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X v Y (2003)

(2004) 1 FLR 582; [2003] EWHC 2974 (Fam)

08/12/2003

Court
Family Division

Summary
Successful application for recognition, registration and enforcement, pursuant to Council Regulation No.1347/2000, of a foreign judgment and order concerning parental contact with a child.

Facts
Application by a father ('X') for recognition, registration and enforcement, pursuant to Council Regulation No.1347/2000 ('Brussels II'), of a judgment and order of a Belgian first instance court. X was a Belgian citizen who married a citizen of both Britain and Italy (.Y') in 1996. They lived in Belgium and had a child ('Z') in 2000. In 2001 X and Y separated. Z was then cared for by Y, but X had access to him on a regular basis. In 2002 Y returned to England with Z. X subsequently commenced proceedings in a Belgian court seeking a divorce and remedies in relation to Z. The Belgian first instance court: (i) deemed it appropriate that there should be joint exercise of parental authority over Z, but that his main residence should be with Y; and (ii) made clear and precise provision as to the amount of time that Z should spend with each parent. X then commenced the instant proceedings in the High Court. Meanwhile, Y had commenced an appeal against the order of the Belgian first instance court and the High Court proceedings had to await the outcome of that appeal. In that appeal, Y challenged the jurisdiction of the first instance court, although she had not done so before the Belgian first instance court. She also wished the Belgian appellate court to state that the High Court had exclusive jurisdiction in relation to Z. Since Z came to England he had had no overnight stays with X, no contact with X on his own and no contact with X outside England. X and Y were unable to reach agreement as to contact between X and Z. Before the High Court, Y submitted that recognition of the first instance judgment and order was manifestly contrary to English public policy within the meaning of Art.15(2)(a) of Brussels II. X sought a relatively rapid progression to staying contact in Belgium, substantially in accordance with the order of the Belgian first instance court.

Held
HELD: (1) The Belgian appellate court recently addressed and considered the whole question of jurisdiction and clearly concluded that the Belgian courts had and continued to have jurisdiction in matters relating to parental responsibility for Z on the basis of Art.3(2) of Brussels II. The Belgian appellate court also considered that jurisdiction was not dependent on whether, at the commencement of the Belgian proceedings, Z was habitually resident in Belgium. Any risk of the illegal retention of Z in Belgium did not render recognition of the order manifestly contrary to English public policy. The appropriateness of the underlying order made by the Belgian first instance court was carefully

considered by the Belgian appellate court. Merely to reconsider the best interests of the child would be to review the first instance judgment as to its substance, which was forbidden by Art.19 of Brussels II. The order in relation to Z was not so contrary to his best interests that it was contrary, let alone manifestly contrary, to some English principle of public policy for it to be enforced. No defence or exception to recognition and registration of the Belgian first instance judgment had been established and the High Court was therefore bound by Art.14(1) of Brussels II to recognise the judgment. The judgment was recognised pursuant to r.7.44 Family Proceedings Rules 1991 SI 1991/1247 and X was granted permission to register the judgment under Art.21(2) of Brussels II. (2) The fact that Art.24(2) imported the Art.15(2) reasons into the enforcement stage indicated that a decision in relation to those reasons at the recognition and registration stage was not conclusive for enforcement. Art.23 was strictly procedural and required that procedure was governed by the law of the state in which enforcement was sought. In the context of Chapter III Section 2 and Brussels II as a whole, “enforce” and “enforcement” meant to give force or effect to the underlying judgment. In doing so, there could be no review as to substance and only limited discretion under Art.24(2). There was no power to vary. The court had some discretion to “phase in” the contact provided for the foreign judgment, if and to the extent that phasing in would eventually best make give effect to that judgment. Any more general discretion was outside the scope of Art.24(2). (3) In light of the limited contact Z had so far had with X, Z’s age and the possible language barrier between the two, strict application of the foreign order was inappropriate. The contact provided for by the Belgian first instance court up until summer 2004 was modified, after which time the order had to be applied and obeyed to the letter, unless X and Y mutually agreed otherwise. To give overall effect to the order’s requirement that Z be returned to Y at the end of contact, X’s contact was restricted to any country that was both a Member State of the European Union and a Contracting State to the Hague Convention on the Civil Aspects of International Child Abduction 1980.