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N v J (Power to Set Aside Return Order)

[2017] EWHC 2752 (Fam)

03/11/2017

Barristers
Teertha Gupta KC

Court
Family Division

Practice Areas
Private Children Law
Judgment of MacDonald J confirming that a High Court judge does have power to set aside a return order made by another High Court judge under the inherent jurisdiction but that the applicant must be able to demonstrate a change of circumstance, or material non-disclosure, relevant to the evaluation of the welfare of the child such as to justify the setting aside of the order as being in the child's best interests.

MacDonald J was required to decide whether a High Court judge had power to set aside a return order made under the inherent jurisdiction by another High Court judge where no error on the part of the court was alleged and, if such a power existed, whether there were grounds for setting aside the return order made by Francis J on 14 September 2017, in respect of which the mother was in breach.

The proceedings concerned two children, G (aged 14) and H (aged 11). On 9 August 2017, HHJ Harris granted the children's father permission permanently to remove them to California and directed the mother to hand the children over to the father by 24 August 2017. The mother failed to do so and Francis J granted a return order pursuant to the court's inherent jurisdiction on 14 September 2017.

On 19 September 2017, the mother applied to set aside the return order and sought permission to appeal HHJ Harris's original order. The appeal was listed on 11 October 2017 before Baker J for a permission hearing to be followed immediately by the substantive appeal hearing if permission were granted.

In this application, the mother contended that the High Court had power to review and to set aside a return order made under the court's inherent jurisdiction by another High Court judge and invited the court to exercise that power on the grounds of (a) material non-disclosure at the hearing on 14 September 2017 and (b) a material change of circumstances since that hearing.

Having conducted a detailed review of the authorities and of the relevant parts of both the CPR 1999 and the FPR 2010, MacDonald J concluded that he did have power under FPR r 4.1(6) to set aside a return order made under the inherent jurisdiction by another High Court judge where no error of the court was alleged but where there had been a change of circumstances, or a material non-disclosure, that went to

the welfare of the child and that this was so notwithstanding the provisions of s 17 of the Senior Courts Act 1981 and notwithstanding that the FPR 2010 were not made under the 1981 Act.

MacDonald then considered how that power should be exercised. His Lordship concluded that adopting strict criteria for setting aside an order concerned with the welfare of a child would run counter to the purpose of a welfare based jurisdiction designed to respond flexibly to the best interests at any given time. He observed that the power must be exercised judicially and not capriciously and in accordance with the overriding objective of enabling the court to deal with cases justly, having regard to the welfare issues involved. Finally, he reminded himself of repeated warnings in the authorities on CPR r 3.1(7) and echoed in the authorities concerning FPR r 4.1(6) that considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion.

In those circumstances, MacDonald J stated that, in order to succeed in an application to set aside a return order made pursuant to the jurisdiction of the High Court, the applicant must be able to demonstrate a change of circumstance, or material non-disclosure, relevant to the evaluation of the welfare of the subject child such as to justify the setting aside of the order as being in the child's best interests.

On the facts of the case, MacDonald J was not satisfied that there had been any change of circumstances or any material non-disclosure and that the mother's application should therefore fail.

To read the judgment, please click here.

Permission