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AG and AB (Children)

[2018] EWHC 381 (Fam)

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Barristers
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Court
Family Division

Practice Areas
Private Children Law

Appeal before Baker J in private law children proceedings where the court at first instance had made a finding that the children were not habitually resident in England and Wales and consequently the English court had no jurisdiction to make orders under section 8 of the Children Act 1989. The appeal was partially successful insofar as the court was found to have overlooked its residual jurisdiction to make orders in respect of the children on the basis of their physical presence in the jurisdiction. However the appeal was dismissed as the judge at first instance's findings of fact and orders were upheld.

The original proceedings were commenced by the father's ex parte application in the Guildford family court for a prohibited steps order restraining the mother from leaving the jurisdiction with the parties' twins (then aged 11 months). The District Judge granted the PSO on the strength of the father's representations (which were later found to have been "exceedingly manipulative, exceedingly untruthful") that the parties had been resident in England for a period of two months with an intention to remain here, before the mother had threatened to return the children to Canada, where they had lived for the first nine months of their lives.

Having obtained the PSO, the father initially delayed telling the mother about the order. When he did, the matter was restored to court before HHJ Nathan, who listed the matter for a contested hearing to determine the habitual residence of the children and the consequential issues of jurisdiction. The mother argued that the children were habitually resident in Canada and the family's presence in England was an entirely temporary, unsettled arrangement that was part of an extended trip to several countries towards the end of her maternity leave.

The court heard evidence on the issue of the children's habitual residence. The factual issues will not be set out in this summary but the court determined that the children were held not to be habitually resident in England at the time the application was made. HHJ Nathan discharged the PSO on the basis that the court did not have jurisdiction to make the order.

After the hearing, the mother and children returned to Canada. Proceedings commenced there in respect

of financial and child arrangements. The father later brought an appeal (out of time) against the order of HHJ Nathan in this jurisdiction.

The father's appeal concerned four grounds, summarised by the Judge in the order in which the appeal court would address them as follows:

(1) Did the judge apply the correct legal test when considering if the children were habitually resident in England and Wales?

(2) Was the judge wrong to conclude that the children were not habitually resident in England and Wales at the relevant date?

(3) Was there any other basis upon which the judge had jurisdiction to consider an application under s.8 of the Children Act in this case?

(4) If there was jurisdiction, what order should this court now make in determining this appeal?

The appeal court was satisfied that the judge had applied the correct legal test in assessing the children's habitual residence, and that HHJ Nathan had been justified to conclude that they were habitually resident in Canada at the time of the application. The appeal court referred to the guidance of A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening) [2013] UKSC 60, Re L (A Child) (Custody: Habitual Residence) [2013] UKSC 75, Re LC (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre Intervening) [2013] UKSC 75, [2014] AC 1017, Re R (Children) [2015] UKSC 35, [2016] AC 76, and In re B (A Child) (Reunite International Child Abduction Centre and others intervening) [2016] UKSC 4, [2016] 1 FLR 561.

The one successful part of the father's appeal related to the court's conclusion that it had not had jurisdiction to make the section 8 orders in light of its finding about habitual residence. Section 2(1) FLA 1986 provides that the English court shall not make a section 8 order unless either

(a) it has jurisdiction under Council Regulation (EC) 2201/2003 ("Brussels IIA") or the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Convention"), or

(b) neither Brussels IIA nor the 1996 Hague Convention applies and (on the facts applicable to this case) the condition in section 3 FLA 1986 is satisfied.

The judgment is worth reading in full on this issue. In summary, because the children were physically present in England and Wales on the relevant date, the appeal court held that there had been residual jurisdiction to make section 8 orders notwithstanding the lack of habitual residence in England. The judge at first instance erred in focusing exclusively on the issue of habitual residence. Baker J made no criticism of the court below for this oversight as the Judge had not been addressed on its residual jurisdiction under section 3 of the Family Law Act 1986 by counsel at the hearing.

However, in light of the court's other findings about the presentation and conduct of the father (which were not subject to the appeal) and the overall facts of the case, Baker J was satisfied that even if the court at first instance had been aware of its jurisdiction to make section 8 orders it would still have discharged the PSO and recommended that any issues be heard in Canada. For this reason, the orders were upheld and the appeal dismissed.

To read the judgment, please click here.

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