Potential Curtailment of the English Court's Powers Under Part III MFPA

The recent decision of Moor J in *TY v XA* [2024] EWFC 96 (24 April 2024) has received attention as the first reported MFPA 1984 Part III leave/set aside case since the Supreme Court decision in *Potanina v Potanin* [2024] UKSC 3 (31 January 2024). The judgment contains some helpful clarifications including that applications for leave will now only be refused if the court concludes that the claim would be bound to fail even if the applicant proved all disputed facts in their favour or if the factual basis for the claim is fanciful (para 36), that the test to be performed on a set-aside application is exactly the same as on an initial application (para 37), and that in the absence of consent all future leave applications will be heard on notice to the respondent (also para 37).

What has perhaps gone under the radar is the suggestion made on the respondent husband's behalf that the English family court may be prevented from making a maintenance order under Part III if there is a post-Brexit maintenance agreement or order from another 2007 Hague Convention signatory (para 47). This would include not only all member states of the European Union but also the USA and other countries. Moor J decided that this was a matter for the final hearing and the question of whether or not the German court retained jurisdiction (as was asserted on the respondent's behalf and challenged on the applicant's behalf) would require expert evidence (para 51).

The suggestion that some international conventions may restrict the English family court's ability to make a maintenance order is not new, although until recently the focus had been upon the EU Maintenance Regulation (No. 4/2009).

First, what is meant by *'maintenance'*. Crucially it can extend beyond periodical payments. The leading case is *van den Boogaard v Laumen* (C-220/95) which confirms that any provision designed to enable one spouse to provide for himself or herself will be concerned with maintenance (para

22). It makes no difference whether the payment of maintenance is provided for in the form of a lump sum (para 23). The range of cases which would be impacted is therefore very large. Only those which are *solely* concerned with dividing property between parties would be excluded.

The argument put forward on the respondent's behalf in *TY v XA* is that Art 28 of the 2007 Hague Convention provides that there can be no review of the merits of a maintenance decision or arrangement.

One argument which could be run in the opposite direction is that Chapter IV of the 2007 Hague Convention – which is titled Restrictions on bringing proceedings – sets out circumstances in which maintenance proceedings cannot be brought in a contracting state and is drafted narrowly. It only contains one article (Art 18) which provides that proceedings to modify or make a new maintenance decision cannot (subject to a few exceptions) be brought by a debtor in a contracting state if the creditor remains habitually resident in another contracting state where the original decision was made. If the intention was to prevent maintenance claims being brought where there is a prior maintenance decision in another contracting state in other circumstances, surely that would have been provided for in Chapter IV.

Similarly, when the UK signed up to the 2007 Hague Convention on departure from the EU, s 15 MFPA 1984 (which deals with jurisdiction to bring a claim under Part III) was amended to preclude an application for maintenance by a debtor if there is a prior maintenance decision in another contracting state where the creditor remains habitually resident. Again, if the intention had been to prevent Part III applications from being brought in wider circumstances, one would have expected s 15 to have been amended accordingly.

There is an interesting link with *Potanina v Potanin* where the provisions of the EU Maintenance Regulation (which were incorporated into the MFPA 1984 when those proceedings commenced) could come to the applicant's rescue by preventing the English court from dismissing part of her claim insofar as it relates to maintenance. This issue has been remitted by the Supreme Court to the Court of Appeal and is discussed in more detail in The Potanin Litigation: A Look Ahead.

As the maintenance agreement in *TY v XA* was made before the UK's departure from the EU the 2007 Hague Convention will not be directly relevant in those proceedings and any comments which may be made by made by the court would be *obiter*. It will however be interesting to see – whether in *TY v XA* or another case – how these arguments are received by the court. If they are successful it will substantially curtail the English court's powers under Part III.

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