Butterworths Family and Child Law Bulletin

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Butterworths Family and Child Law Bulletin provides an immediate updating service for the main text of *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. The Bulletin is published every month and sent to subscribers to those publications and is also available to download from LexisWeb (www.lexisweb.co.uk).

References to BFLS and CHM above each case are to the relevant paragraphs in *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. References are also included, where relevant, to *Rayden & Jackson on Divorce*: these cross-references are to the bound volumes of *Rayden*, unless otherwise indicated, in which case they are to the looseleaf Noter-up Service.

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CONTEMPT OF COURT

Refusal of permission to bring application for contempt

***H v Dent* (*re an application for committal*) *[2015] EWHC 2090* (*Fam*), *[2015] All ER* (*D*) *107* (*Aug*)**

BFLS 1A[3664]; CHM 11[314]; Rayden 1(1)[T30.20]

The applicant Bulgarian national, H, was the father of a ten-year-old girl, B. The parents had separated before B's birth but H had enjoyed regular contact

with B until it broke down when she was aged eight. H put that down to the influence of B's mother and maternal grandmother who, he considered, wished to marginalise or exclude him from B's life. A core assessment report produced by the local social services supported several of H's concerns about the underlying reasons for the difficulties in the parental dynamic and its impact upon B. In September 2013, H made an application to the Family Court for a child arrangements order and a parental responsibility order.

In November 2013, the court ordered that Cafcass be instructed in the case to file and serve a multi-issue report. The social services' core assessment report was provided to Cafcass. Cafcass made number of recommendations to the court which were considered at the next hearing in February 2014. Directions for indirect contact were given, Cafcass was ordered to file an addendum report and a final hearing was listed. In March 2014, the second respondent Cafcass officer, M, was assigned to the case by her supervisor, the first respondent, D. M had facilitated an unsuccessful direct contact session and interviewed the mother. She was not able to arrange an interview with H before the return date for her report. Her report concluded that, while it would be wrong to force B to spend time with H, the parties should be asked to consider indirect contact alongside a contact monitoring order so that Cafcass could support H with his communications with B. The report acknowledged H's criticism that, had Cafcass been quicker in reallocating the case to M, less time would have elapsed before attempts were made to establish direct contact, H's cessation of indirect contact following a letter he had received from B which had upset him had not been appropriate and he should have continued with the indirect contact.

At the final hearing in June 2014, the father appeared in person and the mother was represented by a solicitor, the third respondent, T. The final hearing resulted in a consent order under which B would live with the mother, the mother would make B available for indirect contact and that there would be a family assistance order.

H applied for committal orders against D and M pursuant to Ch 2 of Pt 37 of the Family Procedure Rules 2010 (FPR 2010), SI 2010/2955 and against M and T pursuant to FPR 2010, Pt 37, Ch 4. He contended that there had been repeated failures on the part of D and M to adhere to the directions and orders of the court and that T had interfered with the course of justice by having taken advantage of both him and the lay bench by misleading them as to the effect of European and international law. His applications against M and T required the permission of the court before proceeding.

It fell to the court whether to grant permission for the applications to continue. During the course of the proceedings, H withdrew his application in respect of D, having accepted that D had not been in breach of any court order.

The applications were dismissed for the following reasons:

(1) H would not be given permission to proceed with his applications against M and T. It was clear from each of the committal application

notices that none of them complied with FPR 2010, 37.10(3)(a). While the court could, in appropriate circumstances, waive a procedural irregularity, it could only do so where it was satisfied that no injustice had been caused to the respondent by the defect.

(2) In the present case, the procedural defects went to the very heart of the matter and the court would not waive them. Far from setting out in full the grounds on which each application against each respondent was made with specific details of the alleged act or acts of contempt and the dates upon which they were said to have been committed, there was no specific information at all save for a series of very general allegations.

(3) The notices, as they stood, did not provide any of the respondents with the full particulars to which they were properly entitled. Those procedural defects were not cured by the content of H's two affidavits, still less the written submissions appended to his skeleton argument. The committal application did not specify the court orders in respect of which M was said to be in breach. In relation to T, the committal application merely pointed to unspecified allegations which had ignored the fact that T's professional duties had lain with her own client and there was no evidence that she had deliberately misled the court.

Comment: The court applied the decision in *Harmsworth v Harmsworth* [1987] 3 All ER 816 in which the Court of Appeal set out the following principles to be followed on an application for committal:

(1) A notice initiating a committal application is required to give the person alleged to be in contempt enough information to enable them to meet the charge against them.

(2) If lengthy particulars are required it is permissible to include them in a schedule or addendum to the notice provided that they form part of the notice itself, but it is not permissible to refer in the notice to a completely separate document for particulars that ought to be in the notice.

(3) The particulars in a committal application do not have to be set out as though they were separate counts or particulars in an indictment.

(4) Where there is a defect in the committal application, rather than the committal order, the court should be cautious before exercising its power to substitute a new order, since a defect in the application can materially affect the fairness of the proceedings and render it unjust for the court to use its power.

It is notable that although the applicant was a litigant in person, the fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of a failure to comply with the rules: the more important question is whether there is a good reason for the failure which has occurred (see *Re D (Children) (Placement order: Procedural irregularities on appeal)* [2015] EWCA Civ 409, [2015] All ER (D) 39 (May) which followed the civil case of *R (on the application of*

Hysaj) v Secretary of State for the Home Department; *Fathollahipour v Aliabadienisi*; *May v Robinson* [2014] EWCA Civ 1633, [2014] All ER (D) 165 (Dec)).

PRIVATE CHILDREN

Whether judge erring in making no order for direct contact

***Re A* (*a child*) (*contact order: child's contact with mother where contact detrimental to mother's mental health*) *[2015] EWCA Civ 910, [2015] All ER* (*D*) *104* (*Aug*)**

BFLS [1761]–[1765]; CHM 2[296]; Rayden 1(1)[T39.72]

B was born in 2003 and was 12 years of age. His parents married in 2002 and separated in 2005. Initially, the appellant father had some contact with B. That ended in January 2006, whereupon the father sought a contact order under s 8 of the Children Act 1989. The mother applied for an injunction under the domestic violence legislation. Prior to the present proceedings, the last contact between B and his father had occurred in February 2007. In April 2007, the father withdrew his application for contact, on the ground that the proceedings were causing significant distress to the mother, which would impact upon her ability to cope with B. He suspected that she was likely to suffer a nervous breakdown.

The father applied to bring the matter back to court in November 2010. The matter came on for determination in September 2014 after the report of a psychologist, R, was obtained on the parents and B. The report found that the mother met the diagnosis of post-traumatic stress disorder, and that she had continuously communicated to B that the father was dangerous. Her anxieties had impacted on B. The report concluded that, in the circumstances, contact could not succeed. B expressed in strong terms that he did not want any contact with the father at all. Taking into account the views of R and the children's guardian, the judge held that B had suffered significant emotional harm from the mother. He held that no order for direct contact would be made, on the grounds that making it would be detrimental to the mother's mental health, it would be likely to cause B distress and would have a detrimental effect on B's view of his own father. The judge made no order for direct contact and no residence order with regard to the father, but a modest level of indirect contact was to be operated through the offices of Cafcass. The father appealed to the Court of Appeal.

The father's principal grounds of appeal were, inter alia, that:

(1) the case was one of 'implacable hostility' to contact on the part of the mother. The judge had failed to engage with that part of the case and had proceeded by relying on other factors;

(2) difficult as her situation might be, it was an aspect of the mother's responsibility to her son to do what she could to facilitate contact, and the judge should have relied on that in determining the way forward; and

(3) the judge's findings of significant harm, plain as they had been, had not surfaced again in the course of the judge's overall welfare evaluation and had not featured in the welfare balancing exercise.

Consideration was given to the views of the children's guardian and a plan for therapeutic intervention put forward by the father. A further issue arose as to the information that should be provided about the proceedings to B's school.

The appeal was dismissed on the basis that:

(1) The judge had been right to identify the high level of harm that was likely to be visited upon B if the issue of direct contact was forced upon him from a standing start. He had been entitled to rely upon the views of the children's guardian and R and the plan for therapeutic intervention had not been put before the judge. The ground had not been set before the judge for that to happen, and it was not possible to criticise him for failing to take up the option.

(2) In the circumstances, there had really been no ground for choosing any other way forward than the one that the judge had chosen. B had consistently and adamantly chosen 'no' to any form of contact, even indirect contact, with his father. To contemplate moving a 12-year-old child from that position to having contact was a formidable obstacle in the way of the father's application. For whatever reason, the mother was emotionally very vulnerable. The judge had rightly taken into account the impact on the mother's anxiety levels rising even further because she was required to take part in contact, and the effect of that anxiety on B. In terms of there really being no other option, so much time had gone by that the prospect of restarting contact some six or seven years on had been a formidable change in the circumstances and the judge had been fully entitled to conclude, as he had done, that it would not have worked.

(3) Regarding the information to be provided to the school, it was simply not possible for the court to come to a view on the topic and not right to regard it as a matter for appeal from the judge's decision. It was to be hoped that some discussion could take place and some modest information could be given to the school so that it was at least aware that there had been proceedings before the court. However, other than that, the court would not accede to the father's invitation to make an order on that topic.

Comment: While the focus of the father's appeal was an allegation of 'implacable hostility' on the part of the mother, the Court of Appeal was more concerned with the options available to the judge at first instance and the interrelationship between contact and the mother's anxiety. In that regard

the court considered the decision in *Re F (children) (restriction on applications)* [2012] EWCA Civ 999, [2012] 3 FCR 277 in which the Court of Appeal noted that judges must to be cautious in undertaking a more profound assessment of a parent's psychological or emotional well-being on the basis of their presentation in court. Judges are not psychologists and the courtroom is a wholly artificial environment in which to carry out any form of sophisticated evaluation of personality or predictive behaviour.

McFarlane J repeated his comments in *Re W (children) (contact order)* [2012] EWCA Civ 999, [2012] 3 FCR 277 that: 'Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say "no" to reasonable strategies designed to improve the situation in this regard.' However, events prior to the matter coming before the Court of Appeal, and the assessment of the impact of the mother's emotional and psychological state, meant that while the judge described the outcome of the case as 'a tragedy' he also said that 'some family situations are simply not amenable to the blunt instrument of a judge sitting in a law court making an order'.

CHILD ABDUCTION

Wording of standard form of order used

Taukacs v Taukaca [2015] EWHC 2365 (Fam), [2015] All ER (D) 85 (Aug)

BFLS 3A[4662.7]; CHM 5[55]–[60]; Rayden 1(2)[T46.34]

T was a citizen of Latvia. She spoke very little English. Her marriage was dissolved in 2014. She had two children, one of whom, M, was 13. In February 2015, T brought M to England from Latvia. The husband issued an application pursuant to the provisions of the Hague Convention on the Civil Aspects of International Child Abduction, seeking the summary return of M to Latvia. He made a without notice application for a location order, which was granted. The order required the Tipstaff to locate M and required the delivery up to the Tipstaff of documents. The police attended T's home with copies of the location order. On that weekend, M was staying with his brother, who was an adult and could legitimately stay in the United Kingdom. T was informed that she needed to surrender the passport and other identity documents of M. She produced his Latvian passport and the police took it with them. They informed T that she could keep her own passport, and told her that she was free to go on a holiday to Spain, which she had already booked, provided that she did not take M with her. Shortly afterwards, T tried to board an aeroplane to go on holiday. She was arrested and had been detained in custody since then. The matter came before the Family Division, by which time T had been detained for approximately 42 hours.

Consideration was given to the standard form location order in prescribed Form 1A that had been used in the present case, in particular, para 2, which stated:

> *'The respondent and/or any other person served with this order must hand over to the Tipstaff … (b) every passport relating to the respondent and every identity card, ticket, travel warrant or other document which would enable the defendant to leave England and Wales.'*

Paragraph 4 of the order stated:

> *'The respondent and/or any other person served with this order must not knowingly cause or permit the child:- (a) to be present overnight at any place other than the place where the child was staying at the time of service of this order; or (b) to be removed from the jurisdiction of England and Wales.'*

The court ruled that in the circumstances, there had been no breach in any way of para 4(a) of the order. However, para 2(b) of the order required the handing over of passports and similar documents 'relating to the respondent'. It contained ambiguities. The whole of para 4 was directed to the whereabouts of the child concerned, and a prohibition on causing or permitting the child concerned to be removed from the jurisdiction of England and Wales. The focus of para 4 was a clear and express embargo on removing the child from England and Wales, but neither para 4 nor any other part of the order expressly prohibited the respondent parent from leaving England and Wales. Indeed, it could be necessary to consider very carefully whether there should be any restriction on the parent, as an individual and free person, from leaving England and Wales, provided that the child, who was the subject of the application, was not able to leave England and Wales. The heading of the order described T as 'respondent'. The opening words of para 2 required 'the respondent' to hand over the specified documents, but, in the detail of sub-para (b), the wording meandered between references to 'the respondent' and 'the defendant'. It left unspecified who was meant or intended by the words 'the defendant', but a police officer might reasonably suppose that the reference to 'the defendant' was a reference to somebody other than 'the respondent', and perhaps, that it was a further reference to the child concerned. Assuming that para 2(b) did not contain that ambiguity, then it was a clear direction to hand over to the Tipstaff, or the police where applicable, every passport etc 'relating to the respondent'. If and when the police officers had looked at T's passport, but then left it with her when they left her home, it had been the officers who had failed to understand or failed to discharge their duty under the order. It had not been T. As a result of ambiguities in the standard form of order, a terrible injustice had been done to T. She had not in any way whatsoever broken any court order. The situation was not one where she had purged her contempt. She had never been in contempt of court at all. She should never have been arrested, still less, detained, and her immediate release would be directed.

The court directed T's immediate release.

Comment: A decision that is largely fact-specific but also serves as a reminder to practitioners (and the judiciary) for particular care to be taken as to the wording of orders, particularly where the consequences, as in the instant case, will be significant. Holman J said, per curiam:

> 'I intend to ensure that the official approved transcript of this judgment is placed upon the BAILII website … It must be very urgently drawn to the attention of the President of the Family Division. It must, of course, be very urgently and seriously considered by the Tipstaff. It seems to me vital that very urgent steps indeed are taken to clarify and improve the wording of this standard form of order so as to avoid that any other person suffers the injustice and indignity and loss of freedom which this lady has suffered.'

FINANCIAL PROVISION

Whether jurisdiction to vary terms of undertaking

Birch v Birch [2015] EWCA Civ 833, [2015] All ER (D) 34 (Aug)

BFLS 4A[1412]; Rayden 1(1)[T18.15]

A financial order was made by consent in divorce proceedings between the appellant wife and the respondent husband (the order). Among other things, the order recorded undertakings given to the court by the wife, in particular:

(1) to endeavour to secure the husband's release from the mortgage covenants and for indemnity (para 4.3); and

(2) in any event, to ensure that, if the husband was not released from the mortgage by a specified date, that the wife would secure his release by placing the former matrimonial home on the market for sale (para 4.4).

The wife applied to vary the terms of the undertaking given by her, so that the husband was to be released from the mortgage or for the property to be sold in default when the youngest child attained the age of 18 or either child completed full-time education. The district judge held that the court did not have jurisdiction to consider the application and dismissed the application. Her appeal was dismissed. Both judges held that the effect of *Omielan v Omielan* [1996] 3 FCR 32 was to exclude jurisdiction to entertain the wife's application for a variation. The wife appealed.

The wife submitted, among other things, that the undertaking given in para 4.4 (which she submitted had been ancillary to the undertaking in para 4.3), had been, in reality, an order for sale under s 24A of the Matrimonial Causes Act 1973 (MCA 1973) to which the power of variation under MCA 1973, s 31(1) and (2)(f) applied without qualification. The court had a power to order a variation under those provisions and, in doing so, (in due course, when hearing the application on the merits) would have to give 'first consideration' to the welfare of the minor children, pursuant to MCA 1973, s 31(7). The wife said that there had been a substantial change in the circumstances of the parties since the consent order which compelled the

variation sought. The variation that the wife sought was that the period for compliance with para 4.4 be extended until the earliest of the following, namely, the date upon which the wife was able to remortgage the property in her sole name, the date on which the youngest child reached the age of 18 or further order in the meantime.

The appeal was dismissed on the basis that:

(1) The present case was not a case involving an ancillary order under MCA 1973, s 24A. The undertakings were not to be regarded as merely incorporating by way of undertaking something that the court would or could have ordered under s 24A. The undertaking in para 4.4 was not an undertaking equivalent to a s 24A order. The undertakings sought to be varied were part and parcel of a comprehensive consent order resolving the parties' financial affairs on divorce, without which the other orders (including the substantive transfer of property order) would not have been made.

(2) The variation presently proposed would undermine the substratum of the final order made with the consent of the parties and the approval of the court. It was just that type of variation, against which the highest courts had set their faces in previous authority, unless the new event invalidated the basis or fundamental assumption upon which the order had been made. The order had been framed in a manner to enable the wife to explore, within a limited period, the possibility of securing the husband's release from the mortgage covenants, but with a long-stop date. It might be that the court would have entertained an application for a limited extension of time if it appeared that such release was close to fulfilment. However, an extension departing from that fundamental purpose of the order would have been a very different matter.

(3) There did exist a formal jurisdiction in the court to vary the undertaking, however, when the variation sought was, in effect, an attempt to substitute an entirely different outcome from that provided for by the original consent order, the scope for the exercise of the jurisdiction had to be extremely limited. There was no basis upon which the court would exercise the jurisdiction in the present case.

Comment: Property adjustment orders are defined by MCA 1973, s 21(2) as orders for the transfer of property, settlement of property, or variation of settlement made under MCA 1973, s 24. The court in the instant case applied the decision in *Omielan v Omielan* [1996] 3 FCR 329 which set out the following principles:

(1) The jurisdiction to entertain an application to vary an order under MCA 1973, s 31(2)(f) has to be construed within the statutory context, namely, that when post-divorce capital adjustments have been incorporated in a final order, whether or not by consent, the court had no jurisdiction to revisit the territory in the absence of an element that might vitiate the order, such as fraud, misrepresentation, or material non-disclosure.

(2) Section 24A is a purely procedural section, inserted into the Act to clarify or expand the court's power of implementation and enforcement and any power to vary such a procedural enactment was accordingly limited to matters of enforcement, implementation, and procedure.

(3) While the court has jurisdiction to revisit the territory of the ancillary order under s 24A, it does not have jurisdiction to reconsider the primary order under s 24 which the ancillary order supports.

JURISDICTION

Judicial co-operation in civil matters

A v B C-184/14, [2015] All ER (D) 15 (Aug)

BFLS 5A[1071]; Rayden Noter up [22.233]

A, their spouse, B, and their two minor children were Italian nationals and had their permanent residence in London. The children were born in that city on 4 March 2004 and 5 August 2008, respectively. In February 2012, A brought, before the District Court, Milan, proceedings against B, seeking a declaration of separation on the basis of the latter's fault and that custody over their two children be shared between them, and fixing their place of residence with their mother. A proposed to pay, by way of contribution to the children's education and healthcare costs, the monthly sum of €4,000. B filed a counterclaim similarly seeking a declaration of separation from A, based on the latter's fault, and the grant of a monthly allowance of €18,700, nevertheless contesting the jurisdiction of the Italian court in matters of custody rights, place of residence, maintenance of relations and contacts and the contribution to the children's maintenance, given that it was, in B's view, the UK courts that ought to be recognised as having jurisdiction over those matters, on the basis of Council Regulation (EC) Regulation No 2201/2003 (Brussels II bis), since A and B had always lived in London and their minor children were had been born and were resident there.

The District Court in Milan declared that it had jurisdiction to entertain the legal separation proceedings, on the basis of art 3 of Regulation 2201/2003. However, it inferred from art 8(1) of Regulation 2201/2003 that only the UK courts had jurisdiction to entertain proceedings relating to 'parental responsibility', within the meaning of art 2(7) of that regulation, in view of the fact that the children were habitually resident in London.

A therefore brought proceedings before the High Court, Family Division in England and Wales seeking to have the procedures for the exercise of parental responsibility defined. With regard to the maintenance allowances in favour, first, of B and, second, of the minor children, the District Court in Milan had also made a distinction and therefore treated itself as having jurisdiction to entertain proceedings concerning the allowance application in respect of B on the ground that it was a matter ancillary to proceedings concerning the status of a person, or to the application for legal separation, within the meaning of art 3(c) of Regulation 4/2009 (the EU Maintenance

Regulation). On the basis of art 3(d) of that regulation, that court, however, ruled that it lacked jurisdiction to rule on the minor children's maintenance application, that matter being ancillary to the proceedings concerning parental responsibility. Jurisdiction to decide on the latter application therefore fell also to the UK courts.

A appealed against the District Court's decision to the Italian Court of Cassation, based on a single plea, alleging infringement of art 3(c) of Regulation 4/2009, in that the Italian courts also had jurisdiction over matters relating to the child maintenance obligations. In A's view, the interpretation of art 3(d) of Regulation 4/2009 adopted by the District Court, which had been the basis of that court's decision to declare that it did not have jurisdiction to entertain the application relating to the child maintenance obligations, was incorrect, as such an exclusion of jurisdiction could not be inferred from the wording of that provision. The Italian Court of Cassation ruled that the decision on the appeal required a determination of the manner in which the provisions of art 8 of Regulation 2201/2003 and art 3 of Regulation 4/2009 related to one another, in the light, in particular, of the conditions listed in art 3(c) and (d) of the latter regulation. In those circumstances, it stayed the proceedings and referred a question to the European Court of Justice (ECJ) for a preliminary ruling.

The Italian Court of Cassation sought to ascertain whether the criteria for attributing jurisdiction set out in art 3(c) and (d) of Regulation 4/2009, taking into account the inclusion of the conjunction 'or', were mutually exclusive or whether that conjunction signified that the respective courts that had jurisdiction to entertain the proceedings for legal separation and the proceedings concerning parental responsibility could be both validly seised of an application relating to maintenance in respect of minor children.

The ECJ ruled that:

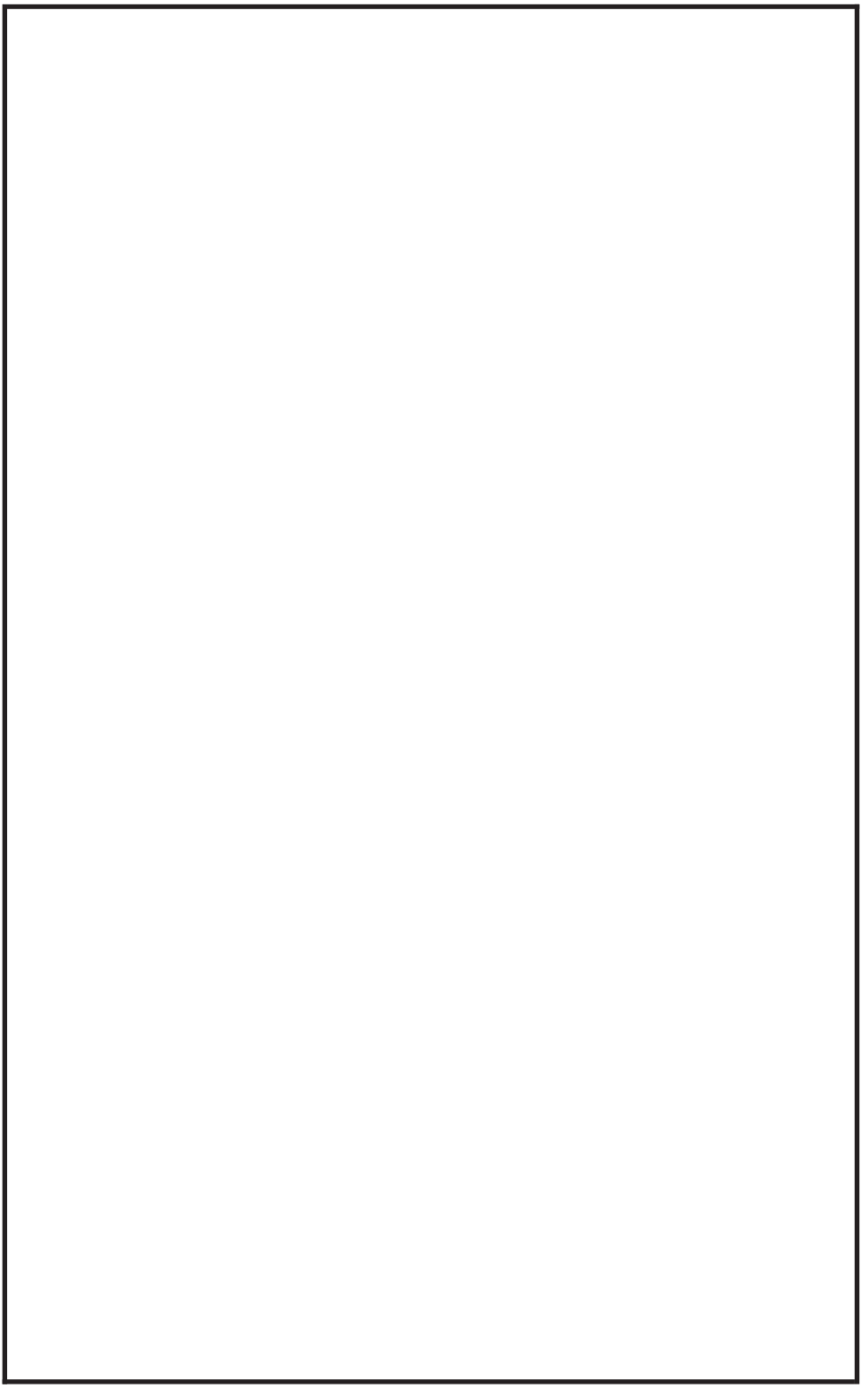
(1) The need for the uniform application of EU law required that, to the extent that the provisions of art 3(c) and (d) of Regulation 4/2009 made no express reference to the law of the member states for the purpose of determining the meaning and scope of that concept, that concept had to be given an autonomous and uniform interpretation throughout the European Union. That interpretation should take into account the wording of the provision and the objective pursued by the legislation in question.

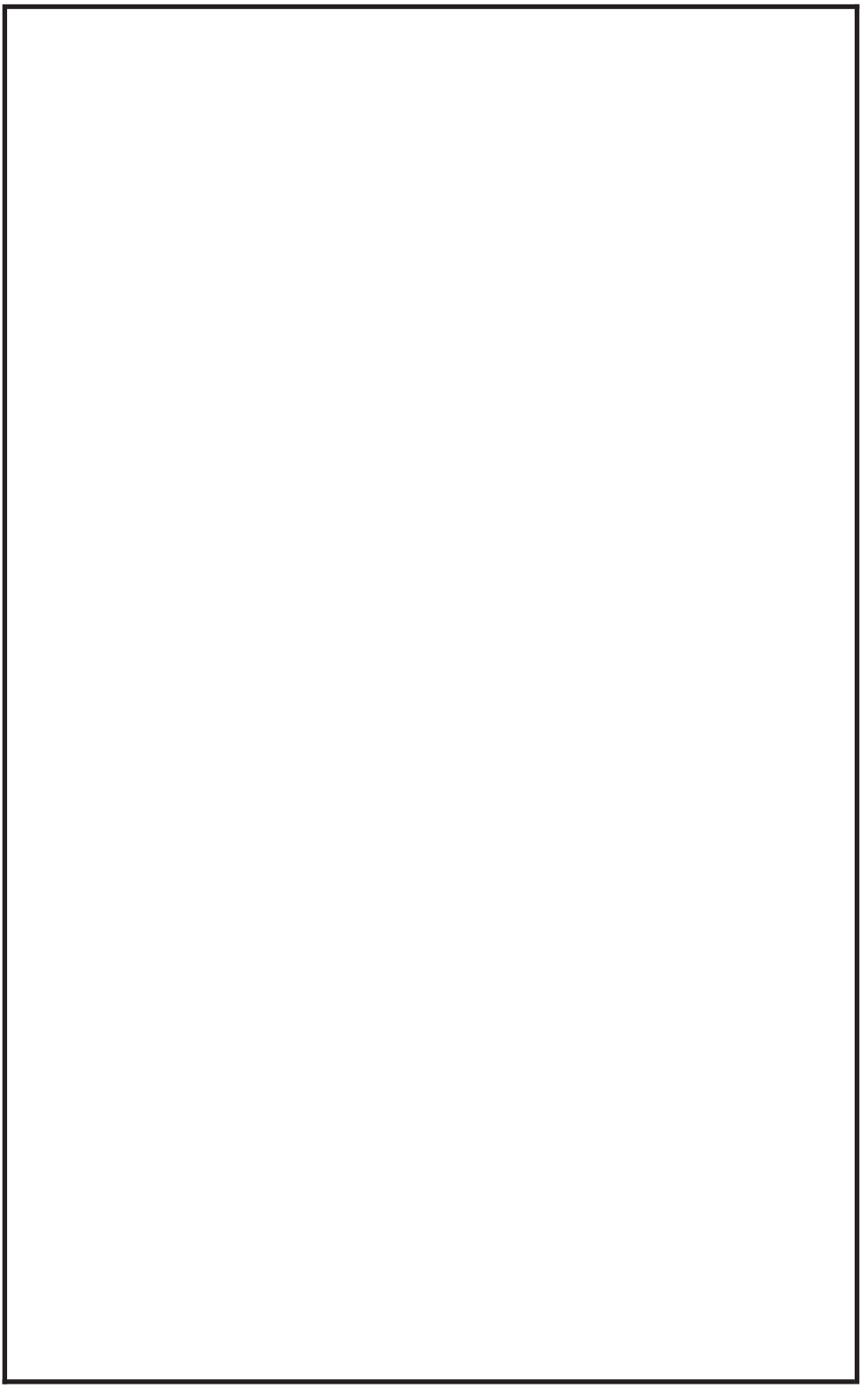
(2) It followed from the wording, the objectives pursued and the context of art 3(c) and (d) of Regulation 4/2009, that, where two courts were seised of proceedings, one involving proceedings concerning the separation or dissolution of the marital link between married parents of minor children and the other involving proceedings involving parental responsibility for those children, an application for maintenance in respect those children could not be regarded as ancillary both to the proceedings concerning parental responsibility, within the meaning of art 3(d) of that regulation, and to the proceedings concerning the status

of a person, within the meaning of art 3(c) of that regulation. They could be regarded as ancillary only to the proceedings in matters of parental responsibility.

(3) Consequently, art 3(c) and (d) of Regulation 4/2009 had to be interpreted as meaning that, where a court of a member state was seised of proceedings involving the separation or dissolution of a marital link between the parents of a minor child and a court of another member state was seised of proceedings in matters of parental responsibility involving the same child, an application relating to maintenance concerning that child was ancillary only to the proceedings concerning parental responsibility, within the meaning of art 3(d) of that regulation.

Comment: The scenario of a family with the nationality of one country and residence in another over a significant period of time is one that is familiar to most family lawyers. In the instant case Italy had jurisdiction under Brussels II bis due to the nationality of the spouses, and the UK had jurisdiction because of the habitual residence of the parties. The husband was first to issue, in Italy, and therefore seised jurisdiction. The matter was complicated however by the issue of jurisdiction in relation to the children. In summary, the position as stated by the ECJ is that on the basis of the EU Maintenance Regulation, parental responsibility determines jurisdiction if the children are not habitually resident in the same country in which the divorce proceedings take place, ie parental responsibility and maintenance for the child are linked, and maintenance for a child is not ancillary to the divorce. Such issues may arise rarely, as usually costs considerations will dictate that all proceedings take place in one jurisdiction, but in cases involving a wealthy international family, where there may be a considerable advantage to one party for the proceedings to be split, the decision of the ECJ is of great interest.





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Published by LexisNexis

Printed in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire

ISBN 978-1-4057-9166-3