

Enforcement of Judgments in Children Cases

PART 1

1. STATUTORY FRAMEWORK

This article relates to enforcement of orders relating to children. The decision of Mrs Justice Black EWHC 822 22.4.07 Re D and the Article in November 2007 International Family Law Magazine p.183 by Professor Lowe highlight some of the problems and inconsistencies. The Family Proceedings Rules are currently in the process of revision insofar as they relate to enforcement of orders under Council Regulation (EC) No 2201 / 2003 of 27 November 2003 (Brussels II Revised – “BII R”).

The provisions relating to jurisdiction in children cases are contained within the Family Law Act 1986 sections 2-6 amended subsequent to BII R. The power to order a stay is in section 5.

The central jurisdictional basis for orders and enforcement relating to children is that the child should either be present or habitually resident in England. Habitual residence is itself a complex subject, being a mixture of law and fact and with a different definition for BII R purposes: *Marinos v Marinos* [2007] 2 FLR 1018).

Power to make orders arises out of FLA 1986 section 2A when matrimonial proceedings are on foot.

2. GENERAL

International enforcement of orders in children cases both outgoing and incoming depend upon:-

- (i) What State made the order you seek to enforce in England;
- (ii) In what state you seek to enforce an English order;
- (iii) Where the child is now;
- (iv) Where the child is habitually resident;
- (v) What are the current orders in place.

3. MIRROR ORDERS.

Unless the State which made the order is a Signatory to BII the solution may be to seek a “mirror order” or order in like terms either in England if the order is incoming or in the foreign state if the order is outgoing.

4. If the order is outgoing you will need the advice of a foreign lawyer in the relevant state to advise whether it is feasible to obtain a mirror order or something akin which is enforceable

5. In many states there is no such thing as a mirror order or order in like terms. There may be concepts such as "friendly settlement" arrangements whereby the parties can agree to lodge a consent order in the foreign state which will be enforceable. This is so in Indonesia where a foreign order including a custody order that fulfils basic conditions of fairness, such as that both parties were heard in England enables the court to enforce it as it would any other foreign order. In Islamic countries the difficulties are different and more complex. It may be impossible to enforce an order at all if the order is outside what is permissible under Sharia law.

6. UNDERTAKINGS

Undertakings may be enforceable in some foreign states as they are in England, but the duration is usually limited. Only the foreign lawyer can tell you.

7. COMITY : THE ENGLISH APPROACH

In enforcing or avoiding enforcement of a foreign order the English court will take into account the need for comity. It is unsatisfactory for there to be conflicting orders in existence in different states affecting children. There is no hard and fast rule however. Welfare currently remains the overriding factor.

e.g.

In *E v E* 2007 1 FLR 1977 the President stressed the importance of comity in the Family Division. It is undesirable for there to be conflicting orders in different jurisdictions.

8. In *Re A* 2007 1 FCR 391 the President again stressed that there should not be conflicting orders in different jurisdictions. In that case there had been an order approved by the court in Kurdistan. The court is slow to allow parallel rival proceedings in another jurisdiction when the parties only recently agreed that Kurdistan was the proper forum.

9. However the concept of the exclusive jurisdiction of a particular state often gives way to the fact that the forum conveniens is England particularly where the child is habitually resident. There is no hard and fast rule. The trend is towards recognising the place of the child's habitual residence as the proper place for litigation rather than follow agreements as to where litigation should occur

10. An agreed "Exclusive jurisdiction" clause is taken into account but is by no means conclusive.

11. The same approach is to be discerned in European BII R decisions. Respect for a key foreign decision is to be found at the crux of *EC (Abduction stayed proceedings) 2007 1 FLR 57 CA* and *Re MI and AI 2007 1FLR 475* Mostyn QC where the judge deprecated the mother's invocation of the emergency protective measure provisions in Article 20 in Austria rather than accept the English primary jurisdiction agreed under Article 12 B2R

12. STAY OF PROCEEDINGS

The possibility of staying the proceedings in England so as to permit enforcement or to resist enforcement of foreign proceedings is analysed by Wilson J in *M v M 2006 1 FLR 138* The mother had issued proceedings in England where there were proceedings on foot in South Africa. Considering the stay provisions of the FLA 1986 section 5

"whether the jurisdiction is statutory or inherent the same principles apply:.

- (a) the burden is upon the father to establish that a stay of the Sunderland proceedings is appropriate.
- (b) The father must show not only that England is not the more natural or appropriate forum but that South Africa is clearly the more appropriate forum
- (c) In assessing the appropriateness of each forum the Court must discern the forum with which the child has the more real and substantial connection in terms of expense and availability of witnesses
- (d) If the Court were to determine that a South African forum was clearly more appropriate it should grant a stay unless other and more potent factors were to drive the opposite result
- (e) In the exercise to be conducted at (d) the welfare of the girls is an important but not a paramount consideration

13. The formulation has been adopted recently by Mr Justice Sumner J in *Re L 2007 1 FLR 1686*, staying proceedings in England where it had been agreed that Panama was the proper forum in February 2006 and the father had issued in England in October 2006 .

14. MECHANISM FOR ENFORCING AN INCOMING ORDER

Where a so called mirror order is the mechanism for enforcement chosen in England (a) invoke the Children Act 1989 or (b) issue a summons under the inherent jurisdiction. This is permissible, albeit more expensive and doubted by judges who regard the inherent jurisdiction as a "plug" only where there is a lacuna .

15. The better practice is to:-

- (I) Issue an application in the High Court under the Children Act 1989 for a section 8 order
- (II) Obtain a direction by-passing the conciliation procedure.
- (III) Annex a copy of the original foreign order which requires the mirror order in England

- (iii) Remember that an English order requires English terminology. For example use words such as "contact" rather than "access" so that it is a recognisable English order (albeit as close as possible to the foreign order).

PART 2

Enforcement of orders between signatories to Brussels II Revised.

1. Article 1(1)(b) of BIIR provides that the Regulation shall apply in civil matters relating to the attribution, exercise, delegation, restriction or termination of parental responsibility.

"Proceedings relating to parental responsibility" should be construed widely so as to include all applications under S8 Children Act: *Re G (Foreign Contact Order: Enforcement)* [2004] 1 FLR 378 at 47.

2. In EU jurisdictions there may well be scope for argument as to what is and is not such a proceeding.

3. BII R provides:

Article 8(1):-

"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

Article 8(2) makes Article 8(1) subject to:-

- Article 9, which provides for the courts of the member State of the child's former habitual residence to retain jurisdiction for three months after the move for the purpose of modifying an access order .
- This means that the inhibition upon varying the access Order will usually cease three months after the lawfully relocated child arrives here. The child can be the subject of CA 1989 proceedings in England. There is therefore a period when there can be 2 sovereign courts with jurisdiction. In the case of *Re S Feb 2008* Fam Law Wood J refused to enforce a Polish contact order although the registration of the order stood. The child was habitually resident in England and the provisions of Article 8 operated so that litigation to vary the Polish order was to take place in England on a welfare basis.
- Article 10, which deals with child abduction between Member States provides in summary that the court of State A can continue to make orders when the child has been wrongfully

abducted for a period of one year (and provided certain other conditions are fulfilled).

- Article 12, which provides for 'Prorogation of Jurisdiction' – in effect agreement with regard to jurisdiction is important. see *MI and AL (EWCH 2385) 2007 1 FCR Mostyn QC*
- Article 12(3) provides that the Courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings where the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national and where the jurisdiction has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised
- In **re C v C 2006 AER (d) 278** Hedley J considered a consent order giving permission to a wife and children to relocate to Spain permanently with provision for contact and directed the mother to return the children to England if directed to do so. The dispute as to contact continued. The mother obtained a divorce in England and then sought to have her contact dispute heard in Spain. The father sought in England a declaration that the English courts had jurisdiction rather than the Spanish. By this time the children had been in Spain for more than a year and so by Article 8 habitual residence primarily governed the dispute which should be heard in Spain unless Article 12 (prorogation) applied. (Article 9 which provides the 3 month continuing jurisdiction rule for access had ceased to apply.) The outcome turned upon the application of Article 12. Hedley J decided that the unresolved contact issue fell within Article 12(2)(b) ie that the children proceedings had not yet become final, hence the English Court still had jurisdiction. The father succeeded in that all the children spoke English and the parties could put their case well in England. Hedley J stated that if Article 12 (1) or (3) are satisfied the court should accept jurisdiction. In *B v B 2008 EWCA Pauffley J* adopted a similar approach. This case will be considered by the Court of Appeal on 10th July 2008

4. TRANSFER TO A COURT BETTER PLACED

Article 15 Paragraph 1 provides that 'by way of exception' the court of one Member State, if it considers that the courts of another Member State 'with which the child has a particular connection' would be better placed to hear the case, and where this is in the best interests of the child may either:-

- Stay the case and invite the parties to bring proceedings before the courts of the other Member State; or
- Request a court of another Member State to assume jurisdiction.

Article 15(2) provides that Paragraph 1 relating to transfer to a court better placed:

shall apply either upon application by a party; or of the court's own motion; or on application by a court of another Member State with which the child has a particular connection.

Article 15(3) defines '*particular connection*', in wide terms.

Article 15(4) and (5) deal with time limits.

Article 15(6) provides for courts to cooperate either through designated central authorities or directly.

5. *In EC 2007 1FLR 57* the creative use of this provision by Charles J was challenged by the Court of Appeal.

Practitioners should note Article 56 in respect of care cases. Clearly there is scope for Article 15 to be implemented in public law proceedings in conjunction with Article 56.

6. FIRST PAST THE POST

Article 19(2) provides for proceedings relating to parental responsibility in identical terms to those which are set out in Article 19(1) in relation to matrimonial proceedings.

7. The court second seised subject to the above will stay the proceedings unless there is for example a transfer to a court better placed. There is therefore a first past the post system for children as well as divorcing adults but subject to limitations. There is scope for serious dispute about what provisional orders may be made under article 20 (see Mostyn Qc in *MI and AL* (EWCH 2385) 2007 1 FCR

8. Enforcement in BII R States

There are two routes to enforcement – one for access orders under the fast track and orders for the return of a child under Article 11(8). Article 40 to 42 are central to fast track enforcement

Under the ordinary procedure it is necessary obtain a declaration of enforceability or in the UK to register the judgment before enforcement. [Article 28].

Under the fast track procedure the order can be enforced directly provided that the appropriate certificate has been issued by the Court of origin. [Articles 40 to 42].

9 Access rights

Access rights are now directly recognised and enforceable by another Member State if accompanied by the appropriate certificate in prescribed form and compliance with other rules relating to service and process.

10. Article 41(1) Certificates

The Article 41 Certificate makes an order for contact which complies with the conditions set out in Article 41 directly recognised and enforceable in another member state if it has an Article 41 Certificate.

If there is an Article 41(1) Certificate in prescribed form and no application has been made to the court of origin to rectify it is enforceable. Power to Rectify is important.

11. In other cases, the procedure is to apply to the new Member State for registration, recognition and enforcement of an order pursuant to Article 21 of Brussels II R.

12. The Art 41 certificate is issued in the member state of origin providing certain conditions apply:

1. It must be issued in the standard form as set out in Annex III see (Family Court Practice page 3188)
2. If the judgment certified was given in default, the person defaulting had good and sufficient notice so as to arrange a defence or where service did not comply with conditions, the defendant accepted the decision unconditionally
3. All parties were given an opportunity to be heard
4. The child was given an opportunity to be heard unless a hearing was considered to be inappropriate having regard to age or maturity. (Art.41 (2))

13. CERTIFICATE : When to apply for it :

A cross border element in an order for contact in England and Wales involving or potentially involving a Member State, makes a request for the certificate desirable at the time of making the order so as to speed up any future enforcement.

14 If the order does not have a cross border character but subsequently acquires one, either party may request the court of origin that delivered the judgment to issue a certificate.

15. HEARING THE CHILD

If appropriate according to national law, the child must be heard and this is not always the case where matters are compromised on a consensual basis. This is a point that needs to be taken into account when agreeing orders for contact after a relocation to a member state. Child consultation procedures remain a matter for national law. The status of the child is significantly increased and enhanced in BII R.

16. HAGUE NON RETURN ORDERS

Also directly enforceable are Article 11 return orders made in State A following a Hague Convention non-return order. See Article 42. The decision *Re A (Maltese return order 2007 1FLR 1923 Singer J* shows how the English courts approach the return order under Article 11.

In *Re A Hb v H Mb 2007 EWCA Singer J* held that where the English Court had jurisdiction but no request for return was made by the Court under Article 11 B II R the English court was able to make a contact order.

THE TWO STAGE PROCESS FOR OTHER ORDERS

18 Other orders are enforced by a 2 stage process. Once a judgment is enforceable then it is enforced according to local laws in the receiving state. Always find out what the receiving country will do for your client in practice as well as theory for example the time scale

20. When applying for enforcement not under the fast track, the general principle is that a judgment shall be enforced in the Member State when it is declared enforceable in state B [Article 28] See Black J in *Re D* (herewith)

21. The national law of the enforcing state governs the procedure for application to enforce but in no circumstances may the judgment be reviewed as to its substance [Article 31(3)]. Partial enforcement is provided for [Article 36] as is a mechanism for appealing against an enforcement decision.

22. Any interested party may apply for the decision to be recognised or not recognised [Article 21] or enforced [Article 28]. The Borrás report addressed this in paragraphs 65 to 80.

23. PROCEDURE ON APPLICATIONS FOR RECOGNITION OR REGISTRATION OF ORDERS MADE IN ANOTHER MEMBER STATE

The process for applying for the recognition or registration of a judgment is set out in the Family Proceedings Rules. However these are not entirely clear and cohesive

24. In summary :- apply in the Principal Registry of the Family Division without notice being given to any other party. The application must be supported by either a statement sworn to be true or an affidavit set forth

above [rule 7.41, rule 7.42 and Article 31 – see also rule 7.43(1)]. The affidavit must summarise the grounds and the statement or affidavit must contain the appropriate exhibits as set forth in the rules.

25. Where the application is for recognition or non recognition rather than registration, the procedure is the same as an application for registration but it is not necessary to produce documents which establish that according to the law of the contracting state in which it has been given, the judgment is enforceable and has been served or, where it is the case, a document showing that the party making the application is in receipt of Legal Aid in the contracting state in which the judgment was given. [Rule 7.48(2)]. If an ordinary appeal against the judgment has been lodged, recognition proceedings may be stayed. [Article 27].

26. An order giving permission to register the judgment must be drawn by the Court and state the period within which an appeal may be made and that the Court will not enforce the judgment until the expiry of that period.

28 Protective measures pursuant to Article 20 are permitted [rule 7.44(3)]. The register of judgments is maintained pursuant to Article 28(2) in the Principal Registry [rule 7.45] at least in theory although as Mrs Justice Black pointed out there is in fact no register at the PRFD. Registration serves as a decision that the judgment has been recognised for the purposes of Article 21(3).

29 PROVISIONAL MEASURES

CA and Re MI and AI 2007 1FLR 475 Mostyn QC a mother was given leave to relocate to Austria under Article 12. The order gave limited interim contact and directions for the final determination in Austria. The mother and child moved to Austria and the habitual residence changed. The father argued that the change of habitual residence had not changed because the mother had obtained the order by fraud. The Judge rejected this,. However because the parties had agreed under Article 12 that England would be the court of primary jurisdiction that underlay the litigation rules.

An order for contact was made in England for one occasion. The mother then went to the court in Austria and obtained an emergency order suspending contact .relying on Article 20. which vested the court in urgent cases with power to make orders to protect the child, even when another Court has primary jurisdiction. The Judge deprecated the mother's invocation of the emergency protective measure provisions in Article 20 in Austria rather than accept the English primary jurisdiction. The mother's manipulation of the protective regulations undermined the letter and spirit of BII R.

30 Notice of the registration of a judgment under Article 28(2) must be served on the person against whom judgment was given by delivering it to him or her personally in accordance with the Family Proceedings Rules 7.44(3) see *Black J Re D* and rule 10.6 FPR 1991 .

31 . Fine tuning of the order: in *Re S 2004 1 FLR 582* upon application for recognition, and enforcement it was held under the comparable Article 21 of the original Brussels II that while there was an overriding duty to enforce an order previously recognised under the Regulation, there remains a limited discretion to refuse enforcement on the basis provided by what is now Article 23 of Brussels II which is addressed below. Holman J stated that he had power to “phase in” the Belgian order

32. Either party may apply for a judgment to be recognised or not recognised;

33 . Recognition proceedings may be stayed if the judgment is under appeal [Article 27].

34 NON RECOGNITION

Article 23 sets out the only grounds for refusing to recognise the judgment. The courts are forbidden from reviewing the jurisdiction of the Court of origin or to review a judgment as to its substance

Article 23 provides that grounds for non-recognition are:-

(A) that the judgment is manifestly contrary to the public policy of the Member State in which recognition is sought

This has been very narrowly construed under the Brussels I Regulation

(B) or that taking into account the best interests of the child it was given except in the case of urgency without the child being given an opportunity to be heard

(C) in violation of the fundamental principles of procedure in that Member State

(D) the judgment is irreconcilable with the later judgment given in that state or another Member State or the state of the child’s habitual residence

(E) that it was given in default of appearance and the person in default was not served and without being given an opportunity for a holder of parental responsibility to be heard.

35 *Re S Brussels II [2004] 1 FLR 571*] is summarised above. The mother sought to invoke the first of the exceptions – now Article 23A – that should have prevented recognition of a Belgian access. Holman J decided that the word ‘manifestly’ meant that neither of the arguments came close to crossing the hurdle.

36. COSTS

In *re C* February 2008 Fam Law Munby J criticised the lawyers of the Italian father for spending a substantial amount of money in anticipated defence of an application to a contact order under Article 41.

37. FAMILY PROCEEDINGS RULES

Registration and enforcement rules are in FPR 7.40 to 7.55

Re D EWCH 2007 24.4.07 Black J drew attention to lacuna in the F.P.R. A father in France wished to have his order for residence in France registered in England and enforced ; he applied without notice for registration and enforcement in accordance with FPR 7.42.

Coleridge J gave the father permission to register the judgement pursuant to Article 28(2) of B2R. The order directed the officer at the PRFD to enter the judgment and the grant of permission into the register of judgments. It then transpired that there was no register of judgments but the judgement was validly registered.

The mother was served with the permission order which contained incorrect information as to the appeal period. She appealed against the registration and applied for non recognition of the French judgment. The father cross applied for its enforcement. Held dismissing the mother's appeal and application for non recognition and listing for consideration of enforcement.

Black J pointed out that Part 7 FPR contained some procedural provisions relating to registration and enforcement. It seemed unlikely that permission for registration was tantamount to registration. Registration suggested registration in a book or computer ledger

Rule FPR 7.46 requiring notice of registration of a judgment to be given seemed to be contemplating more than simply serving the permission order. A notice of registration was a better way of conveying information.

The failure to serve a valid notice of registration in accordance with FPR 7.46 was not so fundamental a flaw as to require the court to decline to require the court to decline to entertain the father's enforcement proceedings. Once a judgment from another Member state had been registered the only way of preventing its enforcement was to appeal against registration. The English court could not entertain the argument that judgment should not be recognised on welfare grounds as to do so would be to review a decision as to its substance prohibited by article 26 and 31(3)

In the Judges view granting permission to register was not tantamount to registration as had sometimes been assumed.

Rule 7.46 FPR requiring notice of registration to be given was tantamount to registration

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