

SUPREME COURT'S DECISION

delivered in Stockholm on 8 December 2021

Case no.

Ö 300-21

PARTIES

Appellants

1. YESN

2. MW

Counsel for 1 and 2: Attorney MHT

THE MATTER

Rejection of application

RULING APPEALED

Decision of the Svea Court of Appeal of 18 December 2020 in case
Ö 10632-20

THE SUPREME COURT'S RULING

The Supreme Court modifies the decision of the court of appeal, sets aside the decision of the district court and refers the case back to the district court for further proceedings.

CLAIMS IN THE SUPREME COURT

YESN and MW have claimed that the Supreme Court shall set aside the decisions of the court of appeal and the district court and refer the case back to the district court for determination on the merits.

REASONS FOR THE DECISION

What is at issue in the Supreme Court

1. The issue in the Supreme Court is whether Swedish courts are competent to adjudicate a custody case pursuant to Article 12 (3) of the Brussels II Regulation.¹ According to that article, the courts of a Member State have jurisdiction in relation to parental responsibility if the child has a substantial connection with that Member State and the jurisdiction of the court has been accepted by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. The issues primarily brought to the fore concern whether it is only holders of parental responsibility who can agree regarding the jurisdiction of the court and what is in the best interests of the child.

Background

2. LS-W was born in May 2020 in Texas, USA, through surrogacy. The birth was preceded by an agreement between YESN, MW and the surrogate mother. The District Court of Bexar County in Texas has declared that YESN and MW are the fathers of the child and that the surrogate mother is not a

¹ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction in the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

parent of L. It is apparent from the decision that the surrogate mother relinquished custody of L for the benefit of YESN and MW.

3. YESN is a Swedish citizen. He emigrated to Great Britain where he permanently resides together with MW and L. The fact that YESN is a Swedish citizen means that L is also a Swedish citizen (see Section 2 of the Swedish Citizenship Act (2001:82)).

4. The Nacka District Court has declared that the American decision applies in Sweden in so far as pertains to the issue of determination of paternity.

5. Thereafter, in August 2020, YESN and MW requested that the district court declare their joint custody of L. They have asserted that the family plans to move to Sweden or Spain and that they must clear up the custody issue for contacts with public authorities regarding L, *inter alia*, for a report of the child's birth and passport application. No custody proceedings are underway in Great Britain. YESN and MW have referred to the fact that they are agreed that a Swedish court shall examine the issue of custody and that it is in L's best interests that there is a custody judgment in Sweden that conforms to the ruling in L's country of birth.

6. The district court dismissed the action by reference to the fact that the applicants were not competent to conclude such an agreement regarding the jurisdiction of the court referred to in Article 12 (3) of the Brussels II Regulation since it did not emerge that they had parental responsibility in the sense referred to in the regulation. The court of appeal, which rejected YESN and MW's appeal, has concurred with the district court's assessment and has in such context also taken into account the fact that no such circumstances came to light according to which the best interests of the child would be

served if the issue was examined in Sweden notwithstanding that L is habitually resident in Great Britain.

Jurisdiction of Swedish courts

Introduction

7. The jurisdiction of Swedish courts in cases regarding parental responsibility is governed primarily by the Brussels II Regulation. It is apparent from Great Britain's EU Withdrawal Agreement that the Brussels II Regulation applies to cases in which the action is brought before 1 January 2021.

8. According to Article 1 (1) b), the Brussels II Regulation applies to civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility. Article 2 (7) provides that parental responsibility means all rights and duties given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect relating to the person or the property of a child. The term covers, *inter alia*, custody and rights of access.

9. According to Article 8 (1) of the Brussels II Regulation, the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. It follows from Article 8 (2), however, that paragraph 1 shall be subject to the provisions of, *inter alia*, Article 12.

10. According to Article 12 (3), the courts of a Member State (in addition to what is stated in Article 12 (1)) shall have jurisdiction in relation to parental responsibility where the child has a substantial connection with that Member State – in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a

national of that Member State – and the jurisdiction of the court has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

The meaning of “all the parties to the proceedings” in Article 12 (3) b)

11. The wording of Article 12 (3) b) expresses no requirement that the parties who reach an agreement regarding the jurisdiction of the court must be holders of parental responsibility; this may be compared with Article 12 (1) b) in which the expression “holders of parental responsibility” is used. Against this background, the European Court of Justice has, *inter alia*, made it clear that the term *party* in Article 12 (3) encompasses all parties to the proceedings within the meaning of national law (see the ruling of the court in the case *Saponaro and Xylina*, C-565/16, EU:C:2018:265, para. 28). The term *parties* thereby also covers persons who do not hold parental responsibility and they may thus reach an agreement regarding the jurisdiction of the court with binding effect in accordance with Article 12 (3) of the Brussels II Regulation. What is decisive is that all parties to the national proceedings have accepted the jurisdiction.

The best interests of the child according to Article 12 (3) b)

12. The next question is what is meant by *the jurisdiction shall be in the best interests of the child*.

13. Recital 12 of the Brussels II Regulation states that the jurisdiction rules established in the regulation regarding parental responsibility are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child’s habitual residence except for certain cases of a

change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

14. The question regarding the best interests of the child was also examined by the European Court of Justice in the *Saponaro and Xylina* case. The court referred to the fact that an agreement regarding the jurisdiction of a court cannot in any case be contrary to the best interests of the child and whether that condition is complied with must be examined in each individual case. After the court reproduced the content of Recital 12, the court noted, *inter alia*, that the agreement was concluded between the parents of the child and that the nationality of the child was that of the Member State of the chosen court. Thereafter, the European Court of Justice observed that there was no indication that the agreed jurisdiction would prejudice the interests of the child. The agreement regarding jurisdiction of the court was deemed to be in the best interests of the child (see paras. 33–40 of the judgment).

The assessment in this case

15. The starting point for the examination is that the Nacka District Court, by virtue of a decision which has become legally binding, has declared that YESN and MW are L's legal parents.

16. The family currently maintains its habitual residence in Great Britain. The action in the case has been brought within the period of time set forth in the transitional provisions regarding Great Britain's withdrawal from the EU. The Brussels II Regulation accordingly applies in the case.

17. L has a substantial connection to Sweden by virtue of Swedish citizenship (*cf.* Article 12 (3) a)). According to Article 12 (3) b), a Swedish court has jurisdiction if all of the parties to the Swedish proceedings have

entered into an agreement regarding jurisdiction and it is in the best interests of the child (see para. 11).

18. In Swedish law, the Children and Parents Code contains a detailed regulation of the manner in, and circumstances under, which a custody action may be brought. However, there is no provision which directly addresses a case such as the current one in which the action is brought by the parents jointly but neither of them has custody. When the parents jointly pursue a custody action regarding a child who, according to Swedish law, is in no one's custody, however, the parents must be deemed to be the only parties in the case. While the Social Welfare Committee must be afforded the opportunity to provide information according to Chapter 6, Section 19, second paragraph of the Children and Parents Code, the Committee is not a party to the case.

19. Accordingly, YESN and MW are the only parties to the case and they are agreed that the action may be examined in Sweden. Accordingly, the conditions for an agreement in accordance with Article 12 (3) b) of the Brussels II Regulation are met.

20. L has a substantial connection to Sweden (see para. 17). His parents are agreed that the case is to be examined in Sweden and assert that it is in the best interests of L that such occurs. The parents are also agreed on the issue of custody. The surrogate mother has no legal claim as regards L. No circumstances have come to light which indicate anything other than that it would be in L's best interest if the action was adjudicated in Sweden.

21. All in all, the jurisdiction of Swedish courts may be deemed to be in L's best interests and the agreement is accordingly to be approved.

22. The parties have a right of action even if an express provision thereon is thus lacking in the Children and Parents Code. Custody constitutes such a

legal relationship which may be the subject of a claim for declaratory judgment in accordance with Chapter 13, Section 2 of the Code of Judicial Procedure (*cf.* the “*California Surrogate Arrangement II*” case, case NJA 2021, p. 437, para. 9). The conditions for such an action are met since there is uncertainty as to who has custody of L, which gives rise to prejudice. Accordingly, the action is appropriate.

23. The decision of the court of appeal is thus modified and the decision of the district court is set aside and the case is referred back to the district court for further proceedings.

Justices of the Supreme Court Gudmund Toijer, Ann-Christine Lindeblad (reporting Justice), Johnny Herre, Eric M. Runesson and Stefan Reimer participated in the ruling.
Judge Referee: Elisabeth von Salomé