2014 IL App (4th) 130935-U

NO. 4-13-0935

FILED
May 20, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: MARRIAGE OF	)	Appeal from
ANDREW S. TOWNLEY,	)	Circuit Court of
Petitioner-Appellee,	)	Coles County
and	)	No. 13D26
SOPHIE CARRAZ,	)	
Respondent-Appellant.	)	Honorable
	)	Brien O'Brien,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court abused its discretion when it failed to use the analytical framework employed in a *forum non conveniens* case.

¶ 2 In February 2013, petitioner, Andrew S. Townley, filed a petition for dissolution of marriage pursuant to the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/101 *et seq.* (West 2012)). In July 2013, respondent, Sophie Carraz, filed a motion to dismiss the petition pursuant to Illinois Supreme Court Rule 187 (eff. Jan. 4, 2013) on the grounds of *forum non conveniens*. In September 2013, the trial court denied Sophie's motion to dismiss.

¶ 3 Sophie argues the trial court abused its discretion in denying her *forum non conveniens* motion. She argues the private and public factors weigh against Illinois as an

appropriate forum because the parties lived in Ireland during the course of their marriage, a separation agreement and order was entered in Ireland, and she and the parties' children continue to reside in Ireland. We reverse.

¶ 4 I. BACKGROUND

¶ 5 Andrew and Sophie were married on December 31, 2005, in Chambery, France. Sophie is a French citizen and resides in Shankill, Ireland. Shankill is in County Dublin and is a suburb of the City of Dublin. The parties have two children: A.T., born in January 2007, and L.T., born in August 2010. The children reside with Sophie in Ireland.

¶ 6 A. Andrew's Petition for Dissolution of Marriage

¶ 7 On February 13, 2013, Andrew filed a petition for dissolution of marriage. He alleged he resides in Mattoon, Illinois, and had done so for the preceding 90 days. The petition alleged, in relevant part, as follows:

> "4. Grounds for dissolution of the marriage herein exist, to-wit: extreme and repeated mental cruelty on the part of [Sophie] without provocation on the part of [Andrew] ***; or in the alternative, irreconcilable differences resulting in the irretrievable breakdown of the marriage.
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> ***
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> 6. On September 18, 2012, the parties entered into a 'Judicial Separation,' which was entered on January 22, 2013, in the Circuit Family Court in Dublin, Ireland. Said settlement agreement resolved all issues, including child custody, child

support, spousal support, and division of assets (including real estate) and debts. A copy of said 'Judicial Separation' is attached hereto and made a part hereof."

¶ 8 The Irish separation order states it is pursuant to the Judicial Separation and Family Law Reform Act, 1989 (Act No. 6/1989) and the Family Law Act, 1995 (Act. No. 26/1995). The judicial separation order states it is entered pursuant to section 2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989. The order states the parties are to have joint custody of the children. The primary place of the children's residence is with Sophie. Andrew's access to the children will occur in Ireland. The order states the parties reached an agreement for (1) Andrew's payment of child support and other child-related expenses; (2) division of the parties' interests in Archistry Limited; (3) closing the parties' joint bank account; and (4) transfer of the parties' home in Shankill, Ireland, to Sophie. The order states "It is the parties[']intention, belief and desire that this settlement agreement makes proper provision for both of them and their dependent children in the context of any divorce in this or in any other jurisdiction. This settlement is in full and final settlement of all issues between them."

¶ 9 B. Sophie's Motion To Dismiss

¶ 10 In July 2013, Sophie filed a motion to dismiss pursuant to Illinois Supreme Court Rule 187 (eff. Jan. 4, 2013) on the grounds of *forum non conveniens*. Sophie alleged Andrew had "no apparent connection to Illinois except the residence of his parents." She alleged Illinois was "both an extremely inconvenient and unfair forum, so far as [she] is concerned, because of (a) the distance between Dublin and Charleston, (b) the cost of travel, (c) the difficulty of travel while caring for two small children, and (d) the presence in Ireland and France of virtually all

[the] evidence relevant to ancillary issues and at least half the evidence relevant to grounds." Sophie alleged the grounds for the divorce may require application of Irish law.

¶ 11 Sophie submitted an affidavit in support of her motion. Sophie stated (1) she and Andrew resided together in Dublin, Ireland, from the date of their marriage until May 2012; (2) Andrew moved to Johannesburg, South Africa, in May 2012 and then to Cape Town, South Africa, in December 2012; (3) since Andrew had left the marital home he had not given Sophie "a specific address or telephone number, but in his telephone calls since our separation, he has said he was calling from South Africa"; (4) she had only been to the United States for "biennial, (more or less)[] visits"; and (5) involvement in litigation in the United States would "impose considerable hardship on me and our children, in the forms of cost, disruption of school and employment, and the expense of transporting witnesses." Sophie stated Andrew owns a business known as Archistry Limited, which, according to its website, has locations in Cape Town, South Africa, Dublin, Ireland, and New York, New York.

¶ 12 Her affidavit also stated the following: "In Ireland, parties may not obtain a divorce until they have lived apart from one another for a period amounting to four out of the previous five years before application for divorce is made, in which sense an action involving the parties' marriage is pending in Dublin."

¶ 13 C. Andrew's Response

¶ 14 Andrew's response quoted the Irish law, which requires parties to live apart from one another for at least four years during the previous five years. He asserted, "Ireland does not have jurisdiction over the parties herein to enter a dissolution of marriage as the parties have not lived apart from one another for a sufficient period of time ***." He added, a "sufficient amount

of time has elapsed since the parties separated that a Judgment of Dissolution of Marriage could be entered upon the grounds of irreconcilable differences should the parties agree to waive the two year requirement found in 750 ILCS 5/401 [(West 2012)]." Should such a judgment be entered, "there would be no need for [Sophie] to travel to the United States and suffer any of the inconveniences alleged as her waiver of the two year requirement could be accomplished without her personal appearance in court."

¶ 15 Andrew attached an affidavit in support. He stated he completed a life insurance application on January 14, 2013, and listed his home address as being on Hickory Lane in Mattoon, Illinois. He attached a copy of the life insurance application. The application is with the Savings Bank Life Insurance Company of Massachusetts. It lists Andrew's employer's name and address as "Archistry South Africa, Cape Town, South Africa." It states Andrew arrived in Cape Town, South Africa, in June 2013 (this appears to be an error) and departed in February 2013.

¶ 16 Andrew included a page from his passport, which we are unable to read. He included an Irish "Certificate of Registration," which states it was issued on September 2, 2011, and expires September 2, 2013. He also included a South African visa, which was issued January 14, 2013, and expires January 13, 2018. It has an entry stamp dated January 30, 2013, from the O.R. Tambo International Airport in South Africa.

¶ 17 D. The Motion Hearing

¶ 18 The supporting record on appeal does not include a verbatim transcript or a bystander's report (see Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) of the September 24, 2013, motion hearing. In his brief, Andrew included a verbatim transcript of the September 24, 2013,

hearing, the court reporter's certification, and an "Affidavit of Authentication for Supplemental Supporting Record." Both parties could benefit from reviewing the supreme court rules on providing and supplementing the record on appeal. See Ill. S. Ct. R. 328 (eff. Feb. 1, 1994) (allowing the appellant to file a supporting record); Ill. S. Ct. R. 329 (eff. Jan. 1, 2006) (permitting any party to motion to supplement the appellate record). It is apparent Andrew has attempted to file a motion to supplement the record pursuant to Rule 329, but he included this motion in his brief rather than as a separate motion. Sophie does not allege she is prejudiced by Andrew's failure to properly file a motion to supplement the record and cites the transcript in her reply brief. A verbatim transcript or bystander's report would obviously assist this court in understanding the trial court's order. In the interest of judicial economy, we construe Andrew as having filed a motion to supplement the record and grant the motion.

¶ 19 The parties made arguments in accordance with their written filings. The trial court announced its ruling, in part, as follows:

> "The *forum non conveniens* issue *** is a little bit more difficult. However, I think it is significant that, first of all, the proceeding in Ireland was initiated by [Sophie].
>
> I think it is also significant that a finding of fault, if such a finding is sought in this Court, certainly in Illinois, would be irrelevant to the determination of any ancillary proceedings.
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> Whether that's the case in Ireland, I can only speculate. But I guess what it gets down to is whether [Sophie] would be prejudiced by a certain finding made here, specifically of mental

cruelty, if that's what [Andrew] is seeking.

I think it is interesting to note that the Judgment of Legal Separation in Ireland *** doesn't talk about [Andrew's] obligation to cover [Sophie] for purposes of health insurance. ***

*** [O]ne of the implications of dissolving the marriage here, and sometimes why we reserve judgment, is that that cuts the spouse off from health insurance. I don't know whether that would be the case here. There is nothing in the Irish decree, for lack of a better term, that governs that issue.

*** I don't see that [Sophie] would be unreasonably prejudiced by allowing [Andrew] to move forward on the issue of grounds."

¶ 20 In November 2013, Sophie filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(6) (eff. Feb. 16, 2011).

¶ 21 II. ANALYSIS

¶ 22 Sophie argues the trial court abused its discretion in denying her *forum non conveniens* motion. She argues the private and public interest factors weigh against Illinois as an appropriate forum because the parties lived in Ireland during the course of their marriage, a separation agreement and order was entered in Ireland, and she and the parties' children continue to reside in Ireland. We reverse.

¶ 23 A. The Doctrine of *Forum Non Conveniens*

¶ 24 In *Fennell v. Illinois Central R. R. Co.*, 2012 IL 113812, ¶¶ 12-17, 987 N.E.2d

355, our supreme court recently restated the doctrine of *forum non conveniens* as follows:

> "The doctrine of *forum non conveniens* assumes that there is more than one forum with the power to hear the case. [Citations.] The doctrine allows a court to decline jurisdiction of a case, even though it may have proper jurisdiction over the subject matter and the parties, if it appears that another forum can better serve the convenience of the parties and the ends of justice. [Citation.] ***
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> ***
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> The doctrine of *forum non conveniens* is founded in considerations of fundamental fairness and sensible and effective judicial administration. [Citation.] Although the doctrine has a long history, its general application crystalized following *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). [Citation.] Illinois courts employ the analytical framework of *Gulf Oil* in *forum non conveniens* cases. [Citations.]
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> In *Gulf Oil*, the Court discussed private interest factors affecting the litigants and public interest factors affecting court administration. Private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing

> the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. [Citations.]
>
> The relevant public interest factors include: the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a community with no connection to the litigation; and the interest in having local controversies decided locally. [Citations.]
>
> In determining whether the doctrine of *forum non conveniens* applies, the circuit court must balance the public and private interest factors. [Citations.] The court does not weigh the private interest factors *against* the public interest factors. Rather, the court must evaluate the total circumstances of the case in determining whether the balance of factors strongly favors dismissal." (Emphasis in original and internal quotation marks omitted.)

¶ 25 "[E]ach *forum non conveniens* case is unique and must be considered on its own facts." *Id.* ¶ 21, 987 N.E.2d 355. A trial court's determination of a *forum non conveniens* motion is reviewed for an abuse of discretion. *Id.*

¶ 26 B. Application of the Controlling Principles

¶ 27 The trial court's order does not include any mention of the private and public interest factors used in a *forum non conveniens* analysis. Nor did the court make a finding about

whether Illinois was a convenient forum for Sophie. Rather, the court found it "significant" Sophie initiated the Irish proceedings and a finding of fault would be "irrelevant" to the ancillary proceedings, and it concluded Sophie would not be "unreasonably prejudiced" by allowing Andrew to argue grounds in an Illinois court.

¶ 28 The trial court abused its discretion by failing to conduct a *forum non conveniens* analysis in accordance with the required analytical framework. The court did not articulate any of the private interest factors affecting the litigants or any of the public interest factors affecting court administration. As the supreme court stated in *Fennell*, "trial courts [are] to include *all* of the relevant private and public interest factors in their analyses." (Emphasis in original.) *Id.* ¶ 24, 987 N.E.2d 355. Nor did the trial court weigh the public and private interests to determine if Illinois was an appropriate forum to resolve the parties' dispute.

¶ 29 Before discussing the *forum non conveniens* factors, we will briefly discuss the trial court's order. The trial court stated the fact Sophie initiated proceedings in Ireland "significant". We do not understand the court's phrasing. The record shows the parties resided in Ireland for the duration of their marriage. The court appears to have provided little consideration to this fact. The effect of the trial court's order was to bifurcate the parties' dissolution proceedings: grounds in Illinois and everything else in Ireland. As the supreme court recently stated in *In re Marriage of Mathis*, 2012 IL 113496, ¶ 31, 986 N.E.2d 1139, the interests in "promoting judicial economy, and avoiding piecemeal litigation" typically weigh against bifurcated dissolution proceedings. Litigating grounds in one country and resolving other matters in another country could only serve to exacerbate the problems raised by a bifurcated dissolution proceeding. Indeed, both counsel and the court admitted they did not know Irish law

and would have to "speculate" about how the Irish separation agreement would be affected by a grounds-only proceeding in Illinois. The trial court summarily concluded Sophie would not be "prejudiced" by a bifurcated grounds-only proceeding in Illinois without considering whether Illinois is an appropriate forum to dissolve the parties' marriage.

¶ 30 Before weighing the private and public interest factors, we consider the amount of deference to give Andrew's choice of forum. See *In re Marriage of Ricard*, 2012 IL App (1st) 111757, ¶ 46, 975 N.E.2d 1220. "A plaintiff's right to select the forum is substantial." *Fennell*, 2012 IL 113812, ¶ 18, 987 N.E.2d 355. But "the plaintiff's choice is not entitled to the same weight or consideration in all cases." *Id.* Our supreme court has explained:

> "When a plaintiff chooses the home forum or the site of the accident or injury, it is reasonable to assume that the choice of forum is convenient. However, when the plaintiff is foreign to the chosen forum and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference. ***
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> Also, 'courts have never favored forum shopping.' [Citation.] Decent judicial administration cannot tolerate forum shopping as a persuasive or even legitimate reason for burdening communities with litigation that arose elsewhere and should, in all justice, be tried there. [Citation.] Indeed, '[a] concern animating our *forum non conveniens* jurisprudence is curtailing forum shopping by plaintiffs.' [Citation.]" *Id.* ¶¶ 18-19, 987 N.E.2d 355.

In determining the amount of deference to be accorded to Andrew's choice of forum, we consider whether he has chosen his "home forum" for purposes of this proceeding. The Illinois courts accord less deference to a plaintiff's choice of an Illinois forum where the plaintiff is not an Illinois resident. See *Fennell*, 2012 IL 113812, ¶ 26, 987 N.E.2d 355; *Espinosa v. Norfolk & Western Ry. Co.*, 86 Ill. 2d 111, 121, 427 N.E.2d 111, 116 (1981); *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 374, 444 N.E.2d 157, 160 (1982). Andrew asserts he is a current Illinois resident and has been since 2001. "[T]o establish residency, two elements are required: (1) physical presence, and (2) an intent to remain in that place as a permanent home." (Emphasis omitted.) *Maksym v. Board of Election Commissioners of City of Chicago*, 242 Ill. 2d 303, 319, 950 N.E.2d 1051, 1060 (2011). For purposes of residency, "[i]ntent is determined primarily from the acts of the person since acts and conduct may negate declarations of intent." *Rosenshine v. Rosenshine*, 60 Ill. App. 3d 514, 517, 377 N.E.2d 132, 135 (1978). The record does not reflect where Andrew physically lived from 2001 to 2005. It does show he lived in Ireland for approximately seven years during the course of the parties' marriage and has two children who are Irish citizens. It is difficult to reconcile Andrew's assertion he has continuously been an Illinois resident when he lived with his family in Ireland for the seven years preceding the filing of his petition. The record does not reflect Andrew maintained a second residence in Illinois during this period or had any other connection to Illinois (other than Sophie's statement his parents live in Illinois). Further, when Andrew left Ireland in May 2012, he relocated to South Africa, not Illinois. Andrew's actions do not support his assertion he has continuously maintained the intent to remain an Illinois resident since 2001. In his counteraffidavit, Andrew stated he had listed his home address on a life insurance application as being in Mattoon, Illinois.

This statement is not the same as a statement his home address is in Mattoon, Illinois. We note Andrew's South African visa states he entered South Africa on January 30, 2013 (14 days before his petition was filed), and in his brief he cites this visa and states he is now in "South Africa attempting to set up Archistry South Africa (Pty) Limited." This statement is inconsistent with his claims he is a *bona fide* current resident of Illinois.

¶ 31 We next consider whether Andrew has engaged in forum shopping by selecting an Illinois forum. Our supreme court has stated a plaintiff's attempts to shop for the most favorable forum "cannot be permitted to override the public interest in, and need for, an orderly, efficiently operated judicial system." *Espinosa*, 86 Ill. 2d at 123, 427 N.E.2d at 117; see also *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 175, 797 N.E.2d 687, 695 (2003) (noting forum shopping does not furnish a legal reason for sustaining a plaintiff's choice of forum). Andrew spends a large portion of his appellate argument asserting the trial court could properly consider the Irish provision requiring divorcing parties to live apart for four out of five years before an Irish court will grant a divorce. In his response to Sophie's *forum non conveniens* motion, Andrew argued Ireland does not have "jurisdiction" over the parties because they have not lived apart for the necessary period. He added, if Sophie agreed to waive the required two-year statutory period for the grounds of irreconcilable differences (750 ILCS 5/401 (West 2012)), she would not "suffer any of the inconveniences alleged" because the divorce could be "accomplished without her personal appearance" in Illinois. Andrew, at the motion hearing, admitted he came to Illinois to seek a divorce because of the time required under Irish law. The timing of Andrew's petition further shows his impatience. It came less than one month after the Irish family court in Dublin entered the judgment of judicial separation in January 2013.

Andrew's appellate arguments focus on the separation period under Irish law and can be simplified to, "Illinois is convenient because I can get a divorce here faster than in Ireland." Andrew's arguments misunderstand the doctrine of *forum non conveniens*. It is not a question of personal or subject matter jurisdiction (see *Wieser v. Missouri Pacific R.R. Co.*, 98 Ill. 2d 359, 365, 456 N.E.2d 98, 100 (1983)), or whether Irish courts can dissolve the parties' marriage as fast as an Illinois court. It is whether "another forum can better serve the convenience of the parties and the ends of justice." *Fennell*, 2012 IL 113812, ¶12, 987 N.E.2d 355. Andrew's ability to obtain a divorce in Illinois faster than he is able to in Ireland is entitled to no consideration in our *forum non conveniens* analysis. See *Dawdy*, 207 Ill. 2d at 175, 797 N.E.2d at 695. Andrew's choice of an Illinois forum is entitled to little deference.

¶ 32 Turning to the private interest factors, we begin with the convenience of the parties. It cannot be argued Andrew's chosen forum is inconvenient to him. See *Fennell*, 2012 IL 113812, ¶ 27, 987 N.E.2d 355. The question is whether Illinois is inconvenient to Sophie. Sophie is a French citizen and resides with the parties' children in the marital home outside Dublin, Ireland. She has only travelled to the United States on an occasional basis during the parties' marriage. Sophie would require international travel to Illinois, which would impose significant financial and nonfinancial burdens on her. The burdens could include the cost of airfare, lodging, child care for the parties' young children, missed days at work, and the anxiety of defending an action in a foreign country. See *Ricard*, 2012 IL App (1st) 111757, ¶ 49, 975 N.E.2d 1220. The sheer distance Sophie would be required to travel reflects the tremendous inconvenience imposed. Assuming she travelled through Chicago's international airport, it is approximately 3,670 miles from Dublin to Chicago and another 185 miles from Chicago to

Charleston. See *Dawdy*, 207 Ill. 2d at 177, 797 N.E.2d at 696 (noting courts may take judicial notice of the distance between two locations, the customary routes, and the usual time required to travel between them). In all, Sophie would need to travel approximately 3,900 miles to appear in court in Charleston. Illinois is not a convenient forum for Sophie.

¶ 33 Next, we consider the access to testimonial, documentary, and other evidence. The parties' marriage began in France and they lived together in Ireland. Andrew alleges mental cruelty and irreconcilable differences as grounds for divorce. There is no suggestion any events supporting Andrew's allegations for grounds occurred in Illinois. Sophie has asserted there is a considerable question whether an Illinois court would be able to compel foreign witness to appear in Illinois. She is correct. See *Ricard*, 2012 IL App (1st) 111757, ¶ 51, 975 N.E.2d 1220. However, neither party has identified any witnesses who would be called at a potential trial. Nor has either party identified documents, records, or other evidence that would be relevant to this action, or their location. See *Id.* ¶ 53, 975 N.E.2d 1220 (noting the location of documents and records is not a significant factor in a *forum non conveniens* analysis because of the ability to send these items electronically). The fact the parties lived in Ireland during the course of their marriage and their marital home is in Ireland would suggest any witnesses or documents relating to their marriage would be in Ireland. Looking solely at the parties themselves, Sophie is in Ireland and Andrew, as he tells us, is in South Africa. This factor does not favor Illinois.

¶ 34 The relevant public interest factors include judicial administration and court congestion, imposing a burden on a community unrelated to the litigation, and the local interests in local controversies. In a dissolution case, there is a strong tie to the place where the martial home is located. See *In re Marriage of Murugesh*, 2013 IL App (3d) 110228, ¶ 36, 993 N.E.2d

1109. The parties lived in Ireland during the course of their marriage and the marital home is in Ireland. Illinois appears to have no connection to the parties' marriage. As discussed above, the only reason Andrew argues Illinois courts should be burdened with this litigation is because he can obtain a divorce in less time than he can in Ireland. This is not a legitimate reason to burden Illinois courts with this litigation. It is clear the Irish courts are capable of resolving this matter because the parties have appeared before and obtained a judicial separation from the Irish courts. The public interest factors weigh in favor of Ireland.

¶ 35 In sum, the weight of the private interest factors greatly favors Ireland. The weight of the public interest factors greatly favors Ireland. Andrew's choice of an Illinois forum is entitled to significantly less deference. Considering all the relevant factors, we conclude the balance of the factors strongly favors dismissal.

¶ 36 III. CONCLUSION

¶ 37 We reverse the trial court's judgment and remand with directions to dismiss this action in accordance with Illinois Supreme Court Rule 187(c)(2) (eff. Jan. 4, 2013).

¶ 38 Reversed and remanded with directions.