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Neutral Citation Number: [2020] EWFC 90

Case No: FD20P00719

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE
IN THE MATTER OF THE CHILDREN ACT 1989

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2020

Before :

Mr Justice Peel

Re AC (A Child)

Penelope Reed QC (instructed by Harbottle and Lewis LLP) for the Applicant

Hearing date (by MS Teams): 3 December 2020

HTML VERSION OF APPROVED JUDGMENT

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Mr Justice Peel :

Introduction

1. This is one of those rare cases where the court is concerned with the exercise of parental responsibility under the Children Act 1989 in relation to the property of a minor.
2. The subject of this application is an 11-year-old child, to whom I shall refer as “AC”. On 19 October 2020, his mother (“M”) applied for an order under s8 of the Children Act 1989 authorizing her to accept an inheritance of a share in an Italian property (“the Property”) on behalf of AC following the death of his father (“F”) in 2017. At the time of his death the Property was held in equal legal shares by M and F.
3. F died intestate. Under Italian laws of intestacy and succession, AC is entitled to one half of F’s 50% ownership of the Property. Thus, he will acquire 25% of the whole. The other half of F’s 50% share passes to M, whose ownership increases to 75% of the whole.
4. The Property had been a family holiday home, but since F’s death it is no longer used by M or AC. M now wishes to sell the property and a prospective purchaser has agreed to pay €220,000 (a price which exceeds the valuation evidence obtained from an expert valuer). M will meet the legal costs from her 75% share. Assuming the sale completes at the envisaged price, AC will receive some €55,000 which M intends to invest on his behalf. Importantly, there are no debts which would pass to AC under the inheritance.
5. There are no Respondents to the application as there is no person with any interest in it save for AC, for whom M holds parental responsibility.
6. I have read the witness statement of M which exhibits a comprehensive letter from an Italian notary public setting out clearly and compendiously the applicable Italian law. Ms Penelope Reed QC, who appears on behalf of M, has greatly assisted me with her written and oral submissions.

Essential chronology

7. M and F bought the Property in their joint names on 6 April 2006. On 22 January 2007 they married and on 20 October 2009 AC was born. F was habitually resident in this country when, very sadly, he died in 2017. Letters of Administration were granted to M on 9 May 2018.

Italian law

8. Under Article 581 of the Italian Civil Code, AC is entitled to half of the estate of F situated in Italy. The only asset in Italy is the Property and, as explained above, AC is thereby entitled to half of F’s 50% share.

9. Italian law requires formal acceptance of an inheritance by the heirs. For these purposes, it does not recognise the English law concepts of Letters of Administration, personal representatives, or trust arrangements.
10. The formal procedure under Italian law for M and/or AC to accept their respective inheritances requires:
 - i) Instruction of a notary or court clerk who draws up an inheritance inventory, and a declaration by the heir that the inheritance inventory is accepted; OR
 - ii) The heir to sign a public deed formally accepting his or her share of the estate.
11. In M's case there is no difficulty, and she is entitled to instruct an attorney on her behalf to comply with the formal requirements. She may elect which procedure she follows.
12. By contrast, by Article 2 of the Italian Civil Code a minor is not permitted to accept the inheritance under Italian law. By Article 320 of the Italian Civil Code the formal acceptance must be made by an adult (usually a parent) and authorised by a tutelary judge who makes decisions on behalf of persons such as minors who do not have formal capacity. In the case of a minor, the acceptance can only be under the first of the two prescribed procedures (the inheritance inventory). The tutelary judge must be satisfied that the authorisation is both necessary and in the best interests of the minor. Once this is done, the minor (in this case AC) becomes the legal owner of his inheritance (in this case 25% of the Property).

European law

13. Italian domestic law defers to Council Regulation (EC) No 2201/2003 to determine where jurisdiction lies in authorising a parent to accept an inheritance on behalf of a minor.
14. AC is and was at all material times habitually resident in England. By Article 8(1) of the Council Regulation; "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."
15. Accordingly, the Italian court will not make an order authorising acceptance of the inheritance on behalf of AC as it does not have jurisdiction in matters of parental responsibility. That falls to the courts of this jurisdiction.

English law

16. Thus, the English court has jurisdiction over matters of parental responsibility pursuant to Article 8(1). The question is whether that jurisdiction extends to authorising acceptance by M on AC's behalf of his inherited share of the Property.
17. Section 3 of the Children Act 1989 provides as follows (omitting sub-paragraphs (4) and (5) which are of no relevance to this application):

"3. Meaning of "parental responsibility".

(1) In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.

(2) It also includes the rights, powers and duties which a guardian of the child’s estate (appointed, before the commencement of section 5, to act generally) would have had in relation to the child and his property.

(3) The rights referred to in subsection (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover.”

18. Sub paragraph (1) is very widely drafted. I do not read into it any restriction to its applicability. It is all encompassing and should be construed purposively. Of particular note in this case is the emphasis on responsibilities as well as rights. Thus, M has a clear responsibility under (1) to act in AC’s interests in relation to property to which he is entitled. By (2) and (3) M has not only rights and powers, but also duties to take steps to receive or recover property for the benefit of the child. The wording of (2) and (3) plainly embraces the Property in this case, being a house in Italy in which AC has an entitlement. And in my judgment a purposive reading of subsections (1) to (3) also includes the responsibility and duty of the person with responsibility to take steps which enable the child to receive or recover property in the child’s own name, and not merely enabling the person with parental responsibility to receive or recover property in his or her own name for the benefit of the child. The former is apt for a situation like the one before me, the latter might be apt where the child has a beneficial interest in property by virtue of trust or otherwise as understood at English law.

19. The diligent researches of Ms Reed QC on behalf of M have uncovered only one reported authority which bears on this topic. In **Hays v Hays [2015] EWHC 3825 (Ch)** Master Matthews (as he then was), sitting in the Chancery Division, was faced with a similar factual situation. After the death of her father, and pursuant to French succession law, the minor child held an interest in a French apartment. The child’s mother applied for an order to be appointed as agent for the child in order to enter into a contract for sale. The application was put forward in a number of ways, including as an exercise of parental responsibility under s3 of the Children Act 1989. The Master granted the order sought on the basis of private international law enabling him, sitting in an English court, to apply French law. The application accordingly succeeded. But, and of interest to those who practise in the field of Family Law, he concluded that he had no power to grant the relief sought under the Children Act, saying:

“25. I have no reason to doubt that the Defendant has parental responsibility for Estelle in English law. But I am not aware of any case law or other authority (and none was cited to me) to the effect that s3 authorises the Defendant to dispose of Estelle’s immovable property rights. S3(3) in particular refers expressly to her being able to give a good receipt or sue for property belonging to the minor, as if that might otherwise be in doubt (cf *Re Chatard’s Settlement* [1899] 1 Ch 712). But it is striking that there is no mention anywhere in s3 of disposal, which goes far beyond receipt and recovery. Taken as a whole, I am not satisfied at present that this section confers powers on those exercising parental authority to enter into a contract to sell immovable property on behalf of a minor.

26. This claim is, of course, brought in the Chancery Division of the High Court. All matters under the Children Act 1989 are assigned, by the Senior Courts Act 1981, s61 and Sch 1, to the Family Division of the High Court. So judges in the Chancery Division have little or no experience of applications under this Act. It may simply be my own lack of knowledge”.

20. In this case, I am not presently being asked to authorise M to enter into a contract of sale in respect of AC’s share of the Italian property. I am asked solely to authorise acceptance of his inheritance by her. **Hays v Hays** is therefore not strictly on point and I have no hesitation in concluding that, on the facts of this case, acceptance of inheritance falls comfortably within the s3 definition. It is plainly the receipt or recovery of property to which the child is entitled. Acceptance of inheritance does not amount to a disposal of property which was the s3 issue before Master Matthews.
21. It may be that once the inheritance is accepted, M will apply for authorisation to enter into a contract of sale of AC’s share of the Property, in which case the dicta in **Hays v Hays** will need to be revisited. I have not received full submissions on this point; that will have to await another day. But my initial view is that the Master’s interpretation of s3 was, with respect, too restrictive. If, in this case, M is not authorised to enter into a contract of sale on behalf of AC, then AC will not be able in a meaningful sense to receive or recover his property until he is 18. Of course, he will hold it, but he will be prevented from converting it into other assets which can be managed, invested or deployed in his interests. I would regard a contract of sale in such circumstances as arguably falling within the phrase “entitled to receive or recover”. In any event, subsection (3) states that the rights referred to in subsection (2) “include” the right to receive or recover. The word “include” does not operate as a limit to the powers relating to property, which powers in my provisional view include disposal of property. It offers one particular example of circumstances in which the power may be exercised (probably aimed at trust arrangements commonplace in England but not encountered in many foreign jurisdictions) but does not limit the power to that example. I see no reason why s3, read as a whole, should not be construed more widely to encompass entering into a contract of sale provided, of course, that the welfare checklist and paramountcy principle govern the exercise of that power.
22. Be that as it may, as indicated above **Hays v Hays** does not directly apply to the question before me of accepting inheritance. Should an application in respect of a contract of sale be made I will need to consider the issues raised in **Hays v Hays** at that time.
23. I am told by counsel that there have been a number of cases with facts similar to those before me and before Master Matthews in **Hays v Hays**. Because of the Master’s decision on the unavailability of the s3 exercise of parental responsibility to achieve the desired outcome of a sale of the minor’s property interest, applications of this nature under the Children Act 1989 are not routinely (or at all) made, whether in the Chancery Division or the Family Court. In my judgment, henceforth parties should not be dissuaded from making such applications and in the ordinary course of events they should be made to the Family Court where allocation to the appropriate level of judge can take place in the usual way.

24. I return to the application before me by which I am invited to make a specific issue order under s8 of the Act which, as defined by s8(1), means “an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child”. Thus I must be satisfied that the question which arises before me is an aspect of parental responsibility as defined by s3 and, if so, I must determine the issue having regard to the welfare checklist and the paramountcy principle. For the avoidance of any doubt, the s8 provision, insofar as it is invoked to address an issue concerning the property of a child, does not entitle the court to make financial provision orders; those matters must be litigated under the Matrimonial Causes Act 1973 and/or Schedule 1 of the Children Act 1989.
25. I am entirely satisfied that (i) by Article 8(1) of the Council Regulation, I have jurisdiction to make the order sought, (ii) the specific issue order sought relates to parental responsibility in respect of property of the child and (iii) it is appropriate to make the order. It is plainly in the interests of AC to have the issue of his heirship in Italy resolved to his financial benefit. There is no disadvantage to him in making the order whereas the risk of leaving his heirship status hanging unresolved if the order is not made by me is all too obvious. There are no debts which he will become liable for. The application enables AC to receive property to which he is entitled. M has fully and faithfully discharged her parental responsibility in bringing the application.
26. I therefore make the order sought. Under Italian law, the contract for sale cannot be executed until such time as the inheritances of M and AC are formally accepted. My order should enable AC’s inheritance to be accepted. As with acceptance of the inheritance, I may then be invited to make further orders authorising M to execute the contract of sale on AC’s behalf. I am not asked to make such orders today. The matter shall be referred back to me if orders are sought specific to the sale of the Property.