Neutral Citation Number: [2023] EWHC 1251 (Fam)

Case No: FD22P00686

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

C	**Applicant**
- and -	
D	**Respondent**

- -
- -

The Applicant appeared in person assisted by a McKenzie Friend
The Respondent appeared in person

Hearing dates: 10 February 2023

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with a series of applications in respect of Y, born in April 2013 and now aged nearly 10 years old. Those application are made by Y's father, C who I shall refer to as 'the father'. The father appears in person with the assistance of his brother acting as a McKenzie Friend. In the particular circumstances of this case, I permitted the father's brother, W, to make oral submissions to the court for the father, which he did appropriately. The mother of Y is D, who I shall refer to hereafter as the 'mother'. She too appeared in person at the hearing.

2. The applications made by the father are articulated in a Form C66 and expanded upon in the extensive documents filed by the father in support of that application form. Those applications with respect to Y are expressed to be as follows:

   i) A "temporary return order" under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and/or the inherent jurisdiction of the High Court.

   ii) Wardship.

   iii) A declaration with respect to "relevant litigation events" in this jurisdiction.

   iv) A direction that the applications be heard "sequentially and in the same court" as the re-hearing of the father's appeal against the registration of a child support order made in the United States.

3. The reference to the re-hearing of the father's appeal against the registration of a child support order made in the United States relates to a separate application before this court by which the father appeals against the registration of a Maintenance Order made on 11 February 2019 and sealed on 3 April 2019 by the relevant District Court in Colorado and latterly upheld on appeal by the Colorado Court of Appeals on 12 May 2022. The father's appeal from the registration by the court officer at the Maintenance Enforcement Business Centre at Bury St Edmunds was originally heard by the Magistrates' Court and refused. The father thereafter sought to appeal that decision to a circuit judge. The decision of His Honour Judge Booth that he had no jurisdiction to hear an appeal was itself the subject of a further appeal by the father to the Court of Appeal, which appeal was allowed (see *D (A Child) (Appeal From the Registration of a Maintenance Order)* [2022] EWCA Civ 641). The matter was thereafter remitted to me for allocation and I allocated the re-hearing of the appeal to myself. The appeal is currently stayed pending the outcome of a further application by the father to the Court of Appeal for permission to appeal the decision of this court to refuse him permission to adduce fresh evidence on that appeal.

4. The applications before the court in respect of Y are resisted by the mother, who invites the court to dismiss each of the applications for want of jurisdiction. The mother submits that Y is now habitually resident in the jurisdiction of the United States of America and that this court accordingly has no jurisdiction to grant the orders sought by the father in respect of Y. Whilst the issue before this court is, at its heart, one of jurisdiction, it is necessary to set out the background to this matter in

some detail in order to provide the proper context in which the question of jurisdiction falls to be addressed.

BACKGROUND

5. The background to this matter is, to say the least, involved. The parents married in the United States in September 2012. The mother is a US Citizen. The father is a British Citizen and holds a US 'Green Card'. Y was born in April 2013 in the United Kingdom and holds dual British and United States citizenship. The parties marriage broke down during the course of 2015 and they separated on 10 July 2015.

6. Following the breakdown of the parties marriage, there has been extensive and continuing litigation between the parents on both sides of the Atlantic for a period now approaching 8 years. Whilst this litigation has extended, as I have noted, to the marriage and consequential financial matters, for the purposes of the current applications before the court it is necessary to deal in detail only with the proceedings that have concerned the welfare of Y.

7. On 10 July 2015, the father made a without notice application to the High Court for an order preventing the removal of Y from the jurisdiction of England and Wales, the father alleging that the mother had attempted to abduct Y from the jurisdiction. On that date, Newton J granted a passport order.

8. On 6 August 2015, the mother made an application pursuant to s.8 of the Children Act 1989 for permission to permanently remove Y to the United States. That application was granted on 11 January 2016 by HHJ Wallwork. During the course of those proceedings, the father elected not to pursue a finding of child abduction against the mother. Whilst HHJ Wallwork was not in the event required to consider such a finding, he indicated his view that the circumstances in July 2015 went "against any consideration that there was an abduction in the classic sense" (this conclusion was later noted by the Colorado Court of Appeals in its judgment dated 22 May 2022). In her judgment of 15 August 2017, to which I will come below when considering the divorce proceedings, HHJ Bancroft observed that the father was "overwhelmed by the need to prove [the wife] attempted to abduct [Y]."

9. The final order of HHJ Wallwork gave the mother permission to remove Y from England and Wales on or after 24 January 2016 to live permanently in the United States. The order further required that, before the removal of Y from the jurisdiction, the mother must obtain and deliver to the court and the parties an order from a court in Colorado reflecting the terms of the order of HHJ Wallwork (a so called 'mirror' order).

10. The order of HHJ Wallwork also set out the following contact regime in a schedule to that order providing for contact between the father and Y following Ys' permanent removal to the United States:

    i) The mother is to make the child available for Google Hangouts with the father on a regular basis for between 5 and 15 minutes every other day.

ii) The father is to make the child available for Google Hangouts with the mother on a regular basis during the periods the child spends time with the father in the United Kingdom for between 5 and 15 minutes ever other day.

iii) The Mother is to make the child available for spending time with the Father in Colorado for extended periods of between 3 to 4 weeks on two occasions during the year.

iv) The Mother is to make the child available for spending time with the Father in the UK for extended periods a minimum of two weeks on one occasion during the year.

v) The Mother is to make the child available for spending time with the Father from when the child is 4 years old (after April 2017) for extended periods of between 3 and 4 weeks on two occasions during the year in the USA comprising a pattern of up to seven days with the father followed by one day back with the mother followed by a further seven days with the father.

vi) The Mother is to make the child available for spending time with the Father from when the child is 4 years old (after April 2017) for extended periods of a minimum of 2 weeks once a year in the UK comprising a pattern of up to seven days with the father followed by one day back with the mother followed by a further seven days with the father.

vii) The Mother is to make the child available for spending time with the Father from when the child is 5 years old (after April 2018) for up to 14 days followed by a couple of days back with the Mother and then for a further period of up to 14 days.

11. In accordance with the terms of the order of HHJ Wallwork, the mother commenced an application in the relevant County District Court in Colorado (hereafter 'the District Court') to seek an order reflecting the terms of the order of HHJ Wallwork. By an order dated 27 January 2016, HHJ Wallwork recorded that the father did not oppose the District Court accepting jurisdiction in respect of Y and that he agreed to waive his response period of 35 days service in order to allow registration of the child arrangements order to commence without delay. Within this context, the father was directed to complete the required waiver form by no later than 2 February 2016. The order of 27 January 2016 repeated the permission to the mother to remove Y from the jurisdiction of England and Wales.

12. However, a further order of HHJ Wallwork also dated 27 January 2016 records that the father had also by that date issued (a) an application for permission to appeal the order of 11 January 2016, (b) an application for a stay of that order, (c) an interim child arrangements order providing that Y live with him, (d) a prohibited steps order preventing the removal of Y from the jurisdiction, (e) the continuation of the passport orders, (f) for permission for W to act as his McKenzie Friend and (g) for release to him of all documents from his solicitors. Within this context, on 27 January 2016 HHJ Wallwork also refused permission to appeal, refused the application for a stay and listed the father's additional interim applications for directions. On 3 February 2016, HHJ Wallwork declined to deal with any of those additional interim applications in circumstances where the father had by that date applied to the Court of

Appeal for permission to appeal. On 3 March 2016, by order of Black LJ (as she then was), the Court of Appeal refused the father permission to appeal the orders of HHJ Wallwork.

13. The Child Arrangements Order made by HHJ Wallwork on 11 January 2016 was registered for enforcement in the District Court at the beginning of February 2016, the father having provided the required waiver form as directed in the first order of 27 February 2016. The father alleges that the mother has subsequently and persistently breached the child arrangements order by refusing to facilitate contact between himself and Y. The last time the father had direct contact with Y was in February 2019.

14. On 22 September 2016, the mother made an application to the District Court for an order restricting the Father's access to Y when he was present for ordered parenting visits in Colorado. That application was refused, the court holding as follows:

> "Both parties should be mindful of the minor child's needs and should act in a fashion that minimises the impact of their disagreements on Y. They should attempt to work together to lessen the child's stress and anxiety. The court finds however, that the petition fails to set forth an adequate basis to restrict parenting time and it is denied."

On 29 September 2016 the mother applied for reconsideration of the decision of the 22 September 2016. That motion too, was denied.

15. In January 2017, the Father made an application in the District Court to enforce the Child Arrangements Order made on 11 January 2016 and registered for enforcement in the District Court. On 21 February 2017, the mother cross applied to the District Court to restrict the Father's access to Y. Following a hearing on 22 February 2017, the court found the mother to be in violation of the terms if the child arrangements order and made orders pursuant to § 14-10129(2) CRS regarding supplementary contact in response to the violations of the order.

16. Within short order, the mother issued two further motions in the District Court seeking to replace herself with her mother in accompanying Y to England on visits in compliance with the child arrangements order. That application was granted on 31 July 2021. The order contains the following finding as to jurisdiction:

> "The Court finds that the minor child, Y, is a habitual resident of the United States in that she has been residing in Colorado since March 2016 with the permission of [the Family Court], and pursuant to his order regarding Child Arrangements issued on January 11, 2016 and filed in this court on January 22, 2016. This Court has taken jurisdiction over matters concerning the minor child."

17. The father had contact with Y in England in 2017 and 2018, with Y accompanied by the maternal grandmother. On 16 August 2017, the mother applied to the District Court for an order sealing the case to prevent the public disclosure of information from the proceedings. That motion was refused on the grounds there was not factual or legal basis for sealing the case.

18. On 17 January 2019, the District Court issued an order requiring the father to attend in person a hearing on 11 February 2019 regarding child support. The father did not attend that hearing and instead sent an email explaining his absence therefrom. In response, and in addition to making the orders for child support which are the subject of separate litigation in this jurisdition in respect of registration, on 11 February 2019 the District Court Judge issued a bench warrant for the father due to his failure to attend the hearing as ordered. The District Court Judge also made an interim order giving sole custody of Y to the mother pending resolution of the warrant and further ordered that Y's school must not permit her release to the father absent a further order of the court.

19. In his subsequent appeal to the Colorado Court of Appeals with respect to the child support order made by the District Court Judge on 11 February 2019, the father also argued that the District Court had erred in issuing a bench warrant on that date and in giving the mother temporary custody of Y pending resolution of that warrant. However, the Colorado Court of Appeals considered that it lacked jurisdiction to consider those arguments in circumstances where a temporary custody order was not a final order for the purposes of appeal and dismissed that part of the appeal for want of jurisdiction, reasoning as follows:

> "When father failed to appear as ordered at the February 2019 hearing, the court entered a bench warrant for his arrest and entered a temporary custody order to remain in place pending resolution of the warrant. The bench warrant required father to return to court within fourteen days, at which time the court would presumably enter further orders. The temporary custody order appears to have been entered without reference to any applicable standard, which is troubling. See § 14-10-129(1)(a)(I), (b)(I), CRS 2021 (providing that the court may make or modify an order granting or denying parenting time whenever such an order would serve the best interests of the child, except that the court shall not restrict a parent's parenting tie rights unless it applies the endangerment standard). Nevertheless, neither of these orders completely determined the rights and liabilities of the parties therefore are not final for appellate purposes. We dismiss this portion of father's appeal. See *State ex rel. Suthers,* 252 P.3d at 10."

20. In April 2019, the father issued a motion to disqualify the District Court Judge from dealing with the proceedings. The court does not have a copy of the motion or the Judge's decision thereon. However, a subsequent judgment from the Colorado Court of Appeals, to which I will come below, states that the father's affidavit in support of the motion to disqualify alleged that the District Court Judge had refused to address what the father contended was the mother's purported fraud on the court, had failed to permit his case to be allowed any judicial consideration, had engaged in an unfair process, had ignored child support proceedings in England and had manifested bias against him. The motion to disqualify was dismissed, as was a motion for reconsideration.

21. On May 9 2019, the District Court Judge made an order of his own motion requiring the parties to adhere strictly to the rules for the format and length of pleadings, motions and other submissions, noting that both parties regularly ignored these requirements. In the circumstances, the District Court Judge required both parties to

file by way of hand delivery at the clerk's office, by mail or electronically via an attorney. The order expressly prohibited either party filing by email. The District Court Judge further directed that all submissions must comply with the rules of civil procedure applicable in Colorado and that those that did not would be rejected.

22. The father thereafter made two further applications for the District Court Judge to disqualify himself from dealing with the proceedings, the first in June 2019 and the second on 10 December 2019. Both motions were again dismissed by the District Court Judge. Again, the court does not have copies of those motions or the decisions in respect of them. Once again however, the subsequent judgment from the Colorado Court of Appeals states that the June 2019 application relied on a transcript of the hearing of 11 February 2019 to raise allegations of improper conduct on the part of the judge and that the December 2019 motion to disqualify ran to 180 pages that incorporated the arguments set out in the first two motions and alleged that the judge continued to exhibit bias against the father. Within this context, the Colorado Court of Appeals noted as follows regarding the context of the third motion to disqualify:

> "[13] Father's third recusal motion alleged that the judge had (1) improperly commented on his mental health outside of his presence; (2) commented that father was 'difficult'; (3) complained about the burdensome and voluminous record; (4) entered a bench warrant against him without reason; (5) entered orders that deprived him of court-ordered parenting time; (6) failed to extend timeliness deadlines under the rule of civil procedure to account for postal delays between Colorado and England; (7) denied his fee waiver requests; and (8) denied or dismissed motions without explanation."

23. Also on 10 December 2019, the father sought to enforce parenting time pursuant to the registered child arrangements order of 11 January 2016. That motion was dismissed by the District Court on 13 December 2019, prior to the District Court Judge determining the father's third motion to disqualify, the order of the District Court Judge dismissing the father's application to enforce the child arrangements order being in the following terms:

> "On February 11, 2019, the Court issued a warrant for the arrest of Respondent, [C], for his failure to appear at a hearing after having been ordered by the Court to do so. The Court further ordered that, until the warrant is resolved, it is in the best interests of the child not to be with Respondent in unsupervised parenting time lest he be arrested on the outstanding warrant. Since that time, the Court therefore has suspended all unsupervised parenting time of the child with Respondent.
>
> For the foregoing reasons, the attached motion is DENIED.
>
> The Court reiterates its prior orders: Respondent may have only supervised parenting time with the child. Such supervision must be with a professional supervisor at the Respondent's expense. Such supervision must be in [X] County, Colorado."

24. In addition, and by the court's own motion, on 16 December 2019 the District Court Judge made an order preventing the father from proceedings *pro se* (i.e. in person)

and requiring him to file all further submissions through an attorney. The grounds for the orders preventing the father acting otherwise than by an attorney and stipulating that *pro se* filings would be rejected were stated to be as follows:

> "This matter comes before the court of its own Motion. Respondent, [C], has inundated this Court with prolix, repetitive, redundant, frivolous, meritless, and vexatious motions. The Court's findings in this regard are set forth in several orders in the record. The Court further finds that Respondent's repeated filings are designed to thwart this Court's orders, to intimidate the Court, and to intimidate and exhaust Petitioner. The Court has been very patient with Respondent. However, because Respondent has abused the privilege of appearing in the Court *pro se*, the Court not enters the following prophylactic orders".

25. The father appealed to the Colorado Court of Appeals with respect to the refusal of father's motions in April 2019, June 2019 and 10 December 2019 seeking disqualify the District Court Judge from dealing with the proceedings, the refusal of his 10 December 2019 motion to enforce parenting time and the order made by the court's own motion of 16 December 2019 preventing the father from proceedings *pro se* and requiring him to file all further submissions through an attorney. This court has a copy of the judgment of the Colorado Court of Appeals delivered on 12 May 2022.

26. The Colorado Court of Appeals declined jurisdiction in respect of the refusal of the motions to disqualify in April 2019 (together with the refusal of the motion to reconsider) and June 2019 on the grounds that the appeals were out of time. With respect to the third refusal of the motion to disqualify, the Colorado Court of Appeals held that, taking the father's allegations to be true, none of them amounted to bases on which to disqualify a judge. With respect to the discussion by the District Court Judge of the father's mental health, the Colorado Court of Appeals held that:

> "[17] Finally, the court's discussion with mother about father's mental health was improper, but it does not require disqualification. We have read this exchange and disagree that the comments reflected a "bent of mind" that would have prevented the judge from dealing fairly with father."

27. With respect to the decision of the District Court Judge to deny the father's motion to enforce parenting time, the Colorado Court of Appeals determined that the District Court Judge had erred in deciding the motion to enforce parenting time *before* dealing with the third motion to disqualify. However, the court declined to disturb the decision as to enforcement of parenting time itself for the following reasons:

> "[22] The court should have suspended the proceedings or assigned another judicial officer to review the enforcement motion while the recusal motion was pending. Even so, the court's erroneous decision to rule on the enforcement order whilst the third recusal motion was pending did not affect father's substantial right or affect the outcome of the case, and any error is harmless as the court ultimately denied the recusal motion on its merits. See od.; CAR 35(c).
>
> [23] We do not consider, however, whether the court erred in denying the enforcement motion. A motions division of this court ordered that father

> may not appeal from that order because it is based on the terms of a temporary custody order and is not final for appeal purposes. See *In re Marriage of Rappe*, 650 P.2d 1352, 1353 (Colo. App. 1982) (holding that a temporary custody order is not final for purposes of appeal). Whilst we are not bound by those divisions' determination of finality, see *Allison v Engle*, 2017 COA 43, 22, we agree with and following that division's rationale and dismiss this portion of father's appeal.
>
> [24] We also decline to accept father's urging that the enforcement order is a final, appealable order because its reliance on the resolution of the bench warrant means it has the effect of being indefinite. The resolution of the bench warrant is squarely in father's control, as the court ordered him to return to the court within fourteen days of its execution. This we dismiss the portion of the father's appeal seeking substantive review of the enforcement order and bench warrant."

28. The father was however, successful in persuading the Colorado Court of Appeals that the District Court Judge erred in making the order preventing the father from acting *pro se* in the terms that he did. In this regard, the Colorado Court of Appeals held as follows:

> "[30 The record unmistakably supports the court's finding that father has abused the judicial process by submitting 'prolix, repetitive, [and], redundant' filings. The overwhelming majority of the filings in the nearly 5,000 page court record came from the father, which refutes his claim that his is merely responding to mother's filings. As just one example, father's three CRPC 97 recusal motions totalled more than 350 pages, with most of the content consisting of arguments already raised and resolved by other orders in the courts for both Colorado and the United Kingdom. It is, therefore, apparent from the record that the father's 'repeated filings are designed to thwart the [c]ourt's orders, to intimidate the [c]ourt, and to intimidate and exhaust [mother].' We note that at least one United Kingdom court reached a similar conclusion, surmising from the 'significant amount of litigation' father 'has an agenda to make these divorce proceedings as drawn-out as possible.' Accordingly, we conclude that the court did not abuse its discretion in entering the injunction.
>
> [31] We further conclude that the order is narrowly tailored to achieve its intended results: 'protect [mother] from having to respond to meritless and vexatious filings'; 'eliminate the need for court staff to spend unwarranted time collecting, collating, organising, and scanning [father's] voluminous filings'; and 'conserve judicial resources by reducing the need for the [c]ourt to issue orders on redundant, meritless, and/ or vexatious motions.'
>
> [32] But father's claim of indigency raises a question of whether the court's injunction, while narrowly tailored to address father's vexatious and lengthy filings, is not narrowly tailored enough to retain his constitutional right to access to the courts. The court reasoned that an attorney is necessary to ensure that father's future filings are consistent with all court rules, are well grounded in fact, are warranted by existing law, and are not interposed for

any improper purpose, such as to harass or to cause unnecessary delay. See C.R.C.P. 1 l(a).

[33] But the requirement that father may proceed only through counsel might, as he asserts, completely foreclose his constitutional right of access to the court if he cannot afford to obtain an attorney. See *Karr*, 50 P.3d at 914 (considering whether order preventing indigent prose litigant from appearing without counsel would effectively prevent him from appearing at all); see also *Procup v. Strickland*, 792 F.2d 1069, 1071 (11th Cir. 1986) (expressing concern that an attorney who knows a litigant's "track record" might well be unwilling to devote the time and effort necessary to sift through the litigant's generally frivolous claims to see if there is one of sufficient merit to undertake legal representation). Mother conceded at oral argument, and we agree, that the existing injunction is problematic for this reason. We additionally agree with mother's statements from oral argument that the injunction unfairly prevents father from filing responses to her motions and that both parties need to comply with C.R.C.P. 10.

[34] Therefore, we reverse the injunction and remand for the court to amend its language consistent with mother's concessions that (1) both parties' submissions must comply with C.R.C.P. 10; (2) father should be allowed file responses to mother's motions; and (3) father must obtain leave of the court before submitting any prose filings, regardless of whether the document is in response to mother's filings or otherwise. See *Karr*, 50 P.3d at 915-16 (listing procedures for litigant's permission to file and considerations for the court before approving or disapproving the petition)."

29. Within the foregoing context, on 11 May 2022 the District Court Judge modified his order to provide that both parties submissions must comply with CRCP 10 and that the father must obtain the leave of the court before submitting any filings without counsel, save that he is permitted to file, without counsel, responses to any motions or other submissions filed by the mother.

30. On 28 January 2021, the Father filed a petition in the US Federal Court, District of Colorado for the enforcement of the Child Arrangements order of 11 January 2016 under the International Child Abduction Remedies Act and the 1980 Hague Convention. The court heard argument on 23 March 2021. On 19 April 2021, the father's application was dismissed with prejudice (i.e. permanently) on the following basis:

"The evidence establishes that there has been no abduction or wrongful removal of the parties' child. [D] brought [Y] to the US in 2016 with the express permission and order of the family court in Manchester, England. The child's habitual residence has been in the US, and in particular in Colorado, since that time. The Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act have no application in this case.

The problem here is that the parents have been unable or unwilling to comply with the parenting time orders that were originally issued by the Manchester court, and that have been registered in, and to some extent

> modified by, the [District Court], Colorado. As a former Colorado state district judge who presided over literally thousands of parenting time disputes in that capacity, I am concerned that the best interests of the child are not being served, due largely to the behaviours of the two parents. Generally speaking, it is in the best interest of children to spend quality time with both parents. That plainly was the desire of both the [English] court and the [US] County District Court. However, this Court cannot sit as a court of appeal from either of those courts in the guise of exercising its authority under the International Child Abduction Remedies Act.
>
> It appears to this Court that R has one, and possibly two, options. His best option appears to be to turn himself in on the outstanding warrant in [the US County District Court]. After addressing the warrant, he can presumably either move to reopen the [District Court] case or file a new action … The [District Court] would then address parenting time, decision making and child support issues. C is a student nurse, and there is some indication in the record that he might have pursued this new career in contemplation of relocation to the US. If he were to relocate to Colorado, then presumably the parenting time issues would be quite different. If he remains in the UK, then the distance will continue to pose logistical and financial barriers. However, Colorado courts are well equipped to address those issues, difficult as they might be."

31. On 16 May 2021, and following an unsuccessful motion for a new trial of his application in the US Federal District Court, the father filed a Notice of Appeal in the United States Court of Appeals for the Tenth Circuit, requesting that the denial of his petition for the enforcement of the foreign Child Arrangements Order under the International Child Abduction Remedies Act and the 1980 Hague Convention be overruled. On 5 January 2022, the US Court of Appeals for the Tenth Circuit vacated the District Court Order of 19 April 2021 and remanded the matter to the District Court with a direction to dismiss the Father's petition without prejudice under the Younger abstention convention on the following basis:

> "The record in appeal in this case indicates that all three requirements [of the Younger abstention convention] are met. First, it is undisputed that the parties have, for the past give years, been litigating access issues in the state court civil proceeding and that [C] attempted to assert in state court the same access issues that he now seeks to assert in this federal action, i.e. enforcement of certain provisions of the [English] family court's January 11, 2106 custody order. To be sure, the state court most recently dismissed the action without prejudice. But it is undisputed that the state court did so, in pertinent part, because of [C]'s failure to comply with a court order, and that [C]'s failure to comply was undoubtedly due to the fact that the state court had previously issued a bench warrant for his arrest due to his failure to appear at a scheduled hearing on child support and allocation of travel costs. In other words, it is apparent from the record that [C] chose to initiate these federal proceedings because his efforts at enforcing the [English] family court's January 11, 2016 order in the state court were stymied by his own failure to comply with the state court's orders and the state court's resulting issuance of a bench warrant for his arrest. Second,

> the record makes clear that the state court provides an adequate forum to hear the access claims raised by [C] in this federal action. And third, we conclude that the state court proceedings involve two important state interests: family relations and the interest in enforcing arrest warrants that have been issued by a state court."

32. Following the decision of the US Court of Appeals for the Tenth Circuit, the father issued Writ of Certiorari before the Colorado Supreme Court concerning the Colorado Court of Appeals' decision. That Writ was denied on 6 February 2023.

33. Within the foregoing context, the father issued his C66 application on 25 October 2022. From that application, and the submissions made on behalf of the father by his brother, it is apparent that the father now seeks the following orders in respect of Y:

    i) A "temporary return order" under the 1980 Hague Convention on the Civil Aspects of International Child Abduction and/or the inherent jurisdiction of the High Court.

    ii) Wardship.

    iii) A declaration with respect to "relevant litigation events" in this jurisdiction.

    iv) A direction that the applications be heard "sequentially and in the same court" as the re-hearing of R's appeal against the registration of a child support order made in the United States.

SUBMISSIONS

34. In support of his application, the father has provided the court with a 'Statement of Case' that runs to 219 paragraphs over 76 pages. In addition, the father has lodged a Skeleton Argument that runs to 107 paragraphs over 27 pages. In these documents, the father ranges over the *entirety* of the litigation between the parties, including the divorce and the financial remedy and maintenance proceedings, in addition to seeking to address the current application. The father's written arguments are discursive and repetitive and it is clear that he has a flawed understanding of a number of the legal principles and propositions he seeks to deploy in respect of his applications. However, and doing the best I can to extract the salient points from the father's overlong and repetitive written submissions and the more concise and directed oral submissions made by his McKenzie Friend, the central arguments on the current application appear to be as follows.

35. In his documents, the father makes clear that the matter in respect of which he now seeks remedies from this court in respect of Y is the alleged obstruction by the mother of his contact with Y, as provided for by the order of HHJ Wallwork dated 11 January 2016 and registered for enforcement in the District Court in Colorado. The father argues that the only way open to him now to achieve contact with Y is via orders made by this court under its inherent jurisdiction. He relies on the long line of authority that emphasises the breadth and flexibility of the inherent jurisdiction as a means of securing the welfare of children and places this in the context of the positive duty on the State under Art 8 of the ECHR to take steps to preserve the relationship between a child and his or her parent. The father argues that the exercise of the

inherent jurisdiction is necessary in this case in order to arrest what he contends is the damage being caused to Y by her enforced separation from him, by what he alleges is the "parental alienation" of Y by the mother and by what he contends is the mother's persistent and deliberate breaching of the child arrangements order made by HHJ Wallwork on 11 January 2016.

36. The father appeared to recognise, in both his written and oral arguments, that the court can only exercise its inherent jurisdiction where it is established that the court has jurisdiction over Y and that that jurisdiction can be grounded only on habitual residence in England and Wales, presence in England and Wales or on Y being a United Kingdom national. During the course of the oral arguments advanced on behalf of the father, his McKenzie Friend concentrated on nationality as the proper basis for this court's jurisdiction in this case. In particular, whilst the father acknowledges that there remain strong reasons to approach the exercise of the jurisdiction based on nationality with caution, it was submitted that the jurisdiction can be exercised in this case as the exercise of the inherent jurisdiction is necessary to avoid Y's welfare being beyond all judicial oversight by reason of an alleged failure by the courts of Colorado to uphold Y's rights under the child arrangements order of 11 January 2016.

37. In that context, the father contends that he has exhausted the judicial processes available to him in the jurisdiction of the United States to enforce the child arrangements order of 11 January 2016 to no effect. Indeed, the father goes much further than this and asserts that it is not now possible for him to secure proper judicial oversight of Y's welfare in the jurisdiction of the United States irrespective of whether there are further applications open to him that jurisdiction, the father asserting that the Colorado courts "do not even demonstrate the slightest direct concern for the fundamental rights of the vulnerable UK citizen minor child or the left behind parent".

38. In support of that contention, the father asserts that in the proceedings in Colorado relating to Y there is evidence of judicial and extrajudicial actions comprising contravention of Colorado Statutes and mandatory court rules, improper coercion, improper denial of access to courts, the making by a judicial officer of "on-their face fraudulent and seriously negligent false assertions which demonstrate actual bias against [the father]", a lack of specialist child focus by the District Court and an absence of any "evidentiary hearings" to address disputed facts. In this context the father submits to this court that:

> "… the county-specific nature of the US State child custody jurisdiction, and the power of individual generic judges in rural counties, can conspire to create a situation where, as here, access to justice for particular children and/or parents can be completely curtailed."

That the District Court Judge has:

> "completely transgressed the boundaries of judicial discretion into the realm of assertion or outright falsehoods due to clear bias against [the father] and in favour of [the mother] with whom [the District Court judge] shares numerous attributes"

And that:

> "…a single district judge controlling a generic court who shows a predisposition to receive, accept and believe from [the mother] (who, like himself, is a wealthy lawyer resident in southern suburbs of [X]) voluminous non-sworn oral and written submissions without subjecting any of these, as required by Colorado and US laws to any evidentiary hearings conducted under due process."

39. Finally, the father further relies on the what he contends is his impecuniosity to assert that, in any event, he cannot employ counsel in Colorado and therefore has no meaningful access to justice in that jurisdiction

40. In these circumstances, the father seeks in respect of the question of jurisdiction to draw an analogy between himself and the position of the parent in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1 regarding the extent to which it is reasonable for him to return to the United States to pursue his case in respect of Y's welfare, the extent to which the US courts will recognise his relationship with Y, the extent to which he will have a realistic opportunity to advance his case in the US courts and the practicability of him litigating in the United States. In such circumstances, the father submits (further relying on the decision in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd v Others (Isle of Man)* [20111] UKPC at [90] to [101] and *The Abidin Daver* [1984] AC 398 at [411]), that there is cogent evidence before this court that now demonstrates that he is not able to secure justice in the State having jurisdiction on the grounds of habitual residence. Accordingly, the father concludes that unless this court exercises its inherent jurisdiction based on Y's nationality, Y's welfare will be beyond all judicial oversight.

41. As I have noted, in terms of the specific relief sought in respect of Y under the inherent jurisdiction, the father seeks a suite of orders ranging from what he describes as a "temporary return order" under the 1980 Hague Convention, through wardship, to a declaration "concerning English law and proceedings in matters pertaining to" Y. The basis for this latter declaration is described by the father as having the function of "establishing the truth concerning the English proceedings" and which the father anticipates being relayed to the courts in Colorado as a definitive record of the proceedings in this jurisdiction. The father further submits that such a declaration will have what he terms a "chilling effect" on the mother's alleged breaching of the child arrangements order and/or will "constrain Colorado or other US courts from making inappropriate orders based upon misunderstanding of those laws and the orders which have emerged from the relevant proceedings" in this jurisdiction.

42. Finally, whilst not set out in the C66 application form, the statement of case also deals with what purports to be an application for an anti-suite injunction. The father contends that such relief should comprise an injunction preventing the mother from (a) commencing any litigation in any court that refers to or affect Y which seeks relief contrary to the child arrangements order and without submitting a copy of the declaratory order outlined above and (b) absent any emergency situation, from seeking to modify the child arrangements order or seeks to establish any child support or children maintenance order contravening what the father terms the *forum conveniens* order of the English Family Court.

43. As have noted, and in a short and concise written submission citing the relevant legal provisions and case law, the mother contends that the court has no basis for exercising its jurisdiction under the inherent jurisdiction in respect of Y in circumstances where Y is neither habitually resident in or present in the jurisdiction of England and Wales.

RELEVANT LAW

44. Pursuant to s.1(1)(d) of the Family Law Act 1986, 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 is, as far as it gives care of a child to any person or provides for contact with or the education of a child, an order to which Part I of the 1986 Act applies. Within this context, s.2(3) of the 1986 provides as follows with respect to the jurisdiction to make orders under the inherent jurisdiction of the High Court with respect to children in so far as it gives care of a child to any person or provides for contact with or the education of a child:

> "(3) A court in England and Wales cannot make a section 1(1)(d) order unless-
>
> (a) it has jurisdiction under the Hague Convention, or
>
> (b) the Hague Convention does not apply but –
>
> (i) the condition in s 3 of this Act is satisfied, or
>
> (ii) the child concerned is present in England and Wales on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection."

45. The condition in s.3 of the Family Law Act 1986 referred to in s.2(1)((b)(ii) is that on the relevant date the child is habitually resident in England and Wales or is present in England and Wales and is not habitually resident in any part of the United Kingdom or a specified dependent territory.

46. The jurisdiction of the court based on the nationality of the child was confirmed in the decisions of the Supreme Court in *Re A (Jurisdiction: Return of Child)* [2014] AC 1 (jurisdiction to make a return order) and in *Re B (A Child)(Reunite International Child Abduction Centre and others intervening)* [2016] AC 606 at [33] (jurisdiction to make orders where the child requires protection) in so far as it is not excluded by the terms of the Family Law Act 1986 as set out above. In *Re B (A Child)(Reunite International Child Abduction Centre and others intervening)* that confirmation centred on the classic statement of the principle in *In re P (GE) (An Infant)* [1965] Ch 568:

> "It is clear from the authorities that the English court has, by delegation from the Sovereign, jurisdiction to make a wardship order whenever the Sovereign as *parens patriae* has a quasi-parental relationship towards the infant. The infant owes a duty of allegiance and has a corresponding right to protection and therefore may be made a ward of court: *Hope v Hope*. Subsequent cases confirm that that is the basis of the jurisdiction… An infant of British nationality, whether he is in or outside this country, owes a

> duty of allegiance to the Sovereign and so is entitled to protection, and the English court has jurisdiction to make him a ward of court."

47. With respect to the circumstances in which the jurisdiction based on nationality may be exercised, within the foregoing context in *Re B (A Child)(Reunite International Child Abduction Centre and others intervening)* at [58] to [62] the Supreme Court held that the coming into force of Family Law Act 1986 did not preclude the exercise of jurisdiction based on nationality where the British child in question requires *protection*, that the exercise of that jurisdiction is not confined only to extreme cases, but that caution in its exercise is nonetheless required having regard to the demands of comity. Baroness Hale holding, in comments that are plainly *obiter dicta*, that:

> "[58] Lord Wilson JSC's conclusion on the issue of habitual residence makes it unnecessary to reach a decision on the hypothetical question whether it would have been right for the court to exercise its jurisdiction founded on B's nationality if she had no habitual residence at the time when these proceedings began. It is not in doubt that the restrictions on the use of the inherent or *parens patriae* jurisdiction of the High Court in the Family Law Act 1986 do not exclude its use so as to order the return of a British child to this country: this court so held in *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] AC 1. The Court of Appeal, ante, p 614, devoted a large proportion of their judgment to this aspect of the case. Their approach is summed up in para 45:
>
>> 'Various words have been used down the years to describe the kind of circumstances in which it may be appropriate to make an order: 'only under extraordinary circumstances', 'the rarest possible thing', 'very unusual', 'really exceptional', 'dire and exceptional' 'at the very extreme end of the spectrum'. The jurisdiction, it has been said must be exercised 'sparingly', with 'great caution' … and with 'extreme circumspection'. We quote these words not because they or any of them are definitive—they are not—but because, taken together, they indicate very clearly just how limited the occasions will be when there can properly be recourse to the jurisdiction.'
>
> [59] Lord Wilson JSC has listed a number of important issues to which that question would have given rise and which must wait for another day. It is, however, one thing to approach the use of the jurisdiction with great caution or circumspection. It is another thing to conclude that the circumstances justifying its use must always be "dire and exceptional" or "at the very extreme end of the spectrum". There are three main reasons for caution when deciding whether to exercise the jurisdiction: first, that to do so may conflict with the jurisdictional scheme applicable between the countries in question; second, that it may result in conflicting decisions in those two countries; and third, that it may result in unenforceable orders. It is, to say the least, arguable that none of those objections has much force in this case: there is no applicable Treaty between the UK and Pakistan; it is highly unlikely that the courts in Pakistan would entertain an application from the appellant; and it is possible that there are steps which an English court could take to persuade the respondent to obey the order.

[60] The basis of the jurisdiction, as was pointed out by Pearson LJ in *In re P (GE) (An Infant)* [1965] Ch 568, 587, is that "an infant of British nationality, whether he is in or outside this country, owes a duty of allegiance to the Sovereign and so is entitled to protection". The real question is whether the circumstances are such that this British child requires that protection. For our part we do not consider that the inherent jurisdiction is to be confined by a classification which limits its exercise to "cases which are at the extreme end of the spectrum", per McFarlane LJ in *In re N (Abduction: Appeal)* [2013] 1 FLR 457, para 29. The judgment was *ex tempore* and it was not necessary to lay down a rule of general application, if indeed that was intended. It may be that McFarlane LJ did not so intend, because he did not attempt to define what he meant or to explain why an inherent jurisdiction to protect a child's welfare should be confined to extreme cases. The judge observed that "niceties as to quite where the existing extremity of the jurisdiction under the inherent jurisdiction maybe do not come into the equation in this case": para 31.

[61] There is strong reason to approach the exercise of the jurisdiction with great caution, because the very nature of the subject involves international problems for which there is an international legal framework (or frameworks) to which this country has subscribed. Exercising a nationality-based inherent jurisdiction may run counter to the concept of comity, using that expression in the sense described by US Supreme Court Justice Breyer in his book The Court and the World (2015), pp 91–92:

> 'the court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives.'

[62] If a child has a habitual residence, questions of jurisdiction are governed by the framework of international and domestic law described by Lord Wilson JSC in paras 27–29. Conversely, Lord Wilson JSC has identified the problems which would arise in this case if B had no habitual residence. The very object of the international framework is to protect the best interests of the child, as the CJEU stressed in the *Mercredi* case [2012] Fam 22. Considerations of comity cannot be divorced from that objective. If the court were to consider that the exercise of its inherent jurisdiction were necessary to avoid B's welfare being beyond all judicial oversight (to adopt Lord Wilson JSC's expression in para 26), we do not see that its exercise would conflict with the principle of comity or should be trammelled by some a priori classification of cases according to their extremity."

48. Thus, in an appropriate case, the English court is able to make orders under its inherent jurisdiction in respect of a British national child where it is demonstrated that that child needs the protection of the English court, including a return order. Given the demands of comity and the framework of international and domestic law centred on the concept of habitual residence, great caution is required when exercising the jurisdiction based on nationality. However, in an appropriate case the demands of comity *may* give way where, absent an order under the inherent jurisdiction, the British national child would be beyond all judicial oversight.

49. As I have noted, in his written submissions the father cites other authorities on the question of whether justice will be done in respect of Y in the Colorado Court, including *AK Investment CJSC v Kyrgyz Mobil Tel Ltd v Others (Isle of Man)* [2011] 4 All ER 1027 and *The Abidin Daver* [1984] AC 398. Those authorities make clear that in order to demonstrate that justice will not be done it must be shown there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Those authorities further make clear however, that comity requires that the court be extremely cautious before deciding that there was a risk that justice would not be done in a foreign country by the foreign court and that considerations of international comity will militate against any such finding in the absence of cogent evidence.

50. With respect to the substantive relief sought should the court determine to exercise its jurisdiction based on Y's nationality, as also noted above, in addition to wardship the father seeks a what he terms a "temporary return order" under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. However, it is plain that the 1980 Convention is of no application in this case where there has been no wrongful removal or retention of Y for the purposes of Art 3 of the 1980 Hague Convention. As noted by the US Federal District Court, the mother brought Y to the jurisdiction of the United States in 2016 with the express permission and order of the Family Court in England. There has been no subsequent order requiring the return of Y to the jurisdiction of England and Wales. In the circumstances, the 1980 Hague Convention does not apply in this case.

51. With respect to the father's application for a declaration "concerning English law and proceedings in matters pertaining to" Y with the aim of "establishing the truth concerning the English proceedings" and which the father anticipates being relayed to the courts in Colorado as a definitive record of the proceedings in this jurisdiction, I reviewed the law concerning the making declarations independent of granting other relief in *Salford CC v W and Ors (Religion and Declaration of Looked After Status)* [2021] 4 WLR 21 (Fam) as follows:

> "[60] In deciding whether the High Court does have jurisdiction under its inherent jurisdiction to determine a freestanding application for a declaration that the children have been "looked after" for the purposes of Part III of the Children Act 1989 where no other claim for relief is made and, if so, whether it is appropriate for the court to exercise that jurisdiction, it is important to be clear that the aspect of the court's inherent jurisdiction with which the court is concerned is not the inherent jurisdiction of the High Court in respect of children but, rather, the High Court's inherent declaratory jurisdiction (see *Egeneonu v Egeneonu* [2017] EWHC 43 (Fam); [2017] 4 WLR 100 at [18]).

[61] Beginning with general principles, by section 16 of the Judicature Act 1873 , the High Court of Justice was created as a superior court of record. At the commencement of that Act the jurisdiction that was vested in or capable of being exercised by certain courts of common law and equity and certain other courts was transferred to and vested in the High Court. Section 19 of the Senior Courts Act 1981 stipulates that the High Court shall be a superior court of record, which court can, subject to the provisions of the 1981 Act, exercise all such jurisdiction conferred on it by the 1981 Act or any other Act and all such other jurisdiction as was exercisable by it immediately before the commencement of the 1981 Act. Within this context, section 19(2)(b) of the Senior Courts Act 1981 subsumes and incorporates the inherent jurisdiction of the High Court previously exercisable by the superior courts under common law. The general jurisdiction of the High Court as defined in section 19 of the 1981 Act is vested in all the Judges of the High Court, irrespective of the Division to which they are assigned.

[62] With respect to the specific question of declaratory relief under the inherent jurisdiction, the court has a discretionary power under its inherent jurisdiction (as subsumed and incorporated into section 19(2)(b) of the Senior Courts Act 1981) to grant declaratory relief. As between the parties to proceedings, the court may grant a declaration as to the rights of the parties, as to the existence or facts or as to a principle of law (see Financial Services Authority v Rourke [2001] EWHC 704 (Ch); [2002] CP Rep 14 and In re G (A Child) (Same-sex Relationship: Family Life Declaration)). When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration (Financial Services Authority v Rourke). A declaration may be refused if it would prejudice the fairness of future proceedings (see Amstrad Consumer Electronics plc v The British Phonographic Industry Ltd [1986] FSR 159).

[63] Declarations are generally sought together with other forms of relief and claims for declarations without a claim for any other remedy in the proceedings in which the declaration is sought are unusual. Within this context I note that, whilst CPR r 40.20 provides that the court may make binding declarations whether or not any other remedy is claimed (unlike the prior rule articulated by RSC Ord 15 r 16, CPR r 40.20 does not distinguish between binding declarations and binding declarations of right), CPR r 40.20 is not replicated in the Family Procedure Rules 2010. Notwithstanding this however, with respect to freestanding applications for declarations without a claim for any other remedy in the proceedings in which the declaration is sought, in *Egeneonu v Egeneonu* at [18] and [19] Sir James Munby P, having regard to the decision of the Court of Appeal in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318 at [120], held that the court does have jurisdiction to make a declaration in such circumstances and, on the facts of that case, decided that that jurisdiction should be exercised:

> '18. The parties, the CPS, the Secretary of State and the advocate to the court are, correctly, agreed that I have jurisdiction. Mr Hames submits that I do not, but his argument, which I do not find convincing, assumes that the inherent jurisdiction in play in relation to this aspect of the matter is the inherent jurisdiction in respect of children whereas it is, in my judgment, the inherent declaratory jurisdiction which is here in issue.
>
> 19. The more problematic question is whether I should exercise the jurisdiction, not least bearing in mind, first, that neither the CPS nor the Secretary of State is a party and that, accordingly, neither will be bound by any declaration I may make and, secondly, that the court is traditionally, and for good reason, slow to grant declaratory relief in relation to the criminal law. I am, none the less, persuaded, having regard to the principles set out by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 WLR 318 , para 120, that I should exercise the jurisdiction. Given the stance being adopted by Mr Hames on behalf of the father, I have the benefit of rigorously adversarial argument. And, at the end of the day, and despite the scepticism expressed both by the advocate to the court and by Mr Hames, I can see advantage, as indeed do both the Crown Prosecution Service and the Home Office, in the court which has determined the question of contempt also deciding whether the contempt is civil or criminal. As Ms Patel put it in her skeleton argument for the hearing before Newton J on 10 March 2016, the mother can properly seek to invoke the adjudicatory powers of the convicting court to clarify whether any of the contempts in question were criminal rather than civil in nature. Mr Summers went even further, submitting that 'only the convicting court is able to determine the issue'. Ms White expressed scepticism, which I share, as to whether this latter point can be right, and I make clear that this is not the basis of my decision to proceed.'

[64] In *Rolls-Royce plc v Unite the Union* Aikens LJ had set out at [120] the following principles (expressed in the context of a civil claim) with respect to applications for declarations without a claim for any other remedy in the proceedings in which the declaration is sought:

> 'For the purposes of the present case, I think that the principles in the cases can be summarised as follows. (1) The power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. (5) The court will be prepared to give declaratory relief in respect of a

> 'friendly action' or where there is an 'academic question' if all parties so wish, even on 'private law' issues. This may particularly be so if it is a 'test case', or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue.'

DISCUSSION

52. Having regard to the extensive documentation provided by the father and to the oral submissions made by his McKenzie Friend, I am satisfied that the application for orders under the inherent jurisdiction with respect to Y made by the father must be dismissed. My reasons for so deciding are as follows.

53. For reasons I have already set out, the 1980 Hague Convention on the Civil Aspects of International Child Abduction is of no application in this case having regard to the facts set out above. Where there has been no wrongful removal or retention for the purposes of Art 3 of the 1980 Convention, the court has no power in this case to make a "temporary return order" under the 1980 Hague Convention. I pause to note that the father sought this relief from this court notwithstanding that the US Federal District Court indicated in the clearest terms why the 1980 Hague Convention could not apply in this case, in circumstances where the mother had been given permission to remove Y to the United States by the English court on 11 January 2016.

54. With respect to the application for wardship and a return order under the inherent jurisdiction, it is beyond dispute that this court cannot have jurisdiction in respect of Y based either on her habitual residence in England and Wales or her presence in this jurisdiction. Y has lived in the United States since shortly after the mother was permitted by the order made of HHJ Wallwork of 11 January 2016 to remove her to that jurisdiction. The legal principles set out above make clear that this court *does* retain a protective (as distinct from custodial) jurisdiction in respect of Y based on her status as a British national. However, that is not the end of the matter. In order for the court to exercise that protective jurisdiction, it must be satisfied that the circumstances are such that Y *requires* the protection of this court notwithstanding that the courts in the jurisdiction of the United States have substantive jurisdiction in respect of Y's welfare based on her habitual residence in that jurisdiction.

55. As made clear by the Supreme Court in *Re B (A Child)(Reunite International Child Abduction Centre and others intervening)*, in determining whether Y requires protection such that the court should exercise its jurisdiction based on nationality notwithstanding she is habitually resident in the jurisdiction of the United States, the court must proceed with great caution in circumstances where the principle of comity and the framework of international and domestic law centred on the concept of habitual residence are engaged.

56. In particular, in this case the court must be mindful that, in the context of the background set out above, Y is habitually resident in the United States and that, accordingly, the courts in that State have jurisdiction in respect of Y's welfare. The court must also pay careful regard to the fact that proceedings in respect of Y are ongoing in the jurisdiction of the United States, with the District Court remaining siesed of those proceedings and the orders made in those proceedings having been made without prejudice (i.e. not final). Where the court in a foreign country is exercising jurisdiction, the importance of comity (as a means of preventing conflicting decisions and/or unenforceable orders) will be further enhanced. This court must further be mindful of the fact that the foregoing circumstances pertain because the courts in this jurisdiction, after due consideration at a final hearing at which the court heard from both parties and the court delivered a reasoned judgment which was not the subject of a successful appeal, gave permission for Y to be removed to the jurisdiction of the United States, the father thereafter accepting the jurisdiction of the courts in that State. Finally, the need for caution in this case before having recourse to the jurisdiction based on nationality is reinforced by the fact that Y is a *dual* national of Britain and the United States. In the circumstances, in addition to her nationality connecting her to this jurisdiction, Y's nationality is also connects her to the jurisdiction of her habitual residence.

57. Within this context, whilst I have considered carefully the matters relied on by the father to demonstrate that the circumstances in the jurisdiction of the United States with respect to Y are such that this dual British and United States citizen child requires the protection of the High Court of England and Wales, I am satisfied that those circumstances do not justify the intervention of the English court.

58. Whilst the father submits that he has exhausted all remedies in the United States, that is not a sufficient reason of and in itself for this court to intervene by exercising a jurisdiction based on Y's nationality and, in any event, is not accurate as a statement of fact having regard to the evidence before the court.

59. Even if it were accurate to assert that the father has exhausted all remedies in the jurisdiction of the United States, that would not be sufficient by itself to justify the intervention of this court based on Y's nationality. The fact that a parent has reached the end of the judicial process in a foreign jurisdiction without achieving the outcome that they seek will not be sufficient, without more, to demonstrate that the subject child is in need of the protection of this court. The evidence before this court makes clear that the father remains entitled to pursue his case for the enforcement of the Child Arrangements order registered in the District Court in Colorado in that court.

60. I recognise that the father is currently the subject of a bench warrant issued by the District Court. However, as the judgment of the US Federal District Court makes clear, it is open to the father to address that warrant and move to reopen the District Court case or file a new action in the District Court of the county in which Y now lives, at which point the District Court would then address the question of parenting time. Within this context, it is no part of the role of this court to shield the father from the lawful consequences of his own actions before a foreign court. In my judgment, whilst the father seeks to draw an analogy between himself and the mother in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, in the foregoing circumstances it is not unreasonable of this court to expect the father to return to the United States to deal with the bench warrant issued

by the District Court as a pre-cursor to continuing the existing litigation in the United States with respect to Y's welfare where the US courts have substantive jurisdiction on that matter. It is plain from the record of the proceedings in the United States that the orders made to date in the US proceedings concerning Y have been made without prejudice and are therefore not final.

61. I further acknowledge that in this case the father goes further and asserts that, irrespective of whether there are further applications open to him in the jurisdiction of the United States, the intervention of this court is required to protect Y in circumstances where he is not able to achieve justice in the United States. The father contends that this is the position due to the improper conduct of the US courts, and in particular what the father characterises as contravention by the District Court of Colorado Statutes and mandatory court rules, improper coercion, improper denial of access to courts, fraudulent and negligent false assertions by a judicial office holder, ongoing bias, a lack of specialist child focus by the court and the failure to hold "evidentiary hearings". These are extremely grave charges on the part of the father.

62. As made clear in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd v Others (Isle of Man)*, in order to demonstrate that justice will not be done in the United States, the father must demonstrate that there is a real risk that justice will not be obtained in that jurisdiction by reason of incompetence or lack of independence or corruption. Comity requires that the court be extremely cautious before deciding that there was a risk that justice would not be done in a foreign country by the foreign court. Considerations of international comity will militate against any such finding in the absence of *cogent* evidence. I am satisfied that there is nothing in the evidence before this court with respect to the orders made by the District Court that can be said to constitute cogent evidence of incompetence or lack of independence or of corruption.

63. Again, the simple fact that the outcomes in District Court have not been those the father wishes cannot not itself be evidence of incompetence or lack of independence or corruption. Further, by reason of the dogged approach of the father to the litigation in the United States, as detailed above each of the substantive decisions made by the District Court (comprising the issue of the bench warrant, the temporary custody order, the refusal to disqualify on the grounds of bias, the order preventing the father from acting *pro se* and refusal to enforce the child arrangement order pending resolution of the bench warrant) has been the subject of close examination on appeal by the Colorado Court of Appeals. It is clear from the evidence before this court that the father raised many of the complaints that he now places before this court when before the Colorado Court of Appeals. In the circumstances, most or all of the complaints the father now makes to this court regarding the conduct of the District Court have been ventilated before and examined by the appellate courts in the United States. Indeed, in many respects the father's application before this court represents simply a further attempt to litigate matters already dealt with by the courts in the United States.

64. Whilst it is the case that the Colorado Court of Appeals held that the District Court Judge entered the temporary custody without reference to any applicable standard, erred in drawing the order preventing the father from acting *pro se* in the wide terms that he did and that certain comments made by the District Court Judge were improper but did not amount to bias, the Colorado Court of Appeals (in so far as it had jurisdiction to do so) upheld the orders made by the Distsrict Court save that

preventing the father from acting *pro se*. That order has now been amended by the District Court in light of the outcome on appeal. Having regard to the need for extreme caution, grounded in the principle of comity, before deciding that there is a risk that justice will not be done in a foreign country, I am satisfied that the limited adverse findings of the Colorado Court of Appeals cannot be said to amount to cogent evidence of incompetence or lack of independence or corruption sufficient to justify the intervention of this court in order to protect Y.

65. The fact that the Colorado Court of Appeals concluded that the District Court Judge omitted reference to the standard applicable when granting the temporary custody order, and had drawn the order preventing the father acting *pro se* in terms that were too wide, were not omissions sufficient to justify the setting aside of the relevant orders, albeit they required the amendment of the latter. Were such omissions to be held to amount to cogent evidence of incompetence for the purposes of justifying a conclusion that a litigant would not receive justice in a foreign court, such a conclusion would be available each time a foreign tribunal was found by a foreign appellate court to have erred. This would be to set the bar at a level that ignores entirely the demands of comity. The Colorado Court of Appeals was not satisfied that, applying the standard applicable in that jurisdiction, that the District Court Judge had demonstrated bias towards the father. Whilst, in effect, the father now seeks to rerun his arguments on appeal in this regard before this court, there is no evidence before the court to justify a different conclusion to that reached by the Colorado Court of Appeals (assuming for these purposes that the issue is not *res judicata*). Finally, there is no evidence *whatsoever* to justify this court concluding that there is a risk of corruption and the father's allegations, wisely, did not extend to a charge in those terms. In the foregoing circumstances, I am not satisfied that there is cogent evidence before this court that the father will be unable achieve justice in the jurisdiction of the United States with respect to the question of Y's welfare such that this court should intervene by exercising the jurisdiction based on Y's British nationality.

66. Finally, I am also satisfied that the fact that the father may find it difficult to engage lawyers in the United States is not a sufficient reason for this court to intervene by exercising its jurisdiction based on Y's nationality. The father's argument in this regard *may* have been stronger had the Colorado Court of Appeals upheld the order of the District Court Judge preventing the father from acting *pro se* in the US proceedings concerning Y. I acknowledge that in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)* at [65] Baroness Hale noted that *one* of the factors to be taken into account when deciding whether to exercise the jurisdiction based on nationality is the extent to which it is practical for a parent to litigate in respect of the subject child in the foreign jurisdiction. However, following that part of the father's appeal being successful in the Colorado Court of Appeals, he is no longer subject of a limitation on him acting on person.

67. The father has proved himself eminently capable of mounting and pursuing extensive litigation in person, both in this jurisdiction and in the jurisdiction of the United States, on complex issues of law concerning proceedings both in relation to Y and more widely in relation to the financial aspects of the parties marriage. In the foregoing context, I am satisfied that the evidence points to the fact that the father has had, and will continue to have a realistic opportunity to advance his case in the US

courts notwithstanding that he is not able to afford a lawyer to represent him in those proceedings (I pause to note that, as the applications in respect of Y would comprise a private law matter under Part II of the Children Act 1989 were it proceeding in this court, the father's position would be the same were the litigation in respect of Y's welfare proceeding in this jurisdiction as he would not be entitled to legal aid).

68. It is plain that the jurisdiction based on nationality is focused on the *protective* element of the court's inherent jurisdiction. In the circumstances I have outlined, and again whilst the father seeks to draw an analogy between himself and the mother in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening)*, in my judgment the facts of this case do not come close to those under which it would be proper for this court to intervene on the question of a child's welfare based on nationality notwithstanding that the courts in a foreign jurisdiction have substantive jurisdiction based on habitual residence and are seised of proceedings. On the evidence before the court, the father has not demonstrated that Y, as a British national, is beyond all judicial oversight and requires the protection of the English court. In these circumstances, and exercising the caution I must in circumstances where the principle of comity and the framework of international and domestic law centred on the concept of habitual residence are engaged, I am satisfied that it would not be appropriate for this court to exercise its jurisdiction based on nationality in respect of Y by making her a ward of this court and ordering under the inherent jurisdiction her return to England and Wales.

69. I am likewise satisfied that it is not appropriate in this case to grant the declaration sought by the father recording the history of the English proceedings and the legal principles that inform them. The considerations in respect of jurisdiction to make such a declaration are different from those pertaining the question of jurisdiction in respect of Y. Here the court is concerned with the High Court's inherent declaratory jurisdiction. As made clear in *Financial Services Authority v Rourke,* pursuant to that jurisdiction the court may grant a declaration as between the parties to proceedings as to the rights of the parties, as to the existence or facts or as to a principle of law. However, I am satisfied that such a course would not be appropriate in this case.

70. From the documents produced by the father, it is plain that the key issue the father seeks to address by way of such a declaration concerns the question of child maintenance. However, the application for the declaration is not made in circumstances where there is no current dispute between the parties on that issue. Rather, the question of child maintenance and its enforcement remains very much a live one. Within this context, the record concerning the facts and law on which decisions have been taken in this jurisdiction on the issue of child maintenance is to be found in the orders and judgments of the courts in this jurisdiction, decided on the basis of the law as interpreted and applied by those courts at the time the decisions were made. In so far as there remain arguments to be put before the court as to the facts and law that inform the question of child maintenance in those judgments and orders, and in particular whether the child maintenance order made by the District Court in Colorado was made on proper legal foundations having regard to the position under English law, the appropriate forum for the determination of those questions is the father's current appeal in this court against registration of the US child maintenance order. In these circumstances, I am not satisfied that the declaration sought by the father is the most effective way of resolving the issues raised as

between the parties concerning the facts and law impacting the question of child maintenance in this case, particularly in circumstances where the father seeks by his application to dictate his own account of what has gone before, which account may require interrogation and determination by the court.

71. Finally, as I have noted, in his Statement of Case but not explicitly in his C66 application form, the father makes what purports to be an application for an anti-suit injunction. In circumstances where that application is made expressly on the basis that the court accedes to the application for a declaration recording the history of the English proceedings and the legal principles that inform them, and where for the reasons I have given I am not prepared to grant such a declaration, the application for an anti-suit injunction also falls to be dismissed. In an event, whilst I did not hear detailed argument on the matter, as a matter of principle I am doubtful that it is appropriate for the court to make such an order with respect to proceedings concerning the welfare of a child.

CONCLUSION

72. For the reasons I have given, the 1980 Hague Convention has no application in this case. I am not satisfied that it is appropriate in this case to exercise jurisdiction in respect of Y based on her nationality to make her a ward of this court and/or to make a return order under the inherent jurisdiction. I am likewise not satisfied that it is appropriate in this case to grant a declaration recording the history of the English proceedings and the legal principles that inform them and a related anti-suit injunction. In the circumstances, the father's applications are dismissed.

73. The unusual and troubling ferocity with which both parents have litigated the issues between them in respect of Y and more widely, over the course of the past nearly eight years and across two jurisdictions, has had the tendency to obscure almost entirely the welfare needs of Y. No doubt each parent will seek to co-opt this observation to their own advantage. However, both parents have an obligation to do all they can to ensure that Y is placed at the centre of their consideration. In this context, I wholeheartedly endorse the observation of the US Federal District Court that at present the best interests of Y are not being served and that this is due largely to the behaviours of both of the parents.

74. It is a cardinal principle across many jurisdictions that it is in the best interest of children to spend quality time with both parents. If the parents are not careful, if they do not quickly start working together to ensure that Y is able to have a fulfilling relationship with each of them, devoid of the persistent drumbeat of rampant litigation and unremitting and caustic parental conflict, then in the long experience of this court both parents risk losing their relationship with their daughter as she enters adulthood.

75. That is my judgment.