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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
CHANCERY DIVISION, FAMILY PART
DOCKET NO. FM-13-0477-16

M.K.,

Plaintiff,

v.

T.K.,

Defendant.

APPROVED FOR PUBLICATION

June 29, 2022

COMMITTEE ON OPINIONS

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Decided: August 18, 2020

Lynn E. Staufenberg, for plaintiff (Zager Fuchs, PC, attorneys).

Robin Jill Schneider, for defendant.

ADAMS, J.S.C.

The bulk of the issues raised in the instant Motion and Cross-Motion were resolved on the record on May 1, 2020. The only issues that were not resolved were (i) the enforceability of a child support order entered in the District of Loughre, Ireland (Ireland order) and its impact on child support arrears; and (ii) each party's respective request for counsel fees. This decision will address these issues only.

RELEVANT PROCEDURAL HISTORY

Plaintiff M.K. (Plaintiff) and Defendant T.K. (Defendant) were married on July 19, 1999.[1] Three children were born of the marriage: M.K. (currently twenty (20) years of age), A.K. (currently seventeen (17) years of age) and M.K. (currently fifteen (15) years of age). The parties were divorced on November 21, 2011, by way of judgment of divorce (JOD) entered in the New York State Supreme Court, Westchester County. The JOD incorporated a marital settlement agreement (MSA) between the parties dated September 29, 2011. Relevant to the current issue, the MSA set child support at $1,700 per month.

On March 22, 2013, the parties entered into a post-dissolution modification agreement (PDMA) which provided, among other things, that Defendant shall have legal custody of the children and the children shall reside with her. The PDMA made clear, however, that both parties would be notified and consulted on all matters of importance concerning the children's health, safety, education, religious upbringing, welfare, and vacation/travel plans. The PDMA recognized that Defendant had moved to Monmouth County, New Jersey and had been residing there with the children for more than ten (10) months at the time the PDMA was signed. Plaintiff's monthly child support obligation was not changed by the PDMA.

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[1] The parties and the children are identified by initials to protect confidentiality. R. 1:38-3(d).

On April 30, 2014, Plaintiff was deported to Ireland after being arrested in connection with a domestic violence incident. He stopped paying child support and, accordingly, on September 25, 2015, Defendant filed a Complaint and Certification for Registration of a Foreign Divorce and to Establish Jurisdiction in Monmouth County, New Jersey. Plaintiff did not challenge the exercise of jurisdiction in the Monmouth County Court and has affirmatively participated in court proceedings here since that time.

In late 2015, Defendant filed a motion to enforce the child support obligation. Although Plaintiff was then residing in Ireland, he retained an attorney in the United States and filed a cross-motion seeking to reduce alimony. That motion and cross-motion resulted in an order dated February 7, 2016, issued by Judge Mara Zazzali-Hogan, enforcing the PDMA and denying Plaintiff's application to change custody and reduce support.

Around the same time, in November 2015, the Monmouth County Probation Division commenced proceedings for the international enforcement of Plaintiff's child support obligation in Ireland, where he was then living. A letter dated November 20, 2015, from Alice Baxter, of Ireland's Central Authority for Maintenance Security, acknowledged receipt of the application. Plaintiff claims he submitted tax returns and bank statements to the court in Ireland. For reasons that are not entirely clear from the record, on November

17, 2016, an Ireland court entered an order modifying the original support order and reducing Plaintiff's child support obligation to €500 per month (approximately $556.20). In the meantime, arrears continued to accrue in the United States for the balance of the child support owed under the original JOD.

Plaintiff returned to the United States on February 2, 2019, on a visa. He did not immediately notify Defendant or the children of his return. A year later, on February 13, 2020, Plaintiff filed the instant motion seeking, among other requested relief, to have this court enforce the Ireland order, establish his child support at the rate of $556.20 per month and recalculate arrears (which have continued to accrue at the rate of $1,700 per month despite the Ireland order and currently amount to $55,889 according to Probation records). Conversely, Defendant seeks to have the Ireland order declared null and void and to require Plaintiff to fully pay all arrears owed.

LEGAL ANALYSIS

Enforcement of Ireland order

In this matter, Plaintiff asks the court to enforce the Ireland order that reduced his child support obligation to €500 per month (approximately $556.20). Defendant argues that Ireland had no authority to modify the original support order and, further, that Plaintiff owes arrears for the difference between

what he has been paying pursuant to the Ireland order and what he is required to pay under the original support order.

Enforcement of a support order issued by another country largely depends upon the existence of a reciprocity agreement between that country and the federal or state government pursuant to 45 U.S.C. § 659a. There are also two international treaties governing the enforcement of child support orders: the United Nations Convention on the Recovery Abroad of Maintenance, June 20, 1956, 268 U.N.T.S. 3 (1956 UN Convention) and the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, November 23, 2007, S. Treaty Doc. No. 110-21, 2955 U.N.T.S. 81 (Hague Convention).

The November 20, 2015, letter from Alice Baxter, from Ireland's Central Authority for Maintenance Security, appears to suggest that Ireland acted pursuant to the 1956 UN Convention. The 1956 UN Convention states:

> The scope of this Convention is to facilitate the recovery of maintenance to which a person, hereinafter referred to as claimant, who is in the territory of one of the Contracting Parties, claims to be entitled from another person, hereinafter referred to as respondent, who is subject to the jurisdiction of another Contracting party.
>
> [1956 UN Convention art. 1, ¶ 1].

As the plain language of the 1956 UN Convention makes clear, both the country where the support order was entered and the country where the obligor, or respondent, is now located must be signatories or "Contracting Parties" to the 1956 UN Convention for it to apply. Ireland ratified the 1956 UN Convention on October 26, 1995. However, the United States never ratified the 1956 UN Convention. Accordingly, the 1956 Convention does not govern this matter, despite Ms. Baxter's letter to the contrary.[2]

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[2] Defendant argues that, assuming the 1956 UN Convention applied, Ireland, as the Receiving Agency, lacked the authority to modify the original support order. Specifically, she points to Article 6, paragraph 1 of the 1956 UN Convention which states that the Receiving Agency shall "take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance." 1956 UN Convention art. 6, ¶ 1 (emphasis added). Defendant argues that this language suggests that the role of the receiving country is limited to recovering maintenance and executing orders from the transmitting country. Defendant's analysis is flawed. Article 6, paragraph 3 states:

> Notwithstanding anything in this Convention, the law applicable in the determination of all questions arising in any such action or proceedings shall be the law of the State of the respondent, including its private international law.
>
> [Emphasis added].

This provision was intended to make it clear that "the law of the State of the respondent will apply in the determination of all procedural as well as substantive questions arising in a maintenance action or proceedings." Contini,

The other international treaty governing enforcement and recovery of child support is the Hague Convention. The Hague Convention was adopted on November 23, 2007, and signed by the United States on that same date. However, before the treaty could enter into force in the United States, Congress was required to enact implementing legislation, which it did through the Uniform Interstate Family Support Act (UIFSA).[3] UIFSA provides uniform rules for the enforcement of family support orders and implemented the Hague Convention at the state level. After all of the states in the United States enacted UIFSA, the Hague Convention was ratified by President Barak Obama on August 30, 2016. The instrument of ratification was deposited with the Ministry of Foreign Affairs of the Kingdom of Netherlands (the depository for the Hague Convention) on September 7, 2016. It entered into force in the United States on January 1, 2017. The Hague Convention was ratified by the European Union, of which Ireland is a member, on August 1, 2014. Thus, as of November 17,

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Paolo, The United Nations Convention on the Recovery Abroad of Maintenance, 31 St. Johns Law Review 1, Article 1 (December 1956) (emphasis added). This provision in the 1956 UN Convention suggests that Ireland may have indeed possessed the authority to modify the support order if, under its own substantive law, it found that Plaintiff was entitled to a decrease in child support based upon his then financial circumstances. However, because the United States never ratified the 1956 UN Convention, this analysis is of no moment and does not provide Ireland with the authority to modify the original support order, nor does it require the United States to recognize it.

[3] Codified under New Jersey Law at N.J.S.A. 2A:4-30.124 to -30.201

2016 (the date the Ireland order was entered), Ireland had ratified the Hague Convention and the United States had signed and ratified the Hague Convention (although it was not technically in effect until January 1, 2017).

The letter from Ms. Baxter must have mistakenly referenced the old 1956 UN Convention even though, as of November 20, 2015, the Hague Convention was clearly the treaty in effect in Ireland – as it had been ratified more than a year earlier. Although the Hague Convention was not technically in effect in the United States at the time the request for enforcement was made in 2015, it seems clear that the request was indeed made pursuant to the Hague Convention, by reference to the term "Central Authority" in the Ireland order. "Central Authority" is a defined term under the Hague Convention, which requires each contracting State to designate a Central Authority to carry out the purposes of the Convention. Hague Convention art. 4. The 1956 UN Convention does not use this term of art. In sum, this court is satisfied that the Hague Convention is the treaty that governs the instant matter.

The question thus becomes whether Ireland had the authority, pursuant to the Hague Convention, to modify the original United States support order. The stated purpose of the Hague Convention is to "ensure the effective international recovery of child support . . . [by] providing for the recognition and enforcement of maintenance decisions." Hague Convention art. 1. The state or country

seeking to enforce a support order in another country is known as the "requesting state." Article 6 sets forth the functions of the Central Authorities. Among other things, the function of the Central Authorities is to "facilitate the ongoing enforcement of maintenance decisions, including any arrears." Hague Convention art. 6(2)(e). Notably, this article does not empower a Central Authority to modify a support order, only to enforce and help collect it.

Article 10 of the Hague Convention lists the available applications to a creditor or a debtor in a requesting state. Either the creditor or the debtor has the authority under this provision to seek, among other things: (i) modification of a decision made in the requesting state or (ii) modification of a decision made in a state other than the requesting state. Hague Convention art. 10, §§ 1(e) and (f);2(b) and (c). Importantly, Article 10 explicitly states that, with very limited exceptions, any application made by either a creditor or a debtor (including one to modify an order) "shall be determined under the law of the Requested State." Hague Convention art. 10, § 3 (emphasis added). Further, Article 18 of the Hague Convention places specific limits on proceedings and provides that: "Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made." Hague

Convention art. 18 (emphasis added). Accordingly, if the debtor wishes to make an application to modify a support order, it must be brought in the requesting state and will be governed by the requesting state's law, provided that the creditor (or obligee) still lives in that state. Here, that state is unequivocally New Jersey, where Defendant (the creditor) has continually lived with the children since 2012 and where the New York support order was successfully registered with both parties' consent in 2015. It is therefore beyond dispute that if Plaintiff (the debtor) sought a modification of the support order, he was required to do so in New Jersey.

This conclusion is consistent with the underpinnings of UIFSA which, as stated earlier, implemented the Hague Convention in the United States to provide uniform rules for the enforcement of family support orders and to avoid jurisdictional competition and conflicts. Each state and territory in the United States has adopted UIFSA in accordance with federal mandates. See 42 U.S.C. § 666(f). The most recent version of UIFSA in New Jersey, codified at N.J.S.A. 2A:4-20.124 to -.201, was enacted in March 2016 and thus was in effect prior to the November 17, 2016, when the Ireland order was entered. In broad terms, UIFSA governs jurisdiction over the establishment, modification, and enforcement of a child support order when at least one of the parties to the action in which support is requested lives outside of the state. As succinctly explained

in a dissent by Judge Barbara Byrd Wecker, later adopted by the Supreme Court as law:

> The apparent purpose of UIFSA is not only to establish a means of enforcing a support order when one or both parties have moved from the jurisdiction where the support order was issued, but also to establish ground rules for modifying such an order, and to do so in a way that avoids conflicting orders issued by courts of different states.
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> [Philipp v. Stahl, 344 N.J. Super. 262, 277 (App. Div. 2001) (Wecker, J.A.D., concurring in part, dissenting in part), rev'd on dissent, 172 N.J. 293 (2002)].

UIFSA specifically states that

> A tribunal of this State that has issued a child support order consistent with the law of this State has and shall exercise continuing exclusive jurisdiction to modify its child support order if the order is the controlling order and: (1) at the time of the filing of a request for modification this State is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or (2)… the parties consent in a record or in open court that the tribunal of this State may continue to exercise jurisdiction to modify its order.
>
> [N.J.S.A. 2A:4-30.133(a)].

Conversely, the state that issued the child support order may not continue to exercise jurisdiction to modify the order if (1) all parties consent to the jurisdiction of another state; or (2) its order is not the controlling order. N.J.S.A.

2A:4-30.133(b). The statute then goes on to specifically explain how to determine which child support order is the "controlling" child support order:

> a. If a proceeding is brought under this act and only one tribunal has issued a child support order, the order of that tribunal controls and shall be recognized.
>
> b. If a proceeding is brought under this act, and two or more child support orders have been issued by tribunals of this State, another state, or a foreign country with regard to the same obligor and same child, a tribunal of this State having personal jurisdiction over both the obligor and the individual obligee shall apply the following rules and by order shall determine which order controls and shall be recognized:
>
> (1) If only one of the tribunals would have continuing, exclusive jurisdiction under this act, the order of that tribunal controls.
>
> (2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this act:
>
> (a) An order issued by a tribunal in the current home state of the child controls; or
>
> (b) If an order has not been issued in the current home state of the child, the order most recently issued controls
>
> (3) If none of the tribunals would have continuing, exclusive jurisdiction under this act, the tribunal of this State shall

> issue a child support order, which controls.
>
> [N.J.S.A. 2A:4-30.135(a) and (b) (emphasis added)].

The filing of a petition to enforce a support order in a non-issuing state does not divest the issuing state of jurisdiction or constitute a consent to transfer jurisdiction to the receiving state. Teare v. Bromley, 332 N.J. Super. 381, 389-90 (Ch. Div. 2000). Further, the issuance of an enforcement order in another tribunal does not deprive the issuing state of its continuing exclusive jurisdiction. Philipp, 344 N.J. Super. at 289. Finally, the mere fact that another state or tribunal has issued a subsequent order does not divest the initial state of continuing jurisdiction. See, e.g., Ibid. (concluding that New Jersey lacked jurisdiction to modify Georgia support order despite the fact that New Jersey had issued several intervening orders because no New Jersey orders substantively modified the support obligation); Teare, 332 N.J. Super. at 390 (holding that New Jersey controlled child support order, despite more recent directive issued in Maryland, because Maryland lacked jurisdiction to modify original order); Banks v. Banks, 221 N.J. Super. 282, 285 (App. Div. 1987) (rejecting Tennessee order that modified New Jersey order under predecessor law to UIFSA).

Applying UIFSA to the current matter, it is clear that the original child support order issued in New York in 2011, and registered in New Jersey in 2015, is the controlling order. It is undisputed that Defendant and the children have resided continuously in New Jersey since 2012. Plaintiff lived in Ireland for a period of time from 2014 to 2019, but Defendant and the children never left New Jersey. The New York child support order was properly registered in New Jersey in 2015, and both parties consented to the jurisdiction of the New Jersey courts – in Plaintiff's case by availing himself of the New Jersey courts and filing a cross-motion seeking to modify the support order in 2015. See Lall v. Shivani, 448 N.J. Super. 38, 49, n.5 (App. Div. 2016) (when both parties appeared in New Jersey court it was deemed consent to New Jersey's jurisdiction). He never objected to the registration of the child support order in New Jersey nor contested jurisdiction in New Jersey. To the contrary, Plaintiff hired an attorney in New Jersey, filed his cross-motion in New Jersey and consented to New Jersey's jurisdiction over this matter all while he was still in Ireland. He has since returned to the United States and now resides in New Jersey. Accordingly, there can be no doubt that New Jersey has continuing exclusive jurisdiction to modify the child support order under UIFSA and that New Jersey has personal jurisdiction over both parties.

Further, since there are competing orders from two separate tribunals, the court must apply the factors set forth in N.J.S.A. 2A:4-30.135(b) to determine which one controls and which order will be recognized. Under subpart one (1) of this provision, if only one tribunal has continuing, exclusive jurisdiction under the act, then the order of that tribunal controls. As set forth above, only New Jersey has continuing exclusive jurisdiction and, accordingly, the New Jersey order controls. Indeed, Plaintiff does not even live in Ireland anymore; he is back living in New Jersey. Even if New Jersey did not have continuing exclusive jurisdiction, under subpart two (2), the order issued by the current home state of the child controls. Again, the home state of the children is indisputably New Jersey. Accordingly, the governing order is the original New York order, subsequently registered in New Jersey, that set child support at $1,700 per month. Under UIFSA, New Jersey has exclusive jurisdiction to modify the support order. It has never done so, and child support therefore remains at $1,700 per month. Ireland had no authority to modify that order and, therefore, the 2016 Ireland order reducing Plaintiff's child support obligation is void ab initio and will not be recognized by this court.

For the foregoing reasons, the Ireland order is declared void. Plaintiff owes child support arrears equal to the balance between the amount he actually paid and $1,700 per month. According to Probation's records, Plaintiff's current

arrears are $55,889. [At the court's direction, the published version of this opinion omits a portion of this paragraph, which discusses credits towards arrears. R. 1:36-3]. Going forward, Plaintiff's child support obligation remains $1,700 per month, payable through Probation.

Counsel Fees

The court has the authority to award counsel fees in family actions, pursuant to R. 4:42-9(a)(1), N.J.S.A. 2A:34-23, and R. 5:3-5. An application for counsel fees must be supported by an affidavit of services. R. 4:42-9(b). The affidavit of services must state that the fee is reasonable and support that assertion by providing the information set forth in R.P.C. 1.5(a):

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) whether the fee is fixed or contingent.

In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors as enumerated in R. 5:3-5(c):

> (1) The financial circumstances of the parties;
> (2) The ability of the parties to pay their own fees or to contribute to the fees of the other party;
> (3) The reasonableness and good faith of the positions advanced by the parties;
> (4) The extent of the fees incurred by both parties;
> (5) Any fees previously awarded;
> (6) The amount of fees previously paid to counsel by each party;
> (7) The results obtained;
> (8) The degree to which fees were incurred to enforce existing Orders or to compel discovery; and
> (9) Any other factor bearing on the fairness of an award.

In addition, the New Jersey Supreme Court pronounced in Mani v. Mani, that, in awarding counsel fees, the court must consider whether the party requesting the fees is in financial need, whether the party against whom the fees are sought has the ability to pay, the good or bad faith of either party in pursuing or defending the action, the nature and extent of the services rendered, and the reasonableness of the fees. 183 N.J. 70, 94-95 (2005) (emphasis removed) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)). Notably, bad faith, in the context of counsel fee awards, has been construed to signify that a party acted with a malicious motive, so as to be unfair, and to use the court system

improperly to force a concession not otherwise available. Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992).

Here, the court will deny both parties' respective requests for relief without prejudice. The court does not believe that either party submitted their applications in bad faith. Both parties concede that Plaintiff paid his child support obligation of €500 per month pursuant to the Ireland order. Plaintiff certified that he believed this was the governing order and he complied with it. While Plaintiff's conclusion was ultimately wrong, the court cannot find that Plaintiff's reliance on the Ireland order was in bad faith. Further, the bulk of the remaining issues raised in the motions are being sent to mediation or were resolved by consent, and thus were not addressed by the court. Finally, the court does not have adequate information before it to assess the parties' relative financial circumstances pursuant to R. 5:3-5(c). Neither party submitted a Case Information Statement. The court also recognizes that Plaintiff will owe significant arrearages by virtue of this order and does not believe it would be equitable to impose an additional financial burden on him at this time by adding counsel fees. Moreover, the court notes that, in connection with this motion, the parties consented to the sale of a jointly owned property in Ireland. Once sold, this will provide each party with a significant sum of money. Thus, both parties

can afford their respective attorney's fees. For these reasons, the parties' applications for counsel fees are denied.