

SCOTLAND / JUDGMENT

# Williamson v. Simpson Or Williamson

## [2009] ScotSC 18 (06 March 2009)

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[2009] ScotSC 18, 2009 GWD 14-220, 2009 Fam LR 44 [ New search ] [ Help ] SHERIFFDOM OF TAYSIDE CENTRAL & FIFE AT KIRKCALDY ALEXANDER IAN WILLIAMSON -v- KAREN MAY SIMPSON or WILLIAMSON F150/08 Kirkcaldy, 6 March 2009 The Sheriff having resumed consideration of the cause FINDS IN FACT:

1. That the pursuer is Alexander Ian Williamson, (known as Ian) and lives currently in Dunfermline; and that the defender is Karen May Simpson or Williamson, currently living in Estepona, Spain.
2. That the parties, who had previously each been married, met in 1999, married on 13 March 2004; and that, coincidentally, each party has a daughter from the previous marriage called Lynsey.
3. That the pursuer was born in Scotland, of Scottish parents, and was educated in Scotland. His domicile of origin is Scottish.
4. That the pursuer's daughter, brother and mother all live in Scotland.
5. That the parties purchased a property in Spain in 2003, that this villa was used primarily as an income stream by rentals until February 2006, and that from that date the parties lived in it when in Spain.
6. That the pursuer owned a property at 1 Balnacraig, Crossford, Fife from about 1982, until it was sold in early 2006.
7. That the defender purchased a property at Provost Kay Park, Kirkcaldy, Fife in March 2000, and that the parties both resided in this property, either together or separately when in Scotland in 2006 to 2008.

8. That the pursuer has a business, which has its sole premises in Kirkcaldy, and until early 2009, had one employee, Thomas Richardson, and that the defender also had a business which shared these premises; that Mr Richardson delivered mail for both parties to Provost Kay Park, for their attention there.
9. That during 2006 and 2007, the parties spent time in both Spain and Scotland, but that neither party applied for a tarjeta de residencia, nor did the pursuer register with a doctor or dentist in Spain; that the parties had a car in Spain but not in Scotland. 10. That the pursuer used a mailing address in Scotland throughout the time of the marriage, and had banking and other financial matters based in the UK; that he used the property at Provost Kay Park for mailing and telephone purposes after February 2006. 11. That the pursuer applied for jobs during 2007 and 2008, which were based in UK or Ireland, and had the defender's support in doing so. 12. That the relationship between the parties began to deteriorate, and they separated in March 2008. 13. That from September 2007, the pursuer was in Scotland from 17 September to 14 October, 4 November to 8 November, 14 December to about 15 January 2008, 5 February to 9 March, and 28 March to 11 April, (the date of citation). For the intervening periods he was in Spain. 14. That the parties returned to Scotland from time to time during 2006 and 2007, including Christmas both years, for periods to cover the absence of Thomas Richardson, and for other occasions. 15. That neither party can speak more than basic Spanish, have no Spanish friends and have no income there, nor pay income tax there; that the pursuer pays UK income tax. 16. That the pursuer considered that he resided continuously in Scotland, but that the defender considered that from February 2006, both she and the pursuer had resided in Spain. 17. That the pursuer's centre of interests remained Scotland throughout the period of the marriage. FINDS IN FACT AND IN LAW That the pursuer was habitually resident in Scotland and has resided in Scotland for the six months immediately before this action was raised; that he has his domicile in Scotland; that he was resident within this Sheriffdom for the forty days prior to raising this action, and that therefore this court has jurisdiction. THEREFORE Repels the defender's first plea in law; Reserves meantime the question of expenses; Appoints parties to be heard on further procedure and assigns 18 March 2009, at 2pm, within the Sheriff Court House as a diet. (Signed) A G McCulloch NOTE : [1]. This is a dispute about jurisdiction. Simply put the pursuer has raised an action of divorce in the Sheriffdom of Tayside Central and Fife at Kirkcaldy, averring that this Court has jurisdiction. The defender, on the other hand, denies that this Court has jurisdiction, maintaining that both parties have been resident in, and domiciled in, Spain since 29 February 2006. She either has raised or intends to raise proceedings in Spain. Accordingly a preliminary proof took place to deal with the defender's first plea in law. [2]. It is surprising how little could be agreed by the parties regarding factual matters, and thus the determination of this issue is largely down to credibility. Some basic facts were agreed in a joint minute of admissions, no 23 of process. [3]. There is no doubt that parties were married in March 2004, that they thereafter lived together, that they had purchased a property in Spain in July 2003, that they separated in early 2008 and that the present action was raised on the 11th of April 2008. The Pursuer's evidence [4]. The pursuer

gave evidence along with four witnesses. He spoke of his education in Scotland, and thereafter he obtained a number of jobs. He eventually found himself in the sales side of the medical supplies business. Initially, he worked just in Scotland. then a series of promotions and job changes saw him gain responsibilities for UK, then for Europe, the Middle east and Africa. This involved considerable travel, with times away from his home, which he had set up in Crossford. He had purchased the house at 1 Balnacraig, Crossford in about 1981 jointly with his first wife, but on their parting, had purchased her share. He continued to live in Crossford with his daughter. He met the defender in 1999. At that time she was living with her brother along with her daughter, having recently separated from her then husband. In early 2000, when the pursuer was in Africa, the defender purchased a flat at Provost Kay Park, Kirkcaldy, and moved in with her daughter. It was the pursuer's evidence that once he and the defender were together, he moved in with her at Provost Kay Park, and that they used Crossford only as an office and store. Each of them had their own businesses; the pursuer having a nutritional foodstuffs operation, and the defender starting a business supplying promotional material and items. The pursuer's daughter did not get on with the defender, and remained living at Crossford. The defender had not wanted to live at Crossford, it having been home to the pursuer's first wife, and she felt uncomfortable there. They did spend occasional nights there, but would usually return to Kirkcaldy. Title to the Kirkcaldy flat was in the defender's name, but the pursuer indicated that it had been agreed that it would go into joint names. [5]. The parties had purchased a villa in Spain in 2003. According to the pursuer, the reason for this was for it ultimately to become their retirement home. The plan was to spend as much time there as possible, but initially it was to be rented out as well. Two long term rentals were agreed, one of 11 months and the other of 18 months. In addition there were a few short, holiday rents, the property being in a popular seaside resort near Marbella. By late 2005, they had decided that they no longer needed to rent the property out. Their finances had improved to the extent that a rental income was not necessary, and they wanted the freedom to come and go whenever the fancy took them. Additionally, the pursuer had sold the Crossford house. Furniture from it was either sold, or sent to Spain, or to the Kirkcaldy flat. Part of the mortgage on the villa was paid off. From late February 2006, the parties spent a considerable amount of time in Spain, although they returned frequently to Scotland. The pursuer said that they had not moved permanently to Spain, that he had not severed his ties with Scotland, and that there had been no discussion about a permanent move. He considered that the villa in Spain was a holiday home, but both he and the defender were able to continue their businesses from there as they were largely internet or telephone based. Before the Crossford house was sold, an industrial unit had been leased in Kirkcaldy, and an employee taken on to deal with the packing and dispatching of orders, the ordering and security of stock, and banking. That employee, Tom Richardson, worked for both businesses, but was paid by the pursuer's company. He would talk regularly to both parties, on the telephone and on Skype. The pursuer indicated that when Richardson was on holiday, he would cover for him, and would also return to Scotland regularly to supervise the business. He claimed that they had few friends in Spain, and of those none were Spanish. He spoke little Spanish, just enough to get by in shops and

restaurants. Their circle of friends in Spain was the "ex-pat" community, mostly from England. [6]. The pursuer said that he paid tax in UK, not Spain. He had not registered with a doctor or dentist there, retaining them in Scotland. He had not registered with the authorities in Spain, nor sought the "tarjeta de residencia" (residence permit) which was required, before March 2007, for those EU persons wishing to live permanently in Spain. Since that date, only registration at the "Oficina de Extranjeros" (Foreigners' Office) is required, but he had not so registered. Neither had he sought a "Numero de Identification de Extranjero" (NIE) required of all foreigners. According to information produced (5/16) anyone with financial, professional or social interests in Spain needs such a number, which is essential when buying a property, opening a bank account, starting a business, or receiving benefits. He had not registered to vote in Spain. His main bank account remained with RBS, Dunfermline. The accountants for both parties were based in Scotland. [7]. The pursuer had applied for a number of jobs during 2006 - 2008. In particular he sought, unsuccessfully, a position as a director of a UK medical company, and for a European position (to be Ireland, UK, France, or Switzerland) with Welch Allen Ltd. This company was based in Navan, Ireland. The defender was supportive of these applications, as evidenced by her emails 5/31, 5/32 and 5/34 of process. The pursuer's contact details were given as the Kirkcaldy flat. He maintained that he would not even get an interview or be considered for this position if he was living full time in Spain. So far as he was concerned he was resident in Scotland, but spent some time in Spain. When in Scotland, he stayed in the Kirkcaldy flat. [8]. Looking specifically at the 6 months prior to the raising of the action, 5/36 is a schedule of the pursuer's whereabouts. He spent 105 days in Scotland and 93 in Spain between 17 September 2007 and 2 April 2008, when the Initial writ was warranted. Thus for the relevant period for one of the requirements for jurisdiction, the 6 month period 1 October to 1 April, he was 91 days in Scotland and 93 days in Spain. For another (possible) requirement, namely 40 days in this Sheriffdom prior to raising the action, being 21 February to 1 April, he was 21 in Scotland and 19 in Spain. Thereafter he has been almost entirely in Scotland. It was a matter of agreement that from at least February 2006, the pursuer had his address for banking, postal, and other matters as the Kirkcaldy flat. [9]. The pursuer was supported by his daughter, who spoke of the defender not wanting to live at Crossford, and of the pursuer living with the pursuer in Kirkcaldy after, and often before, the marriage in 2004. She was aware of the purchase of the Spanish villa, which she had thought of as a holiday home. They went out there as often as they could, often at short notice. She was sure the pursuer had not moved permanently to Spain. There was no farewell party; the business continued to trade from Kirkcaldy; they still had the flat there; and Scotland was their base, with friends family and business there. [10]. Other witnesses, Stuart Hawker and May McCrae, spoke of the purchase of the Spanish villa as a holiday home, with Hawker saying they both had a dream of retiring there one day, but that was to be well down the line. McCrae spoke of seeing the parties socially 6 or 7 times a year. She had been a neighbour of the pursuer for many years, and knew of his marriage to the defender. If she telephoned him, she would call Crossford by day and Kirkcaldy by night. Both doubted that the pursuer had made a permanent move to Spain. Finally, I heard from the pursuer's brother, Gordon Williamson.

He told much the same story, of the Spanish villa being a holiday home, with it one day being for retirement. He conceded that they might have lived there full time if finances allowed. He spoke of how the pursuer would flit about, often going to Spain or coming back at short notice. When they were both back, or when the pursuer was back on his own, the flat in Kirkcaldy was used as home. He recalled one occasion when the pursuer was back to cover Richardson's holiday, how the pursuer had complained of having to walk to the business unit. He could only have done that from the flat. The Defender's evidence [11]. The defender and her 5 witnesses told a broadly different story. She confirmed the facts of her meeting the pursuer, her purchase of the flat at Provost Kay Park, Kirkcaldy, her business being run from an office at the Crossford house from about 2001, her marriage to the defender in 2004, the purchase of the villa in Spain in 2003 and her eventual separation from the pursuer in 2008. But it was her interpretation, and gloss on these facts that was remarkably different from that of the pursuer. She insisted that the Kirkcaldy flat had always been only for herself and her daughter, and that whilst the pursuer had visited it, and indeed stayed there from time to time, he had lived throughout at the Crossford house, and she had moved in to that house after the wedding. The flat was too small for three of them, for more than the occasional overnight stay. The house at Crossford had indeed been adapted for use as an office, but bedrooms remained, and they predominantly lived there. [12]. The villa was bought in July 2003. They had become engaged in May 2003, and according to the defender, planning for a permanent move there had commenced at a very early stage. It had even been discussed, in the abstract, in 1999. She accepted that they could not afford to move there straight away, so it was indeed rented out until about the end of 2005. The intention had been to go once finances allowed, and by February 2006, the decision was made. The Crossford house was sold, the businesses were established and doing well. Both businesses were capable of being run from anywhere, being phone and internet based. She spoke of employing Tom Richardson to do her "picking and mixing" in the unit in Kirkcaldy, to dispatch her orders. One of her clients held stock there. She refuted the suggestion that Richardson was actually paid by the pursuer's business, saying he was employed by both companies. [13]. She said that they arrived in Spain and moved in to the villa on 29 February 2006. She then had no acknowledge that such a date did not exist, and an error had been made with her pleadings; it was the end of that month. It was a permanent move by both of them. They took all clothes, save winter gear, which was moved into the Kirkcaldy flat. Some furniture was sold, and others sent to Spain. In February 2006, she arranged with a telecoms company that her calls would be re-routed to Spain. Thus UK customers calling her 0870 number would only pay for the UK leg of the call. Production 6/2 showed the diverted calls from 1 March 06 to 29 December 07. During 2006, she had only returned to Scotland for a few days in May, and for Christmas. The same had applied to the pursuer, she claimed, as they were together "24/7", which I took to mean at all times. In cross she had to concede that the pursuer in fact was back in the UK on his own on a number of occasions. In any event, she felt that the marriage was not working by about September 2007. Since that time, the pursuer had spent at least half the time in Spain, and the other in Scotland, prior to the action being raised. She had stayed in Spain, although had returned for Christmas 2007/08.

She confirmed that she had encouraged the pursuer to seek employment, as his business was not doing too well, and she wanted him to have something to focus on. The exchange of emails (5/34) in January 2008 was discussed, and she conceded that she had advised him to lie in the application process to better his chances of interview and employment. Had he got the job, he would have worked throughout Europe, and she would remain in Spain. She was firmly of the view that both she and the pursuer had moved permanently to Spain in February 2006, and she had severed most of her connections with Scotland. She accepted that her business still operated from Kirkcaldy, but that she ran it from Spain. She had no Spanish friends, although spoke of befriending an elderly Spanish lady at a café in San Pedro. [14]. Dealing specifically with the 6 months prior to raising the action, she doubted that the pursuer had been staying at the Kirkcaldy flat, apart from a few days in January 2008 when he had been unwell. She thought that when he had been in Scotland, he had stayed with his mother in Dunfermline. She confirmed that in March 2008 she had told a letting agent to change the lock at the flat, and not to give a key to the pursuer. She had moved to another property in Spain, and had raised some finance from the equity in the Kirkcaldy flat. She confirmed that the pursuer had used the flat as his address for bank and other purposes, but that was because he had not wanted anyone to know his address in Spain. She believed that both of them were resident in Spain. She had not obtained any official documentation to confirm her residence in Spain, nor had she registered anywhere. She did not believe it to be necessary. [15]. She was supported by Mark Carpenter, who eventually conceded, after some evasion, that he was her current partner. His belief was that the parties had planned to come full time to Spain, that they moved out there in 2006, and he saw them regularly. He said that he had commenced his relationship with the defender from about March 2008 and that he had not been involved with her in 2007, other than socially. He claimed that the pursuer would not let the defender out of his sight. Stephen Heritage gave evidence of meeting the parties in Spain in 2005, and they had discussed moving out to Spain at some point in the future. He had also visited them in Crossford, and believed that they were living there, rather than in Kirkcaldy. He had thought their move to Spain was permanent from February 2006. [16]. The defender's daughter said that she lived in the Kirkcaldy flat until November 2007, when she moved in to her boyfriend's nearby flat. She accepted that the pursuer had stayed at the flat on a few occasions before the marriage, but her mother had moved in to the Crossford house after the wedding. They both worked from there. After they had bought the villa, they moved there permanently in February 2006. She visited them regularly in Spain. It was more than a holiday home. She was reluctant to agree that the pursuer had stayed at the flat in late 2007 or early 2008. She accepted that email exchanges (5/14) between the parties in January and February 2008 suggested that the pursuer was indeed at the flat. [17]. Tom Richardson was called on behalf of the defender. He confirmed that he had been employed by both parties in February 2006, until January 2009. He recalled that he had been taken on because the parties both wanted to spend a bit of time in Spain. His salary was paid by the pursuer's company, and he would be contacted on an almost daily basis by the pursuer. He saw them infrequently in 2006, but more in 2007. When in Scotland they had stayed at the Kirkcaldy flat, although in March 2008 the pursuer

had stayed with his mother in Dunfermline, after they had split up. He had been instructed to deal with mail and the banking of funds. He delivered mail to the Kirkcaldy flat. Finally I heard from the defender's brother Michael Simpson. He had met the pursuer in 1999, as the defender had had been living with him for a while. He recalled the purchase of the flat, and she had lived there with her daughter until she married the pursuer, after which she moved to Crossford. His position on the villa was that it was bought with the intention of moving there to make it their home when they could afford it. He thought that they did move permanently from February 2006, but accepted that he met the pursuer in Kirkcaldy quite often, collecting him from the flat. [18]. I preferred the evidence of the pursuer insofar as the issue of whether or not he had decided to move permanently to Spain in February 2006, or thereafter. The failure to register with the appropriate authorities there, the paying of tax in the UK, the business being based here, bank and other financial accounts being in Scotland, his address and phone number appearing to be in Kirkcaldy all support his position. He took no steps to become involved in Spanish affairs, and traveled regularly to Scotland. I can well understand the enjoyment of the house in Spain, and also the country itself, but I did not accept the assertion of the defender that they had made the joint decision to emigrate there, and live permanently in Spain. Her evidence was incorrect and exaggerated on occasion. I took the view that she had made rather more of Spain than had the pursuer, although even she had not registered there. It was indicative of the true position that when seeking employment the pursuer sought a role that required residence in Ireland (preferred), UK, France or Switzerland, rather than in Spain. Both parties used the premises in Kirkcaldy, and accountants in Scotland. I do not believe the pursuer had severed his ties with Scotland, and although he enjoyed Spain, he saw it as a holiday rather than his centre of interests. The only independent witness to assist was Richardson, whom I found credible and reliable, and it was significant that he said that he had been taken on by the parties in 2006 as they were "going to spend a bit of time in Spain". That was not indicative at all of a permanent move. There was a considerable amount of evidence regarding the use of the properties at Balnacraig and Provost Kay Park. I have refrained from making any findings in fact regarding these properties, other than formal ones (6 and 7) as whether or not either or both of these became matrimonial property, which seemed to be the driver behind the evidence, is not for this decision. I have accepted that the pursuer lived in Provost Kay Park when in Scotland from February 2006 onwards. The lack of any finding for the period before that is because I viewed that as irrelevant to the only question before me, jurisdiction. The relevant legal framework for jurisdiction [19]. Parties were agreed on what was the relevant law, but disputed how it was to be interpreted, and disputed the facts relevant to jurisdiction. The law relating to jurisdiction is to be found in the Domicile & Matrimonial Proceedings Act 1973, and in particular Section 8, where the relevant parts are in the following terms:- Jurisdiction of sheriff court in respect of actions for separation. - (1) Subsections (2) to

- (4) below shall have effect, subject to section 12(6) of this Act, with respect to the jurisdiction of the sheriff court to entertain an action for separation or divorce . (2) The court shall have jurisdiction to entertain an action for separation or divorce if (and only if) - (a) either - (i) the

Scottish courts have jurisdiction under the Council Regulation; or (ii) the action is an excluded action where either party to the marriage in question is domiciled in Scotland at the date when the action is begun; (b) either party to the marriage - (i) was resident in the sheriffdom for a period of forty days ending with that date, or (ii) had been resident in the sheriffdom for a period of not less than forty days ending not more than forty days before the said date, and has no known residence in Scotland at that date. Section 12(6) has no bearing on the matter. The Council Regulation referred to at section 8(2)(a)(i) is EC 2201/2003, which concerns the jurisdiction and the recognition and enforcement of judgments in matrimonial matters. It is sometimes referred to as "Brussels II bis". The present action is not an "excluded action", as defined by section 12(5)(d). In particular Article 3 relates to the United Kingdom, and is in the following terms:- General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State (a) in whose territory: - the spouses are habitually resident, or - the spouses were last habitually resident, insofar as one of them still resides there, or - the respondent is habitually resident, or - in the event of a joint application, either of the spouses is habitually resident, or - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or - the applicant is habitually resident if he or she resided there for at least six months before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there; (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, the 'domicile' of both spouses.
- (2) For the purposes of this Regulation 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland. The arguments [20]. For the Pursuer it was submitted that jurisdiction in this case had been established and that this court could and should deal with the case. Article 66 of the Regulation defines "habitual residence" and "domicile" in a Member State as being the habitual residence within a particular territorial unit where (as in the UK) there is more than one territorial unit each with its own legal system. The reference to Member State in the Regulation above, should therefore be taken in this case to mean Scotland. In particular, it was stressed that the pursuer was relying upon the final ground in Article 3 (1). Breaking that down, it was submitted that there were three components to be established, in order to establish jurisdiction in Scotland in terms of Brussels II bis. These are (i) domicile within Scotland, (ii) habitual residence within Scotland, and (iii) residence within Scotland for the last six months prior to the raising of the action. The defender accepted these criteria. Domicile [21]. Dealing with these in turn, the first is domicile. Article 3(2) of the regulation states that for the purpose of the regulation, domicile will have the same meaning as it has under the legal systems of the UK and Ireland. Referring to the leading textbook on the subject, Anton & Beaumont, Private International Law, the central idea "is that it is the place where a man has made his home" (p125). One is born with a domicile of origin, agreed here as Scottish. This continues until death, unless a domicile of choice is taken. According to Anton, the domicile of origin

continues " unless and until he resides in a different country with the intention of residing there permanently. If these elements of fact and intention occur, he is then attributed a domicile in that country, called a domicile of choice. Scots law will continue to infer that he is domiciled in the country of choice either until he leaves that country with the settled intention of abandoning it as his home, when he is deemed to revert to his domicile of origin, or until he acquires a domicile of choice in another country (p125). It is clearly established (Anton p128) that each person has only one operative domicile at any one time. Thus a domicile of choice may be acquired by actual residence in a country together with the intention of remaining there permanently. I was referred to the cases of *Udny v Udny* (1866-69) L. R. 1Sc.441; *Bell v Kennedy* (1866-69) L. R. 1Sc. 307; *Spence v Spence* 1995 SLT 335; *Marsh v Marsh* 2002 SLT (Sh Ct) 87; *Liverpool Royal Infirmary v Ramsay* 1930 SC (HL) 83; and *Reddington v Riach's Executor* 2002 SLT 537. From these cases it was established that an existing domicile is presumed to continue. Thus the onus of proof of the acquisition of a new domicile lies upon the person who asserts the change, which in this case is the defender. The pursuer contends that the defender has not, on the balance of probabilities, discharged this burden, in that she has not established a change in both his residence and his intention from Scotland to Spain. On the other hand, the defender, whilst accepting the onus and burden fell on her, submitted that they had been discharged and the evidence was that the pursuer had indeed acquired a domicile of choice in Spain and remained so from February 2006. Decision on domicile [22]. I am satisfied that the defender has failed to prove that the pursuer has acquired a domicile of choice in Spain. I preferred his evidence that he continued to regard Scotland as home; that he looked upon Spain as a holiday home, where he spent as much time as he could. I found it significant that he continued to have his work base in Scotland, that his business phone calls were to a UK number, rerouted when necessary to Spain, and that he continued to seek employment for jobs that were based outwith Spain. In any event I also found that he had certainly abandoned all thoughts of Spain as home by the time he raised the action. By then the defender had left him. Accordingly, even if I had found that he had acquired a domicile of choice in Spain in 2006, which I do not, he had certainly reacquired his domicile of origin in Scotland by 2008. Habitual residence within Scotland [23]. For the pursuer it was submitted that the definition of habitual residence for the purpose of the Regulation is distinct from the definition of habitual residence in Scots law. Unlike domicile, it is not stated in the Regulation that habitual residence shall have the same meaning as it has under the legal systems of the UK and Ireland. No definition is provided in the Regulation, and there are no cases from the European Court of Justice directly in point. The defender founded on *Morris v Morris* 1993 SCCR 144, where Sheriff Principal Maguire suggested a view of habitual residence, in the context of section 9 of the Family Law Act 1986. He stated "At the end of the day it is a question of fact. Without seeking to lay down any definition, I would consider that it encompasses the idea of where the person normally lives." This case was not a Brussels II bis case. The pursuer referred to the Explanatory Report to the Regulation, written by Dr Alegria Borrás and published in the Official Journal of the European Communities C221/27, 16 July 1998. I was referred to paragraphs 28 - 34, and noted that para 28 points out that it

was specifically stated in Brussels II that a party's domicile was to be determined by reference to the internal law of the state of the forum. There was a discussion as to whether a similar provision should be included with regard to habitual residence, but no such provision was inserted. Dr Borrás noted in para 32 that "particular account was taken of the definition given on numerous occasions by the Court of Justice, i.e. 'the place where the person has established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence'". In support of the proposition that this is the proper definition of "habitual residence", and which has been adopted in case law in other jurisdictions, and in the European Court of Justice, I was referred to the following cases:- *Silvano di Paulo v Office national de l'emploi* (Case 76/76) [1977] 2 CMLR 59; *Knoch v Bundesanstalt für Arbeit* (Case C-102/91) European Court Reports 1992 p1-04341; *Rigsadvokaten v Ryborg* (Case C-297/89) [1993] 1 CMLR 218; *Pedro Magdalena Fernandez v Commission of the European Communities* (Case C-452/93P) European Court Reports 1994 p 1-04295; *Swaddling v Adjudication Officer* (Case C-90/97) [1999] 2 CMLR 679; *Marinos v Marinos*

[2007] EWHC 2047 (Fam) and *L-K v K* (No 2) [2007] EWHC 3202 (Fam). These cases all turn on their own facts, but the general concept of normal or habitual residence can be taken as the place where a person has established his permanent centre of interests. Spending nights and weekends for more than a year in State B is not sufficient to conclude that a person has moved his permanent centre of interests to that State. The position would be different if the person concerned settled in State B and manifested an intention to live there and not return to State B. (see *Rigsadvokaten v Ryborg* ). [24]. The matter was considered at length in the English High Court case of *Marinos* . It dealt specifically with the definition of habitual residence for Article 3 of Brussels II bis. According to the pursuer's agent, the important point from the decision of Mr Justice Mumby is that "habitual residence" for the purpose of the regulation has an autonomous meaning which is derived from the jurisprudence of the European Court of Justice. Case law from the ECJ is relevant, case law regarding the English definition of residence for family matters outwith the scope of the regulation is not relevant, and further that this autonomous meaning is the "place where the person had established on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence (para 33)". He also determined that habitual residence involves not a purely quantitative calculation of the time spent by a person in a particular place but rather a qualitative evaluation of all the facts pertaining to an individual's links with a place. Further, he found a distinction in the final two grounds of Article 3(1)(a) between "habitual residence" and "residence". He took the view, with which I agree, that the Regulation clearly distinguishes between two different concepts. What are required are two things:- (a) habitual residence on a particular day, and (b) residence, though not necessarily habitual residence, during the relevant immediately preceding period. He went on to say that habitual residence can be gained in a day. On the facts of the *Marinos* case, the wife returned to the UK from Greece and she was found to have

undertaken "a planned purposeful and permanent relocation from one country to another, .....there is nothing in Community law to prevent the acquisition of a new habitual residence contemporaneously or virtually contemporaneously with the loss of one's previous habitual residence." (para 85-90). [25]. The defender's argument was that the pursuer was in fact habitually resident in Spain, from February 2006. His only heritable property was in Spain, his car was in Spain, and he only visited Scotland after September 2007 because his daughter was ill. Prior to that, the defender's position was that the pursuer was much more often in Spain than Scotland, and that therefore he was habitually resident in Spain. On the other hand, the pursuer argued that the pursuer's "centre of interests" remained in Scotland. His business life was here, his family was here, he paid taxes here, and all bank and other practical matters were based here. He had no such formal connections to Spain. Accordingly, his habitual residence throughout 2007 and 2008 was Scotland. As a fallback position, the pursuer re-acquired habitual residence in Scotland in 2008 following the breakdown of the marriage, when he returned to Scotland, where he remained. Decision on habitual residence. [26]. I am satisfied that the pursuer has established that his habitual residence is in Scotland. It most certainly was established at the time of raising this action, and I do not consider I need go beyond that. It is clear to me that the correct test is that referred to by Dr Borrás in the explanatory report, which was considered and adopted in the Fernandez and L-K cases. Further, habitual residence does not have to be permanent; it needs to be habitual. The verb used in "established" and clearly something can be established quickly or over time. In the present case, I am satisfied that the pursuer's centre of interests at the time of raising the action was Scotland. Residence for the past 6 months [27]. The pursuer next argued that he needed to be resident, although not necessarily habitually resident, during the relevant immediately preceding period, in this case six months. It was a matter of agreement that the pursuer had spent time during the relevant period in both Spain and Scotland. Again I was referred to the Marinos case. In that case it was held that residence does not mean based in one particular Member State at all times, with no breaks elsewhere. The wife had spent rather more time in Greece than in England, but the court found that "it can sensibly and appropriately be said that the wife was resident in both countries..... She had a place of residence in both countries." There is nothing inconsistent with Community Law, nor with Scots Law in being resident in more than one place. In this case, the pursuer could be said to be resident both in Spain and in Scotland. On the other hand, the defender argued that as the pursuer had not actually and physically spent the relevant six month period in Scotland, he could not establish that he was resident here. The joint minute of admissions 5/36 was accepted as a true and accurate record of the pursuer's whereabouts between 17 September 2007 and 2 April 2008. He spent roughly equal time in both countries. Decision on residence for 6 months [28]. It is entirely logical that a person can be resident in more than one place at a time. The example of the business man who lives with his family in Edinburgh, but commutes to London, where he has a flat, comes to mind. He would spend say four nights in London and only three in Edinburgh. Yet he would be entitled to argue that he is resident in Edinburgh, or London, for this jurisdiction purpose. It is not possible

to be habitually resident in two countries, but in my view it can be said that one can reside in two countries. I accept that in my example, both cities are in the one Member State, but it would equally apply to the oil executive who lived with family in Aberdeen, yet worked from Bergen. Accordingly, I find that the pursuer has made out his case that he has been resident in Scotland for the six months prior to raising this action. [29]. It is therefore established that the pursuer has overcome the hurdles and tests required of Brussels II bis. He can raise proceedings for divorce in Scotland. But matters do not end there. He has chosen to bring them not in the Court of Session, but in the Sheriff Court. That requires him to fulfil the requirements of the Domicile and Matrimonial Proceedings Act 1973, section 8(2)(b)(i), namely "resident in the Sheriffdom for a period of forty days ending with that date", where "that date" refers to the bringing of the action, in this case agreed as 11 April 2008. The forty day rule [30]. The pursuer left Scotland on 9 March for Spain and returned on 28 March. Accordingly he was exclusively in Spain for 18 days, traveling on 2 days and exclusively in Scotland for 20 days. The pursuer argued that if I had held that he was resident in Scotland for the six months prior to raising the action, in terms of Brussels II bis, then it must follow that his place of residence for the forty days prior to raising the action would also be Scotland. It was then a question of confirming the Sheriffdom. The pursuer had resided in Kirkcaldy until the defender had the locks changed at the Provost Kay flat, whereupon the pursuer resided with his mother, in Dunfermline. Both are in this Sheriffdom, and this action could have been raised in any court within the Sheriffdom. The central question is whether the pursuer can be outwith the Sheriffdom for a time during the forty days. I was again referred to Anton & Beaumont, pp146-149. "A person may be said to be resident or ordinarily resident in a place although he is temporarily absent from it". I was also referred to the cases of Daniel v Foster 1989 SCLR 378; Cabel v Cabel 1974 SLT 295; and Casey v Casey 1968 SLT 56. These cases do turn on their own facts, and were not directly in point to the forty day rule. However, the various periods relevant to jurisdiction in those cases were not said to be interrupted by absences. In the present case the pursuer's decision to go to Spain, for a short break which was prolonged by the discovery there of a note from the defender, was understandable, and justified. The defender argued that one had to be physically in the Sheriffdom for the relevant forty days. It was accepted that in many cases, the averment was made, and not contested, although the reality might be somewhat different. An example would be the many that live in Fife, and commute to Edinburgh to work. Some might require to stay a night in Edinburgh. Strictly, the forty days would have to restart on return to Fife. In practice, parties would accept that the court had jurisdiction, and not take any objection, or require proof. That was not the case here. I was referred to McNeill v McNeill 1960 SLT 108 and Joel v Gill 1859 21D 929, at 939. When considering the 1973 Act, it was agreed that one had to read the word "and" between subsections (a) and (b) of section 8(2). To do otherwise would make the section incomprehensible. Decision on 40 day rule [31]. The word "resident" must be given its ordinary and natural meaning. In my opinion it would be illogical and unnatural to read "resident" as requiring physical presence over the whole period. The ordinary meaning would be where a person resides, which would tend to suggest where

his ordinary or principal place of residence was found. In this case, that would be in Fife. The intent of the 1973 Act was presumably to provide sufficient linking factors with the Sheriffdom within which the action was raised. The passage quoted from *Joel v Gill* that "the general principal being that residence within the judge's territory gives a judge jurisdiction over a person, and this principle being *juris gentium*, it is for each country to determine as a matter of practice what it will account as sufficient residence to form a domicile for jurisdiction. In our system of jurisprudence and to avoid disputes constant practice has fixed that a residence of 40 days is sufficient - not mere presence within the territory but continuous residence in one locality for 40 days", has been overtaken by events, and by Brussels II bis. Europe has taken over from "each country" and had decided what amounts to sufficient residence to form a domicile for jurisdiction. All that the 1973 Act does, is indicate which Sheriffdom is the correct one, after the basic principal of jurisdiction is established. In any conflict between the 1973 Act, and Brussels II bis, the European Regulation must take precedence. I have found that jurisdiction in Scotland has been established, and it would be illogical to deprive a litigant from pursuing an action in the Sheriff Court, as opposed to the Court of Session, due to a domestic regulation which has its historical origins in a different culture, and under a different prevailing legal framework. Accordingly, the interpretation of "resident" in the 1973 Act should be the same as that which applies to the European Regulation. In any event, I reject the notion that the forty days must be continuous physical presence. For these reasons I hold that the pursuer was resident in this Sheriffdom for the forty days preceding the raising of the action. Disposal [32]. It follows that I hold that this court has jurisdiction, and I therefore repel the defender's first plea-in-law. Parties were agreed that expenses should be reserved meantime. Clearly further procedure in this case is now required, so I have had the case put out for a hearing for that purpose. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2009/18.html>

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