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MD v CT (2014)

[2014] EWHC 871 (Fam)

25/03/2014

Barristers
Michael Gration KC

Court
Family Division

Practice Areas
International Children Law

Summary

The court allowed a mother's appeal under Regulation 2201/2003 art.23(c) against the registration and enforcement of a French court order granting sole custody to the father of her child in default of her appearance, as she had not been served in sufficient time and in such a way as to enable her to arrange for her defence to the French proceedings.

Facts

The appellant mother (M) appealed against a decision to register and permit enforcement of a French court order granting a residence order to the respondent father (F) in respect of their infant son (X).

M and F had made a joint application to the French court for X to reside with M in England, with visiting rights for F "until the hearing". M moved to England. She claimed that the application was to seek permission for X's permanent relocation to England; F contended that the proposed residence and visiting rights only extended to the hearing of the application. M and F were in regular contact. A dispute arose regarding F's contact with X. F issued a separate application for sole residence, to be heard alongside the joint application. He emailed M regarding the hearing date, without mentioning the new application. However, he did inform her by telephone that he had applied for sole custody. Notice of the new application was served on M at F's address in France, as that was her last known address. M's solicitor emailed F requesting all the documents relating to his application. F did not reply. M did not make any enquiries with the French court and did not attend the hearing. The court found that M had been properly served and had not acted in X's best interests. It set his habitual residence with F, with contact for M, and allowed 15 days for M to appeal. F's legal representatives emailed M's solicitors with the judgment and sent them a copy of the court papers. M did not lodge an appeal, but stated to F that the French court order did not have jurisdiction. The registration and enforcement orders were made pursuant to Regulation 2201/2003 art.28(2).

Held

(1) A challenge on public policy grounds would be very difficult as a criterion of exceptional

circumstances applied. There were three stages to establishing a challenge on the grounds of service under art.23(c). First, that the judgment "was given in default of appearance". That did not mean merely that the defendant was physically absent, Tavoulareas v Tsavliris (The Atlas Pride) [2006] EWCA Civ 1772, [2007] 1 W.L.R. 1573 applied. The second stage was whether he "was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence". The initial question was whether there had been actual service of the originating application or an equivalent substitute. The next question was whether the service was in sufficient time and in such a way as to enable the defendant to arrange for their defence. Even where there had been formal valid service, the court of registration was entitled to examine whether there had been actual service sufficiently far ahead of the hearing for that purpose, British Seafood Ltd v Kruk [2008] EWHC 1528 (QB) considered. Mere notification of the proceedings to the defendant would not suffice to knock out that defence, Tavoulareas considered. The third stage was the final conjunctive proviso. Under Regulation 44/2001 art.34(2), that was "unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so". That was a perfectly rational and understandable provision and there was no discernible reason why it was not included in art.23(c), where the conjunctive proviso was "unless it is determined that such person has accepted the judgment unequivocally". M was appealing against registration of the judgment, and therefore by definition resisted its implementation. It was hard to envisage a scenario where she would have been unequivocally accepting the judgment beforehand. Although it might be logical and rational to take into account her subsequent inaction in seeking to challenge the original judgment, it had to be recognised that the art.34(2) conjunctive provision had been expressly excluded by the art.23 draftsman. The conclusion was therefore that M's subsequent inaction was irrelevant (see paras 10-16 of judgment). (2) M's appeal on the ground of public policy was hopeless. The fact that the judgment was given in her absence was completely unexceptional. There was nothing in the procedure leading up to the hearing, or in the terms of the judgment, which went close to the very high threshold required. With regard to service, the fact that M had been properly served under French law did not prevent the instant court from making a realistic judgment as to whether she had sufficient opportunity to prepare her defence. F had to have known that attempted service of M at his own address was an absurd charade. He had refused to supply copies of the relevant documents to M's solicitor, and had done all he could to make M's defence as difficult as possible. M was almost as obstinate in refusing to seek copies of the documents from the French court or to appear at the hearing. The French judgment was one given in default of appearance by M for the purposes of art.23(c). The reality was that M did not "appear" on F's application for sole custody. Although the balance was exceedingly fine, F's conduct was more culpable than M's. M had not seen F's sole custody application and had not been served in sufficient time and in such a way as to enable her to arrange for her defence (paras 29-36).

Permission

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