

H v H (Jurisdiction to grant Wardship)

[2012] 1 FLR 23; [2011] EWCA Civ 796

08/07/2011

Barristers

Ruth Kirby KC
Teertha Gupta KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

A judge had been wrong to find that a child, who had been born in Afghanistan and had never been to England, was nevertheless habitually resident in England on the basis that his parents were habitually resident in England and their settled intention was for him to live with them there.

Facts

The appellant father (F) appealed against orders making his child (C) a ward of court and requiring him to bring C within the jurisdiction. F and the respondent mother (M) were from Afghanistan. F had British citizenship, and M had come to the United Kingdom shortly after C's birth in Afghanistan, leaving him with an uncle. M later left the marital home. F and the uncle claimed that C had been abducted, while M claimed that F had concealed his whereabouts. She issued wardship proceedings. Because of late authorisation of public funding, F was unable to instruct counsel for one hearing and he was represented by a member of his solicitor's firm who was unfamiliar with his case. The judge considered that he had jurisdiction to consider the wardship application and to require C to be brought to England, on the basis that C was habitually resident in England. He took that decision on the grounds that F had British nationality, M was habitually resident in England, and it had been the settled intention of both parents that C should live in England with them. The judge further considered the circumstances surrounding C's removal from his uncle's house. He heard evidence from F with the assistance of an interpreter, one having been found at short notice at the solicitor's request. F argued that the judge had been wrong to find jurisdiction and that the hearing had been procedurally deficient. M conceded that the judge's finding of jurisdiction based on habitual residence could not be supported, but argued that F had accepted the court's jurisdiction at an earlier hearing.

Held

(1) The judge had been wrong to find jurisdiction based on habitual residence. Jurisdiction was governed by the Family Law Act 1986 s.1(1)(d), s.2(3) and s.3(1). The orders would be set aside and the wardship discharged, because there was no jurisdiction over a child who was not, and never had been, habitually

resident or present in England (see paras 36-41, 52 of judgment). (2) F had been represented throughout, and it would hardly be fair to criticise his solicitor, who had done his best in very difficult circumstances. The solicitor had asked for an interpreter and the judge had ensured that one was found. Nor could the judge be criticised for the robust way he had gone to the heart of the dispute both factually and legally (paras 42-44). (3) Although F's submissions had not been as clear as they might have been at the earlier hearing in challenging jurisdiction, he had never conceded jurisdiction even implicitly, and his case overall had been one of persistent challenge (paras 45-51).

Permission

Lawtel 