



Neutral Citation Number: [2019] EWFC 9

Case No: LS442/18

IN THE FAMILY COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 06/02/2019

Before:

THE HONOURABLE MR JUSTICE COBB

Re E (Scottish Adopters: English Adoption Proceedings)

Brett Davies (Solicitor Advocate) for the Local Authority
Laura Beevers (Solicitor from Ramsdens Solicitors) for the Children's Guardian
E's parents were unrepresented
The Prospective adopters did not appear nor were they represented

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE COBB

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 Cobb:

Introduction

1. E is 2½ years old. When she was 6 months old, she was made the subject of a final Care Order (*section 31 Children Act 1989*) and Placement Order (*section 18 Adoption and Children Act 2002: 'ACA 2002'*) in proceedings conducted in the Family Court in England. Some four months later, she was placed for adoption in Scotland. Her prospective adopters live in Scotland. I am satisfied on the evidence that at least one of them is domiciled in Scotland, and they have both unquestionably been habitually resident in Scotland for many years. They have previously adopted E's older full sibling; E and her sibling have established a strong and close bond.
2. The adopters have now applied for an adoption order in respect of E. The application is made under *section 50 ACA 2002* (adoption by a couple). They have issued their adoption application in the Family Court in England. At a case management hearing, a preliminary question arose for determination – namely whether an adoption application in respect of a child placed for adoption in Scotland with Scottish adopters can be determined in England.
3. This judgment sets out my reasons for the conclusion that it can. I am of the view that in these circumstances, the Scottish adopters would in fact have the option of pursuing their application in either Scotland or England. I indicated this outcome to the parties at the conclusion of the case management hearing.

Discussion

4. Within the United Kingdom, there are, of course, three quite distinct legal jurisdictions: (i) England and Wales, (ii) Scotland, and (iii) Northern Ireland. The *ACA 2002* currently contains the statutory basis for adoption in England and Wales; the *Adoption and Children (Scotland) Act 2007* ('*AC(S)A 2007*') contains the equivalent provisions in Scotland. I have annexed a table to this judgment comparing those statutory provisions of the *ACA 2002* (England) and the *AC(S)A 2007* (Scotland) which are relevant to the issue before me; it will be seen that they effectively mirror each other.
5. An adoption order is defined, in English law as:

“... an order made by the court on an application under *section 50* or *51* giving parental responsibility for a child to the adopters or adopter” (see *section 46(1) ACA 2002*).

It operates (per *section 46(2) ACA 2002*) to extinguish:

“(a) the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order,

(b) ...

(c) any order under the *Children (Scotland) Act 1995* (c 36) other than an excepted order,

[(ca) any child assessment order or child protection order within the meaning given in *section 202(1)* of the *Children's Hearing (Scotland) Act 2011*,]

...”

Equivalent definitions are given in the *AC(S)A 2007* at *section 28(1)* and *section 35(2)(a)* (see below).

6. The crucial section for determining jurisdiction in this case is *section 49 ACA 2002*; this provides that “[a]n application for an adoption order may be made by (a) a couple...” provided that the applicants can satisfy one of a number of pre-conditions. Of particular relevance are those conditions set out in *section 49(2)* and *49(3)*:

“(2) The first condition is that at least one of the couple (in the case of an application under *section 50*) or the applicant (in the case of an application under *section 51*) is domiciled in a part of the British Islands.

(3) The second condition is that both of the couple (in the case of an application under *section 50*) or the applicant (in the case of an application under *section 51*) have been habitually resident in a part of the British Islands for a period of not less than one year ending with the date of the application.” (emphasis added)”

7. Reference in *section 49 ACA 2002* to “British Islands” means “*the United Kingdom, the Channel Islands and the Isle of Man.*” (*Interpretation Act 1978, Schedule 1, paragraph 1*). It is notable that the *AC(S)A 2007* has mirror provisions (*section 29(2)* and *section 30(6)* *ibid.*).
8. It is clear, therefore, that the *ACA 2002* gives the Family Court in England and Wales jurisdiction to make an adoption order in favour of applicants who satisfy one or other of the *section 49 ACA 2002* criteria set out in para.[6] above. The prospective adopters in this case in fact satisfy both conditions as I indicated at para.[1] above. Indeed, they previously adopted E’s sibling in a Family Court in England without issue.
9. It is equally clear that the *AC(S)A 2007* would give the Court in Scotland jurisdiction to make an adoption order in favour of applicants who satisfy one or other of the *section 29 AC(S)A 2007* criteria (in similar terms to those set out in para.[6] above). As the prospective adopters satisfy these conditions, they could therefore have issued their application in Scotland had they chosen to do so.
10. All of this seems clear enough. Should there be any doubt, it is dispelled, I believe, by the decision of the Court of Appeal in *Re N (Children: Adoption: Jurisdiction)* [2015] EWCA Civ 1112, a case in which the Court of Appeal considered “fundamentally important issues to do with the application of our domestic adoption

law in cases with a foreign element” ([4]). Having reviewed the international context in which adoption orders come to be made in England and Wales, Sir James Munby P said this:

“Adoption: the jurisdiction of the court

74. As will be appreciated, the effect of *Articles 1, 1(3)(b)* and 8 of *BIIA* is that whereas, in the case of care proceedings, the jurisdiction of the court to entertain the proceedings is determined by the provisions of *BIIA*, specifically *Article 8*, this is not so in the case of adoption or placement order proceedings under the *2002 Act*. What, then, determines the jurisdiction of the court to make orders under the *2002 Act*, specifically, jurisdiction to make an adoption order in accordance with the *2002 Act*? And related to this, in cases involving a foreign child or a foreign parent, by reference to what system of law is the case to be decided?
75. Of its nature, an adoption involves three different parties: the child, the natural parent(s) and the adoptive parent(s). In principle, therefore, the jurisdiction of the court could be defined by reference to the circumstances (for example, nationality, domicile, habitual residence, presence within the jurisdiction) of the child, and/or the circumstances (nationality, domicile, habitual residence, presence) of the natural parent(s), and/or the circumstances (nationality, domicile, habitual residence, presence) of the adoptive parent(s).
76. Now it is true that *section 42(7)(b)* of the *2002 Act* requires the presence of the child within the jurisdiction at some point either before or during the adoption process, a requirement that goes to the practical ability of the court to make an adoption order. Moreover, although the English courts sometimes make orders affecting the status of a person outside the jurisdiction, this is rare. However, it is clear from *section 49* of the *2002 Act* that the fundamental foundation of the *jurisdiction* of the court to entertain the application for an adoption order at all is determined by the circumstances, crucially for present purposes the domicile or habitual residence, of the adoptive parent(s) and no-one else. Moreover, and assuming that the jurisdictional requirements of *section 49* are met, the *2002 Act* contains no limitation, whether by reference to nationality, domicile or habitual residence, upon the children who can be adopted or the natural parent(s) whose consent can be dispensed with pursuant to the *2002 Act*.
77. In other words, if the sole basis of the court's jurisdiction is by reference to the domicile or habitual residence of the

adoptive parent(s), it must follow that it has jurisdiction to make an adoption order in relation to a child irrespective of the child's nationality, domicile or habitual residence, and likewise has jurisdiction to dispense with the consent of the natural parent(s) irrespective of their nationality, domicile or habitual residence. That is what, in my judgment, one derives from a simple reading of the *2002 Act*.” (emphasis by underlining added; emphasis by italics in the original).”

11. Black LJ (as she then was) in the same case summarised the position to like effect at [177]:

“*Section 49* of the Act lays down the core requirement which must be satisfied if the courts of England and Wales are to have jurisdiction in relation to an adoption application. Ignoring, for present purposes, the variations dependent upon whether the application is made by a couple or by one person, it is that an application can only be made by a prospective adopter who fulfils one of the conditions as to domicile/habitual residence in the British Islands.” (emphasis by underlining).”

12. Furthermore, the comparative statutory provisions both north and south of the Scottish border were specifically considered by Sir James Munby P in a brace of cases in 2017:

- i) *Re A and others* [2017] EWHC 35, which dealt with applications for adoption orders by prospective adoptive parents who live in *England*, of various children, living in England with their prospective adoptive parents, in relation to each of whom a Scottish Sheriff has made a permanence order with authority to adopt under *sections 80 and 83* of the *AC(S)A 2007*, and
- ii) *Re A & O (Children: Scotland)* [2017] EWHC 1293 where, similarly, he was dealing with applicant adopters living in England and seeking from the (English) Family Court an adoption order pursuant to the *ACA 2002* in relation to two Scottish children, A and O, placed with them by a Scottish local authority, but where there was no permanence order. In this case he said at [34] “it is quite clear that the jurisdiction of the English court to entertain an application for an adoption order is *not* dependent upon the child being habitually resident in England”.

In the first of those cases, the Court was primarily concerned with the pre-condition for adoption set out in *section 47(6) ACA 2002* which concerns that class of children who are “the subject of a Scottish permanence order which includes provision granting authority for the child to be adopted”, as to which *section 105(1) ACA 2002* specifically provides that:

“A Scottish adoption order or an order under *section 25* of the *Adoption (Scotland) Act 1978* (c 28) (interim adoption orders) has effect in England and Wales as it has in Scotland, but as if references to the parental responsibilities

and the parental rights in relation to a child were to parental responsibility for the child”,

and *section 105(2)* *ibid*.

“A Scottish permanence order which includes provision granting authority for the child to be adopted has the same effect in England and Wales as it has in Scotland], but as if references to the parental responsibilities and the parental rights in relation to a child were to parental responsibility for the child”.

These cases provide a useful analogy with the instant case: in relation to a Scottish child placed for adoption in England (the converse of the facts of this case), Sir James Munby P was satisfied that the adoption application could have been made in either England & Wales, or Scotland.

13. To underline that point, a review of the table annexed to this judgment will reveal the high degree of mutuality of these arrangements between the two jurisdictions. Notably, under *section 31(9)(b)(ii) AC(S)A 2007* the Scottish Court can make an adoption order where the child has been placed for adoption under a Placement order in England and Wales under *section 21 ACA 2002*.
14. The Court of Appeal in *Re N* were concerned with creating a situation in which the adoption order would not be recognised in the country of the child’s domicile, or in this case her habitual residence. They referred to Goff J in *Re B(S) (An Infant)* [1968] Ch 204 at (112)

““The court cannot shut its eyes to the possibility of creating the "limping infant" referred to in Cheshire's Private International Law, 7th ed (1965), p 382, and if the child is domiciled in a country where the English order would not be recognised, he may "limp" not only there but in other places, and may find himself faced with a dispute in other countries whether the English order should be recognised or not.”

15. No such risk arises here: in this case, the situation is covered by *section 77* of the *AC(S)A 2007*, which provides:

“(1) An adoption order (within the meaning of *section 46(1)* of the *2002 Act*) has effect in Scotland as it has in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child.”

Conclusion

16. In summary, the position in this case therefore is:

- i) The adopters' application is lawfully and procedurally well made here in the English Family Court; I am satisfied on the evidence that at least one of the adopters is domiciled, and in any event, both are and have been habitually resident for more than a year, in a part of the British Islands (*section 49(2)/(3) ACA 2002*);
 - ii) The Court here will rely on the Placement Order which was made nearly two years ago (*section 21 ACA 2002*);
 - iii) If the adoption order is made here, it will have the same effect in Scotland as it has in England and Wales (*section 77(2) AC(S)A 2007*);
 - iv) The adopters could have applied in Scotland, relying on the English Placement Order (*section 31(9)(b)(ii) AC(S)A 2007*);
 - v) Any Scottish adoption order would have had effect in England (*section 105(2) ACA 2002*).
17. As it is established that either jurisdiction could entertain the application, an issue of *forum conveniens* then arises. The adopters have chosen to issue in the English Court, and by inference it is not inconvenient to them to travel to the court where the application has been issued. As the birth parents have indicated their intention to apply for leave to oppose the adoption, and as there is no other contentious element to this proposed application, it is appropriate in my judgment that the application should be allowed to proceed in this jurisdiction. No party raises any dispute about this.
18. I conclude this short judgment by extending my thanks to the solicitor advocates for the professional parties in this case, who have presented the arguments in writing and orally with great ability.
19. That is my judgment.

Annex

Comparative Statutory provisions (England and Scotland) relevant to this issue.

<i>Adoption and Children Act 2002 (England and Wales)</i>	<i>Adoption and Children (Scotland) Act 2007 (Scotland)</i>
<i>Section 46(1):</i> An adoption order is an order made by the court giving parental responsibility for a child to the adopters or adopter	<i>Section 28(1):</i> An adoption order is an order made by the appropriate court vesting the parental responsibilities and parental rights in relation to a child in the adopters or adopter
<i>Section 46(2)(a):</i> The making of an adoption order operates to extinguish the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order	<i>Section 35(2)(a):</i> The making of an adoption order extinguishes any parental responsibilities and parental rights relating to the child which immediately before the making of the order were vested in any person

<i>Adoption and Children Act 2002 (England and Wales)</i>	<i>Adoption and Children (Scotland) Act 2007 (Scotland)</i>
<i>Section 50</i> : An adoption order may be made on the application of a couple where both of them have attained the age of 21 years	<i>Section 29(1)</i> : An adoption order may be made on the application of a couple, and where each member of a relevant couple is aged 21 or over
<i>Section 49(1)</i> the application for an adoption order “may” be made in England and Wales if either the domicile or habitual residence conditions are met	<i>Section 29</i> (couple) and <i>30</i> (single adopter): the application for an adoption order “may” be made in Scotland if either the domicile or habitual residence conditions are met
<i>Section 47(6)(a)</i> permits the Court in England and Wales to make an adoption order with respect to a child who has been the subject of a Scottish permanence order “which includes provision granting authority for the child to be adopted”	<i>Section 31(9)(b)(ii)</i> permits the Scottish Court to make an adoption order with respect to a child who is the subject of a placement order under <i>section 21 ACA 2002</i> .
<i>Section 105(2)</i> a Scottish permanence order which includes provision granting authority for the child to be adopted has the same effect in England and Wales as it has in Scotland], but as if references to the parental responsibilities and the parental rights in relation to a child were to parental responsibility for the child	<i>Section 77(2)</i> provides that a Placement order made in England and Wales shall have effect in Scotland as it would have effect in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child
<i>Section 49(2)</i> contains the condition that at least one of the adopters should be ‘domiciled’ in a part of the British Isles	<i>Section 29(2)</i> contains the condition that at least one of the adopters should be ‘domiciled’ in a part of the British Isles
<i>Section 49(3)</i> contains the condition that the adopters (if a couple) should both be ‘habitually resident’ in a part of the British Isles for a period of not less than one year ending with the date of the application	<i>Section 30(6)</i> contains the condition that the adopters (if a couple) should both be ‘habitually resident’ in a part of the British Isles for at least one year before the date of the application
<i>Section 105(1)</i> A Scottish adoption order has effect in England and Wales as it has in Scotland, but as if references to the parental responsibilities and the parental rights in relation to a child were to parental responsibility for the child	<i>Section 77(1)</i> An English/Welsh adoption order (made under section 46(1) of the 2002 Act) has effect in Scotland as it has in England and Wales but as if any reference to the parental responsibility for the child were to the parental responsibilities and parental rights in relation to the child

<i>Adoption and Children Act 2002</i> (England and Wales)	<i>Adoption and Children (Scotland) Act</i> 2007 (Scotland)