

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 24.09.2012

+ FAO 105/2010

ERIN JENNIFER HAWK Appellant

Through : Mr. Mohinder Singh along with
Mr. Ankur Goel, Advs.

versus

STATE & ANR Respondents

Through : Mr. Rajeeve Mehra, ASG along with
Mr. Ashok Singh, Mr. Kunal Kahol &
Mr. Madhusudan, Advs.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. Present is an appeal under Section 47 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the Act') against the impugned order dated 15.02.2010 passed by the learned District Judge, Delhi whereby the petition filed by the appellant for her appointment as guardian of person of minor child Urmila born on 21.11.2001 under the care of respondent no.2 Society, under Section 7 and 26 of the Act has been dismissed.

2. The factual background of the case is as under:-

The appellant is a single lady. She had filed a petition under

Section 7 and 26 of the Act for her appointment as guardian of the person of minor child Urmila born on 21.11.2001 under the care of respondent no.2 Society, with permission to adopt her as per local court of her country. The said petition was filed through Mrs. Vijay Raina, Director SOS children's Villages of India i.e. respondent No.2 before the learned District Judge, Delhi. At that time, appellant was 37 years of age. Appellant is permanent resident of USA being its citizen/national. The appellant was earlier married to Anthony F. Hawk on 28.09.1996. Due to irreconcilable differences between them, they could not live together and their marriage ended on 01.09.2004. From the said wedlock, there are two male children viz., Spencer Anthony Hawk and Keegan Wesley Hawk born on 26.03.1999 and 18.07.2001, respectively. Appellant is having joint custody of the children along with her earlier husband. It is stated in the petition that appellant is medically and physically fit and wishes to adopt a minor child to expand her family. She is self-employed for the past 5 years as a property manager. Her average annual income in the year 2008 was \$323,000. She has a high status and sufficient means of livelihood.

3. Respondent no. 2 is a registered society and is licensed by the Government of NCT of Delhi to keep and maintain the abandoned, orphan and destitute children. It has been granted recognition by the Ministry of Social Justice and Empowerment, Government of India, New Delhi for submitting applications to the competent court for declaration of foreigners as guardians of Indian children under the Act. It was further alleged that on 08.10.2006, a minor female child, namely, Urmila born on

21.11.2001 was found abandoned by the police officials of P.S. Old Delhi. On that very day, the care and custody of the child was handed over to the Child Helpline, Central Zone, New Delhi which handed over the care and custody of the child to respondent no. 2 society on 09.10.2006 and since then nobody has come forward to claim the child. Respondent no. 2 society had moved an application before the Child Welfare Committee for declaring the said child as an abandoned child free for adoption and the said committee after making enquiries vide order dated 25.07.2007 had declared the child Urmila as an abandoned child free for adoption. It is further averred in the petition that every attempt was made to place the child in an Indian family but no suitable Indian family came forward to adopt and accordingly the Co-ordinating Voluntary Adoption Resource Agency (CVARA) had cleared the child as an abandoned child free for adoption. It was further alleged that the appellant has been found to be the most suitable person for legal adoption of the child and the Central Adoption Resource Authority (CARA) has issued 'No Objection Certificate' in her favour. It was prayed that it will be in the interest of minor child that the appellant be appointed as guardian of the minor child Urmila with permission to adopt her as her daughter in accordance with local laws of her country.

4. Notice of the said petition was issued to the respondents. However, none appeared on behalf of respondents to contest the claim of appellant before the learned District Judge. The appellant examined Mrs. Vijay Raina, Director of respondent no.2 and attorney of appellant as PW-1 who led in evidence her affidavit Ex. PW1/A along with

documents Ex.P1 to P26. Mrs Surekha Pawar, Sr. Social Worker for R-2 had appeared and filed her affidavit as Ex. PW2/A and proved documents Ex.R1 to R3 i.e., Abandonment Certificate, Certificate from CVARA and No Objection Certificate issued by CARA respectively.

5. Before the learned District Judge it was argued that the appellant was the most suitable person to adopt the child Urmila and it was in the welfare and interest of the child to appoint appellant as her guardian with necessary permission to adopt the said child as per local laws of the country.

6. After considering the material on record, the learned District Judge dismissed the application mainly on the ground that in the absence of appellant at home, presence of female child in the company of two male children of almost same age might not be conducive. It was further observed that appellant is already having two male children from her previous marriage. She is open to idea of remarriage. In these circumstances, it was not a fit case to appoint the appellant as guardian for female child Urmila and to adopt her as per laws of country.

7. Aggrieved with the same, the present appeal is filed.

8. The learned counsel for appellant has contended that no Indian family has come forward to adopt the child, as such the Co-ordinating Voluntary Adoption Resource Agency (CVARA) vide Ex.R-2 has cleared the child for foreign adoption. It is contended that Central

Adoption Resource Agency (CARA) under the Ministry of Women and Child Development has granted 'No Objection Certificate' vide Ex.R3 to the appellant for adopting the child in question. The appellant has also no adverse interest to that of minor. It is further contended that appellant is a well off lady. Appellant is a self-employed lady and enjoys high status and has got self sufficient means of livelihood. It is contended that in order to complete her family, she wants to adopt the child. It is contended that the learned District Judge relying on the judgment dated 31.08.2009 in FAO No. 32/2009 in the case of ***Craig Allen Coats & Anr. vs. State & Anr.*** of this court has dismissed the petition. It is contended that aforesaid judgment has been set aside by the Supreme Court in Civil Appeal No. 7475/2010 decided on 08.09.2010. It is contended that inter-country adoption is permitted by the Supreme Court vide judgment delivered in ***Lakshmi Kant Pandey vs. Union of India*** reported in 1984 (2) SCC 244 and vide the said judgment, guidelines and procedure for adoption of abandoned children by foreigners has been laid down. It is contended that in the present case the guidelines laid down in ***Lakshmi Kant Pandey*** (supra) have been followed. It is further contended that it is in the welfare of the child that the appellant be appointed as a Guardian of minor child with permission to adopt her as per local laws of her country.

9. The court notice was issued to the Additional Solicitor General as well as Standing Counsel, Government of India. Pursuant thereto Mr.Rajeeve Mehra, Ld. Additional Solicitor General assisted by Mr.Ashok Singh, Standing Counsel have entered their appearance. Ld. Additional Solicitor General has submitted that the Ld. District Judge has

correctly exercised the discretion taking note of all the relevant facts. It is submitted that the appellant is a working woman having two male children of the age group of 13 years and 11 years respectively. The age of the child Urmila is 10 years and it would not be appropriate for the girl child to stay alone at home when the appellant is out for work. It is further submitted that as per the study report Ex. P-2, appellant is currently dating a gentleman and is open and receptive to marriage in the near future which may put the future of the child in the dark. Ld.Addl. Solicitor General has submitted that keeping in view the totality of facts and circumstances, it will not be in the welfare of the child to appoint appellant as guardian with permission of adoption. It is further submitted that judgment in *Craig Allen Coats & Anr.* (supra), is of no help to appellant as the facts of the said case are entirely different as that of present case.

10. I have considered the submissions made and perused the material on record.

11. The appellant had filed the petition under Section 7 and 26 of the Act before the learned District Judge for her appointment as guardian of the child Urmila with permission to adopt her as her daughter in accordance with local laws of her country on 19.8.2009. At that time appellant was 37 years of age. As per her own averment, she has got two male children i.e. Spencer Anthony Hawk and Keegan Wesley Hawk who are presently of 13 ½ and 11 years of age respectively.

12. Section 7 of the Act deals with the power of the court to make orders as to the guardianship. The same reads as under:-

“7. Power of the Court to make order as to guardianship -

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made –

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

13. As per this Section, District Judge appoints the guardian of the person and properties of minor. If the District Judge finds that the appointment will not be in the welfare of the minor, the petition will be rejected. In making orders as to the guardianship; the prime consideration is the welfare of the child. The welfare has to be measured not only in terms of money and physical comforts. The word ‘welfare’ must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well being. The reference is made to the judgment of the Madras High Court titled

D.Rajan v. Dhana Pal and Anr.; AIR 1986 Mad. 99. The welfare includes healthy upbringing of the child in a congenial atmosphere.

14. Section 17 deals with the matters to be considered by the court in appointing guardian. The same reads as under:-

“17. Matters to be considered by the Court in appointing guardian -

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(5) The Court shall not appoint or declare any person to be a guardian against his will.”

15. While appointing a guardian, the court should be guided by the sole consideration of the welfare of the minor. The welfare of the minor in each case depends on facts and circumstances of each particular case.

16. The Supreme Court in *Laxmi Kant Pandey vs. UOI* (supra), while supporting the inter-country adoptions, has held as under:-

“9. But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country”

In para 21 of the said judgment, it is further held that:

“We may also point out that if a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to new surroundings in a different land and sometimes a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown child. But we make it clear that when we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely, because they are past the age of 3 years”.

17. Since in the present case the child is of 10 years old, to ascertain her wishes I had spoken to her also. The child is not able to make her own independent preference.

18. Perusal of the record shows that the appellant was married to Anthony (Tony) Hawk who was having a son, namely, Riley, from his previous wife. It is stated in the report that at the time of marriage in order to give love and affection to the said child she had given up the job but after the divorce, there is no mention about the said son. There is nothing on record to show as to whether she is still in touch with that child. The Home Study Report Ex.P-2 is silent about that aspect of the matter. The appellant is already having two sons of 13 years and 11 years of age respectively whereas the age of the child Urmila is 10 years. The elder boy is in teen age. The younger one is a pre teen. The girl child Urmila is also in growing age. She needs special protection. The appellant is a working woman. Considering age factor, in the absence of appellant at home, presence of female child with two male children of aforesaid age group will not be appropriate. In these circumstances, the chances of child Urmila being in congenial atmosphere at home cannot be ruled out.

19. The learned District Judge in this regard has also observed as under:-

“Both the children residing with the petitioner at present are aged about 11 years and 9 years old. In the

absence of the petitioner due to any reason, at home, presence of a female child from India in the company of two male children of almost same age might not be conducive.”

20. Further at this age and the environment in which she has been brought up, it will be difficult for her to get assimilated and integrated in the new environment. In Home Study Report ExP-2, it is also stated that appellant is currently dating and is open for remarriage in future. The chance of expanding her family with another marriage also cannot be ruled out.

21. The counsel for appellant has submitted that the trial court Judge has relied on the judgment of this court in FAO No.32/09 in **Craig Allen Coats & anr. vs. State and anr.**, which has been set aside by the Supreme Court in Civil Appeal No.747/10 decided on 8.9.2010. I have gone through the aforesaid judgment of the Supreme Court. The facts and circumstances of the said case are entirely different and are not applicable to the facts of present case. In the said case the appellants therein were having three children i.e. two boys of age group of 21 years and 16 years respectively and third was daughter of 19 years of age and the child to be given in adoption was a male child and the child was suffering from mental ailments i.e., development delays and difficulty with respect to learning and expressing. The Supreme Court ordered for the examination of the child by an expert committee. Thereupon the child was examined by a Committee of Medical experts. The Medical

Board of AIIMS had examined the said child and a report was submitted before the Supreme Court. The relevant portion of the same is as under:-

“
.....
From all records it was apparent the child has development delays and difficulties with respect to learning and expressing and would require special care for learning needs. In the opinion of the board such a child will benefit from family based care and nurturance rather than institutional care.”

“
.....
The board further examined Ms.Coates, her intentions, her professional experience and her proposed education of the child. She has had extended experience in home bases nursing and in a respite home where she has given personal care to patients with neuro-muscular disorders, cognitive impairments and other handicaps. Her experience in home health and her sensitivity towards multicultural issues was evident in her interactions. She presented a clear vision of the family school and community resources she needs to mobilize in order to make the adoption successful. She is committed to providing physical therapy, occupational therapy, speech therapy and special education to her adopted child.”

22. The Supreme Court after considering the report of Medical Board AIIMS and considering the experience of the appellants therein in home nursing found her the proper person to whom the child could be given in adoption. The said judgment has no applicability to the facts of the present case.

In view of above discussion, the Ld. District Judge has rightly exercised the discretion by rejecting the petition. No illegality is seen in the impugned order. The appeal is dismissed.

VEENA BIRBAL, J

SEPTEMBER 24, 2012

ssb/kks