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[24/01/1997; United States District Court for the Eastern District of New York; First Instance]
In the Matter of Mahmoud, No. CV 964 165 (RJD) (E.D.N.Y. Jan. 24, 1997)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

January 24, 1997

Before: Dearie, D.J.

In the Matter of T. MAHMOUD (an infant)

S. MAHMOUD (a/k/a S.H.) (Petitioner) vs. M. MAHMOUD (Respondent)

Background:

Petitioner S.M. filed a petition in New York state court, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. s. 11601 et seq., seeking the return of her child and permission to return with the child to England. On the day of the state court hearing, respondent M.M. filed a notice of removal with the state and federal courts. Respondent advised the state court that the action had been removed, but the state court judge entered an order granting petitioner's requested relief. Ms. M. has since returned with the child to England, where related litigation is currently pending.

Respondent moves to vacate the state court order for lack of jurisdiction and to dismiss the action as moot. Petitioner agrees that the action is moot, but seeks a forum to make an application for attorney's fees and costs. [FN1] Petitioner contends that this Court lacks subject matter jurisdiction and that the state court order is valid. For the reasons stated below, the Court vacates the state court order and dismisses the action as moot.

Discussion

Petitioner argues that the Court lacks subject matter jurisdiction over this action because the purpose of the Hague Convention and ICARA is to protect the rights of the person seeking a child's return, and therefore, only the petitioner may control the forum in which the case is heard. Petitioner concludes that the Court should dismiss the action because respondent had no right to remove the ICARA proceeding to federal court from the state court forum chosen by petitioner. Pet. Hem. Of Law at 3-4. Petitioner's reliance on *In re: the Application of Fjeldheim v. Fjeldheim*, No. 95-CV-394, (W.D. Mich. Jan. 19, 1996), is misplaced because *Fjeldheim* addressed the question of who may bring a petition pursuant to the Hague Convention and ICARA, but did not address removal of an ICARA proceeding.

The Court concludes that subject matter jurisdiction is proper because the matter could have been originally filed by petitioner in federal court. ICARA grants state and federal courts "concurrent original jurisdiction of actions arising under the Convention." 42 U.S.C. s. 11603(a). The federal removal statute, 28 U.S.C. s. 1441(a), authorizes removal by the defendant to federal court if original jurisdiction exists in the district court, except "as otherwise expressly provided." Neither the Hague Convention nor ICARA prohibits removal. "The general rule is that 'absent an express provision to the contrary, the removal right should be respected when there is concurrent jurisdiction.'" *Johnson v. First Union Life Ins. Co.*, 914 F. Supp. 51, 52 (S.D.N.Y. 1996) (citations omitted); see also *Leonardis v. Local 282 Pension Trust Fund*, 391 F.Supp. 554, 557 (E.D.N.Y. 1975) ("the existence of concurrent state and federal jurisdiction does not operate to defeat defendant's right to remove to federal court").

The Court vacates the state judge's order as null and void, pursuant to Fed. R. Civ. Pro. 60(b)(4), because it was entered subsequent to the filing of notice of removal. Section 1446(d) of Title 28 provides that once removal is effectuated, "the State court shall proceed no further unless and until the case is remanded." *New York State National Organization of Women v. Terry*, 691 F.Supp. 1324, 1330 n.5 (S.D.N.Y. 1988). Upon removal, the state court is deprived of jurisdiction "irrespective of whether the action is removable." 1A J. Moore Federal Practice PO 168(3.-8), at 1306 (2d ed. 1965) (quoted in *United States ex gel. Echevarria v.*

Silberglitt, 441 F.2d 725, 227 (2d Cir. 1971)). An order of the state court entered after removal is void. *Tarbell v. Jacobs*, 856 F. Supp. 101, 104 (N.D.N.Y. 1994).

The court dismisses this matter as moot because the child has been returned to England and is living with Ms. M., which was the principal relief requested by the petition. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn New York

January 24, 1997

/s/ Raymond J. Dearie

RAYMOND J. DEARIE

United States District Judge

1. The question of petitioner's legal fees and costs was resolved during oral argument with the understanding of counsel.

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