

# Re B (A Child by her Guardian) (2017)

**[2017] EWHC 488 (Fam)**

15/03/2017

## **Barristers**

Alistair G Perkins

## **Court**

Family Division

## **Practice Areas**

International Children Law

Application by non-biological mother for a child arrangements order in respect of B, now living with the mother in Pakistan, to spend time with the applicant, for telephone and Skype contact, and for indirect contact by way of letter.

## **Background**

R and J lived together in a same-sex relationship between 2004-2011. In 2007 J underwent NHS intrauterine insemination ('IUI') treatment, resulting in pregnancy with B. J was 'to all intents and purposes co-parenting B when the parties were living together', B was treated by J as her child and B saw her as a mother, and B continued to see J in that context after the two women separated in 2011. In February 2014 B's biological mother and principal caregiver, J, lawfully removed B from this jurisdiction to Pakistan. B has remained there since. In the same month, J made applications for a Child Arrangements Orders ('CAO') and relief under the inherent jurisdiction. 2014 B has had no direct contact with J, save for some limited telephone contact.

At first instance Hogg J refused J's applications on the basis that the court did not have jurisdiction. On appeal the Court of Appeal upheld Hogg J's decision (reported as: *Re B (A Child) (Habitual Residence) (Inherent Jurisdiction)* [2015] EWCA Civ 886). J appealed to the Supreme Court; the Court of Appeal's decision was overturned (reported as: *In the matter of B (A child)* [2016] UKSC 4).

## **Hearing before Russell J: Parties' positions**

The parties' positions fluctuated prior to and during the trial. B's guardian recommended that: (i) B remain with R in Pakistan, (ii) there should be a CAO in place for direct contact once per year, plus telephone and Skype contact, (iii) there should be a parental responsibility order in the interests of B which would recognise the role and status of J in B's life, but on the basis that J will not be able to exercise parental responsibility in Pakistan, and (iv) the case return to court, as B re-establishing contact and her relationship with J was in a 'fledgling' stage and needed some oversight. The guardian was neutral as to wardship, but noted that the proceedings had run their course without wardship thus far. The guardian supported a finding that J was a psychological parent to B.

On the second day of the trial, having carefully considered the recommendations of B's guardian, J no longer sought the return of B to this jurisdiction, but she continued to pursue contact. J applied for the case to return before the court in 9 months time to ensure that the CAO has been given effect and to review that order. J also applied under the inherent jurisdiction for B to be made a ward of court and declarations in respect of parental responsibility. J asked that the court to make a finding that she was a 'psychological parent' to the child.

R agreed the terms of the CAO sought by J and recommended by B's guardian, but opposed the applications for the case to return to court; for wardship proceedings to be initiated; for a parental responsibility order and/or declaration; and, for a finding that J was a psychological parent to B.

#### Law

Russell J considered the welfare checklist, and s.2A of the Children Act 1989 that the court is 'to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.'

Her ladyship also had regard to Re G (Shared Residence Order: Biological Mother of Donor Egg) [2014] EWCA 336; [2014] 2 FLR 897 (which considered the legal framework governing parental responsibility in the expanded boundaries of legal parenthood, including same-sex couples), noting that the only governing principle remains the paramountcy of the child's welfare while particular consideration must be given to the part each adult can play in the child's life. Re G [2006] UKHL 43, in respect of a 'psychological' parentage, was also considered.

#### Decision

Russell J agreed that it would not be in B's best interests to be returned to the UK, and further agreed with the guardian's recommendation for a CAO in the terms set out above (as accepted by J and R). Applying the paramountcy principle of B's welfare (as described by Black LJ in A v B and C [2012] 2 FLR 607), and considering that it was in B's best interests to do so, Russell J also made a parental responsibility order (pursuant to s.12(2A) (a) & (b) of the Children Act 1989), albeit limited in that J was not to approach B's school or medical practitioner for information. The parental responsibility order would remain in force for the duration of the CAO, ie: until B is sixteen, as provided for by statute (s.9(6)).

Her ladyship also agreed with the guardian and J, that the court should retain some oversight of the case, principally due to (i) the CAO only having just been made, (ii) the international dimension and, (iii) as means by which to put mirror orders in place in Pakistan to safeguard B's best interests. The matter is therefore to return to court in February 2018.

As to wardship, Russell J found that this was unnecessary, as there was no reason for the court to take up oversight or control over any major decisions in B's life at this point, when the parties finally reached some agreement about B.

#### Separate representation of the child?

B's representative suggested that in future cases where there is dispute as to habitual residence, early consideration should be given to joinder of the child(ren) so that the court maintains a fluid picture of the child's circumstances, wishes and feelings. Russell J endorsed his suggestion, thus: (para 52)

'It must be right that children in these cases should be separately represented to avoid the focus being on the dispute between parents and/or care-givers and their "rights".'