if I were obliged to recognise the later orders of the foreign  
15 Court, I would refuse to exercise my discretion to order that the child be produced and  
16 delivered into the custody of his father without hearing evidence that went to show that  
17 this was in the child’s best interests. I would, given the length of time that the child has  
18 been here, consider that it was not in his best interests to be returned without such an  
19 inquiry. He is well-settled and is currently enrolled in school He has potentially very  
20 strong ties to the community and there is evidence that he is very attached to his mother  
21 who has been the custodial parent since the parents divorced.

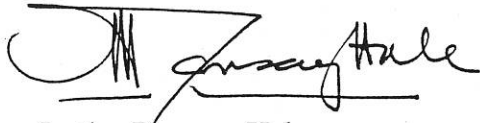
22

23 In respect of the issues before me, I am satisfied that this Court has jurisdiction and is the  
24 proper Court to vary orders with respect to the custody of the child as the child is  
25 habitually resident here. The evidence of how well the child’s needs have been met by the

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<sup>7</sup> [1951] A.C. 352 at p. 364.

1 health, leisure and educational opportunities here, the availability of resources to provide  
2 for his special needs, the value, if any, of the extended family relationships enjoyed in  
3 these Islands, the economic opportunities of his mother and step-father and other  
4 evidence relevant to such an inquiry is available here, as is the evidence of the child, if it  
5 is desired by the Court. Evidence concerning his care, his education and his personal  
6 relationships is no longer available in Texas.

7  
8   
9

10 Justice Ramsay-Hale  
11 Acting Judge of the Grand Court  
12 16<sup>th</sup> March 2006

