Neutral Citation Number: [2018] EWHC 2048 (Fam)

Case No: FD19P00283

FD18P00252

IN THE HIGH COURT OF JUSTICE

**FAMILY DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/07/2018

**Before** :

THE HONOURABLE MR. JUSTICE COHEN

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**Between :**

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| --- | --- | --- |
|  | **A & B** | Applicant |
|  | **- and -** |  |
|  | **C** | Respondent |

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**Mr M Hosford-Tanner** (instructed by **A & N Care**) for the **Applicant** **Grandmother**

**Ms J Renton** (instructed by **JI Solicitors**) for the **Applicant Aunt**

**The Respondent appeared in person**

Hearing dates: 30 July 2018

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Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**The Honourable Mr Justice Cohen:**

1. This case concerns a boy aged 7½ years whom I shall call P.
2. He is the son of the Respondent to these applications who is now aged 39. Sadly, P’s mother died on [a date in] 2016. At the time of the mother’s death P had been living with her and her family in Poland. P’s father lived in England. Following the death, the father moved to Poland, collected P and went with him to live with his parents. In January 2017 the father returned to England leaving P with the paternal grandparents and in June 2017 he collected P and he has lived with his father in England since that time.
3. The maternal family have been allowed no contact with P since June 2017 and the father has opposed any contact saying that P is not yet ready to resume his relationship with the maternal family. I am very pleased that this logjam has today been broken at court and that communication and contact will be restarted.
4. On 28th December 2015 P’s mother signed a document declaring that the maternal grandmother had the mother’s authorisation to exercise rights of custody over P and on 6th October 2016, the day before her death, P’s mother signed a will/testament which states that the mother grants custody of P to the maternal grandmother.
5. It appears that other members of the maternal family assisted in the care of P before his mother’s death, including the mother’s sister. However, none of them were granted any rights of custody in the way that P’s grandmother was. For the remainder of this judgment I shall refer to the maternal grandmother and aunt as respectively the grandmother and the aunt.
6. In early May 2018 when I was sitting as applications judge the aunt appeared through solicitors and counsel seeking disclosure orders as to the whereabouts of the father and P in this country and rights of access pursuant to Article 21 of the Hague Convention on the Civil Aspects of International Child Abduction 1980.
7. At a subsequent hearing on 15th May 2018 when further disclosure orders were sought I expressed my reservation as to whether the aunt fell within the remit of that Article. Counsel instructed on behalf of the aunt was not in a position on that day to deal with the argument, but I expressed in the order that I made, that the court would require to be addressed on the issue of jurisdiction at the return date. The matter was duly fixed for 15th June 2018.
8. It came as a surprise to me when another application was made by the grandmother also seeking disclosure orders and rights of access which fortuitously was listed before me on 8th June 2018. I remembered the facts of the previous case and was thus able to align them.
9. I ordered that they should both be listed before me on 15th June 2018. I had hoped to conclude the matter then, but I decided that it was better to put the matter over until today so as to give P the opportunity to be seen by a CAFCASS officer to determine his wishes and feelings and to enable the aunt to obtain advice as to whether she had rights of access under Polish law.
10. By good fortune, in the meantime the opinion of Advocate General Szpunar in the case of Valcheva v Babanarakis in the Court of Justice of the European Union (Case C-335/17) was published at [2018] 1FLR 1571 followed by the judgment of the CJEU on 31 May 2018 under the number In Case C-335/17. That decision has been significantly influential in my thinking.
11. The application by the grandmother:

It seemed to me that by reason of the testamentary documents signed by the mother that the grandmother had in any event rights of custody/rights of access. It was therefore clear to me that her application was properly made under Article 21 of the 1980 Convention.

1. That said, it was plainly unsatisfactory that her application for disclosure orders and contact was made through different solicitors and counsel with the benefit of a different legal aid certificate to that made by the aunt. Indeed, the grandmother’s representatives were when they appeared before me, completely unaware of the applications which had already been made by the aunt within her proceedings.
2. The aunt’s application:

The aunt had been living intermittently with P and his grandmother in Poland and had had some significant role in his care before his mother’s death, albeit to a lesser extent than the grandmother.

1. Rights of access under the 1980 Convention are defined at Article 5 (B) as follows:

“Rights of Access” shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.

This is the almost identical wording to the Brussels IIA definition which at Article 2.10 describes:

“Rights of Access” shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time.

1. The question that arose was whether a non-parent who had been granted no right either by a court or by someone with parental rights could avail him or herself of Article 21. If the aunt was entitled to bring an application under Article 21 then so might anyone of a myriad of family members. Logically, it seemed to me that the same capacity to make an application would be open to, for example, a family friend, schoolteacher or any other person who had played a part in the child’s life. I found it difficult to believe that this would be the intended consequence of the convention.
2. Neither of the experienced counsel in this case had been able to find any reported case in this jurisdiction of an application being brought by a non-parent except in the rarest occasions – see for example, Re K (a child) (Northern Ireland) [2014] UKSC 29 where in certain circumstances inchoate rights of custody might arise.
3. I readily accepted that such applications could properly be made by those who have been granted some status in the child’s life. By way of further example, the holder of a Special Guardianship Order or some other order providing parental responsibility would be likely to satisfy the convention definition of having “the right to take the child for a limited period of time to a place other than the child’s habitual residence”.
4. On behalf of the aunt it was argued that Article 21 sets no restriction as to who may avail themselves of it. The Polish authority referred the application to ICACU and ICACU accepted the referral, and this, it was said, was determinative.
5. There is an important financial consequence that follows if the aunt’s argument is correct. Article 21 is engaged with all the benefit of non-merit and non-means funding. Thus, it was that the grandmother and aunt appeared before me with different solicitors and counsel on each occasion. In theory at least, the court could be faced with a significant number of family relations each making an application for access and each separately represented, notwithstanding that there was no conflict between the family members.
6. Valcheva was a case in which a grandmother wished to exercise rights of access to her grandson. The question on referral to the Court of Justice was whether such a claim fell within the scope of Brussels IIA 2201/2003. Unlike the case before me, that grandmother had no specific right granted to her.
7. The case was analysed by the Advocate General against the fundamental importance of a child maintaining contact with the grandparent.
8. In the course of a detailed and scholarly opinion it was pointed out that the EU Legislature intentionally used broad definitions in order to cover a number of situations. At paragraph 31 he accepted that there was considerable uncertainty as he put it:

*Those grey areas may give rise to, sometimes paradoxical, uncertainties concerning the existence of rights of access by persons other than the parents, in this case grandparents.*

1. The Court acknowledged that Regulation No 2201/2003 does not specify whether the concept of “rights of access”, defined in Article 2.10 includes the rights of access of grandparents but

*That concept must be interpreted autonomously, taking account of the wording, scheme and objectives of Regulation 2201/2003, in the light, in particular, of the travaux preparatoires for that regulation, as well as other acts of EU and international law.*

1. The Court noted that rights of access are defined broadly and without limitation in regard to the persons who may benefit from them [see paragraphs 18-21].
2. It was clear in the light of the travaux préparatoires for the Regulation that the EU legislature intended to extend the scope of Council Regulation No 1347/2000 which was limited to disputes concerning parents “*and that it contemplated all decisions concerning parental responsibility and therefore concerning rights of access, irrespective of the nature of the persons who may exercise those rights and without excluding grandparents”* [paragraph 32].
3. The Court concluded at paragraphs 33-34 and 37 that rights of access must be understood *“as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child’s grandparents, whether or not they are holders of parental responsibility”.*
4. I therefore conclude that my initial reaction that the application by the aunt fell without the terms of Article 21 was incorrect and that both grandmother and aunt, as people to whom it is important that the child maintains a personal relationship fall within the Article.
5. Case Management:

There is no conflict between what is sought by the grandmother and by the aunt. The court has wide powers of case management and it would be in my view absurd if their applications were to continue to be litigated separately and in isolation from each other.

1. I accordingly direct that their applications shall be consolidated. There shall be one set of lawyers (i.e. one barrister and one solicitors’ firm) acting on behalf of the grandmother and mother. In the unlikely event of there ever being a conflict between the grandmother and mother this ruling can be revisited.
2. I direct that a transcript of this judgment be prepared at public expense and that a copy be made available to the Legal Aid Agency.
3. In due course it will be necessary to consider where these proceedings should continue. Experience and enquiry has shown a substantial variation in the way that Article 21 cases are handled. There are at least four routes that have been taken:
   1. they remain in the High Court;
   2. they are transferred to a district registry close to where the child is living;
   3. they are transferred to the Central Family Court as the court with particular expertise in international matters;
   4. they are transferred to the local family court.

I understand that the International Committee is considering this issue.

1. The difficulty of resolving any case will vary from case to case. For my part, I can see no reason why this case should stay in the High Court in London. I will hear submissions as to which court should receive it.