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Re JS (Private International Adoption)

[2000] 2 FLR 638

06/10/2000

Barristers
Henry Setright KC
Private: Marcus Scott-Manderson QC
Robin Barda

Court
Family Division

Facts
After the child's birth in Texas, the mother executed an affidavit of relinquishment of parental rights which designated a licensed adoption agency as managing conservator of the child. The Texan Family Code states that such an affidavit is irrevocable. The child was then handed by the agency to the prospective adopter, Mr S who, after signing an agreement and paying the agency $19,000, took the child to England. The agreement with Mr S stated that '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 finalisation of the adoption'. After hearing of the arrangement, the local authority in which the prospective adopters lived informed the agency of concerns as to the fitness of Mr and Mrs S to provide a safe home for the child. The agency then requested the return of the child but Mr and Mrs S refused to comply. The agency alleged wrongful retention of the child under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980. Soon after this, a Texan court made the decree of termination which terminated the relationship between the child and her natural parents. In the Hague Convention proceedings, Mr and Mrs S submitted that the adoption agency did not have rights of custody within the meaning of Art 3, that at the time of retention the child was not habitually resident in Texas and that the court should exercise its discretion not to order the immediate return of the child to Texas under Art 12 as a return would place her in an intolerable situation.

Held
Held – ordering the return of the child to the USA –

(1) The agency had rights of custody at the time of the request for the child's return. The mother's affidavit stated that she relinquished her rights and appointed the agency to be managing conservator of the child. The agreement between the agency and Mr S conferred certain rights upon him in respect of the child but not total rights, for example most importantly the agency retained the right to call for the child's return. If the agency did not have rights of custody when it requested the child's return, it certainly had such rights after the decree of termination was made.

(2) The child was habitually resident in Texas. A child of such a young age cannot form an intention about her residence so her habitual residence is determined by whoever has legal responsibility for her. As the child could be removed from Mr and Mrs S at the request of the agency, her presence in the UK did not constitute habitual residence. This is so even though she would have remained in the UK indefinitely if all had gone well with Mr and Mrs S.

(3) The return of the child to Texas would not place her in an intolerable situation despite the fact that the agency had made a placement decision based on what was found to be an entirely inadequate document allied to the payment of a considerable sum of money. The agency had now offered undertakings to ensure that the child, if returned, would be looked after appropriately.

(4) If an order had not been made for the child's return under Art 12, an order for her return would have been made under the inherent jurisdiction. The child is American and her future ought to be decided by an American court and by American procedures and American ways.

Permission