

SJ and Another v JJ and Another [2011]

[2011] EWHC 3450 (Fam)

16/11/2011

Barristers

Jacqueline Renton

Court

Family Division

Practice Areas

International Children Law

Summary

Proceedings relating to a child (A) retained in Poland by his mother. Father applied under Brussels II Revised seeking orders (a) making A a ward of court; (b) requiring that A be returned to this jurisdiction; and (c) in the alternative seeking contact. Held that the English court retained jurisdiction. Interim contact order made.

Facts

This was a child abduction matter in which both parents were Polish. They had moved to Barnstaple in 2004 and obtained employment. Their child, A, was born in June 2009. In September 2009, the mother was planning to take A on holiday to Poland but the father became concerned that she was planning to stay in Poland permanently. He made an ex parte application for a prohibited steps order in Exeter County Court. However, at the return date, the prohibited steps order was discharged and a residence order made in favour of the mother who was permitted to take A to Poland for a holiday.

Shortly before she was due to return, the mother e-mailed the father to inform him that she intended to remain permanently in Poland. The father made further applications to the county court and the High Court. On 27 November 2009, Coleridge J declared that A was habitually resident in England at the time of the unlawful retention in Poland.

In or around December 2009, the father also filed an application in the court in Poland under the Hague Convention seeking the return of A to this country. This application was granted but overturned on appeal. The father subsequently filed an application in the High Court of England and Wales under Article 11(7) Brussels II Revised seeking orders (a) making A a ward of court; (b) requiring that A be returned to this jurisdiction; and (c) in the alternative seeking contact.

This judgment of Baker J considers the question of which court had jurisdiction in relation to this matter. In essence, having been seised of the matter before the Polish court made its non-return order, the English Court retains jurisdiction until the requirements of Article 10 are satisfied, namely:

- (i) A has acquired habitual residence in Poland;
- (ii) A has resided in Poland for at least a year after the father has or should have had knowledge of his whereabouts;
- (iii) A is settled in his new environment; and
- (iv) The English court has issued a judgment on custody

Whilst the first three of these appeared to be satisfied, the fourth was clearly not. The Court therefore retained discretion as to whether to continue proceedings. The obligation imposed by the last sentence of Art.11(7) BIIR on the court of the Member State in which the child was habitually resident before removal to 'close the case' only applies to cases where that court was not seised prior to the non-return order and the parties, having been invited to make submissions on the question of custody, fail to do so within the three-month period.

Held

This Court therefore retained jurisdiction. Baker J concluded that even if he was mistaken about that, the Court continued to have jurisdiction because of the father's application pursuant to Article 11(7).

The Court heard submissions on whether A should return to the UK. He ultimately accepted the evidence of the Guardian that A was settled in Poland and that to require him to return, given that it would mean separation from his maternal grandparents with whom he and his mother had lived for almost two years, and it would cause considerable distress and hardship to A's mother, would not be in A's best interests.

However, the court declined to make a final order at this stage. Baker J made a detailed order for interim contact and listed the matter for review in February 2012, ensuring that the High Court retained jurisdiction for the time being. The rationale was that this was to give A's mother the opportunity to demonstrate that she was able to comply with the contact requirements and to actively promote A's relationship with his father which had been found to be of a very good quality.

Permission

Family Law Week 