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FCMP 184 / 2014

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FAMILY COURT
MISCELLANEOUS PROCEEDINGS NO. 184 of 2014**

IN THE MATTER OF CID, a girl born on
the XX February 2007 and RSD, a boy
born on the XX November 2009

and

IN THE MATTER OF an application
under section 10 of the Guardianship of
Minors Ordinance. Cap. 13

BETWEEN

EMD Applicant

and

MAM Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to
Public)

Dates of Hearing: 27 August and 1 September 2014

Date of Ruling: 26 September 2014

RULING
(Interim custody and care and control)

Introduction

1. This is an application by a father for custody and care and control and interim custody and care and control of the two children of the family, a girl named C who is now aged 7 ½ and a boy named R, who will be 5 years old in November.

2. I should say at the outset that I am extremely concerned by this application and the ramifications that arise from it.

Background

3. In essence it seems from the papers that the father removed the children from their home in Brazil, without first seeking the leave of the Brazilian courts to do so and without obtaining the consent of the mother. This followed a three year legal battle, where the mother, who is Argentinean, did exactly the same thing to the father. According to the father's affidavit the mother removed the children from Brazil on the 8 October 2011 without first obtaining an order from the court, or his consent. The children would have been very young at the time. C would have been 4 years and 8 months and R not yet 2 years of age. According to the father, litigation then ensued more or less continuously for the next three years. He said that during that time he did not have any physical access to the two children for 2 ½ years and in addition there was no telephone contact for 18 months. Eventually the children were returned to Brazil under the Hague convention and the court in Sao Paulo heard the matter substantively. On the 5 June 2014 the court made an order, which appears to be by consent as follows:-

A	Parties agreed as follows: (1) Defendant will begin to live in a	A
B	permanent basis in the real estate located at the Rua XXX, X	B
C	floor, which is with furniture, the plaintiff E assuring her stay in	C
D	the place. It is registered that plaintiff E lives (and will	D
E	continue living in a permanent basis) in the same floor no. 1	E
F	(middle floor). Plaintiff E agrees that the defendant M receives	F
G	visits of her relatives in her real estate, without living in a	G
H	permanent basis in the place; (2) During four months, the	H
I	custody of the minors C and R will be carried out by the	I
J	plaintiff E, and the children will live with the father in the	J
K	middle floor. During this period the children will remain	K
L	with the mother every Wednesdays, and the mother will take	L
M	away them in the school. The stay overnight it is authorize,	M
N	the mother must carry them directly to the school Thursday. (3)	N
O	From the fifth month the custody of the minors will be	O
P	shared. The minors will continue to live in the same	P
Q	address but thenceforth the visits will be free, because the	Q
R	parties live in the same address, at once being agreed that the	R
S	children will sleep Mondays and Wednesdays in the father's	S
T	home and Tuesdays and Thursdays in the mother's home.	T
U	(4) Parties agree that the children will remain one weekend	U
	with each parent, who must take them away Friday in the	
	school, and carry them directly to the school Monday. (5)	
	Irrespective of the visit regime already agreed, the mother is	
	authorized to carry them to the school, agreeing to be	
	accompanied by the father whenever it is possible. (6) Plaintiff	
	E will pay to the defendant M an alimony during four months,	
	consisting of water, electrical power internet, in addition to the	
	amount of one thousand fifty hundred Reais (R\$ 1,500.00)	
	After four months, the plaintiff E will be automatically exempted	
	of the alimony owed to the defendant M. (7) Plaintiff E	
	undertake to pay all expenses related to the minors, such as	
	school, food, housing, clothes, health, leisure, etc. (8) Parties	
	agree in participating of psychological treatment with the minors,	
	undertaking to make appointments with the psychiatry and	
	neurologist DE, which will guide them on the best treatment to	
	be followed by the family. Plaintiff E will pay the amount of	
	the Doctor and later treatment. (9) Parties agree that in the	
	event of they may court or establish a stable union or marriage	
	with third parties they shall leave the house in which they live,	
	and the children will remain in the house of other parent, but	
	obviously will have renegotiation related to the visits. (10)	
	Parties further agree on the divorce, and the Honorable Court "a	
	quo" will expedite the respective annotation order. (11) By this	
	agreement, the incidental protective order of provisory custody,	
	the alimony suit, this interlocutory appeal as well as the	
	provisional remedy of separation of bed and board and the	
	provisional remedy of consent supply and the parental	

disposition suit are extinguished. It is declared that the questions hereof object of agreement will be no longer discussed in the divorce suit, which is already ordered, and the suit of lower court must continue related to the discussion of the partition of properties only, both located in Brazil and in Argentina, including those object of simulation action in that country and here. (12) The eventual remaining costs of the suits hereby extinguished will be supported by the plaintiff E as well as the fees of his attorney. (13) The case record returning to the lower court, the Honorable Court must “a quo” expedites the respective certificate of fees in favour of the defendant’s attorney, with the respective arbitration, in each suit. (14) **Parties waive to the right to present any appeal against this agreement.**

4. From this it would appear that the father was initially given sole custody and care and control of the children for four months only with access to the mother on every Wednesday. Thereafter the parties were to have joint custody and shared care, with the children spending Mondays and Wednesdays with the father and Tuesdays and Thursdays with the mother. Weekends were to be alternated. The parties were living on different floors of a three storey house, which made this arrangement feasible.

5. According to the father there was an incident on the 28 June 2014 following this judgment which led to him being physically assaulted by the mother and threatened by his former mother in law. Photographs that have since been exhibited to a third affidavit show some evidence of scratches and bruising. He also says that he has received death threats – but no evidence has been produced in support of this assertion. 5 days later, on the 3 July 2014 the father removed the children from Brazil and brought them to Hong Kong. It seems that the mother has not had any contact with the children since their removal to Hong Kong.

6. On the 2 July – the day before the father left for Hong Kong the Prosecution office in Sao Paulo issued a document in which it is stated as follows:-

Honorable Judge

The agreement entered into by the parties in 2nd Degree, in other case, lasted few time.

There are not conditions to live in the same place, in different floors.

My opinion is for interlocutory relief, authorizing plaintiff to leave the place together with the minors, by fixing the visits for the mother/grandmother from the mother's side in the public visit place, to avoid new conflicts.

In the event of this is not understood so, I strive for a conciliation hearing.

I wait service of process.

7. A number of points arise from this sequence of events that need to be noted as follows:-

a) the father was seemingly well aware of his obligations under the Hague Convention and the need to obtain a court order prior to permanently relocating with the children to Hong Kong.

b) The document from the Prosecution office only authorized the father to leave the property in which he was living with the children. The expectation was that visitation between the mother/grandmother and the children would continue. This document does not give the father permission to relocate.

8. The father initially sought a standalone order for interim custody and care and control and final custody and care and control citing

A that this is in the best interests of the children. For the avoidance of doubt,
B in my view it is never in the best interests of children to be unilaterally
C removed from their place of habitual residence and prevented from having
D contact with their other parent. This was the case when the mother
E removed the children to Argentina without the husband's consent and it
F remains the case now when the father has removed the children to Hong
G Kong without the mother's consent. I am also acutely aware that the father
H would have been a virtual stranger to his children following their three
year stint in Argentina and that to be removed from their mother after only
living permanently with their father for three weeks or so is likely to cause
them further distress and possible psychological harm.

I 9. I indicated initially that at most I might be prepared to make a
J mirror order based on the Brazilian order. A draft to that effect has been
K prepared by the father's lawyers. The difficulty with that is that it is no
L longer reflective of the reality given the fact that it presupposed a situation
where the children would be living in close proximity to both parents.

M 10. The father says that he needs an order from the court for
N Immigration purposes and in order to enrol the children in school. With
O respect this is something that he should have thought about before.

P 11. My other difficulty however is that the mother has not
Q responded to these proceedings at all. I don't know where she is or what
R her intentions are. Thus my not making any order at this juncture may also
place the children in a completely untenable position.

12. Consequently and somewhat reluctantly I will make an interim order only granting the parties interim joint custody with interim care and control of the children to the Applicant. This should not be seen in any way to prejudice any application that the mother might wish to make either in this court or the High Court for the return of the children to Brazil. The Respondent mother shall have interim reasonable access to the children to include access by telephone and skype in the meantime.

13. There shall be liberty to apply on an urgent basis. All reasonable steps shall be taken to serve this Ruling and related order on the Respondent. An affidavit of service is to be filed at court within the next 14 days. Costs shall be reserved.

(Sharon D. MELLODY)
District Judge

Ms Caroline Langley instructed by Haldanes for the Applicant
The Respondent was not represented and did not appear