[J-8-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

LEILA HILKMANN,	:	No. 29 WAP 2003
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered January 21, 2003 at No.
	:	613WDA2002, reversing the Order of the
v.	:	Court of Common Pleas of Allegheny
	:	County, entered March 25, 2002 at No.
	:	3852 of 2001.
DIRK H. HILKMANN,	:	
	:	816 A.2d 242 (Pa. Super. 2003)
Appellee	:	
	:	
	:	ARGUED: March 1, 2004

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: SEPTEMBER 21, 2004**

I respectfully dissent. I begin by noting my agreement with much of the Majority Opinion -- indeed, the entirety of the Opinion up until the point where the Majority speaks of "the procedural requirements for obtaining recognition and enforcement of an extra-national judgment." Slip op. at 15. Prior to that point, the Majority thoroughly sets forth the background of this action, the sensitive issues posed, and the complexity in this area of law which is exacerbated by the fact that there is, at present, no specific Pennsylvania statutory procedure devoted to the transfer and recognition of an extra-national guardianship judgment. As the Majority notes, other jurisdictions have "undertaken to codify specialized procedural and substantive rules for the transfer of guardianship judgments, and the National College of Probate Judges and the National Center for State Courts have proposed uniform standards." Id. Unfortunately, neither the Pennsylvania General

Assembly, nor this Court, has undertaken to address this distinct circumstance. This type of situation presents a rather daunting challenge for a litigant seeking enforcement of a foreign guardianship judgment, *i.e.*, trying to predict exactly what will be required of her by Pennsylvania courts as a substantive and a procedural matter. And, of course, it presents a challenge for this Court as well, which not only must attempt to decide this case in a manner which will "ensure that justice is done," In re Christoff's Estate, 192 A.2d 737, 739 (Pa. 1963), but must also attempt to formulate some sort of clear procedure for the benefit of the bench and bar in future cases of this ilk.

This sort of challenge does not lead to easy jurisprudential solutions, and the uncertainties in the Majority Opinion reflect that reality. Thus, the Majority not only details the procedural deficiencies it perceives in the way appellant went about seeking a comity-based recognition of her Israeli judgment here, but also suggests a set of procedural requirements which it states would be "the most straightforward course for a foreign guardian seeking comity in Pennsylvania." Slip op. at 17. The latter "course" requires that a foreign guardian do three things in addition to securing the relevant foreign judgment. First, the guardian must seek the issuing court's approval for the extra-territorial extension or transfer of authority as guardian. Next, the foreign guardian must implicate the Pennsylvania judicial process, under the Probate Code's guardianship provisions, complying with all procedural processes, including due process. Finally, the guardian must then go before the Court of Common Pleas for recognition of the foreign court decree in the context of a Pennsylvania guardianship proceeding in "the first instance." See Slip op. at 17. This framework is significantly more burdensome and stringent than what would be

commanded by general principles of comity alone.[1] Appellant is afforded no opportunity to attempt to satisfy this set of procedural rules.

In my view, it is unwise, and indeed ironic, to dispose of this appeal upon procedural grounds. Faced with the absence of any particularized framework for litigation of an action such as this, the Majority ultimately concludes that the Israeli guardianship order must be ignored, not because it is not entitled to comity in its own right, but because appellant failed to navigate what the Majority's own thorough analysis reveals to be rather perilous and unpredictable waters in Pennsylvania procedural law. Thus, the Majority finds that appellant "failed to invoke the appropriate statutory framework for entry of a guardianship order in the first instance" in Pennsylvania, and therefore, "the case never progressed to a posture in which the merits could be properly considered." Slip op. at 16. As a result, the Majority concludes that it cannot enforce the Israeli guardianship ruling "for the purpose intended by [appellant] without the affordance of additional procedure and the making of relevant substantive determinations concerning disputed issues." One such deficiency identified by the Majority is the fact that the court below (through no fault of appellant) failed to make a "determination on a full and fair hearing concerning Daniel's present status and best interests." Id. at 17. The Majority does not afford appellant any "additional procedure" to address these deficiencies, however.[2]

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[1] The framework is also more stringent than the specific statutory framework for applying foreign custody orders in Pennsylvania under the Uniform Child Custody Jurisdiction Act, 23 Pa.C.S. §§ 5341-5366 (the "UCCJA"), which arguably involves the same public policy concerns. The UCCJA allows enforcement and recognition of international custody orders as long as there is reasonable notice and an opportunity to be heard. See 23 Pa.C.S. § 5365.

[2] It is not clear whether the Majority is ruling against appellant entirely upon grounds of procedural deficiency or upon a combination of procedural and substantive grounds. The uncertainty arises from the fact that the Majority, apparently in order to disavow the Superior Court's review of the public policy question, opines that the foreign determination (continued…)

Of course, once the Majority identifies "a guardianship order in the first instance" as the only procedure by which appellant might be able to secure recognition of her Israeli guardianship judgment upon comity grounds, and then sets forth a procedural requirement that the foreign decree include the issuing court's anticipatory "approval for the extra-territorial extension or transfer of the authority as guardian," appellant is doomed to defeat irrespective of whether the Majority would afford her an opportunity to attempt to satisfy its new procedural framework. Not having had any reason to believe initially that such would be required of her, appellant will not be able to make the showing that would be required of her to secure an order of guardianship in the "first instance" under the Probate Code, for such is not what she was seeking. Instead, appellant only sought a comity-based recognition of, and deferral to, the guardianship judgment she **already** had in hand and had secured, so far as we can tell, in full compliance with Israeli legal requirements. The Majority's answer to the plea actually forwarded by appellant, indirect but unmistakable, is that Pennsylvania will simply not entertain such requests.

I think a better approach is that adopted by the Superior Court: *i.e.*, to recognize jurisdiction to entertain appellant's comity-based request on its own terms, and to evaluate the merits of the accompanying due process issue (raised by appellee) under settled substantive principles of comity law. But to dismiss appellant's action on procedural grounds, as the Majority does, punishes her both: (1) for the fact that Pennsylvania law does not currently provide a clear method and procedure whereby a party in possession of

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(…continued)
is inadequate on the current state of the record, which suggests a merits ruling. Slip op. at 17. But, that observation is accompanied by the denial of an opportunity for appellant to make the required showing, as well as the purely procedural analyses which preceded this commentary. Since appellant is assessed one hundred percent of the retroactive blame for the procedural deficiencies identified by the Majority, with no opportunity to address the deficiencies, the disposition here must be deemed procedural.

a presumptively valid foreign guardianship order may seek in good faith to have that order enforced in Pennsylvania; and (2) for failing to predict the procedural course this Court would decide is "most straightforward" in the absence of a specifically governing course. Furthermore, proceeding to an evaluation of the merits avoids the irony of this Court essentially avoiding a sensitive substantive question which would involve our assessment of whether a foreign jurisdiction's judicial proceedings comport with our own notions of due process, by holding that the foreign party will have no meaningful day or process in Pennsylvania because this Commonwealth's approach is so uncertain and byzantine that the party could not possibly have guessed how to proceed.

On the substantive question presented, the Majority has set forth the controlling law involving application of principles of comity, and I need not discuss those principles at length here, except to note my agreement with the following Third Circuit formulation:

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or an obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (citations omitted) (applying Pennsylvania law).

Therefore, I respectfully dissent.