Case No: B4/2013/2116

Neutral Citation Number: [2013] EWCA Civ 1131
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION
THE RIGHT HONOURABLE MR JUSTICE WOOD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/09/2013

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE UNDERHILL
THE RIGHT HONOURABLE LADY JUSTICE MACUR

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Between :

M (A Child) **Appellant**

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Mr Mark Jarman (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Mr Robin Powell (instructed by **Norman H Barnett & Co Solicitors**) for the **Respondent**

Hearing dates: 12th September 2013

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Judgment

Lord Justice Longmore:

1. This is an appeal from an order, made by Wood J on 18th July in the course of Hague Convention proceedings, that the mother be permitted to carry out paternity testing by DNA of her daughter. He required samples for the purpose of such testing to be taken from the daughter, the supposed father and the mother by 16th August and that the matter be listed for a determination of the question of summary return of the daughter to Latvia or for further directions on Monday 16th September. On 5th September McFarlane LJ granted the supposed father permission to appeal and certified that the case was fit for Vacation Business. The appeal was heard a week later on 12th September. It will be apparent that, even if we had been able to give judgment dismissing the appeal on the conclusion of the hearing, it would have been impossible for the results of any DNA testing to be available for a hearing on 16th September. As it is, we have had to take a short time to consider our judgment. McFarlane LJ commented adversely on the delay that occurred between 18th July and 27th August before a skeleton argument was provided to accompany the notice of appeal.

2. The history of the matter is that the parties are both Latvian nationals who began living together in Latvia in 2000. A daughter, M, was born to the mother on [a date in] 2008. The mother registered the appellant as the father on the birth certificate. In 2010 the parties separated. Initially the mother and daughter went to the United States but they returned to the Latvian family home in August 2010. In October the mother left for Ireland to find work and left M with the appellant. She returned in December 2010 and then resided in a property two roads away from the appellant; there was an informal arrangement for M to reside 3 days a week with the appellant. This continued until about Easter 2012 when the mother began a new relationship. Difficulties then arose about the appellant's continuing to have access to M.

3. On 18th May 2012 the appellant applied to the Riga City Zemgale Suburbs Court ("the Riga City Court") for directions. The parties were, however, able to come to an agreement on 22nd October 2012 which provided that the appellant had the right to see M 9 times a year for at least 7 hours per meeting and that during such meetings he had the obligation to look after and take care of M. In default of any other arrangement the mother was to take M to the appellant's residence at S Street; she was also obliged to inform the appellant of any lengthy absence or change of residence on the daughter's part. On 3rd January 2013 this agreement was made an order of the court which recorded that the appellant's claim had been pursued to establish a procedure for exercising rights "with the daughter M". The order took effect on 15th January 2013.

4. In February 2013 the mother told the appellant that she was going to Glasgow to obtain work and would take M with her. The appellant asserts that he agreed with the mother that he could collect M at the end of May and take her back to Latvia in 3 months time for her to reside with him for a month. On 7th May the appellant bought air tickets for the purpose with a view to collecting M on 31st May. The appellant was then contacted by a third party who told him that the mother had left Glasgow to live in London; the appellant was unable to contact the mother and on 20th May instructed the Latvian central authority to begin Hague Convention proceedings. The mother did contact the appellant on 25th May to say that M would not be returning to Latvia. The appellant nevertheless travelled to Glasgow on 31st May but neither the mother nor M were at the airport. English proceedings were issued on 13th June; the mother

was located on 28th June and served on 1st July; she was required to appear on 3rd July. This she duly did and said she had made contact with a solicitor; the matter was accordingly adjourned until 18th July. The mother's written evidence for the hearing asserted for the first time, according to the appellant, that he was not M's biological father. According to the mother that fact, if it be a fact, would mean that the appellant had no rights of custody either under Latvian law or under the Hague Convention. It would then follow that there was no "wrongful retention" of M and the Convention would not apply.

5. Chapter Two of the Latvian Code relating to Family Law is headed "Rights and Duties as Between Parents and Children". Sub-Chapter Three deals with "Custody" (inter alia) as follows:-

> "I Personal Relations of Parents and Children
>
> 177. Until reaching the age of majority … a child is under the custody of his or her parents.
>
> Custody is the rights and duties of parents to care for the child …
>
> Care for a child means his or her care, supervision and the right to determine his or her place of residence …
>
> By the right to determine the place of residence of the child is understood the choice of the geographic place of residence and choice of dwelling …
>
> 178. Parents living together shall exercise custody jointly. If the parents are living separately, the joint custody of the parents continues …
>
> The joint custody of the parents shall terminate upon the establishment on (sic) the basis of an agreement between the parents or a court adjudication of the separate custody of one parent."

6. Articles 3-5 of the Hague Convention as scheduled to the Child Abduction and Custody Act 1985 provide:-

> "Article 3
>
> The removal or the retention of a child is to be considered wrongful where
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of the State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.

Article 5

For the purpose of this Convention:-

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "right of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

7. On 18th July counsel then appearing for the mother said he did not know whether under Latvian law the appellant would have a right of custody if he was not M's biological father nor whether any such right of custody would give rise to a right of veto on any proposed place of residence for M nor yet whether the agreement or court order constituted a termination of any right of custody under Article 178 of the Latvian Code. Naturally enough Wood J asked him to draft the questions to which an answer would be desirable. He came up with questions which, after some amendment, were substantially the questions now attached to Mr Powell's amended skeleton argument for the purpose of this court. Mr Jarman agreed that it was at least necessary to know whether the settlement incorporated in the order of the Latvian Court terminated any joint custody of the appellant and the mother and whether that agreement allowed the mother to act unilaterally in permanently removing M from Latvia. In response to the mother's application for paternity testing, he said that that should only be done if in Latvian law the appellant did not have rights of custody. The discussion of Latvian law had proceeded on the basis that the court might exercise its power under Article 15 of the Convention to obtain a decision from the Latvian court that M's retention was wrongful but the judge was "not having that" (Transcript page 18 line7), because of the inherent delay to which it would give rise. He therefore ordered that an expert to whom the questions of Latvian law could be posed should be identified by Monday 22nd July and that agreed questions were to be put to him or her by Thursday 21st July. He then "on fine balance" ordered DNA testing in parallel with instructions to the Latvian expert (page 19 line8). It is only this part of the order which is the subject of appeal.

8. Mr Jarman for the appellant submits that any such order is premature. The Latvian court order presupposes that the appellant is M's father (it refers to M as being "the daughter") and the settlement agreement incorporated in the order refers to M as "his daughter". Unless and until that order is set aside by the mother, DNA testing is inappropriate. In any event no such order should be made unless it is clear that only a biological father has rights of custody in Latvia.

9. Mr Powell for the mother submits that the judge made a sensible order that the DNA testing and the obtaining of advice from an expert on Latvian law should proceed in parallel so that the judge would, when the matter came back to court on 16th September, be fully informed as to all possibilities and thus be in a position to make a final determination of the question whether M should be summarily returned to Latvia. He effectively submits that the order for DNA testing was a case management decision with which the court should not interfere.

Conclusion

10. I do not consider that an order for DNA testing to establish paternity is, in the circumstances of this case, a mere case management decision. It is a serious step for any court to take and should not, in my view, be ordered unless it is necessary for it to be done before a conclusion can be reached. It may not be a physical invasion of privacy since samples can be obtained without any substantial physical bodily interference but it is on any view a psychological invasion of a litigant's rights to a personal life. There are also inherent welfare considerations. Is it to be explained to M (now aged 5) that a bodily sample is required from her or is it to be taken surreptitiously? If it is to be explained, who is to furnish that explanation; if it not to be explained now, is she ever to be told that it has happened and what the result is? These are troubling questions to which there is no obvious answer.

11. It seems to me, therefore, that DNA testing as ordered by the judge, if it is to be done at all, should only be done as a last resort. That means that the expert in Latvian law should first give his answer to the questions of Latvian law posed to him. If by Latvian law the appellant has a right of custody or if, despite any conclusion of Latvian law, the appellant has a "right of custody" on the true construction of the Convention, any question of DNA testing will fall away. If, however, the court concludes that the appellant has no right of custody on which he can rely unless he is actually M's biological father, then the question of DNA testing will have to be revisited. But it should only be at that stage that any order should be made.

12. For these reasons, I would discharge paragraph 6 of the judge's order.

Postscript

13. I cannot, however, part with the case without expressing my dismay in relation to the parties' disregard of the other parts of the judge's order. Paragraph 3 of the order permitted the parties to jointly instruct an expert in Latvian law to advise whether the appellant had rights of custody. Duncan Lewis were designated as the lead solicitors for that purpose; agreed questions were to be sent to the expert by 25th July and the expert report was to be filed and served by the 30th August. None of that has happened; instead Duncan Lewis on 3rd September 2013 sent the proposed letter of instruction, not agreed by mother's solicitors, to a Ms Dana R in Riga requesting an

answer to six questions all of which presuppose that the appellant is M's father and does not explain that the basis of the mother's assertion that the "Father" does not have rights of custody is that the appellant is not M's biological father. This appears to have left the Mother's questions as drafted for the judge in the course of the hearing on 18th July (and subsequently amended) out in the cold and Mr Powell was unable to tell us when those questions were submitted to Ms R, if indeed they have been submitted to her at all. No expert report has been produced by 30th August as required by the order or, so far, at all. Neither party has gone back to the court to ask for the order to be varied; each appears to have thought that the terms of the order in these respects could just be ignored. Wood J, quite rightly, takes the court's obligation under the Hague Convention extremely seriously but the court's efforts in that regard have been effectively undermined by the parties' solicitors to the serious prejudice of their clients' cases, whichever of them may in due course turn out to be right.

Lord Justice Underhill:

14. I agree. I sympathise with the Judge's wish, given that this was a Hague Convention case, to accelerate matters by ordering DNA testing in case the issue of paternity turned out, once expert evidence of Latvian law was available, to be material to the question of his jurisdiction under article 3. But a determination of paternity is best carried out in a welfare context and by the Court of the child's habitual residence. In my view such a determination should only be made in the context of a Convention application if it is clear that that is necessary for the purpose of a decision which the Court has to make. That was not so here. In the first place, the Respondent might succeed in showing that the case fell outside article 3 on one of the other bases advanced by her. But, even if she did not, it does not follow that the Appellant's rights of custody at the material time under Latvian law depended on whether he was the biological father. He was named as the father on the birth certificate; he had acted for most of M's life as a *de facto* father; and the Respondent had consented to the making of a Court order on the explicit basis that he was the father. It would not be in the least surprising if on any one or more of those grounds he would fall to be treated in Latvian law as having rights of custody at the moment of removal, even if they might subsequently be lost as a result of his being shown not to be the biological father. Indeed I would go so far as to say that they put the burden squarely on the Respondent to show, by reference to specific evidence of Latvian law, that he was not entitled to be so treated. I accordingly agree with Longmore LJ that the right course was to defer a decision whether to order testing until it had been clearly established that the issue of biological paternity was indeed the decisive question for the purpose of jurisdiction. That need not have involved an adjournment of more than a week, particularly if the parties had been directed to put the necessary arrangements in place on a provisional basis.

Lady Justice Macur:

15. I agree that this appeal must be upheld for the reasons given by my lord, Longmore LJ and with the additional comments of my lord, Underhill LJ. I share my lord, Longmore LJ's dismay at the party's comprehensive failure to abide by the directions of Wood J, not least in the frustration of his obvious design to achieve the aim of speedy resolution of these "Convention" proceedings.