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Re LSDC (A Child) (2012)

[2012] EWHC 983 (Fam)

24/04/2012

Barristers
Private: Marcus Scott-Manderson QC
Cliona Papazian

Court
Family Division

Practice Areas
International Children Law

Summary
It was manifestly contrary to public policy to recognise, pursuant to Regulation 2201/2003 art.23(a), a Portuguese judgment providing that a child rotate on a two-monthly basis between his mother in England and his father in Portugal as the mother's mental health at the time of the agreement that led to the judgment raised concerns about her ostensible consent and ability to make any dissent known.

Facts
The Portuguese applicant father (F) applied for registration, recognition and enforcement of a Portuguese judgment providing for shared-care arrangements for his child with the English respondent mother (M).

M and F had been living in Portugal with F's parents. M had been receiving mental-health treatment in Portugal and had been prescribed anti-anxiety drugs. A Portuguese child-protection officer had described her as "very unbalanced and nervous and in some aspects . . . a negligent mother". Following an incident in which M attempted to remove the child to England but was prevented from doing so by the authorities, the parties entered into an "Agreement on the Exercise of Parental Responsibilities" that provided for equal shared care on a rotating two-monthly basis in England and Portugal until the child's third birthday. That agreement formed the basis of a judgment. M then returned to England with the child to begin her first two-month rotation. As the date for the child's return to Portugal approached, M applied to the English courts for a residence order. That application was stayed and F made the instant application under Regulation 2201/2003 art.41, which related to the recognition of judgments granting rights of access, alternatively under art.21. Issues for consideration included whether (i) F's application should be decided under the art.21 procedure or the art.41 procedure; (ii) recognition of the judgment should be refused under art.23(a), art.23(d) and art.23(e); (iii) the English courts had jurisdiction to hear M's application for a residence order.

Held
(1) F's application under art.41 was dismissed. Article 2.9 and art.2.10 differentiated between rights of

custody and rights of access. While the definition of rights of access in art.2.10 could be strained to accommodate F's agreement with M, art.2.9's definition of rights of custody clearly accorded with their expressed intentions. A party could not extract the "rights of access" involved in his parental responsibility in order to gain a tactical advantage by relying on the art.41 procedure rather than the art.21 procedure. Regulation 2201/2003 art.40(2) could not be read to permit such procedural selection, D-F (Children), Re [2011] EWCA Civ 963 considered. The application would therefore be considered under the art.21 procedure (see paras 7-9 of transcript). (2) (a) Article 23(a) would permit non-recognition of the judgment if recognition were manifestly contrary to UK public policy taking into account the welfare of the child. A case where welfare consideration might be legitimately entertained without undermining the principle of art.26, which prohibited reviewing a judgment as to substance, would be extremely rare, S (Brussels II: Recognition: Best Interests of Child) (No.1), Re [2003] EWHC 2115 (Fam), [2004] 1 F.L.R. 571 considered. The definition of "public policy" encompassed the fundamental rights guaranteed by the European Convention on Human Rights 1950 and the Charter of Fundamental Rights of the European Union. By faithfully applying the provisions of the Regulation, the court would be complying with the Convention on the Rights of the Child 1989 (United Nations) art.3(1), E (Children) (Abduction: Custody Appeal), Re [2011] UKSC 27, [2012] 1 A.C. 144 followed. The overall situation envisaged in the instant case, although not one that the instant court would have ratified at first instance, was not so obviously and extremely abusive that it qualified as an exceptional case. Nevertheless, M's mental health at the time of the agreement raised concerns about her ostensible consent and her ability to make any dissent known. Therefore, pursuant to art.23(a), it would be manifestly contrary to public policy to recognise the judgment (paras 29-31, 34). (b) Further, a prohibited-steps order, a residence order, or an order making L a ward of the court would be irreconcilable with the Portuguese order, and would justify non-recognition under art.23(e), but the aim of the Regulation should not be thwarted so readily in the absence of other grounds for non-recognition (para.36). Non-recognition could also be justified by a concern that the child (or his appointed independent agent) had not been given an opportunity to be heard, in violation of fundamental principles of procedure in the UK. Too much emphasis had been placed on adult consensus rather than the child's best interests (para.37). (3) The English courts had jurisdiction to entertain M's application under art.13 and it was in the child's best interests to conduct proceedings in England. The child could not be "habitually resident" in two places at once within the meaning of the Regulation. The nature of the agreement, however, conceded a constantly changing habitual residence for the child. Given his age and understanding he was deemed to acquire the habitual residence of the parent exercising de facto sole parental responsibility at a given time, Mercredi v Chaffe (C-497/10 PPU) [2012] Fam. 22 considered. Thus wherever the child happened to be in the cycle of shared care endowed the relevant Member State with jurisdiction. The stay on M's application for a residence order was lifted (paras 41, 45, 48).