4PB, 6th Floor,
St Martin's Court,
10 Paternoster Row,
London, EC4M 7HP
T: 0207 427 5200
E: clerks@4pb.com
W: 4pb.com

GM v KZ (No 2)

[2018] EWFC 6

30/01/2018

Barristers
Mark Jarman KC

Court
Family Division

Practice Areas
International Children Law
Judgment of Mostyn J in which he refuses Mother's application to set aside his earlier order to return the children to England.

This decision is to be read in conjunction with Mostyn J's first decision in this matter, set down at GM v. KZ [2017] EWFC 73. On that occasion Mostyn J ordered the Mother ('M') to return the children from Poland to England by 15 December 2017.

M had made two applications to the court in Lodz, Poland. The first, dated 02 June 2016, was never served on the Father ('F'), and was dismissed by Judge Rzeznik on 14 June 2016, when she concluded that the children were habitually resident in England. On 04 July 2016, F brought an application before the Family Court sitting Brighton. M then brought a further application on 01 August 2016 in Poland. On this occasion, Judge Rzeznik found that the centre of the children's' lives was in Poland, and they were habitually resident there, meaning the Polish court had jurisdiction. It was unclear whether this was an appeal of Judge Rzeznik's earlier decision, or a fresh application by M. In his first judgment, Mostyn J concluded that this was a fresh application instigated by M, not least as Judge Rzeznik could not sit on an appeal regarding her own decision. As a result, Mostyn J concluded that the English court was the first seised and ordered the children to return to their habitual residence in England.

Mother's application:
The matter before the court in this second judgment was M's application to set aside the order of Mostyn J in GM v. KZ [2017] EWFC 73. M's application was brought under both r.27.5, and section 31F(6) MFPA 1984.
In order to succeed under rule 27.5, M must have:

i. Acted promptly on finding out that the court had exercised its power to enter judgment or make an order against the applicant;
ii. Had a good reason for not attending the hearing or directions appointment; and
iii. Had a reasonable prospect of success at the hearing or directions appointment [7].

In order to succeed under section 31F(6), M must have acted promptly, and must show either:

i. That there had been a material change of circumstances since the order was made; or
ii. That facts on which the original decision was made had been misstated; or
iii. That there had been a manifest mistake on the part of the judge in formulating the order [9].

Mostyn J noted that there is an additional requirement to satisfy the criteria under this section; the due diligence requirement. M would need to show that the evidence in support could not have been made available with due diligence at the original hearing [10].

He concludes that the bar required under rule 27.5, is lower than that established by section 31F(6) [12].

Judgment:
Under the rule 27.5 criteria, there was no dispute that M had acted promptly [13]. Whilst the second and third criteria would normally be considered together, the failure on this third requirement – a reasonable prospect of success – would mean the need to evaluate the second criteria would fall away [14].

At the hearing, M relied on expert evidence which concluded that England was not the first court to acquire jurisdiction in this case [20]. F relied on expert evidence which said the contrary, as the Polish court was not seised until M's second (properly served) application on 01 August 2016. The English court was therefore the first seised with F's application on 04 July 2016 [21].

Mostyn J noted that neither expert was particularly helpful in determining the character on M's application made on 01 August 2016. He concluded however that his original decision was correct:

'The application of 01 August 2016 was a fresh application. With the dismissal on 14 June 2016 of the mother's initial Polish application of 02 June 2016, the Father's English application of 04 July 2016 took priority' [24].

This view was supported by the fact that M's first application in Poland dated 02 June 2016 was never served on F [28].

Mostyn J therefore concluded that he was:
'satisfied that the mother has no reasonable prospects of success of disturbing my finding that on 04 July 2016, with the issue of proceedings in Brighton, and certainly by 14 July 2016 with the dismissal in Poland of the mother's application of 02 June 2016, the English court had priority under articles 16 and 19 of BIIR. It therefore follows that she had no reasonable prospects of success in relation to this issue at the original hearing before me had she chosen to attend.' [29]

To read the judgment, please click here.

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