

Re M (A Child) (2013)

[2013] EWCA Civ 1131

17/09/2013

Barristers

Mark Jarman KC

Court

Court of Appeal (Civil Division)

Practice Areas

International Children Law

Summary

Where a mother was resisting proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the return of her daughter to Latvia, by asserting that the applicant father was not, in fact, the child's biological father, and the judge had ordered the instruction of an expert in Latvian law to determine whether only a biological father had custodial rights in Latvia, the ordering of paternity testing by DNA on the child was premature and should only be done if the expert found that only a biological father had custodial rights.

Facts

The appellant father (F) appealed against a decision that the respondent mother (M) be permitted to carry out DNA paternity testing of her daughter (L).

F and M were Latvian nationals who had lived together in Latvia from 2000. M had L in 2008 and registered F as the father on the birth certificate. The parties separated in 2010 and an informal arrangement later came into place whereby L lived with F for three days a week. Difficulties arose with F's continuing access to L in 2012 when M started a new relationship. The parties agreed that F would have access to L on certain occasions and that M was obliged to inform F of any lengthy absence or change of residence on L's part. That agreement was approved by order of the Latvian court in January 2013, recording that F's claim had been pursued to establish a procedure for exercising rights "with the daughter L". In February 2013, M told F that she was going to Glasgow to obtain work and would take L with her. F asserted that he agreed with M that he could collect L at the end of May and take her back to Latvia for a month. F subsequently learned that M had left Glasgow to live in London. He was unable to locate her and F and instructed the Latvian central authority to begin proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980. M was located and English proceedings were issued and served on her. She asserted that F was not L's biological father so that he had no rights of custody either under Latvian law or the Convention, that the Convention did not apply and that there was no "wrongful retention" of L. M consequently applied for paternity testing. The judge ordered that an expert on Latvian law should be identified to give an opinion on whether, under Latvian

law, F had any custodial rights over L if he was not her biological father. He ordered DNA testing in parallel with instructions to the Latvian expert.

F contended that the order for DNA testing was premature. He submitted that the Latvian court order presupposed that he was L's father, since it referred to L as being "the daughter", and that the settlement agreement incorporated in the order referred to L as "his daughter". F argued that unless that order was set aside by M, DNA testing was inappropriate and that, in any event, no such order should be made unless it was clear that only a biological father had rights of custody in Latvia. M contended that the order for DNA testing was a case management decision with which the court should not interfere. She submitted that the instruction of an expert on Latvian law should proceed in parallel so that the judge would, when the matter came back to court, be fully informed as to all possibilities and thus be in a position to make a final determination of the question whether L should be summarily returned to Latvia.

Held

An order for DNA testing to establish paternity was not, in the circumstances, a mere case management decision. It was a serious step for any court to take and should not be ordered unless it was necessary for it to be done before a conclusion could be reached. It might not be a physical invasion of privacy since samples could be obtained without any substantial physical bodily interference but it was, on any view, a psychological invasion of a litigant's rights to a personal life. There were also inherent welfare considerations. Questions arose as to how to explain to L, who was now aged five, why the taking of a bodily sample from her was required, and who would furnish such an explanation, or whether a sample was to be taken surreptitiously. Those were troubling questions to which there was no obvious answer. The DNA testing as ordered by the judge, if it was to be done at all, should only be done as a last resort. That meant that the expert in Latvian law should first give his answer to the questions of Latvian law posed to him. If by Latvian law F had a right of custody, any question of DNA testing would fall away. If, however, the court concluded that F had no right of custody on which he could rely unless he was actually L's biological father, then the question of DNA testing would have to be revisited. It should only be at that stage that any order should be made (see paras 10-11 of judgment).

Appeal allowed

Permission

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