

Re AW (Adoption Application)

[1993] 1 FLR 62

21/02/1992

Barristers

Private: Jonathan Cohen QC

Court

Family Division

Facts

This was an application for an adoption order in respect of a child born in 1987. The applicants, Mr and Mrs B, had already adopted a child in 1980 after a private placement, not at that time prohibited. They were anxious to adopt another child but knew that by reason of their age – they were 62 and 60 respectively – their health, strains within the marriage and the alcoholism suffered by Mr B, they would not be regarded as suitable applicants. Consequently, they set out deliberately to circumvent the law. They made arrangements with a pregnant woman in England who did not wish to keep her baby that she should have the child in Germany. They paid £1000 towards her expenses in England and her hospital and other costs in Germany. Having arranged for a Mrs E, accompanied by Mr B, to bring the child to them in England, they embarked on a course of devious and evasive conduct, concealing the facts from the local authority and manipulating the doctors and other professionals involved, so as to prevent the investigation of their family situation and to delay matters until, as happened, the child had been in the family for so long that nobody concerned with her welfare could contemplate her removal. The local authority played into their hands by countenancing their delaying tactics and by failing to unearth essential information and to discharge their duties under the Adoption Rules 1984.

Held

Held –

(1) Section 29(1) of the Adoption Act 1958, replaced since 1 January 1988 by s 11 of the Adoption Act 1976, which provided that no person other than an adoption agency should place a child for adoption unless: (a) the proposed adopter was a relative of the child; or (b) he was acting in pursuance of an order of the High Court, though it did not have extraterritorial effect, applied in the present case since all arrangements for the adoption were made in England and the physical handover of the child by Mrs E took place in England.

(2) It followed that the adopters were in breach of s 29(1), and since the provisions of s 9 of the Children Act 1975 did not provide a loophole whereby an adoption order could be made outside the terms of s 29(1), the court was barred from making an order unless authorised by the High Court under s 29(1)(b).

Re Adoption Application [1992] 1 FLR 341 and Re ZHH (Adoption Application) [1993] 1 FLR 83 not followed.

(3) Since s 50(1) of the Adoption Act 1958, replaced since 1 January 1988 by s 57 of the Adoption Act 1976, which provided that any payment or reward to bring about the adoption of a child had no extraterritorial effect, the payment that remained to be considered was the £1000 paid by the adopters in England. That payment constituted a breach of s 50(1), whether or not there was a commercial or profit motive, the nature and purpose of the payment, apart from such items as fees for home study reports or for lawyers, being relevant only to the question whether the court should exercise its dispensing power under s 50(3).

(4) In considering whether dispensation should be given to remedy the breaches under s 29 and s 50 so that an adoption order could be made, the court had to balance public policy against the welfare of the child, giving first consideration to the need to safeguard and promote the welfare of the child throughout its childhood. In this case, the welfare of the child demanded that she should stay within the family, although matters might have been different without the delay on the part of the Bs and the local authority. On the one hand, the factors in favour of an adoption order were that she was settled and receiving love and a good standard of care in the only home she knew. On the other hand, the behaviour of the Bs, their health and the state of their marriage gave cause for concern. As regards public policy, the breaches of s 29 in particular had been very serious, seen in the context of the Bs' deliberate campaign of deceit in order to circumvent the Act, and were such that the court would be fully justified in refusing to sanction the breaches, but the options open to the court in the light of the fact that the child was to stay where she was were limited and unsatisfactory. The court had concluded, therefore, that the welfare of the child outweighed questions of public policy and that the welfare of the child would be best served by the court authorising the breaches and making an interim order under s 25 of the Adoption Act 1976, vesting legal authority in the Bs for a probationary period not exceeding 2 years upon terms whereby the guardian ad litem and the local authority were to be provided with reports at 6-monthly intervals by the child's head-teacher and a doctor in the case, the matter to be heard in the first week of February 1994.

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