

This judgment is being handed down in open court on 14th July 2010. It consists of five pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Case No: FD09A00268

Neutral Citation Number: [2010] EWHC 1694 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2010

Before :

MR JUSTICE HEDLEY

Between :

E.C.C. (The Local Authority)	<u>Applicant</u>
- and -	
SM (a child) (By her Guardian)	<u>1st Respondent</u>
- and -	
DC	<u>2nd Respondent</u>
- and -	
BM	<u>3rd Respondent</u>
- and -	
DMH	<u>4th Respondent</u>

Ruth Cabeza (instructed by The Local Authority Legal Dept.) for the Applicant
Lloyd North as Solicitor Advocate (from Sparling, Benham and Brough Solicitors) for the 1st Respondent
Deirdre Fottrell (instructed by Mr. N Priestley from Ridley and Hall Solicitors) for the 4th Respondent

Hearing dates: 28th June 2010

Judgment

1. This case raises again issues relating to the placement of a child with kinship carers in the United States of America for the purposes of adoption. These are matters that have been considered by the Court of Appeal in RE A (ADOPTION: REMOVAL) [2009] 2 FLR 597. That case was concerned with placement under Sections 84 and 85 of the Adoption and Children Act 2002 (as amended) with a view to adoption in the U.S.A. It considered an earlier judgment in this case (ESSEX COUNTY COUNCIL v M [2008] EWHC 332) of Black J (as she then was) and pointed out an undoubted legal minefield.
2. However on 1st April 2008 the U.S.A. acceded to and adopted into domestic law the Convention of 29th May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. The practical effect of that would be that the making of a Convention Adoption in this Country would obligate the U.S.A. to make all necessary arrangements for the admission to and residence in the U.S.A. of the adopted child. In those circumstances the local authority changed its care plan from a placement for adoption in the U.S.A. to the making of a Convention Adoption in this country with a view to subsequent permanent removal to the U.S.A.
3. To achieve that, however, the prospective adopters must comply with the requirements of Section 42 of the 2002 Act. The relevant provision – Section 42 (2)(a) – requires the child to live with one or both of the adopters at all times during the period of ten weeks preceding the application. The domestic and economic circumstances of the prospective adopters preclude their setting up a temporary home in this country and the question arises as to whether that period can be spent in the U.S.A. That raises the issue as to the relationship between Section 28 (2) – (4) and Section 85 of the Act given that Section 42 admits of time being spent abroad - see RE A (above).
4. This is an application by the local authority for a Placement Order in respect of a child SM born on 19th June 2003 and who is therefore 7 years of age. Her parents are DC and BM who, although not married, share parental responsibility. Neither parent is able to care for SM and neither contend otherwise. A full care order was made on 21st February 2008. It has been the local authority's plan for a long time (and approved in principle by the court) that SM should live with her paternal uncle and aunt in the U.S.A. The reasons for the delay are to be found in the practical and legal difficulties that have been encountered and have been described in Black J's earlier judgment and acknowledged in RE A.
5. That approach is supported by the father although he has never formally lodged his consent. It is opposed by the mother principally on the basis of resultant contact difficulties. However, she advances no tenable alternative. As I shall explain, I am satisfied that SM's welfare will positively require me to dispense with their consent. However it is always more satisfactory both for prospective adopters (especially where they are family members) and often for the child (when adult) to know that a placement was supported by parents. Hence the order giving the parents an opportunity to consent before the dispensing order is drawn up.
6. The local authority are now anxious to press on with the placement with the prospective adopters. They have issued their application for a placement order and I have heard it. In order to decide whether such an order should be made, the court must

have regards to the matters set out in Section 1 of the 2002 Act. The simple facts are these: SM is living in a non-permanent foster placement; her parents cannot care for her and thus arrangements for permanency must be made; the paternal uncle and aunt are ready and willing and have been carefully assessed as able to care for her permanently; SM is keen to join them; because of immigration controls, she is unable to do so unless it is as an adopted child. In those circumstances a court applying Section 1 can only conclude both that a placement order is both right and necessary and also that, if the parents feel unable or unwilling to consent, the welfare of SM positively requires that it be dispensed with pursuant to Section 52 (1)(b) of the Act.

7. Thus we reach the position where the court is disposed to make a placement order. It is made on the basis of a placement for adoption with the paternal uncle and aunt. The court should then satisfy itself that adoption by them is an end which is in fact (and in law) achievable. Many of the problems which have been confronted by courts, and are illustrated in RE A (above), have been resolved by accession to the Convention. The practical problem in this case is the required residence period of 10 weeks. It is now established (see RE A) that the home base does not have to be in this jurisdiction. The question is, however, whether the local authority can place this child in the U.S.A. with the prospective adoptors for some or all of this period.
8. Section 28 (2) and (3) of the 2002 Act have the effect of preventing the local authority from removing a child the subject of a placement order from the jurisdiction “unless the court gives leave.” It is therefore clearly envisaged in Chapter 3 of the Act that there will be occasions where the court will give such leave. No doubt the ordinary position will encompass a holiday though it is to be noted that by Section 28 (4) no leave is required where the removal is for less than a month. It follows that Parliament contemplated removal for longer periods. Was there intended to be a fetter on the purpose of removal?
9. For that one goes on to Chapter 6 (Adoptions with a Foreign Element) and in particular to Sections 85 (1) and 85 (2)(a). They provide so far as is material –
 - “(1) A child who -
 - ...(b) is habitually resident in the United Kingdom, must not be removed from the United Kingdom to a place outside the British Islands for the purposes of adoption unless the condition in subsection (2) is met.
 - (2) The condition is that -
 - (a) The prospective adoptors have parental responsibility for the child by virtue of an order under Section 84, or ...”

It is the case that once the child is placed with the prospective adoptors they will indeed have parental responsibility for her but it will be conferred by virtue of Section 25(3) and not Section 84. Breach of Section 85 is made a criminal offence and, if what is contemplated here is a breach of Section 85, then clearly it cannot be done.

10. Parliament must of course be taken to know that the provisions of Chapter 3 and those of Chapter 6 are in the same Act and must, in my judgment, be taken to have intended that they be not in conflict with one another. The question is as to how they should be read so as to render them compatible. Two options suggest themselves: either to read Section 28(2) and (3) in such a way as to exclude any concept of the placement for the purposes of adoption; or to read Section 85 in some restrictive measure that does not encompass the making of a Convention adoption order in this country.
11. The difficulty with the restrictive reading of Section 28(2) and (3) is that it is difficult to see, once a placement order has been made, how any placement is not for the purposes of adoption. It would, I think mean either restricting Section 28 (2) and (3) to long holidays in respect of a child otherwise placed in this country or devising a very restricted, even artificial, form of words as to purpose of placement whose sole purpose would be to defeat Section 85(1). I do not find either approach attractive and would prefer, if possible, to concentrate on the construction of Section 85 (1) itself.
12. The context in which Section 85 is found is that of removal of children for the purposes of adoption abroad. It seems that one of the main purposes of Chapter 6 is to ensure that children who are to be adopted abroad have all the same protections as they would were they to be adopted in this jurisdiction. That would be consistent with there having to exist an order for parental responsibility made under Section 84 with all the safeguards provided by the Adoption with a Foreign Element Regulations 2005. Chapter 2 of Part 3 of those regulations (a different part to those dealing with Section 84) deals with Convention Adoptions and of course govern the procedure in this case. Those Regulations can be complied with whether the child is here or in the U.S.A. I should also note that Section 86 gives power to restrict the provisions of Section 85 in respect of family member by Regulation but none to date have been laid. Section 85 therefore applies as much to family members as it does to strangers.
13. In my judgment Section 85 should be read restrictively (it is after all a penal provision) by confining it to permanent removals abroad for the purposes of adoption abroad. It should not be taken as covering what are temporary removals pending a return to apply for a Convention Adoption order in this jurisdiction – and return they must not least because that is required by the U.S.A. Immigration Authorities. In those circumstances in my judgment Section 28 (2) and (3) empower the court to sanction an arrangement which means that the period prescribed by Section 42 can be spent outside the jurisdiction. In order clearly to distinguish this situation from one to which Section 85 would apply, the Court should assert that the child remains subject to this jurisdiction, permission should be given for a specific time and the prospective adoptors should be required to undertake to return the child to the jurisdiction within that period or earlier if called upon so to do.
14. In those circumstances I doubt whether it would ever be right to give leave permanently to remove under Section 28 (2) and (3) though I recognise that the drafting replicates Section 13 of the Children Act 1989 which clearly allows for permanent removal. I express no concluded view, however, as any such view should only be offered were the question directly to arise. For the purposes of this case only temporary leave is sought or is necessary.
15. Accordingly I conclude that the court can give leave for the child to be removed to the U.S.A. for the purposes of the period required by Section 42 of the 2002 Act and that

the taking up of such leave would not involve a breach of Section 85. Considering the matter on its merits I have no doubt that such leave should be given subject to an end limit of 6 months and supported by undertakings to return and an acknowledgment of the continued jurisdiction of this court. Accordingly I make the Placement Order and give the leave sought.

16. I have adjourned this judgment into open court as others may wish to consider its contents. I have therefore produced it in an anonymised form. It will be understood, however, that nothing must be reported which might reasonably lead to the identification of the child concerned. I cannot part with this application without expressing my appreciation to counsel for all their assistance.