Neutral Citation Number: [2010] EWHC 2040 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/10

Before :

MRS JUSTICE PARKER

Between :

AP Applicant

- and -

TD Respondent

Frances Heaton of Counsel (instructed by Pannone LLP) for the Applicant
Alison Woodward of Counsel (instructed by Mills and Reeve LLP) for the Respondent
Hearing dates: 22 June, 25 June 2010

Judgment

Mrs Justice Parker:

1. This case concerns issues of jurisdiction as between England and Wales and Canada, and the application of the Council Regulation (EC) Number 2201/2003, and domestic law of this jurisdiction contained in the Family Law Act 1986.

2. Two children, with their mother, relocated permanently to Canada with the father's consent in January 2009. In the order which records the father's consent to relocation, the parties agreed that issues of contact should continue to be dealt with in the English courts, and there were other provisions arguably relevant to the question of jurisdiction. Difficulties have now arisen in relation to contact; the mother has unilaterally and ex parte obtained an order in Canada varying the contact arrangement in the English court order; and the father now not only wishes the original contact order to be reinstated and/or enforced in the English courts, but wishes to seek a residence order and an order for the children's return to this jurisdiction. The mother concedes that the English court has jurisdiction in relation to contact, but says that it should not exercise it, and that the proceedings in this jurisdiction should be stayed.

3. The two children are H now eight, and N Now five. The Applicant father lives in England; the Respondent mother lives in Alberta, Canada.

4. The jurisdictional issues came before me in the context of a directions hearing only but in the light of the issues involved and my limited sitting on circuit I decided, on invitation by the parties' representatives, that I should deal with the issue of jurisdiction of the Courts, and, if I concluded that this Court did have jurisdiction in relation to any of the issues, should proceed to give directions for an early hearing of the matter. I originally reserved judgment from Tuesday to Friday in order to consider my decision and my reasons, and to fix the case for the convenience of Counsel.

5. In the meantime I took the opportunity of speaking to the Liaison Judge for the court where the mother had obtained her order in Canada. As a result of my discussions with Justice Moen, and because I had concluded that I needed further help with the interrelationship between the Council Regulation and our domestic law, I decided in the event that I would not give judgment on the day originally set but would reserve further in order for further communications to take place with Canada, and to receive further submissions from counsel. Those submissions were then delayed and as a result it was not possible for me to deliver judgment until three weeks after the original hearing, after I had left circuit.. In the meantime I had, with the parties' agreement, reserved a two day hearing slot before the local Cicuit Judge in August 2010, at a time when the mother and the children are due to be in England.

The history

6. The parents and children are of English origin and of British nationality. The parents separated and divorced some time before 2005 and the children remained making their permanent home with their mother although there was no residence order. An order for contact was made by a Circuit Judge on 6 October 2005, which provided for overnight staying contact with the father. There were a number of stipulations in that order, indicating that there was perceived conflict between the parents as to how the children should be managed and a degree of anxiety on the part of the mother. N has health problems and this may be the backdrop to the mother's anxiety.

7. By 2008 the mother had decided to marry Mr D and they wished to make a new life for themselves in Canada. Father says that his understanding was that the proposals were for a temporary move only, but that is not how I read the mother's position. The mother applied for an order permitting her to relocate. The father was extremely concerned about what this would mean for the children. Mother said that her fiancé had obtained employment as a Senior Project Manager in Alberta and that she was not intending to work and would be a full time mother. The father in his statements was concerned about the mother's true commitment to contact and the extent to which the mother's proposals for a move to Canada were properly thought out and would provide a stable background. He set out a number of stipulations as pre-conditions to any potential removal. He wanted there to be a minimum of three two-week returns to this jurisdiction, no attempts to change the children's names, full contact details of schools and treating physicians, uninterrupted "ring fenced webcam contact", the immediate return of the children if mother was seriously ill or died, a return to the UK if there was any long term deterioration of N's medical condition and confirmation from the mother and her fiancé that there were no relevant criminal or civil proceedings in relation to him in Canada. He stipulated that if there was evidence that the children no longer wished to remain in Canada at any stage, he would bring proceedings for residence within this jurisdiction.

8. The mother in her statements made proposals that there be three visits a year between the father and the children, that two of the visits would be in the UK, at Christmas and during the summer holidays, with the third, Easter visit being in Canada. She said that the length of the children's Easter holidays did not permit a trip to England. She agreed to fund all three contacts. There was also to be weekly web cam contact.

9. On 10 October 2008, a hearing took place before the District Judge in the County Court. The order recorded that the parties had reached agreement on the following issues:

a) that father consents to an order permitting mother to remove the children from the jurisdiction

b) that the mother agrees that

i) She will inform the father of full contact details of schools, nursery schools, family GP and hospital consultants caring for the children;

ii) Uninterrupted ring fenced contact via web cam at a weekly time decided by the Court;

iii) In the case of death/serious illness of the mother, the immediate return of the children into the father's custody.

iv) In the event of long term deterioration of N's medical condition, the parties will discuss where N's care would be best catered for, with permission to apply in the event that agreement cannot be reached.

v) The mother confirms that her partner has no outstanding court injunctions or convictions in Canada and she has no concerns over the children's welfare.

10. It was recorded that the issues that remained in dispute were :

a) The parties agreed that uninterrupted "ring fenced" contact via web cam shall take place and would continue endeavour to agree when that should take place but otherwise the issue would be determined by the Court.

b) Direct contact: (i) Mother's proposal was to fund two visits a year and the third to take place in Canada (ii) Father wanted three visits a year in England.

11. The order provided for directions for filing of statements and listing for final hearing and concluded:

"6. In respect of matters agreed it is ordered by consent that the Applicant mother is permitted to permanently remove the children from the jurisdiction of England and Wales"

12. The application came on again before the District Judge on 20 November 2008. The preamble to the order records an agreement that :-

> 1. Any future disputes about contact shall be resolved in the UK, the mother agreeing to return to the jurisdiction for hearings."

13. The preamble went on to record an agreement for weekly web cam contact, unlimited telephone contact, that the children's names would not be changed, that mother would provide father with all relevant contact details in respect of schools and GPs; and

> "6. in the event that she is unable to care for the children they will be returned to father's care in the UK."

14. The order then provided for contact between the father and the children for one week over the Christmas school holidays in the UK, two weeks during the school summer holidays (location not specified: no doubt to provide for a summer holiday potentially outside the jurisdiction), and one week during the school Easter/Spring holidays in Canada. It was directed that mother was to provide for the cost of the children's flights for contact outside Canada and for the father's flights to Canada.

15. To put it as neutrally as possible, this order has never settled down. The parties give different accounts as to why and blame one another. There are usually two sides to every story and I should not, and in any event am unable at this stage, to resolve any of the differences particularly since question marks arise on both sides as a result of their filed evidence. The father's case is that mother has been obstructive and the mother's case is that father has not taken up all the contact. The children went to Canada with their mother and her fiancé in January 2009. The first Easter holiday did not take place. Father says that the flight tickets which were booked by mother in advance allowed him only four hours in Canada. The mother accepts that the dates were wrong on the first ticket but says that she eventually put it right. Father says she did not do so. I do not know who is right about this. The children came to England in the summer of 2009 but father says that the mother said that the children needed to settle down before the visit and there were other things she wanted to do with them so the visit in fact was only 10 days rather than a fortnight. In the light of mother's subsequent statement, I think he is likely to be right about this. Mother says that the father cut off the maintenance and I am not entirely clear what father's response is. Father says that mother was obstructive with telephone calls and web cam contact; mother says he did not take this up.

16. On 4 September 2009 the mother made an application to the Court in Canada, which she says that she had been contemplating since June 2009, although she had not told the father about either her intention or her application. She sought to reduce the frequency of contact. She swore an affidavit on 4 September 2009 in which she said she sought a "single" return each year, removing the Christmas contact. She said that she could not afford two return visits, and that the children needed to spend time with other family members in the UK and to recover from jet lag before visiting their father for 14 days, and that this did not leave sufficient annual leave for her. She said that the children were too young to travel unattended and that the arrangements did not leave over any vacation time in Canada, or to provide care during school holidays or if the children were ill. She said that there were no objections to the father visiting the children at Christmas in Canada at his own cost. She said that the father had stopped paying child maintenance and that this contributed to her need to return to work. She agreed to continue funding the father's Easter visit, but since he had not taken up an earlier visit she wanted the order changed so that he would purchase the ticket and she would reimburse him. The statement asked for an order for "substitutional service" on the father

since she could not serve him personally.

17. On 4th September 2009 the mother appeared before Justice Manderscheid sitting in the Court of Queen's Bench in Edmonton, Alberta. At the hearing before me the mother's counsel told me that the hearing on 4th September 2009 was simply for an order for substituted service. However, the transcript of the hearing does not support that contention. The mother was represented by Mr Tkachuk, the duty counsel. Mr Tkachuk told the Judge that there was an order in the UK, that father had stopped paying maintenance, that mother now had a job only giving her 2 – 3 weeks' holiday a year, and that she could not afford to pay for flights. Mother told the Judge that father had failed to come to Canada for Easter 2009. Mr Tkachuk told the Judge "the problem is there is a term in the order –" and then showed Justice Manderscheid the District Judge's order. The Judge said "well, with all due respect, paragraph number one literally just takes the Hague convention and throws it out the window, and I question whether or not this particular Judge or Justice, the District Judge is aware of exactly what he has done….. I mean if that is the case, he has overruled international law. …..now if I am incorrect, then I would take it then, unfortunately, the applicant will have to take the matter up then with the UK court. But in the interval, I am going to assume that this court has jurisdiction and I will grant the order. And if the other party wants to dispute it and not be - not abide by it, well, then they can take the matter up in the UK, unfortunately, but in the meantime, I will grant that order, and hopefully…...". Mr Tkachuk then went on to outline what it was that the mother was proposing and the Judge acceded to the mother's application and an order was made in the following terms:-

Order
"UPON THE APPLICATION of {TD}
AND UPON HEARING Queen's Bench Duty Counsel for the Applicant [TD], AND UPON NOTING the Applicant , or their counsel, is served with a certified copy of this Order by the clerk of the Court on today's date;

(the names and dates of the children were then recorded)

AND UPON NOTING that the children of the marriage now reside in Alberta and that Jurisdiction lies with the Court of Queen's Bench in Alberta Canada;

AND UPON READING the sworn evidence of [TD] filed in support of this application;

IT IS HEREBY ORDERED THAT:

1. The Applicant confirms that she will fund the costs of the children going to the UK once a year during the summer for a period of 2 weeks and in addition the Respondent shall fund his own cost to fly to Canada to visit with the children and the Applicant shall reimburse the Respondent the cost of an economy flight ticket (London to Edmonton) upon his arrival in Canada once a year.

2. The Applicant shall be at liberty to substitutionally service the Respondent by registered mail by mailing a copy of this Order and any subsequent Court documents to:

a) (Father's address recited)

D. J. Manderscheid

_____

JUSTICE OF THE COURT OF QUEEN'S BENCH OF ALBERTA

ENTERED this 4th day of September 2009

L. Ross

_____
CLERK OF THE COURT (sealed)"

18. The order was served on the father by post on 21 September 2009 and the same day he wrote to Justice Manderscheid expressing his "great upset and surprise" at its contents. He pointed out that the application had not been served on him, that he had only given his consent to relocation on the basis of the agreed contact, and that the mother had agreed that jurisdiction in respect of contact should be retained in England and Wales and that she would return here for any hearing. He offered to forward copies of the English Court documents.

19. The father received a reply from Peggy Kobly, Court of Queen's Bench Legal Counsel, the following day, 22 September 2009. She said that the father's letter had been forwarded for response since it was inappropriate for a judge to correspond directly with a litigant. She continued:

> "I have reviewed the tape of the hearing and can tell you that Justice Manderscheid's order was an interim order, which he expressly indicated could be varied on an application to a UK court. Further since the order is entered and final, the only recourse for setting aside that order there would be an appeal. Neither Justice Manderscheid or any judge of this court can alter the order now.
>
> "As it is not within my capacity to provide litigants with legal advice you may wish to seek a legal opinion on your position."

20. The father then says that it took him several months to obtain a transcript of the hearing.

21. Christmas contact did not take place because the mother relied on the Canadian order. There was no contact at Easter 2010 either. I assume that the mother, relying on the Canadian order, did not provide the father's ticket, and the father did not purchase one. The mother took the children to Mexico. Whilst there, she says that significant domestic violence was inflicted on her by her husband, and on her return she sought and obtained an injunction against him and they are now separated.

22. On 21 April 2010 the father issued an application in the Altrincham County Court pursuant to the Children Act 1989, seeking contact orders to both children. In Box 3, detailing why he was making the application, the father referred to the orders of 2008 and asserted that the mother had failed to comply with the Court order and had made a further application in Canada. He continued "the change of circumstances to be reviewed plus if the Court deems necessary make further rulings". The matter came before the District Judge on 11 May 2010, who transferred the matter to be heard by Mrs Justice Eleanor King on 18 May 2010. At that hearing Eleanor King J declared that "that in accordance with the agreements

and terms recorded in the consent order made in the Altringham County Court on 10 October 2008, the High Court of England and Wales shall retain jurisdiction in relation to the said children pending the determination of any application to this Court by the respondent mother that Canada is the proper jurisdiction in relation to any applications in relation to the welfare of the said children or further order". She adjourned the application by the father to order the return of the children to the jurisdiction of England and Wales (it by then being apparent that that was what he was seeking) and enforcement of the 10 October 2008 for further directions to be heard before me on 22 June 2010; ordered that the father file a statement by 1 June 2010 and the mother reply by 11 June 2010; provided that service by e.mail should be adequate service on the mother, and provided for a Court bundle. The father was at that stage acting in person. The mother then made e-mail representations to me asking me to adjourn the hearing on 22 June until August 2010 when she was due to be in England with the children. She then instructed solicitors, who told me that they were in the process of drafting a statement, and did not seek an adjournment but sought an extension of time to file her affidavit. I gave a short extension, directed mother to attend the hearing, and for the avoidance of doubt refused to adjourn it.

23. The parents have duly served and filed their evidence.

24. On 17 June 2010 the mother made an application by way of Originating Summons returnable before me that all issues relating to the children shall be resolved in Canada with the exception of any issue in relation to contact which shall be resolved in the UK. She now resiles from the concession that contact should be resolved in the UK, at least as her primary case.

25. The father's case is not only that contact should be restored, but that the children should be returned to live in England, and that there should be a shared residence order or a sole residence order in his favour.

26. The mother says that the children are now well settled in Canada, although as a result of the breakdown of her second marriage she is now looking for smaller accommodation. In October 2009 she had found a job earning $94,000 Canadian pa. The father says that her situation is most unstable, that the children are unsettled, and that they want to come home; that she and the children have only a three year temporary visa and she is trying to obtain permanent residency through sponsorship by her employer. The mother continues to say that there should be only one visit a year and that she does not have sufficient holiday time for herself if she brings the children here for a full two weeks in the summer.

Communication with the Liaison Judge in Canada

27. Justice Moen telephoned me on the evening of 24 June 2010 in response to my enquiry. She told me that she had reviewed the order of Justice Manderscheid and the letter from Queen's Bench legal counsel dated 22 September 2009. Justice Manderscheid was away and she had not managed to speak to him. She hoped to do so the following week. She had not seen the transcript of the hearing of 4 September 2009. She told me that the application had come into the morning family chambers list. She assumed that the mother must by then have been in person since duty counsel spoke for her. Justice Moen's initial impression was that this had been an ex parte order, and, if so, legal counsel was wrong in stating that the only remedy was appeal. She confirmed (that as in this jurisdiction), the remedy of a party aggrieved by an ex parte order is to apply to the court of first instance rather than to appeal. The father might be able to apply for the order to be set aside. She would investigate and get

back to me. She also told me that the Canadian court offers the facility for judges to communicate by video conference. Furthermore the father could participate in Canadian proceedings by video link. There is no equivalent of Cafcass or other court support at superior level. In some cases a psychologist can be instructed. This would be likely to cost between C$18,000 and $30,000. She offered to continue to communicate with me and I gratefully accepted.

28. I emailed Justice Moen on 25 June 2010 to tell her that I had postponed delivery of the judgment and was proposing to hand down a judgment in writing after I had received further submissions from counsel, and would like to know the result of her enquiries about the hearing on 4th September 2010.

29. On 28 June 2010 she wrote to me as follows:

> "I have now been able to meet with Justice Manderscheid. Indeed, the order was an ex parte order and Justice Manderscheid can open it up.
>
> In the meantime, he has reviewed our electronic recording of the hearing (FTR recording) and he has advised me that it appears that the preamble to the order does not accurately reflect the hearing that morning. Consequently, he is preparing an amended order to reflect what he heard and the basis of his decision.
>
> I should explain that the order was made in our morning chambers (which we affectionately call the "zoo") because we hear matters very quickly in which we have no opportunity to review any materials in advance. We rely on duty counsel and the CGO clerk (Court Generated Order) to assist in preparing the order. This enables us to provide orders to self-represented litigants before they leave the court room. Unfortunately, sometimes we have experienced clerks who quickly prepare the order reflecting the nature of the order and sometimes our clerks are not experienced. Here, the order should have reflected that it was an ex parte order on an interim basis and several other matters.
>
> When Justice Manderscheid has amended the order to reflect what happened in court that morning, we shall forward a copy to you. The parties will, of course, also get the order.
>
> …In the meantime, we look forward to receiving your order and a copy of your reasons for judgment.
>
> After all this is done, Justice Manderscheid will consider whether it is necessary to open up the ex parte order for submissions of the father.
>
> We think it has been helpful to be able to be able to communicate on this matter."

30. On 30 June 2010 she wrote to me:-

> "Justice Manderscheid has now amended his order as I discussed in an earlier email."

31. Justice Moen attached the amended order, and agreed that it should be circulated through my clerk although it would be served in due course by the Canadian court. Justice Moen concluded:

> "If there is any need to communicate with the parties present, we can arrange that in our court. Given that Justice Manderscheid granted the ex parte order, he would be the justice presiding."

32. The amended order now reads

> AMENDED EX PARTE ORDER
>
> UPON THE APPLICATION of [TD]
>
> AND UPON HEARING Queen's Bench Duty Counsel for the Applicant, [TD], AND UPON NOTING the Applicant, or their counsel, is served with a certified copy of this Order by the clerk of the Court on today's date;
>
> (the names and dates of the children were then recorded)
>
> AND UPON REVIEWING the Contact Order of the [name omitted] County Court by District Judge [name omitted] dated October 10, 2008;
>
> AND UPON NOTING that the Children of the marriage now reside in Alberta and that Jurisdiction lies with the Court of Queen's Bench in Alberta Canada, the children having resided in Alberta for eight months;
>
> AND UPON READING the sworn evidence of [TD], filed in support of this application, and noting that in May 2009 the Applicant had purchased a ticket for the Respondent to visit the children as he agreed to, but the Respondent did not use the ticket or exercise his access;
>
> IT IS HEREBY ORDERED THAT:
>
> 1.The Applicant confirms that she will fund the costs of the children going to the UK once a year during the summer for a period of 2 weeks and in addition the Respondent shall fund his own cost to fly to Canada to visit with the children and the Applicant shall reimburse the Respondent the cost of an economy flight ticket (London to Edmonton) upon his arrival in Canada once a year.
>
> 2.The Applicant shall be at liberty to substitutionally serve the Respondent by registered mail by mailing a copy of this Order and any subsequent Court documents to:
>
> a) (Father's address recited as before)
>
> 3. If the Respondent wishes to dispute this order, he may raise the matter in the Courts of the United Kingdom.

(signed)

_____

Justice of the Court of Queen's Bench of Alberta

ENTERED this 30 day of June 2010

(signed)

_____
Clerk of the Court (sealed)

33. The father says that it is factually inaccurate that the mother had purchased a ticket for him to visit for a week at Easter 2009.

The Law

34. Jurisdiction, recognition and enforcement of decisions on parental responsibility in the European Union is governed, since 1 March 2005, by Council Regulation (EC) 2001/2003 of 27 November 2003, Concerning Jurisdiction and Recognition and the Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility. It is referred to in the UK domestic legislation simply as "the Council Regulation" but I shall refer to it as the "Council Regulation- Brussels II Revised" in order to distinguish it from the preceding Council Regulation (EC) 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, to which I shall refer as the "Council Regulation-Brussels II", repealed by the Council Regulation-Brussels II revised. Canada is naturally not a party to either of the Council Regulations.

35. The domestic legislation is to be found in the provisions of the Family Law Act 1986 as follows:-

"**Chapter I**
Preliminary
1 Orders to which Part 1 applies
(1) Subject to the following provisions of this section, in this Part "Part 1 order" means-

(a) a section 8 order made by a court in England and Wales, other than an order varying or discharging such an order;
……

(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

(i) insofar as it gives care of a child to any person or provides for contact with, or the education of, a child; but

(ii) excluding an order varying or revoking such an order."

36. Chapter 2, was amended on 1 March 2005 to reflect the implementation of the Council Regulation –Brussels II revised. It now provides:-

"**Chapter II**
Jurisdiction of Courts in England and Wales
2 Jurisdiction: general
(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 Regulation, or
(b) the Council Regulation does not apply but-

(i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2 A of the Act is satisfied, or

(ii) the condition in Section 3 of the Act is satisfied.

(2A) A court in England and Wales shall not have jurisdiction to make a section 1 (1) (a) order in a non-matrimonial case (that is to say, where the condition in Section 2A of this Act is not satisfied) unless the condition in section 3 of this Act is satisfied."

2A Jurisdiction in or in connection with matrimonial proceedings or civil partnership proceedings
(1) The condition referred to in section 2 (1) of this Act is that the matrimonial proceedings are proceedings in respect of the marriage or civil partnership of the parents of the child concerned and –

(a) the proceedings –

(i) are proceedings for divorce or nullity of marriage or dissolution or annulment of a civil partnership, and

(ii) are continuing;

(b) the proceedings –

(i) are proceedings for judicial separation or legal separation of a civil partner,

(ii) are continuing

and the jurisdiction of the court is not excluded by subsection (2) below; or

(c) the proceedings have been dismissed after the beginning of the trial but –

(i) the section 1 (1) (a) order is being made forthwith or

(ii) the application for the order was made on or before the dismissal.

[subsection 2 applies where certain proceedings are continuing in Northern Ireland and subsection (3) applies only to certain orders made in Scotland and Northern Ireland]

(4) Where a court-

(a) has jurisdiction to make a section 1 (1) (a) order by virtue of Section 2 (1) (b) (i) of the this Act, (i.e. where "the question of making the order arises in or in connection with matrimonial proceedings "which are continuing"), but

(b) considers that it would be more appropriate for Part 1 matters relating to the child to be determined outside England and Wales,

the court may by order direct that, while the order under this subsection is in force, no section 1 (1) (a) order shall be made by any court in or in connection with those proceedings.

3 Habitual residence or presence of child
(1) The condition referred to in section 2 (2) of this Act is that on the relevant date the child concerned-

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

(b) is resident in England and Wales and is not habitually resident in any part of the United Kingdom

5 Power of court to refuse application or stay proceedings
(1) A court in England and Wales which has jurisdiction to make a Part 1 order may refuse an application for the order in any case where the matter in question has already been determined in proceedings outside England and Wales.

(2) Where, at any stage of the proceedings on an application made to a court in England and Wales for a Part 1 order or for the variation of a Part 1 order, other than proceedings governed by the Council Regulation, it appears to the court –

(a) that proceedings with respect to the matters to which the application relates are continuing outside England and Wales, or

(b) that it would be more appropriate for those matters to be determined in proceedings to be taken outside England and Wales

the court may stay the proceedings on the application.

"**42 General interpretation of Part I**

(2) For the purpose of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of 18 (whether or not a decree has been granted

and whether or not in the case of a decree of divorce or nullity of marriage, that decree has been made absolute)."

Jurisdiction under the Council Regulation

37. The preamble to the Council Regulation- Brussels II Revised states that :-

(Paragraph 5) "in order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding."

(Paragraph 6) "Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of parental responsibility."

(Paragraph 12) "The grounds of jurisdiction in matters if parental responsibility established in the present Regulation are shaped in the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member Sate of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility."

38. Section 2 of the Council Regulation is headed "Parental responsibility". Article 8, headed "General jurisdiction" provides that :-

" 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.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

39. Article 9, under the heading "Continuing jurisdiction of the child's former residence" provides for the original court of habitual residence to retain jurisdiction for a three month period where a child lawfully relocates "for the purposes of modifying a judgement on access rights", unless the holder of access rights has accepted the jurisdiction of the court of new habitual residence by participation in those proceedings.

40. Articles 10 and 11 are not relevant for these purposes.

41. Article 12, under the heading "Prorogation of jurisdiction" provides that :

"1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an

unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

(a) 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 of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 3, headed "Divorce, legal separation and marriage annulment" appears in Section 1, "headed General jurisdiction". It provides for a number of bases of jurisdiction, including habitual residence of one or both spouses during prescribed periods, and, in England and Wales, the domicile of one spouse.
Article 15 gives the power of the court to transfer the proceedings to the courts of another Member State.

42. Canada is not a contracting party to the Hague Convention of 19 October 1996.

43. In *Re L (Residence: Jurisdiction)* [2006] EWHC 3374 (Fam) [2007] 1 FLR 1686, Mr Justice Sumner considered whether the Courts of England and Wales had, and if so should exercise jurisdiction, where the mother had relocated to Panama with the parties' two children. The mother, whilst pregnant, had returned to Panama where the parties' second child was born, and the eldest child had remained in England. The parties negotiated a consent order in England permitting the elder child to join the mother in Panama, and the

order acknowledged the Panamanian court's jurisdiction in relation to the younger child in the following terms:-

> "……and upon the agreement of the Applicant and the first Respondent that whilst the child (K) will continue to live in Panama and be subject to the jurisdiction of the Panamanian court, it is the parties' wish and that of the High Court of Justice of England and Wales that orders be made in Panama, in the terms set out in "Schedule A" annexed hereto, and that such orders once made be reflected and supported in orders made in the English jurisdiction in respect of (K)".

44. It was further ordered by consent that the mother might remove the older child from the jurisdiction of England and Wales permanently to Panama. Provisions were made for contact. The matter was listed for review to consider "inter alia issues relating to contact and jurisdiction". The father then expressed concern about the care of the children, and at the review hearing his case was that he should be treated as having made an application for residence in respect of the older child in England. At the hearing this was clarified to mean that the father was seeking residence of both children.

45. Mr Justice Sumner set out the relevant provisions of Chapter 2 of the Family Law Act 1986. The parties agreed that the issue of contact was still before the English court because of the provision for review. The parties were in dispute as to whether the review also covered the issue of residence. On behalf of the father it was argued that the divorce proceedings were still not concluded because there had been no decree absolute, and therefore under Section 1 (b) (i) of the 1986 Act, "the question of making the order arises in or in connection with matrimonial proceedings". On behalf of the mother it was argued that the children aspect of the matrimonial proceedings had been determined. Mr Justice Sumner does not appear to have been referred to Section 42 of the Act. He said:-

> "[20] The principal objective of Part 1 of the Family Law Act 1986 was to avoid difficulties that arose with three separate legal jurisdictions within the UK. It was held in 1995 that it also covered those cases where the conflict crossed state boundaries (*Re S (Residence Order: Forum Conveniens)* [1995] 1 FLR 314). This is not in dispute nor the court's inherent power to stay proceedings.
>
> [21] The essential provisions as they affect this case can be put shortly. The court only has jurisdiction if the father's application for a residence order arises in or in connection with matrimonial proceedings (s 2 of the 1986 Act), or either N or K are habitually resident in England and Wales (s 3). The latter is not argued.
>
> Accordingly the question arises whether the present application arises in connection with matrimonial proceedings."

46. The original application made in Re L was the father's application issued prior to the divorce petition, but followed by mother's application for a residence order, after the issue of the petition. Mr Justice Sumner recorded, (and it was not disputed by the parties) that the effect of Rule 2.40 of the Family Proceedings Rules 1991 is that any application by a party in relation to a child where a cause is pending is made within that cause and cause means matrimonial cause. Therefore, he held, the proceedings in February 2006 were matrimonial proceedings for the purpose of the l986 Act.

47. On behalf of the mother it was argued that whilst it was accepted that the matrimonial proceedings were "continuing" because there had not yet been decree absolute, he held that the reality was that the Children Act proceedings had been concluded: the February 2006 order expressly provided that K would be subject to the jurisdiction of the Panamanian court and express permission was granted to the mother to take the older child there permanently. The judge recorded that a decree nisi had been granted and that the courts had certified the arrangements for the children were satisfactory. He said:-

> "[27] It is difficult to argue in those circumstances that the matrimonial proceedings are continuing so far as the two children are concerned".

48. Mr Justice Sumner commenced his conclusion by commenting :-

> " [28] I can see the argument that, until the proceedings are finally concluded and there is a decree absolute, they are continuing even though the continuance would not impinge on the children in any way. I reach that conclusion with no enthusiasm. There may be little to commend retaining jurisdiction over children when all the decisions in relation to them have been made. There is even less when the express orders of the court recognise another jurisdiction in respect of one of the children, and provides for the other child to go and reside within that other jurisdiction."

49. He said that whether he was right or wrong about that he had to look at the effect of the 2006 order. He said that he was satisfied [para 31] that:-

> "[31] …the parties sought to provide a means whereby the question of contact could be reviewed by the courts in this country some 11 months later….It is difficult to believe in those circumstances that there could have been any contemplation that the father had a right to raise the question of residence within a matter of months before the courts of this country once more."
>
> "[33] …it has the unattractive potential of there being different jurisdictional rights in relation to each of the two brothers."
>
> "[34] …I would be most reluctant to contemplate…that this court had jurisdiction on matters of residence over K. He has only recently visited this country for the first time. He has always lived with his mother in Panama. He has never stayed with his father. He is habitually resident in another jurisdiction….."

50. In his conclusion Mr Justice Sumner said that it would be wrong to allow the father to re-open the residence issue which had been resolved the year previously unless there were:-

> "[52]…compelling grounds to do so. That safeguard arises because there is always a residual jurisdiction in relation to a child who was resident in England but is in the care of a parent resident abroad with the recent consent of the other parent. But the circumstances in which that jurisdiction will be exercised are very limited."
>
> "54]…though matrimonial proceedings are continuing, the children's element of that has been decided. Where international considerations arise as here, no encouragement should be given to re-opening that issue within a comparatively short time. As I have

said, it does not exclude the court's jurisdiction if an urgent and serious issue arises over child protection."

51. The Judge also concluded that Panama was the convenient forum and, because of the history and the mother's connections with Panama, it was in the interests of the children that any dispute as to their future should be decided there.

52. The Judge was not referred to Brussels II Revised. Nor was he referred to the provisions of Section 42 of the Family Law Act, although he may have had them in mind in stating that the court retained a jurisdiction, at least in principle.

53. In *I (a child)* ***(2009) UKSC 10***, the Supreme Court considered the effect of Article 12 of the Council Regulation on cross-jurisdictional issues where a child was habitually resident in a third state, Pakistan, not a party to the Council Regulation.

54. Baroness Hale stated at paragraph 15 that

> "It will be noted that, if Brussels II Revised applies, it governs the situation. If some other EU country (excluding Denmark for the purpose) has jurisdiction under the Regulation, then this country does not. But if Brussels II Revised applies and gives this country jurisdiction, it will give jurisdiction even though the residual jurisdictional rules contained in the 1986 Act would not. Only if Brussels II Revised does not apply at all will the residual rules in the 1986 Act come into play."

55. The Court decided unanimously that Article 12 of Brussels II Revised can clearly apply when a child is lawfully resident outside the European Union

56. The Court was unanimous, having considered the provisions of Article 16, that seisin must occur at a particular moment in time. Baroness Hale pointed out that in that case there had been a number of proceedings culminating in the mother's application for contact in 2007 (for which no provision had been made in the 2004 proceedings), in which the father had been granted permission to take the child to live abroad. It was common ground between the parties, and the Court agreed, that these were the "proceedings" with which the court was concerned, and that they were governed by Brussels II Revised. Also, the Court accepted that the acceptance could only be that of original parties to the proceedings, and that once the jurisdiction was accepted no party could resile from it.

57. The Court went on to consider the provisions of Article 12.3 (b): "the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner at the time the court is seised"; and that the jurisdiction of the court "is in the best interests of the child".

58. The Court was divided as to whether acceptance of jurisdiction had to take place at the commencement of the proceedings, or could take place at any time thereafter providing that the court was already seised. This issue however did not matter, because all parties accepted that there had been unequivocal acceptance both before and after the proceedings began.

59. The Court inferred acceptance of jurisdiction by the father from the following:-

> i) No objection was taken to the jurisdiction until jurisdiction was queried by the court in 2009;

ii) He gave an undertaking to return the child to the jurisdiction when called upon to in the 2004 order. Although the object of the 2004 order was to enable him to establish a habitual residence outside the jurisdiction, he was undertaking to bring the child back when required to do so. He also attended court hearings of the mother's 2007 application, and confirmed in 2009 that he accepted the jurisdiction of the English court.

60. Baroness Hale said

> "even if the words 'at the time the court is seised' qualify the parties' acceptance, and refer only to the precise date when the proceedings are initiated rather than to once they have begun, the court is entitled to look at the parties' conduct after the proceedings have begun in order to decide whether they had accepted jurisdiction at the time the proceedings did begin. There is nothing unusual about this. Courts often take into account later behaviour as evidence of an earlier state of affairs".

61. As regards "superior interests" (synonymous with best interests), the Court concluded that

i) The considerations which come into play are a those which come into play when deciding on the most appropriate forum;

ii) The deeming provisions in Article 12 (4) that jurisdiction shall be held to be in the best interests of the child concerned, where there has been prorogation, although not irrebuttable , "make sense" (per Baroness Hale); and, (per Lord Collins), "deemed" means "presumed".

iii) Any risks attendant on contact would be best assessed within this jurisdiction.

iv) Difficulties in enforcement must be taken into account, but it must be borne in mind that contact orders are enforced in personam.

62. I have identified three cases in which the Courts of England and Wales have considered the issue of whether there has been "acceptance" within the meaning of article 12.

63. In *L v L* [2006] EWHC 2385 (Fam), a husband and wife separated in 2004. In 2005 the wife was given leave to relocate permanently with the children to Austria. The High Court Order was made by consent and recorded an express agreement under Article 12 vesting jurisdiction with the High Court to determine (1) the father's contact application and (2) the mother's undertaking to return the children if called upon to do so. Upon the mother trying to withdraw from the agreement, the trial judge, Mr Nicholas Mostyn QC as he then was, now Mostyn J, said that :

> "That agreement is manifestly a full and effective prorogation of jurisdiction over the substance of the matter in favour of this court, provided that I am satisfied that it is in the "superior interests" of the children, which I unequivocally am. It overrides the normal rule expressed in Article 9 which is that absent a prorogation agreement this court would lose jurisdiction three months after the change of habitual residence."

64. In *C v C* [2006] EWHC 3247 (Fam), a decision of Mr Justice Hedley, the father and the mother of two children had separated in 2002. Thereafter there was what Hedley J described as "incessant litigation" between the parents as to contact, the two children living with the wife, who had made allegations of sexual abuse. On 5 June 2005 a "critical" order was made giving W permission, effectively by consent, to relocate to Spain, with a contact order to the father. The mother was directed to return the children to the jurisdiction if called upon to do so. She made further allegation of abuse. The father relisted his English application for further consideration by the court. The matter was set down for a hearing in England. The mother then applied for injunctive relief in Spain, and declined to bring the children to an English hearing. She had also obtained the report of a Spanish psychologist and sought to file it in the English proceedings, without permission to do so.

65. The father sought a declaration from the High Court that the UK had jurisdiction and an order remitting the case back to the County court. The mother sought a declaration that Spanish court had jurisdiction and the UK courts should stay proceedings in respect of parental responsibility.

66. Hedley J. held [para 17]:

> "In my judgment the fundamental approach to this should be objective; what inference should be drawn from the mother's litigation conduct? The answer to that is clear: complete acceptance. Then one should ask whether a failure to address the question of challenge vitiates what otherwise appears to be an unequivocal acceptance. I do not think it does. This case demonstrates a clear acceptance of the Northampton County Court's jurisdiction at least until late July 2006 by which time on any basis the court must be seised of the matter. Accordingly it is then too late to object. In my judgment the evidence demonstrates an unequivocal participation in the proceedings and thus an acceptance of the jurisdiction. I do not think that the absence (as I am prepared to accept it was) of advice on her right to object should vitiate the unequivocal acceptance otherwise established. I am glad to reach that view in this case as questions of jurisdiction should be resolved at the outset of a case and not on the eve of a final hearing. That point of policy also fortifies my view that the court should be looking at what the parties have actually done rather than the reasons (or lack of them) for doing it, absent, of course, fraud or misrepresentation."

67. In *Bush v Bush* [2008] EWCA Civ 865, [2008] 2 FLR 1437, the Court of Appeal rejected the argument (upheld by the judge at first instance) that the father's completion of the response to the statement of arrangements form constituted an acceptance of English jurisdiction, since that step was integral to the divorce rather than an acceptance of the jurisdiction of the English Court in matters of parental responsibility. Lawrence Collins LJ (as he then was) said that:

> "It is plain that Article 12(1) (b) of the Brussels II bis Regulation (Council Regulation (EC) 2201/2003), when it speaks of the jurisdiction being "accepted expressly or otherwise in an unequivocal manner … at the time the court is seised," is not simply referring to a mere submission in matrimonial proceedings equivalent to what would be an entry of appearance under the Brussels I Regulation (Council Regulation (EC) 44/2001), Article 24. First, it is clear that it does not refer to acceptance of the jurisdiction in relation to matrimonial proceedings alone. It must refer to jurisdiction in matters of parental responsibility. Second, the emphasis is on the acceptance of

> jurisdiction "expressly" or "in an unequivocal manner." This must mean that acceptance of jurisdiction of a court other than that of the child's habitual residence is not lightly to be inferred, and that the paradigm case will be actual agreement by the parents at the time the matrimonial proceedings are instituted."

68. Thorpe LJ said that

> "I do not consider that the judgment of Hedley J (in CVC) supported the judge's conclusion. In that case there had been years of contentious litigation in relation to the children in this jurisdiction both before and after the divorce and the mother's subsequent move to Spain with the children. Her application to transfer the proceedings to Spain was plainly tactical. Article 12 (1) as well as Article 12 (3) was plainly engaged. Hedley J was plainly correct to refuse to relinquish jurisdiction on the facts of that case. He established no general principle."

When does acceptance terminate/how long does it endure?

69. In *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741, Mr Jonathan Baker QC sitting as a Deputy High Court Judge (now Baker J) held that for the purposes of Article 12 (1) of Brussels II Revised a matter relating to parental responsibility was connected with a divorce application where the father's Spanish proceedings had not been finalised, and that the making of a final judgment order in the parental responsibility proceedings did not terminate the parental responsibility jurisdiction if the proceedings were still ongoing. He further held that jurisdiction acquired in one country by virtue of Article 12 (1) could not be terminated by the decision of a court in another country "otherwise the result would be to create the conflicts of jurisdiction which Brussels II Revised was designed to avoid."

70. I agree that once the parental responsibility jurisdiction has been established under Article 12 (3), it cannot be terminated by the decision of a court in another country. I would add that this must particularly be so where the application to the other court has been made unilaterally.

Application of the Article 12.3 criteria

71. As Hedley J said in *C v C*, I have to decide what inference I should draw from the conduct of the mother. In the context of this case I should look at the question of acceptance as at the date of the orders of October and November 2008 when relocation was contemplated and made the subject of the court order, (and indeed thereafter). The father's primary application made on the 21 April 2010 was for enforcement of the order, and secondly for "the change of circumstances to be reviewed and if the court deems it necessary to make further rulings."

72. Substantial connection: both children undoubtedly have a substantial connection by reason of their British nationality and the fact that their father who has parental responsibility for them is habitually resident in England and Wales.

73. Unequivocal acceptance When was the court seised? The original proceedings were issued, I am told, in April 2005 under the old Brussels II regime, and therefore on a different jurisdictional basis.

74. The parties' acceptance of the jurisdiction now relied on is contained in the order of the District Judge dated 20 November 2008. Providing that seisin is a continuing state of affairs,

then there is no difficulty regarding the parties' acceptance of the jurisdiction as effective at the time.

75. I consider that the two orders of the District Judge have to be read as one. Both parents unequivocally and expressly accepted the jurisdiction of the court in respect of contact when the orders of the District Judge were made. They unequivocally accepted that it should endure. The mother now says that that the point at which seisin has to be determined was at 21 April 2010 when the father's current application was filed, but I do not consider that that is right. The father's application at that point was primarily for enforcement of the order for contact of 20 November 2008. I do not accept that it is the effective application in respect of which the mother must unequivocally signify acceptance. But in fact the mother in her Originating Summons dated 17 June 2010 expressly proposed that issues in relation to contact shall be resolved in the UK, and Miss Woodard accepted, certainly at the outset of the proceedings before me, that this court had jurisdiction in relation to contact, although she submitted that the court should not exercise it. The mother has therefore accepted the jurisdiction of the court in respect of contact both before and after the issue of the current application.

76. I do not accept that the mother can unilaterally withdraw her acceptance that the English Court shall have jurisdiction by the issue of fresh proceedings in another jurisdiction. As was said in *Re S-R*, to allow that interpretation would undermine the whole purpose of the Council Regulation.

77. There was no such clear undertaking or order here as in *Re I, C v C* and *L v L* to return the children to the jurisdiction of England and Wales if called upon to do so. The mother in this case did however agree herself to return for hearings. She agreed that the children should return to the UK if she was unable to care for them. Those matters are not conclusive, but there was also a recital that the parties will discuss where N will be best cared for, with permission to apply in the event that agreement shall not be reached, which makes it clear that the parties had in mind that the father might invoke the jurisdiction of the English Court in relation to residence and relocation. Permission to apply in that context can only be consistent with the retention of jurisdiction to seek a residence and /or return order.

78. Taking those matters together I conclude that the mother has unequivocally, albeit impliedly, accepted the jurisdiction of the court in relation to issues of residence and return as well as contact.

79. But there is another basis on which the father puts his case. Miss Heaton argues that once there is acceptance of jurisdiction in relation to one aspect of parental responsibility, then this acceptance must be construed to be to all aspects of parental responsibility. She points to the wording of Article 12. I note a distinction between the wording of Articles 12.1 and 12.3: Article 12.1 states that "The Courts of a Member State shall have jurisdiction in any matter relating to parental responsibility" as opposed to the wording of Article 12.3 "shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in Article 12.1".

80. On behalf of the father Miss Heaton says that jurisdiction cannot be limited to contact: contact is one of a range of section 8 orders: and the court of its own motion can make any s 8 order when proceedings are before it pursuant to s 10 (1) (b) Children Act 1989, which provides that where in any family proceedings in which a question arises with respect to the

child, and an application has been made by a person who is entitled to apply for a section 8 order, the court may make an order where it "considers that the order should be made even though no such application has been made."

81. Miss Woodward says that the order permitting the mother to relocate was not a s 8 order but an order pursuant to s 13 CA 1989. But it does not seem that the mother has ever been granted a residence order, and the provisions of section 13 refer only to cases where there is a residence order in force. (I observe that the Court of Appeal has recently restated that there can be no contact order without a residence order but nonetheless in my view the contact order in this case cannot be regarded as a nullity.) In my judgment the order granting permission to relocate was a specific issue order pursuant Section 8.

82. Taking the provisions of 10 (i) (b) of the Children Act 1989 and the provisions of Article 12 of Brussels II Revised together, it seems to me that parental responsibility is indivisible and that acceptance of the court's jurisdiction in relation to one aspect of parental responsibly is to be taken as an acceptance of jurisdiction in respect of parental responsibility generally. This seems to have been the approach in both *L v L* and *C v C* in both of which decisions the acceptance of jurisdiction was in relation to contact only coupled with an agreement or undertaking to return the children when called upon to do so.

83. Article 9 of Brussels II Revised does not assist me. It provides for a limited retention of jurisdiction in respect of contact in cases of lawful relocation. In my judgment no general rule applicable to the interpretation of Article 12 can be derived from it. That does not mean that the court should necessarily exercise all aspects of jurisdiction, when looking at the criteria of best interests of the child.

84. I have come to the conclusion that there has been an unequivocal acceptance of parental responsibility jurisdiction here by the mother which she cannot withdraw.

85. Best interests of the child: As was stated in *Re I* and in *Bush v Bush*, this involves considerations of forum conveniens. Potential outcome is irrelevant.

86. In *Re I* Baroness Hale referred to the advantages of the contact application being heard in this jurisdiction. Miss Woodward submits that the distinguishing facts in that case were that the parents both resided in England and contact was to take place in England. I do not consider that those are conclusive considerations.

87. In *Bush v Bush* Thorpe LJ said that :

[48]. ….an application to relocate is properly determined by the court of the child's habitual residence which is being asked to sanction the relocation rather than the court of the jurisdiction to which the primary carer seeks to move. I can understand that the mother might think that she would be more likely to persuade a London judge of the benefits of the move to English residence and education but the Spanish judge should take that decision having at her reach all the evidence as to the well settled history and as to the children's achievements in their current environment. It would in my opinion create a most unhelpful precedent if a court exercising divorce jurisdiction, exceptionally and transiently seised with jurisdiction in matters relating to parental responsibility, were to issue an order permitting a parent to leave the jurisdiction of the child's habitual residence without any involvement of the courts of the children's long settled residence."

88. In this case the issue is not so much relocation but with which parent the children shall reside. Therefore the court has to look at both parents' environments. Furthermore although the children are undoubtedly habitually resident in Canada, as Justice Manderscheid found, their residence cannot be described as objectively long settled in the light of the short period of time that they lived there, the changes in their environment, and the fact that they arte there on only temporary visas.

89. In *C v C* Hedley LJ said that in a transnational case it is

> "inevitable that the litigation will almost always be more difficult for one party than another. Just as it would be contrary to the spirit and intention of the Regulation for comparisons on merit to be made about competing jurisdictions, so the court must be very cautious about attaching weight to difficulty. It must be in the interests of children that at least both parties can fully and fairly put their case; further than that it would not be wise for the court to go."

Conclusion as to the appropriate forum

90. If I adopt Miss Woodward's submissions and align the contact issue with the as yet non-existent residence proceedings which on her case should be heard in Canada, then the mother's acceptance of the jurisdiction, which both parents agreed should remain in England, is treated as subsidiary to the residence issue, and in reality counts for nothing. Particularly in the context that the mother plainly from the terms of the 2008 orders saw a continuing role for the English courts in matters relating to the children's general welfare as well as contact, and that she agreed to return here for such issues to be decided, in my view that would be wrong.

91. I remind myself that there is a presumption that the jurisdiction which has been accepted is deemed under this article although not irrebuttably, to be in the child's best interests. But a factor pointing the other way is that it is not impossible to hold proceedings in Canada; far from it. And I accept that the Canadian court will apply very similar principles to ours and will treat welfare as paramount.

92. In my view however it is absolutely critical for the issue of contact to be determined swiftly. I have reserved a two day hearing before Judge Newton when the parents and the children are both in the jurisdiction in the third week of August 2010. The father wanted that hearing also to include the issue of residence, which I have always regarded as probably unrealistic to achieve in terms of presentation of the evidence and time estimate, but not hopelessly so.

93. I am in no doubt that it is in the interests of the children for the issue of contact to be determined, at least in the first instance, in the English court, at that hearing. The parties have legal representatives. The mother will be here with the children; there was insufficient time to appoint Cafcass, but it may still be possible for a jointly instructed independent social worker to see them. At the moment it is unquestionably in the children's best interests for contact to be considered here. The parents have each agreed that course, and the Canadian court has now unequivocally accepted that the father may apply to the English Court. It is unquestionably not in their best interests for contact proceedings to start all over again in Canada at the moment, effectively from scratch.

94. I do not consider that with children of these ages, and when the objection to contact twice

a year stands or falls, on the mother's case, on practical considerations, that the question of the children's wishes and feelings is at the forefront of the decision. The decision for Judge Newton is whether there is some reason relating to the mother's circumstances to now change arrangements freely negotiated and agreed in November 2008, thought by both parties to be, and endorsed by the court, as being in the children's best interests.

95. The mother's case, that it is not possible for contact to take place as envisaged because of the demands of her job, can be as easily evaluated in this jurisdiction as in Canada. In these circumstances, I would hope, particularly bearing in mind the terms of the amended order of Justice Manderscheid, that if the court in England comes to a clear conclusion on contact, that the Court in Canada would respect and enforce that decision if necessary.

96. The same considerations do not apply to the issue of residence.

97. There is no doubt in my mind that the children are now habitually resident in Canada. The order envisaged relocation without limit of time and the children have been in Canada now for 19 months. I agree with Justice Manderscheid's assessment that they were habitually resident in Canada as at the date of the mother's application on 4 September 2009. I have not received any expert opinion as to Canadian law as to jurisdiction but I see no reason to doubt Justice Manderscheid's statement that the Canadian Court has jurisdiction. Conflict of jurisdiction, and potential enforcement is however not determinative.

98. The father relies on the mother's actions in relation to contact and her unilateral application to the court in support of his case that she will not permit a proper relationship between him and the children. He also says that the mother's circumstances and in turn those of the children are unstable in Canada.

99. The father's case involves investigation of the extent to which the children's needs are now met in Canada, the ability of the mother to provide a stable home, the extent to which they are settled into their new environment, and their wishes and feelings. I accept that it may be far more difficult for the English Court to evaluate the mother's circumstances and the children's circumstances than the Canadian court. Important evidence may need to be obtained from the children's schools, from her employers, and from people who know and see the children, even if evidence is not to be obtained from an independent professional witness who has seen the children on their home ground. If there is to be an independently instructed social worker or a Cafcass officer, here, that is evidence that could be adduced in any Canadian proceedings. Also it must be borne in mind that the father was prepared, however reluctantly, for the children to relocate, subject to contact arrangements.

100. Whichever jurisdiction is to hear any application by the father for residence and return, it may well have to hear evidence by video link, if the witnesses cannot attend personally. The father is able to visit Canada and could combine a visit to the children (which by the terms of both English and Canadian orders is to be at mother's expense) with a court hearing. Alternatively, he could give evidence by video link. The same is true of the mother. She did of course agree to come to England for court hearings on contact, and she has family and relatives here who she says are important to her and the children.

101. The father's ability to care for the children in his home environment, and his family environment and social support will need to be evaluated to the same extent as the mother's.

102. Also although I do not consider that there is a bar in principle against proceedings is respect of different aspects of parental responsibility being heard in different jurisdictions, it may be undesirable to do so, at least at this stage. I observe that in Re L, Sumner J had no hesitation, in a case which he was asked to consider only the provisions of the Family Law Act, in ordering that the contact issues be tried here and the residence application tried in Panama.

103. But on a practical level the English Court's decision on contact (which in the context will involve an evaluation of the mother's actions and her motives) is likely to provide an important template for the future and to be relevant to a "best interests" determination in relation to residence and country of residence. If, for instance, Judge Newton endorses the contact regime imposed by the mother, then the father's proposed residence application will be seen in a different light than if the judge takes a strong view that the mother had behaved wrongly. I do not see any reason in principle why the "best interests" consideration in Article 12.3 is set in stone for all time, in contrast to seisin and acceptance. In my judgment this must be a rolling consideration. Certainly pursuant to s 5 (2) of the Family Law Act 1986 on an application for a Part 1 or variation of Part 1 order, the court may stay the proceedings at any stage. Since the reference in section 5 is to a "Part 1 order", it seems to me that the court may remit a particular issue ("matter") to the other court, and this indeed seems to be the course that Sumner J adopted in Re L.

104. So for the moment it is in the best interests of the children that the court should retain jurisdiction in relation to all aspects of parental responsibility, so that the parties can concentrate on the way forward in one jurisdiction. The question of whether it is in the children's best interests for a residence application to proceed in the Canadian jurisdiction or be retained in England and Wales after the August hearing must be a decision for the Circuit Judge, who may wish to give directions as to how that decision is to be determined if there is insufficient time at the August hearing, and/or to remit it back to me. The parties will be able to advance informed reasons why one jurisdiction is better than the other after the contact decision has been made. I accept that the absence of Cafcass or a similar facility in Canada is not determinative, but the involvement of Cafcass in this country does give a significant advantage to the court.

105. Lastly, if the father does wish to pursue an application for residence, he must file an amended application, and file evidence in support, if he has not already done so. The provisions of section 10 (1) (b) Children Act 1989 are there to ensure that the Court has power to make orders of its own motion, not to substitute for an application which should be properly made in the proper form.

Stay

106. Thus it is inappropriate at the moment to stay a residence application. For one thing, no such application has formally been made, although it may be right that it would be 'more appropriate' for 'matters to which the application relates' to be determined outside England and Wales in due course, bearing in mind the provisions of s 5 Family Law Act 1986. .

107. I am not satisfied at the moment that the mother has established that Canada is the appropriate forum, or that the balance of convenience requires the hearing of the residence issues in Canada. At the moment the balance of convenience, expense and (potential) availability of witnesses is very finely balanced.

108. So far as contact is concerned, I am quite satisfied that the father's application should be dealt with urgently in this jurisdiction, as I have said

109. In Justice Manderscheid's order and amended order, he made a final order as to contact in the Canadian proceedings. The power to stay proceedings pursuant to s 5 (1) "where the matter has already been determined outside England and Wales" is discretionary, and since the amended order specifically permits the father to make an application to the English court, I decline to stay the father's contact application. I also bear in mind that the order was made ex parte and that, save for appeal, there appears to be no mechanism by which it may be revisited in Canada. It is not in my view "more appropriate" for the matter of contact to be decided in Canada, certainly at the moment.

Residual jurisdiction pursuant to Section 2 and 2A of the Family Law Act 1986, and the effect of s 42 (2)

110. Since I have held that there is jurisdiction here under Article 12.3 it is not strictly necessary for me to consider the residual jurisdiction, but I shall do so in case my primary decision is found to be wrong.

111. The Court only has jurisdiction under Brussels II Revised if (i) the children are habitually resident here, or (ii) there is jurisdiction under Article 12. If jurisdiction is not established under Article 12 in this case, the question arises as to whether the court has jurisdiction pursuant to the "residual jurisdiction" in Sections 2 and 2A of the Family Law Act 1986, as qualified by Section 42 (2), pursuant to Section 2 (1) (b) (i), where "the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 2 A of the Act is satisfied" (i.e. there are "continuing matrimonial proceedings").

112. Miss Woodward draws my attention to The European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005 (SI2005/265), which introduced the relevant amendments into the Family Law Act. The Explanatory Note states that the purpose of the Regulations was to amend domestic law "so as to make it consistent with, and clarify its relationship to, Brussels II Revised, the changes being necessary to amend inconsistent provisions of national law". The Explanatory Note continues that the amendments "also make it clear that when considering the jurisdiction in England and Wales and Northern Ireland that the Council Regulations needs to be considered before domestic jurisdiction is looked at." I read that as confirming that the first question to look at is whether Brussels II Revised applies.

113. Miss Woodward also draws my attention to Recital 12 of the preamble to Brussels II Revised, which records that the regulations are shaped in the best interests of the child, in particular on the criterion of proximity, jurisdiction in the first place being based on the child's habitual residence or pursuant to an agreement between the holders of parental responsibility. She draws from that the proposition that the court ought not to exercise jurisdiction save in conformity with the child's habitual residence. These are arguments in my view which go to the exercise rather than the existence of jurisdiction, where it is not explicitly based on habitual residence.

114. Lowe, Everall and Nicholls in International Movement of Children (2004), pointed out that the principal aim of the 1986 Act was to resolve conflicts of jurisdiction within the UK, (now, subject to Brussels II and Brussels II Revised), but that the provisions have more

general application. Within the UK and the Isle of Man there is a hierarchy of jurisdiction, primary jurisdiction being over the children of both spouses where matrimonial proceedings are "continuing", next is habitual residence, and last is jurisdiction based on presence. The authors of Lowe, Everall and Nicholls commented that Section 42 (2) was in conflict with the provision of Brussels II, although they have not commented on the new provisions in the supplement. The Council Regulations have been grafted on to the 1986 Act, but the match is not perfect.

115. Baroness Hale said at paragraph 15 in Re I that :-

> "Section 2A (of the Family Law Act) need not concern us as there are no continuing matrimonial proceedings between the parties, not were any orders made in connection with them"

It is difficult to imagine that Baroness Hale was not familiar with the provisions of s42.

116. Counsel have established that in *Re I* the parties were divorced in England and Wales and that there had long since been a decree absolute. Thus there were no "continuing" divorce proceedings within the meaning of the Family Law Act 1986. According to counsel's researches, S 42 Family Law Act 1986 was not referred to or considered in *Re I* at any level of court.

117. At the time when the applications were made leading to the orders the District Judge in October and November 2008, Rule 2.40 of the Matrimonial Proceedings Rules 1991, revoked on 25 November 2008 was still in force. It provided that

> "**2.40 Applications relating to children of the family**
> (1) Where a cause is pending, an application by a party to the cause or by any other person for an order under any provision of Part I or Part II of the Act of 1989 in relation to a child of the family shall be made in the cause; ….
>
> (2) ……
>
> (3) A cause shall be treated as pending for the purposes of this rule for a period of one year after the last hearing or judicial intervention in the cause and rule 1.2 (2) shall not apply."

118. I conclude that the applications made leading to the 2008 orders were not "in the cause". There are no current rules defining when proceedings are in "connection with" matrimonial proceedings, or "in the cause".

119. It is not easy to discern the interrelationship between Section 2 (1) (b) (i) and section 42 (2) since, if "in or in connection with matrimonial proceedings" is to be interpreted to mean "before decree absolute", then the provisions of s 42 (2) are rendered nugatory.

120. Rule 2.40 referred to "applications in the cause" whereas Section 2 (1) (b) (i) refers to "the question of making the order arises in or in connection with matrimonial proceedings." Sumner J considered the two provisions to be synonymous, but I do not consider that they necessarily are. However since Rule 2.40 was not revoked as at 1 March 2005, it may be that the word "in" the matrimonial proceedings is to be construed as meaning "in the cause".

121. I find the interpretation and interrelation of these provisions exceptionally difficult. It is possible to read section 2 and 2A together so as to construe them not as requiring a connection to be established with divorce in order to establish jurisdiction, but rather that the words "the question of making the order arises in or in connection with" mean that the party may simply rely on his or her status as a party to "continuing" proceedings as a basis of jurisdiction. That does not seem to have been the approach of the Supreme Court in Re I, but the court was not referred to the provisions of section 42. And if that suggested interpretation were right the subsection would read more simply, for instance "the persons with parental responsibility for the child are parties to continuing matrimonial proceedings in England and Wales which are continuing within the meaning of s 42 (2)".

122. Therefore I conclude that section 2 (1) (b) (i) does qualify section 42 (2) and does require a connection, probably a temporal connection, to be established between "the question of making the order" and the matrimonial proceedings, but how that connection is to be defined is more difficult. In the light of the Explanatory Note to the Rules introducing the amendments consequent on Brussels II Revised, a purposive construction of Section 2 (1) (b) (i) would support an interpretation of the provisions bringing it into line with the provisions of Brussels II Revised, and away from the UK based "continuing proceedings" jurisdiction. The time frame of the revoked FPR 2.40 is similar to the time frame for continuing jurisdiction based on divorce in Brussels II and Article 12 of Brussels II Revised. In my judgment to fall within the residual jurisdiction there must be proximity between the divorce proceedings and the court being asked to determine a question of making an order in relation to children. In any case it may be that essentially the same application or issue has been before the court, unresolved, for some time, but once an order has been made, then in my view the connection with the matrimonial proceedings would terminate.

123. In *Re I* although there had been divorce proceedings the order for residence in favour of the father was originally made within care proceedings, which long predated the parents' separation and divorce. Miss Heaton says that that is a very different picture from this case, where the first application was made during the divorce proceedings and orders were made thereafter all dependent on the original proceedings which were commenced "in the cause". Miss Heaton says that the mother's application should have properly have been presented as an application to vary or discharge the existing contact order coupled with an application for leave to remove from the jurisdiction, and was thus an application within the original matrimonial proceedings. She bases her argument on section 42 (2). But I have concluded that s 42 (2) must now be qualified by the amended section 2 (1) (b) (i) and that some actual nexus must be established. Miss Woodward says that the father's applications were freestanding applications, and cannot be regarded as "in or in connection" with the divorce proceedings.

124. In contrast to pre Children Act proceedings, "freestanding applications" are now made leading to an order following which it is necessary to issue fresh applications and seek fresh determinations. As far as I can see the last order before 2008 was a contact order on 6 October 2005, and the next order was made on the mother's relocation application on 10 October 2008, followed by a contact order linked to the relocation order six weeks later. On the information I have I do not conclude that the proceedings were "in or in connection with" the matrimonial proceedings, and I conclude that the father cannot rely on the residual jurisdiction.

125. If I am wrong and the court has jurisdiction pursuant to section 2 (1) (b) (i) Family Law Act 1986 to make a Section 1 (1) (a) order, then it may decline to exercise jurisdiction to make a section 1 (1) if it considers pursuant to section 2 A (4) that it would be more appropriate for Part 1 matters relating to the child to be determined outside England and Wales and will direct that "no section 1 (1) (a) order shall be made by any court under section 2 of the Act." So the residual jurisdiction is not to be exercised in all circumstances as is exemplified by *Re S (Jurisdiction to Stay Application)* [1995] 1 FLR 1093, and in the present day habitual residence is likely in most cases to determine whether jurisdiction will be exercised here or not.

126. Since Section 2 A (4) is concerned with exercise rather than establishment of jurisdiction, it seems to me that pursuant to it the court may send one aspect of the matter in issue to the more appropriate court. The words "a section 1 (1) (a) order" and "no section 1 (1) (a) order" in my view support that interpretation. It is implicit from section 2 A (4) of the Act that such an order is revocable, since the direction only applies "while the order under this subsection is in force".

Conclusion: order

127. The order that I intend to make is:-

i) It will be recorded that the court has jurisdiction under section 8 of the Children Act 1989 pursuant to Article 12 (3) of Brussels II Revised;

ii) The listing before HH Judge Newton in the week commencing 16 August 2010 is confirmed ;

iii) The parents may provide such further evidence as they may wish to adduce including a report from an Independent Social Worker if one can be found in time;

iv) I shall direct that HH Judge Newton shall determine the extent to which, as may be necessary, any further issues which shall arise as to the jurisdiction in which the proceedings shall be heard, or alternatively give directions for the determination of such issue.