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MD v (1) AA (2) DD (By his Children's Guardian) (2014)

[2014] EWHC 2756 (Fam)

31/07/2014

Barristers
Jacqueline Renton

Court
Family Division

Practice Areas
International Children Law

Summary
An appeal against the recognition and registration of a Romanian court's decision that custody of a seven-year-old child should be transferred from his mother in the United Kingdom to his father in Romania was allowed because the child had not been given an opportunity to be heard and the mother had not been served with documents to enable her to defend the proceedings.

Facts
The appellant mother (M) appealed against orders recognising and registering a Romanian court's decision that the custody of her son (D) should be transferred to the respondent father (F) in Romania.

F and M, who were Romanian, had met in England. D, aged seven, was born in Romania, but had lived with M in England since the age of eight weeks. F and M had separated and F had enjoyed regular contact with D. F and M chose to litigate D's custody in Romania. The Bucharest Court of Appeal made a final decision in November 2013 establishing D's residence with F. Its central finding was that D craved F's permanent presence. The English court initially granted F recognition and registration of the custody decision in February 2014, notwithstanding that the time for appealing against it had not expired. Due to procedural anomalies, F applied to re-register the custody decision in May 2014. The issue was whether the custody decision should be registered for enforcement in England and Wales.

M submitted that the custody decision should not be recognised because (1) under Regulation 2201/2003 art.23(a), recognition would be contrary to public policy taking account of D's best interests; (2) under art.23(b), D had not been given an opportunity to be heard, in violation of fundamental principles of procedure; (3) under art.23(c), M had not been served with the application leading to the custody decision to enable her to defend those proceedings and, under art.23(d), she had not been given the opportunity to be heard; (4) the procedural requirements for registration had not been met.

Held

(1) Article 23(a) contained a very narrow exception to recognition, set the bar very high and was not engaged in the instant case, L (A Child) (Recognition of Foreign Order), Re [2012] EWCA Civ 1157, [2013] Fam. 94 applied. Whilst it was possible to envisage a decision so ridiculous that it would offend public policy, and even though a change in custody and country would be painful and might be damaging, D had a substantial relationship with F and M had not raised any concerns about F's abilities. If M was unable to care for D, he would almost certainly pass into F's care. Taking all those matters into account, the custody decision was not so extreme as to require recognition to be withheld under art.23(a) (see paras 70, 73-74 of judgment). (2) The Romanian court's conclusion about D's wishes had not arisen from any enquiry involving D himself. The court had an obligation to hear a child and the views of children as young as D had to be taken into account, D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 A.C. 619, F (A Child) (Abduction: Child's Wishes), Re [2007] EWCA Civ 468, [2007] 2 F.L.R. 697 and W v W [2010] EWHC 332 (Fam), [2010] 2 F.L.R. 1150 applied. The child's entitlement to a voice was a fundamental procedural principle in the English system. Although D had been in England throughout, he could readily have been given an opportunity to be heard in the Romanian proceedings. An English court, faced with an application for a peremptory change of lifelong carer, country and language would, as a minimum, seek a report from a court social worker containing the child's perspective. That report would be fundamental and any decision reached without such information would be vulnerable on procedural and substantive grounds. Accordingly, the case under art.23(b) was made out (paras 83, 94-97, 103-104). (3) It was more likely than not that M had become aware of the Court of Appeal proceedings only after they had concluded. If that was wrong, F had only himself to blame; he had done the bare minimum to inform M of them and was unable to show that he had given her actual notice. When the court was considering art.23(c), the test was whether the respondent had been served at the outset in a way that enabled him to defend the case, MD v CT (Parental Responsibility Order: Recognition and Enforcement) [2014] EWHC 871 (Fam), [2014] Fam. Law 975 applied. The custody decision had been given in default of appearance and service had not taken place in such a way as to enable M to arrange for her defence. Non-recognition was further justified by the fact that the proceedings had been over before M had known of them. M's case under art.23(c) and art.23(d) was made out (paras 117-118, 121-123). (4) The degree of care with which registration applications were considered had to bear some relationship to the consequences of registration. If there were substantial shortcomings, registration should not occur without them being corrected. On the other hand, in the right case a defective registration could be cured by a subsequent order on appeal. The February orders had to be set aside for cumulative procedural failures. An effective right of appeal was a fundamental part of the process. There had been no urgency from the point of view of D's welfare in enforcing the decision, and no basis for abridging the time for enforcement. In those circumstances, M was entitled to have the February orders set aside as of right (paras 143-145, 148-149).

Permission

Lawtel