

Re ML & AL (Children) (Contact order: Brussels II Regulation) (2006)

[2006] EWHC 2385 (Fam)

29/09/2006

Barristers

Teertha Gupta KC

Court

Family Division

Summary

Where parents had agreed that the mother could relocate their children to Austria subject to an agreement for contact with the father and that jurisdiction would remain with the English courts, the mother's application in Austria for an emergency order to suspend contact on the basis of Regulation 2201/2003 Art.20 was an abuse as it usurped the jurisdiction of the English court and had the effect of overthrowing the very substance of the contact order.

Facts

The applicant father (F) applied for declarations that his children were habitually resident in England and Wales and that they had been unlawfully removed from the jurisdiction by the mother (M). M had been given leave permanently to relocate the children to Austria, subject to an express agreement under Regulation 2201/2003 Art.12 vesting the English court with jurisdiction to determine F's contact application; and an undertaking by M to return the children to the jurisdiction if requested to do so. The order also provided for limited supervised interim contact in F's favour and directions for the final determination of his contact application. It was accepted that the agreement constituted a valid prorogation of jurisdiction in favour of English court. A further interim contact order was made a few months later, appointing F's mother as supervisor. Six months after that, M applied for an emergency suspension of contact under Art.20 of the Regulation, supported by two medical reports alleging that F suffered from serious psychiatric disorders and had paedophilic tendencies. The Austrian court decided that the terms of Art.20 were satisfied and suspended the contact order pending psychiatric assessments, while acknowledging that any subsequent application for cessation of contact would have to be made to the English court. The English court was presented with psychiatric evidence concerning F and the children which was highly critical of the reports produced by M. F argued that the children's habitual residence had not changed as a matter of law from England and Wales to Austria because M had falsely represented that she would promote contact between F and the children when she had no genuine intention of doing so and the original order had therefore been obtained by fraud.

Held

HELD: (1) A child's habitual residence was largely a matter of fact. Where there had been a lawful

removal from one state to another and the children had lived exclusively in the second state for over a year, it was not possible to argue that they had in fact remained habitually resident in the first state merely because their mother may have had the intention to subvert the contact order at the time it was made. However, in the instant case there was no evidence that M has secretly resolved to defy the contact order at its inception. (2) The psychiatric evidence placed before the Austrian court was wholly unsatisfactory. The allegations made by M were late inventions and almost certainly untrue. The Austrian court's uncritical acceptance of the reports was precipitate and had resulted in great unfairness. Moreover, its order had had the effect of overthrowing the very substance of the earlier contact order, which was an abuse of the Art.20 procedure. Article 20 could not be used illegitimately to seize jurisdiction validly vested in the first court, *Wermuth v Wermuth* (2003) EWCA Civ 50, (2003) 1 WLR 942 applied. M had not demonstrated the requirement of urgency; it had been open to her to obtain those reports a long time before and make an emergency application to the English court for a variation of the original order. The order of the Austrian court had effectively usurped the primary jurisdiction of the English court and a fresh order was made, containing directions and declarations regarding the future conduct of the matter.

Judgment accordingly

Permission

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