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[06/07/2000; High Court (England); First Instance Court]
Re JS (Private International Adoption) [2000] 2 FLR 638; [2000] 3 Fam Law 787

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

6 July 2000

Johnson J.

In the Matter of re JS (Private International Adoption)

Counsel: Henry Setright for the applicants; Marcus Scott-Manderson for the local authority; Peter Wright for the prospective adopters; Robin Barda as a friend of the court.

Solicitors: Reynolds Porter Chamberlain; Sharpe Pritchard; Woolacott and Co; Official Solicitor.

JOHNSON J: On 18 December 1999 a little girl was born in Texas. Her birth has been registered in Texas with the name NG. Two days later on 20 December 1999 her mother executed, in accordance with Texan law, an affidavit described as being an affidavit of relinquishment of parental rights. I have been referred to the Texan Family Code which describes the effect of such an affidavit:

'An affidavit that designates a licensed child placing agency as managing conservator of a child is irrevocable. Such an affidavit must state in terms that the relinquishment is irrevocable.'

The mother's affidavit designated as the managing conservator of young NG an agency licensed by the Texas Department of Protective and Regulatory Services called the Blessed Trinity Adoptions Inc based in Houston. The affidavit records the mother as understanding her rights as a parent: 'I freely, voluntarily and permanently give and relinquish to the above named agency all of my parental rights, privileges, powers and duties'. The mother consented to the placement of NG for adoption by the agency. The affidavit expressed the mother's understanding that there would be a legal process, which if not filed already would be filed promptly in the appropriate court with a view to termination of the relationship between mother and child. The affidavit recorded the mother's understanding of the significance of what she was doing and as required by the Code recorded in large type her understanding that the document was irrevocable.

Later that day NG was handed over by the agency to Mr S. That was done pursuant to a written agreement made between the agency and Mr S, signed I believe at the airport. Mr S paid the agency $19,000. The agreement set out what it called the services which the agency

was to provide to Mr S and his wife. The first such service was the placement of the child in their home. By this time NG seems to have become JS. So far as I am aware there was no legal basis for that change of name. The agreement provided that Mr and Mrs S would have JS, as she was now called, in their home. The address of that home was not identified in the document but it was known to all concerned that Mr and Mrs S lived in England. The agreement referred to the 'finalization of the adoption' which was to occur within 7 months unless decided otherwise by the agency. The document as drawn seems to have been inappropriate for the placement of a child so far away. For example, it provided for face-to-face visits between the agency and Mr and Mrs S, one of those visits to be in their home. However, more importantly for the purpose of the decisions that I have to make the last paragraph of the agreement is in these terms:

'Both the agency and the adoptive family understand that after the termination of parental rights decree is signed, the agency is the managing conservator of the child with legal responsibility for the child. Therefore the adoptive family understands and agrees that the child can be removed by, or returned to, the agency at the discretion of either party prior to the finalization of the adoption.'

Having signed that document and paid the $19,000, Mr S boarded the plane for England, bringing with him, as she now was, JS.

There the matter remained for a time at least. JS made her home with Mr and Mrs S and their 15-year-old son, Adam. Adam has written a letter to the court, which I find compelling. I do less than justice to the way he has expressed himself if I summarise his letter by saying that it emphasises that the home of Mr and Mrs S was the only home that JS had ever known and that the Blessed Trinity Adoptions Inc had committed JS to their care willingly. I was about to say voluntarily, but I remind myself of the $19,000 that the agency required.

There were a number of surprising features of this arrangement beyond those to which I have already referred. I do not intend this list to be exhaustive but simply to indicate some of the matters that may be -- I certainly do not say should be, but emphasise may be -- of concern to the Government of the USA. The birth certificate of NG/JS is dated only in March 2000, so it is perhaps surprising that a passport was obtained for NG in the name of JS. It is surprising too that the Blessed Trinity Adoptions Inc made the important decision as to where NG should be for the rest of her life and by whom she should be brought up on the basis of a report which I have read. It is from a supposedly independent social worker. It will be observed from the report that the lady concerned does not purport, in the document at least, to have any professional qualifications for the enormously important task conferred upon her, reporting as she was about a family resident in England for the benefit of an adoption agency in Texas. Again, simply to illustrate the gross inadequacy of the report, the author of the report clearly made no inquiries of the local authority in whose area the family lived in England. Again, it may be a matter of concern that neither the author of the report nor anyone involved with the Blessed Trinity Adoptions Inc seemed to have paid any regard to the arrangements that have been put in place by the UK Government for inter-country adoptions. One would suppose that agencies such as Blessed Trinity Adoptions Inc and the supposed independent social worker would have been familiar with the existence in all countries of guidance such as we have here in the UK, published by our Department of Health, to assist in this important work being carried out in a way that safeguards and promotes the welfare of children. Some of these matters constitute offences contrary to the criminal law of the UK, those offences being committed by Mr S and by the author of the report.

To return to the history, the arrival of JS in the UK came eventually to the notice of the social services of the local authority in whose area she was living. That social service department was concerned because it believed that there were compelling reasons why Mr and Mrs S should not be regarded as able to provide a safe and secure home for JS. As to these reservations, I make absolutely no findings of fact at all. What happened was that this social services department communicated its concerns to the Blessed Trinity Adoptions Inc, which thereupon communicated with Mr and Mrs S by telephone call of 17 May 2000. The adoption agency requested that they return JS to them in Texas. Mr and Mrs S declined to do so. So it is suggested there was a retention of JS in terms of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 to which both the UK and the USA were parties and which is incorporated into English law by the Child Abduction and Custody Act 1985.

On 7 June 2000, JS was removed from Mr and Mrs S pursuant to an order made earlier that day by Wilson J. Since then she has been looked after by foster-parents under the supervision of the social services department here in England. There were then applications to the court in Texas. On 26 May 2000 the court made the decree of termination, the effect of which was, as I understand it, to terminate the relationship between the child and her natural parents. On 6 June 2000 the Family District Court of Fort Bend County in Texas made orders: one directing the return of the child to Texas, the other being a writ of habeas corpus.

In England, proceedings were instituted by the local authority under the wardship or inherent jurisdiction of the English court, the local authority having obtained the necessary consent of the court under s 100 of the Children Act 1989. At an earlier hearing, I had thought that the substantial issue arising, namely whether JS should go back to Texas, could be best determined under the inherent jurisdiction, but my attention has been helpfully drawn to Art 16 of the Hague Convention which provides that no decision such as that can be made under the inherent jurisdiction of the court until after resolution of the application under the Hague Convention. The Article provides in effect that the court shall not decide the merits of rights of custody until it has determined that the child should not be returned under the Hague Convention.

Three submissions are made by counsel on behalf of Mr and Mrs S in opposition to the application by Blessed Trinity Adoptions Inc. The application by the agency is supported by the local authority and by the Official Solicitor who appears before me, not as guardian of the child but as what in former days would have been called amicus curiae but now somewhat awkwardly called 'friend of the court', and I am grateful to the Official Solicitor and to Mr Barda for the submissions that they have put forward. Mr Wright on behalf of Mr and Mrs S submits that the agency did not have rights of custody within the meaning of Art 3 of the Convention, that at the time of retention (whenever that is) JS was not habitually resident in Texas, and finally that the court should exercise its discretion not to order the immediate return of JS to Texas in accordance with the duty imposed upon the court under Art 12, the court, Mr Wright submits, being satisfied that her return to Texas would place her in an intolerable situation. As to that first submission, it seems to me plain on the face of the mother's affidavit of relinquishment and on the face of the agreement between the agency and Mr and Mrs S that the agency did hold rights of custody at the time of the request for return made by the agency on 17 May 2000. The affidavit said in terms that the mother relinquished her rights and appointed the agency to be managing conservator of her child. The agreement made between the agency and Mr and Mrs S certainly conferred upon them certain rights in respect of the child, but in my judgment the agreement did not confer total rights. The phrase 'rights of custody' in the Convention seems to me to envisage what might properly be called a bundle of rights, so that, as it seems to me,

the agreement provides for some rights to be conferred upon Mr and Mrs S whilst others are retained by the agency. For example, the agency retained the right to supervise the placement of JS with Mr and Mrs S, but most importantly the right to call for her return. That important final paragraph of the agreement seems to me to have emphasised that 'the agency is the managing conservator of the child with legal responsibility for the child'. I hold that at the time of the telephone call on 17 May 2000 which required the return of JS the agency had rights of custody within the meaning of the Convention. If contrary to that finding, the agency did not have rights of custody on 17 May 2000, they most certainly had them after the decree of determination was made on 26 May 2000 or indeed one might say after the orders of 6 June 2000, since when there has been what I regard as a retention.

Mr Wright's second submission was that at the time of the retention JS was not habitually resident in Texas for the purpose of Art 3 of the Convention. I have not found this an easy question. The intention of the agreement would seem to have been that, had there been no intervention such as has in fact taken place, JS would have remained here with Mr and Mrs S indefinitely. So I questioned how it could be that she had not become habitually resident with them. She came here on 22 December 1999, so that she had been here for 5 months at the time of the request of 17 May 2000, long enough one might have supposed for her to have become habitually resident here. The response to that concern is, I think, really this. A child, certainly a child of the age of JS, cannot herself form an intention about her residence or indeed anything else, so that the law provides that the habitual residence of a child shall be determined by the parents of the child and failing that by whoever has legal responsibility for the child. I sought to test that proposition with a number of examples which I put to counsel, but always it seemed to me the outcome was that the term 'habitual residence of a child' envisages a state of affairs based not only on physical presence but with what one might call a mental element on the part of the parent or here the institution having legal responsibility. I refer again to that important last paragraph of the agreement between the agency and Mr and Mrs S: 'The agency has legal responsibility for the child. Mr and Mrs S understand and agree that the child can be removed from them at the discretion of the agency'. So it seems to me that at the time that the request was made, whether it be on 17 May 2000 or subsequently, JS's presence in the UK did not constitute habitual residence, and I reject Mr Wright's second submission.

His third submission raises the defence under Art 13 that JS's return to Texas would place her in an intolerable situation. This submission finds support in the report and written submissions of the Official Solicitor. 'I have asked myself', writes the Official Solicitor, 'whether committing a child to an agency which was prepared to make a placement decision on the basis of such an entirely inadequate document as the Home Study Report, allied with the payment of a very large sum of money is an agency which might place this child in an intolerable position'. I have asked myself the same question. It is important that I should emphasise that I have sought studiously to avoid applying to the workings of this agency the practices and procedures which we follow here in the UK. But, whilst emphasising my wish not to be thought critical of the agency, that being a matter for others if criticism be deserved, it does seem to me to have been surprising to say the least that the future of a baby should have been determined in the way that I have described. No one could, I think, claim that the inquiries that were made about her future home were other than grossly inadequate for the purpose.

Recognising the concern to which I have referred, the agency has offered certain undertakings and for that it is to be commended. I understand that the very experienced solicitor acting for the agency here in England has obtained instructions by telephone to enable those undertakings to be given. They are undertakings, the detail of which I need not recite in this order, but the object of which is to seek to do what is possible in the

circumstances to ensure that if returned, JS is looked after appropriately. Of course, English judges are familiar and understand and sympathise with the misapprehension that can sometimes exist in American courts about the consequence of undertakings being given to an English court when children are to be returned to the USA. That has been the subject of high level discussion between the two legal systems, and I need not refer to it further. But I am confident that my brother or sister judge sitting in Texas will understand that what I have sought to do is to obtain from the agency some assurances which are recorded formally in the order of the English court with the obvious objective to which I have referred.

In the light of those undertakings I am satisfied that if returned to Texas JS would not be placed in an intolerable situation. I am confident that her future will be determined under the supervision of the courts of the State of Texas and the administrative agencies there charged with responsibility for the future of children. However, even had I been satisfied that Mr and Mrs S had made out a proper case under Art 13 I would none the less not have thought it right to exercise my discretion not to order JS's return. I repeat my regard for the matters relating to JS's welfare which have been canvassed before me and principally, may I say, the quite excellent way those concerns have been elaborated by young Adam, but all said this little girl is American and her future ought to be decided by an American court and by American procedures and American ways.

Accordingly, I propose to perform my duty under Art 12 of the Convention by ordering the return of JS to Texas forthwith.

Had I not been persuaded that that was the right order for me to make under the Convention then I would have had to consider how to exercise the inherent jurisdiction of the English court. Broadly stated the options would have been for me to give directions for inquiries to be made with a view to a hearing before a judge here in England. That would have taken some time, but it would have been an in-depth inquiry aimed at achieving what was best for JS. The other option would have been to order JS's return to Texas so that her future could be determined by the legal processes there. The choice between those two options in the circumstances of this case is not by any means straightforward. The suggestions, so far unproven in these proceedings at least, against Mr and Mrs S would all be the subject of evidence available here in England, a consideration which points to the advantage of JS's future being determined here. On the other hand, she is, as I have said, an American child whose future ought to be determined there and of course whether she were to be placed with Mr and Mrs S or placed somewhere else would be a matter that would not be decided only by the truth or otherwise of the local authority's reservations about Mr and Mrs S, by which I mean to say that if those allegations were not established it would not necessarily follow that they would be granted the custody or care of JS. So had I not made an order for return under the Convention I would have made an order for return under the inherent jurisdiction.

I shall make an order for the assessment of those parties who have legal aid certificates if there be any.

No order as to costs save legal aid assessment of the costs of Mr and Mrs S in both proceedings, both the wardship and the Convention proceedings.

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