

Case Nos. FD10P00641 & FDIOP00518

Neutral Citation Number: [2010] EWHC 1311 (Fam)  
IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION

Royal Courts of Justice  
Date: Friday, 30th April 2010

Before:

**MRS. JUSTICE ELEANOR KING**

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BETWEEN:

**P     Plaintiff**  
**and**  
**G     Defendant**

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MS. I RAMSAHOY (instructed by International Family Law Group) appeared on  
behalf of the Plaintiff.

MR. F. WILKINSON (instructed by Richard Crumly) appeared on behalf of the  
Defendant.

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JUDGMENT

**MRS. JUSTICE KING:**

- 1 This is an application made by the plaintiff father, P, by way of an originating summons dated 9th March 2010. He seeks an order that certain Children Act proceedings commenced by the defendant mother, G, should be stayed pursuant to s.5 of the Family Law Act 1986. The basis of his application is that the matters before the court should be heard in Scotland and not England.
- 2 The matter came before me this morning for the determination of this jurisdictional issue. I am grateful to counsel representing both parties who have provided full skeleton arguments on this somewhat complicated area of the inter-relation of the jurisdiction as between England and Wales on the one hand and Scotland on the other.
- 3 In view of the urgency of this application which has hearings listed in both England and Scotland, I now give an extempore judgment in relation to the application.

**Background**

- 4 The background is as follows: there are two children of the family: C, who was born in 1997 (12 years) and S who was born in 2006 (4 years).
- 5 C is the natural child of the mother but not the father. The father has no parental responsibility in respect of C although she lived and was regarded as a 'child of the family' throughout the parties' relationship.
- 6 The father has indicated to the court today that whilst he would wish to continue to see C and to maintain his relationship with her, he accepts that given her age, it would not be appropriate to pursue an application for residence or contact against her wishes. It is agreed that at present C would be resistant to any such applications.
- 7 In relation to C, it is agreed therefore that there will be no proceedings whether in England or Scotland in relation to her future welfare.
- 8 S is the child of the relationship between the mother and the father. Although the parties never married, the father has parental responsibility for S.
- 9 The mother and father started seeing each other in about 2004 and began to cohabit in Basingstoke later that year. S was born in January 2006 in England where her birth is registered. In May 2007, the family moved to Scotland to a property which was to be their family home until December 2009.
- 10 The relationship between the parents did not prosper. It is alleged by the mother that there were a number of incidents of violence against her by the father; she alleges incidents of violence in October 2008 when the police were involved. More recently, on 18th December 2009, the mother alleges a further instance of serious violence when she says that the father not only attacked her but threatened

to remove S from her care. Whatever the rights and wrongs of the incident may be, immediately following it the mother left the family home and moved first to a refuge in Scotland and thereafter the following day to England.

- 11 Following the events of 18th December, the police attended at the family property in Scotland where they discovered that the father had an unlicensed shotgun in his possession. That matter is being pursued by the police as are allegations that the father threatened to kill the mother which threats are said to have been communicated by the father to the mother in the form of text messages, emails and voicemails. The police have retained the mother's mobile phone whilst that matter is being investigated.
- 12 The mother and the children are now living together at an undisclosed address in the South of England where they have been since about 19th or 20th December 2009.
- 13 On 20th January 2010, the father issued proceedings in relation to both children in the Sheriff Court. A hearing took place on 27th January 2010 before Sheriff Drummond. On 3rd February 2010, the mother (despite having notice of those Scottish proceedings), issued her own proceedings in her local County Court. On 10th February 2010 in Scotland a further hearing took place again before Sheriff Drummond. At that hearing service on the mother was deemed to have taken place.
14. On 18th February 2010 the mother made an ex parte application to the County Court where, given the jurisdictional issues, District Judge Henry transferred the matter to the High Court as a matter of urgency. The matter having been transferred to the High Court in England the mother made a further ex parte application on 22nd February 2010 before His Honour Judge Clifford Bellamy, sitting as a s.9 High Court Judge. Judge Bellamy made various directions which included: a non-molestation order; a residence order in respect of the children; and a prohibited steps order prohibiting the father from removing the children from the jurisdiction of England and Wales and more particularly, from the mother's care.
15. The orders were not served on the father personally – a requirement given that there was a penal notice on that order – but they were sent to the Scottish Court and to the father's Scottish solicitors and the father knew of the existence of the orders and the terms in which they were made.
16. On 24th February 2010, there was a further hearing in Scotland before Sheriff Drummond when he granted an application by the mother to stay the Scottish proceedings. On 4th March 2010 the father appealed the granting of the stay to the Sheriff Principal, Sir Stephen Young.
17. Meanwhile, in England, a few days later on the 8th March 2010, there was a hearing this was listed as the return date of the mother's ex parte application heard on 22 February 2010. The matter came before Recorder Setright QC sitting in the High Court as a s.9 Judge. At the hearing the father confirmed that it was his intention to issue an application to stay the English proceedings. In those circumstances, Mr. Setright made (by consent) extensive directions which not

only continued the interim protection in place for the children, but provided for the filing and serving of affidavits. Recorder Setright also ordered that the originating summons applying for the stay which the father intended to issue should be set down for hearing on 16th April.

18. On 9th March (the day after the hearing before Recorder Setright) the father issued the originating summons.
19. Meanwhile the Scottish proceeding continued and a couple of weeks later, on 31st March 2010, the Sheriff Principal heard the father's appeal against the order that Sheriff Drummond had made on 24th February staying the Scottish proceedings. The appeal was allowed, the interlocutor of 24th February recalled and the stay lifted. In those circumstances, the father's Scottish proceedings in relation to both children were once again 'live' and the case was remitted to the Sheriff for hearing.
20. On 7th April 2010 the first inter-parties welfare hearing (whether in Scotland or England) was heard by Sheriff Drummond – in Scotland. Both parties were legally represented. The Sheriff made an interim contact order in respect of S whereby there was to be staying contact with the father each alternative weekend.
21. On 16th April 2010, the father's originating summons seeking a stay of the English proceedings came on for hearing in the Royal Courts of Justice. Unfortunately the case was unassigned and no court became available. The matter was therefore re-listed for today.
22. Before the matter was relisted in the Royal Courts of Justice there was a further hearing in Scotland on 28th April 2010 just two days ago. Once again both parties were legally represented. Once again the matter came before Sheriff Drummond. Sheriff Drummond heard the mother's application for leave to appeal against the order for staying contact in respect of S which had been made on 7 April. Sheriff Drummond refused her application and the order for contact remains although the mother has not complied with the terms of the order and no contact has taken place since December 2009.
23. The present position so far as the Scottish proceedings are concerned is that they are re-listed for 12th May. That hearing is a further welfare hearing in relation to S. S is therefore currently the subject of orders in two jurisdictions: in the English Courts there is a residence order, a prohibited steps order and non-molestation orders. In the Scottish Courts there is a contact order.

## **The Law**

24. The law governing the inter-relation of the Scottish jurisdiction and the jurisdiction of England and Wales is found in Part 1 of the Family Law Act 1986 (the Act).

"(1) Subject to the following provisions of this section, in this Part "Part I order" means

(a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;

(b) .....

(c) .....

(d) an order made by a court in England and Wales in the exercise of the inherent jurisdiction of the High Court with respect to children."

25. Section 1(1)(a) therefore incorporates into the provisions determining jurisdiction as between England and Wales and Scotland, orders made under Section 8 of the Children Act 1989 – that is to say contact, residence and prohibited steps orders.

26. Orders made under the court's inherent jurisdiction (as opposed to Children Act orders under s.8) are included under section 1(1)(d) of the Act.

27. The Act does not provide a complete answer to all issues relating to jurisdiction. Issues which relate to either the acquisition by a father of parental responsibility or for applications for non-molestation orders are not covered by the Act.

28. The general jurisdiction of the courts in England and Wales is found in section 2 of the Act. Insofar as it is relevant to this case it says as follows:

"(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless:

(a) It has jurisdiction under the Council Regulations, or

(b) The Council Regulation does not apply, but (a)...or (2) the condition in s.3 of this Act is satisfied.

.....

(3) A court in England and Wales shall make a section 1(1)(d) order unless:

(a) It has jurisdiction under the Council Regulation, or

(b) The Council Regulation does not apply, but

(i) The condition in s.3 of this Act is satisfied, or

(ii) The child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

[It should be noted that the relevant date is the date of the first application (under the provision of s.7(c) of the Act).]

Section 3 provides:

"(1) The condition referred to in s.2(1)(b)(ii) of this Act is that on the relevant date the child concerned:

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom, or in a specified dependent territory."

There is additional important provision at section 41, whereby the Act anticipates a state of affairs where a child has been removed from the jurisdiction without permission. It reads as follows:

"(1) Where a child who:

(a) has not attained the age of sixteen, and

(b) is habitually resident in a part of the United Kingdom or in a specified dependent territory becomes habitually resident outside that part of the United Kingdom or that territory in consequence of circumstances of the kind specified in subsection (2) below, he shall be treated for the purposes of this Act as continuing to be habitually resident in that part of the United Kingdom or that territory for the period of one year beginning with the date on which those circumstances arise.

(2) The circumstances referred to in subsection (1) above exist where the child is removed from or retained outside, or himself leaves or remains outside, that part of the United Kingdom or the territory in which he was habitually resident before his change of residence:

(a) without the agreement of the person or all the persons having, under the law of that part of the United Kingdom or that territory, the right to determine where he is to reside, or

(b) in contravention of an order made by a court."

It is accepted by Mr. Wilkinson on behalf of the mother that this case is caught by section 41 of the Act in relation to S: the father has parental responsibility and did not give permission for her to relocate to England. Equally it follows that Section 41 does not apply to C in respect of whom he has no parental responsibility.

29. It is further conceded by Mr. Wilkinson that as a consequence of the terms of section 41, this court has no jurisdiction to make section 8 orders under the Children Act 1989. In order to persuade this court to accept jurisdiction in

respect of S Mr Wilkinson is therefore driven to rely on section 2(3)(b)(ii) of the Act. In doing so he submits that the court should use its inherent jurisdiction on the statutory basis found in subsection at section 2(3)(b)(ii) namely that the court "considers that the immediate exercise of its powers is necessary for his protection". "His", in the present case, naturally refers to S.

30. An analysis of the Act as it applies to the facts of this case, can only lead to the conclusion (as is accepted by Mr. Wilkinson), that the English Court only has jurisdiction to make orders in relation to S if it concludes that that the "immediate" exercise of the courts powers are "necessary for her protection".
31. Mr. Wilkinson submits that the court, once having accepted jurisdiction on that basis, (namely that the immediate exercise of its powers is necessary for the protection of a child), can not only exercise that discretion immediately, but can therefore retain that jurisdiction on the basis that England is the most convenient forum in which to make decisions regarding the future of the child in question.
32. With respect to the carefully developed argument of Mr Wilkinson, I disagree. In my judgment, section 2(3)(b)(ii) of the Act provides a limited exception to the general rule provided for by section 41 of the Act which is applicable to children removed from the jurisdiction without the consent of a parent with parental responsibility In the absence of that limited exception, Scotland alone has the jurisdiction to make Part 1 orders in relation to S.
33. 33 The rationale of the provision is not difficult to appreciate. Over the last 30 years Parliament has moved steadily towards the codification of the Law in relation to children. The Children Act 1989 provided a new statutory framework in relation to children. One aim of the Children Act was to create a statutory code whereby welfare issues in relation to children would almost exclusively be dealt with through the provisions of that Statute. In relation to private law cases this would be largely through section 8 orders and in relation to public law cases via Part 4 of the Children Act 1989.
34. The Children Act 1989 did not strip the High Court of its inherent jurisdiction. However wherever possible following the enactment of the Children Act, orders in respect of a child subject to the jurisdiction of England and Wales were to be dealt with by the making of orders under the Children Act rather than under the court's inherent jurisdiction. In public law cases that principle is reflected in the restriction of the use of the court's inherent jurisdiction imposed by section 100 of the Children Act.
35. In my judgment it is not surprising that the Family Law Act (as amended by Schedule 13 to Children Act 1989), treats the making of orders under the inherent jurisdiction differently and more restrictively than the making of section 8 orders. It does this by restricting the use of the inherent jurisdiction to cases of urgency where the child is present in England and Wales (regardless of his or her habitual residence). To my mind, the two critical elements necessary in order to permit the court to exercise its inherent jurisdiction are identified in the subsection by the use of the word "immediate" and the clause "necessary for his protection".

36. As indicated to Mr. Wilkinson during the course of his submissions, I accept without hesitation that on the facts as put before him, His Honour Judge Bellamy having heard the ex parte application made on behalf of the mother on 3rd February 2010, had jurisdiction and was acting in the exercise of his discretion when he made the raft of orders including prohibited steps orders and residence orders. I do not however accept Mr Wilkinson's argument that having once exercised his discretion on the 3rd February 2010, the issue of jurisdiction is now res judicata or that Recorder Setright QC, sitting on 8th March 2010, by making the directions he did was in some way accepting the jurisdiction of the English Courts.
37. I take that view partly on the facts: the father had no notice of the hearing in front of Judge Bellamy and he therefore had no opportunity to make submissions as to jurisdiction and further the directions ordered by Mr. Setright were made specifically on the basis that the father was applying for the English proceedings to be stayed.
38. Regardless of the facts the wording of the Statute is in my judgment unambiguous. To my mind the crucial word "immediate" and the clause "necessary for his protection" together indicate a form of holding order made in cases of urgency to ensure the protection of children until such time as the Scottish Courts can be seised of the matter. Neither the plain wording nor the structure of the Act allow Section 2(3)(ii)(b) to operate in such a way that the subsection, once utilised to make an order necessary for the child's protection, can thereafter be used as a vehicle to give the English Courts some sort of continuing primary jurisdiction in relation to all aspects of the upbringing of a child.
39. There is no dispute in relation to C's legal position:
- (a) The father does not have parental responsibility so s.41 does not bite; and
  - (b) The authorities – in particular, *Re J (a minor) (abduction: custody rights)* [1992] AC and *Re S (habitual residence)* [2009] EWCA Civ 1021 – mean that the mother, having moved to England on 18th December and the father not having issued proceedings until January 2010, C has ceased to be habitually resident in Scotland and is now habitually resident in England. It follows, therefore, that C is subject to the jurisdiction of this court.

In my judgment an argument based upon conflict of law concepts of forum conveniens or forum non-conveniens has no place in the jurisdictional issue which I have to determine today. I have no doubt that it would be more convenient for this mother to contest the litigation in England. I understand that for her it is inconvenient and expensive to be obliged to attend hearings in Scotland. The fact remains that the Statute, is unambiguous in stating that, for the twelve months after a removal without the permission of a father with parental responsibility, a child will continue to be habitually resident in the country from where she was removed. The Act is equally clear that this court can only make section 8 orders if the child is habitually resident in England and Wales or is present in England and Wales, and is not habitually resident elsewhere in the United Kingdom.



40. S is habitually resident in Scotland pursuant to s41 of the Act and the Scottish Courts are the proper courts to decide issues in relation to her welfare.
41. There is a hearing on 12th May in Scotland. The father has travelled down to London for this hearing. He chose to stay overnight last night in the general area where he believed the mother and the children are residing. He chose to do this despite such a location being wholly inconvenient for his attendance at court today; this is borne out by the fact that due to transport difficulties he had not arrived at court by the time submissions were concluded at 12.30.
42. The non-molestation injunctions made by His Honour Judge Bellamy are not Part 1 orders and will continue in any event.
43. Regardless of my decision as to the proper forum for the future of this litigation I am of the view that – whilst there have not as yet been any findings of fact – the nature of the allegations that the mother makes against this father are such that there is an immediate need for orders for the protection of the children to be made and to continue until such time as the Scottish Courts resume their jurisdiction on 12th May. In those circumstances, therefore, I will make those orders to continue until 12th May and thereafter there will be a Stay of the English proceedings.