Neutral Citation Number: [2013] EWHC 578 (Fam)

Case No: FD12Z00524

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2013

Before :

MRS JUSTICE PAUFFLEY

Between:

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Kent County Council v. PA-K and IA (a child)

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- -

Ruth Cabeza for the Applicant, Kent County Council
PA-K, the mother, did not appear and was not represented
Christopher Hames for the Children's Guardian, Bob McGavin

Hearing date: 11th March 2013

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Judgment

THE HONOURABLE MRS JUSTICE PAUFFLEY

This judgment is being handed down in private on 15th March 2013. It consists of 30 paragraphs 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.

Mrs Justice Pauffley :

Introduction

1. Although the way forward in these proceedings is agreed, I volunteered to give this judgment for two reasons – (i) so as to provide complete clarity for the agencies involved here and in the United States as to how the English Court intends that the welfare plans for the child are to be implemented; and (ii) to describe the way in which an apparent divergence in the case law relating to determining a child's 'ordinary residence' and the 'disregard' provision contained within s.105(6) of the Children Act 1989 has arisen.

2. On other occasions and with reason, the intricacies inherent in seeking to place a child in the USA have been described as "an undoubted legal minefield." In this instance, I

am indebted to Miss Cabeza and Mr Hames, both specialists in the field, who have provided invaluable assistance in familiarising me with the statutory framework as well as the case law on the subject of ordinary and habitual residence where the 'looked after' child is placed overseas.

3. The local authority's application is for permission to remove a child, IA, born in June 2008, so four years and nine months old, from the United Kingdom so that she might go to live in the USA with Mr and Mrs X. They are British Citizens who adopted IA's elder half sister, A, in 2003. Their son, O, is 15. A is now 10. Mr and Mrs X are living in the USA largely as the result of Mr X's employment. They remain domiciled in England and Wales.

4. Leave to remove IA is required under s. 28(2)(b) of the Adoption and Children Act 2002 because she was made the subject of a placement order in July 2009, because the mother has not given her written consent and also because the proposal is for removal for more than one month.

5. There are powerful welfare arguments for acceding to the application, extraordinarily well described within Mr Bob McGavin's excellent report, summarised by Mr Hames in this way – IA will be able to live with and grow up alongside her half sister A whom she already refers to as "my sister." Mr and Mrs X are very impressive individuals who will be able to offer IA a safe, secure and nurturing home where all of her physical and emotional needs can be met. IA is ready and able to move now. She has met and begun to engage very favourably with Mr and Mrs X. Any delay could frustrate her development. IA's mother by reason of her very sad history and mental health difficulties was excluded as a potential carer; and it is difficult, says Mr Hames, to conceive of any reasonable objection she might have.

The mother's absence from the hearing

6. The mother has played no part in this hearing. She did attend in person on 21st November 2012 when I gave directions which included a requirement she should file evidence if she wished to oppose the application. The indications were that she intended to instruct solicitors. Miss Cabeza provided her with the bundle of papers. Mrs A-K was polite and friendly.

7. No notice of acting from Solicitors acting on her behalf has been received. Mr McGavin's letter of 25th February 2013 asking the mother to get in touch did not elicit a response. When the allocated social worker and her manager called at the mother's home last Thursday, the mother's reaction was both aggressive and bizarre. It was necessary to summon police assistance. Mrs A-K's non appearance at the hearing on Monday was not surprising against the background of her diagnosis. In 2009, she was said to be suffering from a paranoid psychotic illness. She was described as extremely anxious, volatile and unpredictable.

Interplay between the UK and the USA in relation to adoption

8. The interplay between the laws of the UK and the USA in relation to adoption and also the USA's immigration requirements have guided the local authority towards the route it now pursues. Because Mr and Mrs X retain English domicile, in theory they could apply to adopt IA utilising the English domestic framework. In November 2011,

at a time when it was believed a domestic adoption would most efficaciously solve the legal complexities, I made a declaration as to the X's domicile and therefore pronounced them eligible to apply to adopt pursuant to s.49 of the Adoption and Children Act 2002.

9. The alternative option, from a UK perspective, would have been for Mr and Mrs X to apply for a Hague Convention Adoption order because they are habitually resident in the USA.

10. However, from a US perspective, neither route is viable. If IA were to be adopted under English domestic provisions, her adoptive parents would have had to live with her for two years in the UK before they would be eligible for a visa permitting her to enter and remain with them in the USA. There are practical reasons why they cannot pursue that option.

11. The alternative of a Convention Adoption order would not be available to the Xs if they were to apply in the USA because, as a matter of US policy, only US citizens are eligible to apply when America is the receiving State. Mr and Mrs X are not citizens though they do enjoy permanent leave to reside in the USA. They will not be eligible to apply for citizenship until about the middle of next year, 2014. The Hague adoption process could take between 6 and 9 months to complete.

12. The original plan, put forward as I understand it by the American authorities, was for IA to be placed in the USA and then adopted under American domestic law. However, a placement of that kind would have been in contravention of s.85 of the ACA 2002 ("Restriction on taking children out of the UK for adoption") unless she had been removed under the auspices of s.84 ("Giving parental responsibility prior to adoption abroad") which in the case of the USA would have to have been authorised under the Convention. In any event, because Mr and Mrs X retain their UK domicile, under s.84(2), they would not be eligible under UK law to apply for such an order

13. Accordingly, the view was taken that the only way for the Xs to secure an adoption order would be under the Hague Convention. Any such application could not be made until such time as they become US citizens. Since they will not be eligible to apply for US citizenship until the middle of 2014, it is unlikely they will be in a position to apply to the US Central Authority for an assessment of their suitability to adopt IA under the Convention until early in 2015; and therefore the likelihood is that any Convention adoption proceedings would not be concluded before the end of that year.

A mechanism for placing IA with Mr and Mrs X

14. It is therefore both urgent and vital in terms of welfare planning to find a mechanism for placing IA with Mr and Mrs X in the interim and until such time as they are able to apply for a Convention Adoption order.

15. Mr and Mrs X are approved as foster carers. Thus IA could be placed with them pursuant to the Care Planning, Placement and Case Review (England) Regulations 2010. Regulation 11 deals with the "Placement decision" and the requirements of the responsible authority's nominated officer. Regulation 12 is concerned with "Placements outside England and Wales"; and refers explicitly to arrangements to place children outside the jurisdiction in accordance with the provisions of paragraph

19 of Schedule 2 of the 1989 Act. Although the regulation is silent about placements made pursuant to s.28 of the ACA 2002, it must be the case that the regulation extends to such arrangements. Otherwise there would be no regulatory control in such situations.

16. Because a Placement Order has been made in relation to IA, s.28 of the ACA 2002 governs the way in which she may be removed from the United Kingdom. The relevant provisions of s.28 of the Act are as follows –

> (2) "Where – (a) a child is placed for adoption under s.19 or an adoption agency is authorised to place a child for adoption under that section, or
>
> (b) a placement order is in force in respect of a child,
>
> then (whether or not the child is in England and Wales) a person may not do either of the following things, unless the court gives leave or each parent or guardian of the child gives written consent.
>
> (3) Those things are –
>
> (a) causing the child to be known by a new surname, or
>
> (b) removing the child from the United Kingdom.
>
> (4) Subsection (3) does not prevent the removal of a child from the United Kingdom for a period of less than one month by a person who provides the child's home.

17. Pursuant to s.42(2) of the ACA 2002, IA has to live with prospective adopters for 10 weeks prior to the application for adoption. *ECC (The Local Authority) v. SM* [2011] 1 FLR 234 is authority for the proposition that the 10 week period may be spent outside the jurisdiction notwithstanding the apparent prohibition contained within s.85 of ACA 2002. Hedley J decided that s.85 (Restriction on taking children out of the UK for adoption)

> "….. should be read restrictively … 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 what is required by the USA immigration authorities. In those circumstances, in my judgment, s.28(2) and (3) empower the court to sanction an arrangement which means that the period prescribed by s.42 can be spent outside the jurisdiction. In order to clearly distinguish this situation from one to which s.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 adopters should be required to return the child to the jurisdiction within that period or earlier if called upon to do so."

18. In that case, on the merits, Hedley J had no doubts that leave to remove should be given subject to an end limit of 6 months, supported by undertakings to return and acknowledgment of the continued jurisdiction of this court.

19. I detect no impediment to permitting a longer period such as is suggested here so long as this court retains jurisdiction. Pursuant to Article 2 of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29th May 1993), it is essential that IA continues to be habitually resident in England. The relevant part of Article 2 reads as follows –

> "The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the Receiving state") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State of origin."

A child looked after overseas – 'habitual' or 'ordinary' residence

20. It is therefore necessary to consider whether it is possible for IA to remain habitually resident here notwithstanding that pursuant to the local authority's plan she will be living with Mr and Mrs X in the USA. The local authority accepts that if she were to be living with them under a private arrangement for two years or so, she would become habitually resident in the USA.

21. It is suggested that s.105(6) of the Children Act 1989 applies to IA because she is a 'looked after' child. The section provides that –

> "In determining the 'ordinary residence' of a child for any purpose of this Act, there shall be disregarded any period in which he lives in any place – ……
>
> (c) while he is being provided with accommodation by or on behalf of a local authority."

22. Miss Cabeza has drawn attention to a series of authorities relating to the disregard provisions contained within s.105(6). In the earliest of them, *Re G (Adoption: Ordinary Residence)* [2003] 2FLR 944 Wall J (as he then was) considered but rejected as "quite artificial and wholly unreal" an argument that two looked after children, placed with relatives in the USA for 8 years or so had retained their habitual residence in England. He said it was plain to him that 'ordinary residence' in s.105(6) is a term of art used for specific administrative and jurisdictional purposes within the Children Act 1989 and can neither be exported or transformed into 'habitual residence' for the purposes of the Family Law Act 1986. He had no doubt at all on the facts that the two children were habitually resident in the USA.

23. In *Greenwich London Borough Council v. S* [2007] 2 FLR 154, Sumner J found that the words 'ordinarily resident' as mentioned in s.31(8) and s.105(6) and 'habitually resident' have the same meaning. Even although the provisions of s.105(6) did not apply because the children were placed within the family, on the facts, Sumner J expressed himself satisfied that they had never acquired habitual residence in Canada where they had lived for a year or so. He observed that the children's time in that country had always been at the behest of the local authority which, alone, had determined when it began, for how long it continued and when it came to an end. The

children were, said Sumner J, dependent not on the aunt to determine their residence but on the local authority which, in his view, was determinative.

24. Somewhat curiously, Sumner J's attention was not drawn to ***Re G*** when he decided the ***Greenwich*** case. Nor was Hedley J taken to either ***Re G*** or Sumner J's decision in the ***Greenwich*** case when confronted by ***ECC v.*** SM in 2011. It was, of course, fundamental to Hedley J's determination in the latter case that the child's habitual residence remained in this country throughout the period of proposed placement in the USA. That fact was recorded on the face of the order permitting removal under s.28 ACA 2002; and it was underpinned by undertakings given by the foster parents to return the child at the request of the local authority or order of the court and in any event by a specified date.

25. Miss Cabeza and Mr Hames invite me to consider whether ***Re G*** was wrongly decided particularly given that Wall J was not referred to ***Ikimi v Ikimi*** [2001] 2 FLR 1288. In that case, the Court of Appeal held that in the context of the court's divorce jurisdiction, 'ordinarily' and 'habitually' must be regarded as synonymous, and that the same meaning should be given to 'habitually' wherever it appeared in a family law statutes.

Discussion and conclusion

26. As I said during the course of argument, I encounter real difficulty when asked to disagree with Wall J and for a wide variety of reasons which do not require exploration. However, I am not bound by his decision because, in exactly the same way as he was, I am sitting at first instance. His observations are of interest quite obviously but I am entitled just as any other first instance judge would be to arrive at a different conclusion as to the way in which s.105(6) should be interpreted and applied.

27. It does not appear to me to be necessary or desirable therefore to venture into the realms of describing Wall J's decision as wrong or inconsistent with other relevant reported cases. Any such critical observation is not for me. Moreover, whether or not 'ordinarily resident' in s.105(6) is synonymous with 'habitually resident' for other jurisdictional purposes (the Family Law Act, the Hague Convention or Brussels II revised) is not critical to decision making here.

28. What is of infinitely greater, even vital, importance is that I should pronounce myself entirely satisfied, as I do, that IA – as the result of an intention shared by the local authority, Mr and Mrs X and, indeed, the court – will remain habitually resident in England. The placement in the USA with the Xs is either disregarded by application of s.105(6) and / or on the facts the local authority has no settled intention that IA should live in the USA.

29. In those circumstances, it is straightforward to give the local authority permission under s.28 of the ACA 2002 to remove IA from the United Kingdom and to place her with Mr and Mrs X for a time-limited visit which, in the first instance, is envisaged to be of one-year's duration.

30. Miss Cabeza and Mr Hames have drafted an order which meets with my complete approval. It may be of considerable assistance to other practitioners and judges for a copy to be appended, in anonymised form, to this judgment.

DRAFT ORDER

And Upon hearing Counsel for the local authority and Counsel for the Children's Guardian;

And Upon the Court recording the following material facts:

- The child remains subject to a care order and placement order made in in favour of the local authority on _____
- In consequence of the Care Order, under English law, the local authority holds parental responsibility for The child and is entitled to exercise that parental responsibility to the exclusion of every other person, including the child's parents;
- The local authority has approved as foster carers (whose identity is confidential to the court within these proceedings but who will be referred to herein as Mr and Mrs X)
- The local authority care plan, which the court approves, is to place The child with Mr and Mrs X for the purpose of a time limited visit which is envisaged in the first instance to be of 1 year's duration, but which may, dependent on the circumstances at that time, and subject to the necessary visa being in place, be further extended;
- Throughout the term of the proposed placement, the local authority will retain full responsibility for meeting all of The child's needs, and will monitor and support her placement with Mr and Mrs X in both financial and practical terms and that this responsibility will continue for the duration of any part of the placement which is spent outside of England and Wales;
- While acting as The child's foster carers Mr and Mrs X will not hold parental responsibility for her, and in particular they will not be entitled to determine her place of residence;
- If in the future Mr and/or Mrs X wish to adopt The child while they are still habitually resident in the US, such adoption application would have to be carried out in compliance with the Hague Convention of 29th day May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, under which the US central authority will issue Article 15 to the Department of Education and the relevant UK central authority would take responsibility for the assessment of the child and the preparation of the Article 16 report;

And Upon the local authority confirming that it will not place The child into the care of Mr and Mrs X unless it has first obtained and lodged with this Court a completed General Form of Undertaking

signed by Mr and Mrs X wherein they must undertake to return The child to England and Wales forthwith upon request of the local authority or upon the order of this Court and in any event to return her to England and Wales not later than [insert specific date]

And Upon the Court declaring that in the event that The child is placed with Mr and Mrs X and has her home with them in the US for a period of time, any such period shall not have the effect within English law of changing The child's place of habitual residence which shall remain at all times in England and that at all times this Court shall retain primary jurisdiction in respect of The child's welfare.

And Upon the Court confirming that as a matter of English Law, in exercising its parental responsibility for The child, the local authority is entitled to apply to any foreign Embassy or Consulate for a visa which would enable The child to enter temporarily into that jurisdiction, irrespective of whether or not the mother has consented to that application being made;

And Upon the Children's Guardian consenting to the terms of this order on behalf of The child

IT IS ORDERED THAT:

1. Pursuant to s.28 there be permission to the local authority to remove The child from England and Wales for a period of not exceeding 1 year from the date of her removal, on the basis that The child must in any event be returned to England and Wales not later than 23.59 on [insert date].

2. Permission is given to the local authority to disclose this order to the US consulate as part of any visa application it issues on The child's behalf to enable her to take up the opportunity of an extended visit in that country.

3. Permission is given to the local authority to disclose the report of the children's guardian prepared within these proceedings to Mr and Mrs X.

4. No order for costs.

DATED this 12th day of March 2013