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[16/04/1997; United States District Court for the District of Arizona; First Instance]
Steffen F. v Severina P., 966 F. Supp. 922 (D. Ariz. 1997)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

April 16, 1997

Before: Roll, D.J.

S.F. (Petitioner) vs. S.P. (Respondent)

ROLL, D.J.: This matter involves the temporary custody of a three year old boy. It was tried to the Court March 11-13, 1997. This Court has jurisdiction pursuant to the Convention on the Civil Aspects of Child Abduction signed at the Hague on 26 October 1980 ("Hague Convention") and the implementing statute the International Child Abduction Remedies Act, 42 U.S.C. s. 11601 et seq. For the reasons set forth below, it is ordered that J. remain in the custody of his mother, S.P., until-permanent custody is awarded by a court of competent jurisdiction.

In the interest of providing some background to the findings of fact and conclusions of law, this Order will first outline the evidence presented to the Court at the trial, followed by some of the relevant procedural history in this case and the applicable law. Finally, the Order outlines the findings of fact and conclusions of law.

Evidence at Trial

J. is a three year old boy. His mother is S.P. and his father is S.F. S.P. is a citizen of Great Britain, the United States, and the Federal Republic of Germany ("Germany"). S.F. is a citizen of Germany. J. was born in Germany and is a citizen of both Germany and the United States. Both S.P. and S.F. were among the witnesses in the three day trial regarding the interim custody of J.

S.F. and S.P. lived in Germany and became romantically involved in late 1990 or early 1991. At that time, S.P. was pregnant by another man whose child, T.P., was born in Germany on August 22, 1991. In early 1992, S.P. and S.F. began to cohabit, and T.P. lived with them. S.F. was, and still is, employed as an electrical engineer in the * Service of the German Air Force at Ramstein Air Base. S.P. was a nursing student.

On December 10, 1993, S.F. and S.P. were married in Landstuhl, Germany. By all accounts, the marriage was a stormy one and, almost immediately, the couple discussed divorce. On March 10, 1994, J. was born. The marital situation did not improve, however, and on March 3, 1996, S.P. moved out of the family residence, taking both children with her.

On March 13, 1995, S.P. and S.F. met together with their attorneys to discuss the terms of the separation and the custody of the two children. An arrangement was agreed upon wherein S.F. would have physical custody of both children every other weekend, and visits in between those times were permissible. These arrangements were carried out by the parties.

Eight months later, on November 13, 1996, with no advance notice given to S.F., S.P. left Germany with J. and T.P. That day, S.P. mailed a letter to S.F., which stated, in part: "As you read this letter, we are already out of the country . . . If you try to find me, good luck." They flew to Detroit, Michigan, where they were met by a male friend of S.P. who was in the process of obtaining a

divorce. After approximately ten days in which the four lived together in Dayton, Ohio, they drove to Tucson, Arizona.

Since arriving in Arizona, S.P. and the children have lived in a number of different locations. Most recently, the three live with S.P.'s parents, who now own a home in Arizona. S.P. did not directly notify S.F. of her location, but he eventually learned of it when he was served with dissolution papers that S.P. had filed in Pima County Superior Court. Since learning of his whereabouts, S.F. has been able to visit J. at least once when S.F. was in Arizona for some court proceedings.

In addition to testimony regarding the family history, evidence was presented at the trial indicating that T.P. had been sexually abused. This evidence included testimony that T.P. has engaged in inappropriately sexualized conduct, the fact that T.P. had a yeast infection and vaginal discharge prior to leaving Germany, a clinical psychologist's testimony that T.P. told him that "papa" had touched her "pee pee," and the opinion of Dr. Jerry Richard Day, a psychologist, that T.P. had been sexually molested. S.F. testified that S.P. threatened him with sexual abuse allegations should he contest J.F.'s custody.

There was also testimony as to the psychological status of both T.P. and J.F. Dr. Jerry Day testified extensively concerning the results of psychological testing administered to and interviews of the children. The tests included the Twenty-Five Point Bonding Assessment, the House, Tree, Person Test, and the Children's Apperception Test. He concluded that both children were attached and bonded to their mother, S.P. Dr. Day also testified concerning the likely consequences of unnattaching and unbonding a child after bonding and attachment has occurred. S.F. presented no expert witnesses to counter the testimony of Dr. Day.

Procedural Background

There, have been a number of judicial proceedings initiated in both Germany and the United States pertaining to the custody of J.F.

On January 30, 1996, S.P. filed a petition to establish child custody in the Superior Court of the State of Arizona, Pima County. The Pima County Superior Court declined to exercise jurisdiction over the issue of J.F.'s custody.

S.F. fared better. After S.P. left the two children, S.F. filed a petition for custody of J.F. in the Family Law Division of the Landstuhl District Court in Germany. That court awarded S.F. custody of J.F. for the duration of the parties' separation on June 13, 1996.

On April 15, 1996, approximately five months after S.P. left Germany with J.F. and T.P., S.F. filed an application for assistance under the Hague Convention on Child Abduction with the United States Central Authority.

The Pima County Superior Court granted S.P. dissolution of her marriage to S.F. in August of 1996. That dissolution decree did not address any custodial issues involving J.F.

Because the Landstuhl District Court order awarding S.F. custody of J.F. on June 13, 1996 was not an award of permanent custody, after S.P. obtained the dissolution decree in August 1996, S.F. sought and obtained a decree of "preliminary" permanent custody of Jaime F. That decree was entered February 24, 1997, by the Landstuhl District Court, Family Law Division.

Finally, on July 26, 1996, S.F. filed the Petition for Return of Child Pursuant to the Hague Convention in this Court. The parties' need for discovery resulted in this matter not being tried to the Court until March 1997.

Applicable Law

Under the Hague Convention and the International Child Abductions Remedies Act, 42 U.S.C. s. 11601 et seq., the issue before this Court is a very narrow one. Specifically, this Court must

determine whether, pending a determination of custody, J.F. should be returned to Germany and his father, S.F., or remain in the United States with his mother, S.P.

Pursuant to the Hague Convention, as Petitioner in this action, S.F. must prove the following three elements by a preponderance of the evidence: (1) J.F. was an "habitual resident" of Germany; (2) S.F. had either sole or joint rights of custody concerning J.F; and, (3) at the time of J.'s removal from Germany, S.F. was exercising those custodial rights. 42 U.S.C. s. 11603(e)(1)(A); Hague Convention, Art. 3. Once that burden is met, the burden shifts to Respondent S.P., who must prove at least one of three affirmative defenses she has raised to prevent the return of J.F. to his father. 42 U.S.C. s. 11603(e)(2)(A) and (B); Hague Convention Art. 12, 13(b) and 20. See also, Friedrich v. Friedrich 983 F.2d 1396 (6th Cir. 1993).

The first of these affirmative defenses requires proof by a preponderance of the evidence that J.F. has now settled into his new environment and that S.F. did not commence proceedings for return of the child until after a period of one year; had expired following wrongful removal of the child. 42 U.S.C. s. 11603(e)(2)(B); Hague Convention, Art. 12.

A second affirmative defense is provided for under 42 U.S.C. s. 11603(e)(2)(A) and the Hague Convention, Art. 20. That affirmative defense requires proof by clear and convincing evidence that J.F.'s return to Germany "would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." Hague Convention, Art. 20.

The final affirmative defense raised by S.P. requires proof by clear and convincing evidence that J.F. should not be returned to the country of the child's habitual residence because "there is a grave risk that his return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." 42 U.S.C. s. 11603(e)(2)(A); Hague Convention, Art. 13(b). Most of S.P.'s evidence at trial pertained to this defense.

Discussion

A. Petitioner's Initial Burden

Based on the facts presented by both Petitioner and Respondent, S.F. proved by a preponderance of the evidence that: (1) J.F. was an habitual resident of Germany and was removed from that country by S.P.; (2) at the time that S.P. removed J.F., S.F. had either sole or joint custody of J.F.; and (3) at the time of removal, S.F. was exercising his custodial rights.

J.F. was born in Germany and lived his entire life there Until S.P. brought him to the United States in November 1995. Therefore, he was clearly a "habitual resident" of Germany when S.P. left Germany with him. See, e.g., Meredith v. Meredith 759 F.Supp. 1432 (D.Ariz. 1991). It is uncontroverted that S.P. removed J.F. from Germany. At the time S.P. took J.F., she did so wrongfully because S.F. had joint custody of J.F. and was exercising his custodial rights as evidenced by both S.P.'s and S.F.'s testimony regarding the terms of their separation as agreed to in March 1995. BGB S. 1626, translated in The German Civil Code S. 1626 (Simon L. Goren trans., Rothman & Co.1994) (hereafter "German Civil Code S. 1626); Currier v Currier, 845 F.Supp. 916, 921 (D.N.H. 1994).

B. Affirmative Defenses

Because S.F., has met his initial burden of proof, S.P., in order to prevent the return of J.F. to his father in Germany, has the burden of proving that at least one of the available affirmative defenses applies.

1. New environment and passage of more than one year

The affirmative defense that J.F. has settled into his new environment and that S.F. permitted over one year to expire following J.F.'s wrongful removal before commencing proceedings to obtain

J.F.'s return is inapplicable. The second prong of this defense is not supported by the facts. J.F. was taken from Germany on November 13, 1995, and S.F. filed this action on July 26, 1996. This is well within one year of J.F.'s abduction. Therefore, S.P. failed to prove this affirmative defense by a preponderance of the evidence.

2. Violation of human rights and fundamental freedom

Nor is the second affirmative defense raised by S.P. applicable. There is nothing in the record to indicate that return of J.F. to Germany would be violative of human rights and fundamental freedoms. Therefore, S.P. has failed to establish this affirmative defense.

3. Grave risk of harm

Only the affirmative defense of grave risk of harm to J.F. remains to be considered. S.P. has the burden of establishing this defense by clear and convincing evidence.

a. Sexual abuse

S.P. argues that a grave risk to J.F. exists because S.F. molested S.P's daughter, T.P. There was no evidence that J.F. was molested. Evidence that T.P. was molested is only probative to the extent that T.P.'s molestation is attributable to S.F. If S.F. is responsible for molesting T.P. it may be inferred that if S.F. molested T.P., S.F. would be an unfit father for J.F., and J.F. would also be at risk of molestation.

While it is highly probable, based on the testimony of the fact witnesses and the psychologists, that T.P. has suffered sexual abuse at some point in her life, S.P. has not shown by clear and convincing evidence that S.F. was responsible for that abuse. Because it has not been shown that any abuse is attributable to S.F., it cannot be inferred that J.F. would be physically at risk of abuse if he were returned to his father or that S.F. is an unfit parent. Accordingly, the affirmative defense of grave risk of harm to J.F. may not be grounded upon S.F.'s alleged sexual abuse of T.P.

b. Bonding and attachment

S.P. also provided evidence of another source of grave risk to J.F. If he were returned to Germany, that being psychological harm. Dr. Jerry Day offered compelling testimony that J.F. faces a grave risk of psychological harm if he is returned to Germany. After testifying that J.F. was bonded to his mother, Dr. Day stated that removal of J.F. from his mother for any period of time longer than a few weeks would likely result in unbonding and unattachment. He stated that a grave risk exists because a child being unbonded and unattached often produces long-term, serious psychological problems. Such children often grow up to be manipulative and untrusting. He stated that sociopaths tend to be adults who were unbonded as children. He also stated that a painful separation such as would occur here should J.F. return to Germany would likely result in J.F. suffering significant disorders. Dr. Day further testified that, although it is possible for a child of Jaime F.'s age who has bonded and attached to his mother, upon removal from her, to reattach to the child's father, the prospects for rebonding and reattachment are bleak.

S.F. argues that bonding and attachment issues do not rise to the level of grave risk of harm, relying upon Friedrich v Friedrich, 78 F.3d 1060 (6th Cir.1996). There, the Sixth Circuit stated that grave risk of harm exists in only two situations: (1) where return of the child puts the child in imminent danger prior to resolution of the custody dispute, for example, returning a child to a war zone, or (2) in cases of serious abuse or neglect, or extraordinary emotional dependence, where the court in the country of the child's habitual residence may be incapable or unwilling to give the child adequate protection. 78 F.3d at 1068.

Under the Sixth Circuit's reasoning, issues such as attachment and bonding, even when constituting extraordinary emotional dependence, do not meet the requisite grave risk of harm absent an additional finding that the court in the country of the child's habitual residence is incapable or unwilling to give the child adequate protection. Should the Sixth Circuit's interpretation of grave

risk of harm be applied to this matter, S.P. would fail to make the necessary showing because any resulting detachment and unbonding would result from Jaime F. being deprived of his mother, not from lack of effort by a German court.

It is significant, however, that language in the Eighth Circuit decision of Rydder v. Rydder 49 F.3d 369, 373 (8th Cir. 1995) suggests that specific evidence of potential harm to a child as a result of separation from a primary caregiver may constitute grave risk of harm under the Hague Convention. There, a mother relied upon seven authorities that recognize that separating a child from his or her primary caretaker creates a risk of psychological harm. 49 F.3d at 373 (citations omitted). Based on the facts before it the Eighth Circuit declined to find a grave risk of harm, emphasizing that the mother had failed to present specific evidence of potential harm to the children' at issue.

It is also notable that at least one previous petition pursuant to the Hague Convention has been denued because the court found that the chiid's return would be psychologically dangerous to the child. While this Court clearly recognizes the absence of precedential impact on this Court of any foreign court decision [FN1] and the absence of precedential impact in Germany of a German court decision, Germany being a civil law country, [FN2] the decision in B. v B., Family Court of Westerberg, September 29, 1992, is nevertheless instructive. B. v. B. is a mirror case to the instant matter. There, a German court found that grave risk of harm existed should a German child abducted from Texas and taken to Germany be returned to Texas, because of the intensive bond between [German] mother and child.

In response to S.P. s arguments of psychological harm, S.F. relies heavily upon the Sixth Circuit's statement that "[a] removing parent must not be allowed to abduct a child and then - when brought to court - complain that the child has grown used to the surroundings to which they were abducted." 78 F.3d at 1068. S.F. argues that if J.F. is more bonded to S.P. than he is to S.F., it was a result of S.P.'s abduction of J.F. and she should not be allowed to benefit from such wrongful actions.

Certainly this Court would agree that no parent should be rewarded for wrongfully abducting a child. However, punishment of the wayward parent should not be the single decisive factor in resolving this matter. Where bonding and attachment have occurred and removal of the child would likely cause great harm to that child, it would be troubling to remove the child from that parent in order to punish the parent for the wrongful act of abduction.

S.P. acted wrongfully in removing J.F. from Germany. In doing so, she deprived J.F. of contact with his father and caused S.F. to go to extraordinary lengths to locate his son and seek his lawful return. This conduct is inexcusable. Nevertheless, her conduct should not obligate this Court to ignore compelling proof that the return of J.F. to Germany at this time would pose a grave risk of psychological harm to him now and in the future.

Having weighed all the evidence before it, the Court concludes that Respondent S.P. has proven by clear and convincing evidence that a grave risk of harm exists if J.F. were returned to Germany. The grave risk of harm arises from the fact that J.F. has attached and bonded to his mother and is likely to suffer detachment and unbonding should he be removed from her.

Findings of Fact

Based upon the evidence; presented at trial, the Court makes the following findings of fact:

1. S.F. is a citizen of Germany and S.P. is a citizen of Great Britain, the United States and Germany.

2. At all relevant,times, up until November 13, 1996, S.F. and S.P. lived in Germany, although S.P. did travel to the United States for approximately nineteen days in 1995.

3. S.F. was, and still is employed as an electrical engineer in the * Service of the German Air Force at Ramstein Air Base.

4. S.F. and S.P. began a romantic relationship in late 1990 or early 1991. At that time S.P. was pregnant by another man.

5. S.P.'s child, T.P., was born August 22, 1991.

6. In early 1992, S.F. and S.P. began to cohabit. T.P. lived with them.

7. S.F. and S.P. were married on December 10, 1993.

8. J.F., son of S.F. and S.P., was born on March 10, 1994, in Germany. J.F. is a dual citizen of Germany and the United States.

9. S.F.'s and S.P.'s marriage was a stormy one. Almost immediately, the couple discussed divorce.

10. On March 3, 1995, S.P. moved out of the family residence and took J.F. and T.P. with her.

11. On March 13, 1995, S.F., S.P. and their respective attorneys met to discuss separation and shared custody of both children.

12. In July 1995, T.P. had a yeast infection, the cause of which is unknown.

13. On November 13, 1995, S.P. left Germany with T.P. and J.F. Before leaving Germany, S.P. wrote a letter to S.F. in which she stated in part: "As you read this letter, we are already out of the country. If you try to find me, good luck."

14. S.P. and the two children flew from Frankfurt, Germany, to Detroit, Michigan, where they were met a male friend of S.P.'s who was in the process of obtaining a divorce. The male friend, S.P. and the two children drove to his home in Dayton, Ohio, stayed there for approximately 10 days, then drove to Tucson, Arizona.

15. On November 15, 1995, S.F. received S.P.'s letter of November 13, 1995.

16. S.F. filed a petition for custody in the Landstuhl District Court, Family Law Division, in Germany on January, 18, 1996.

17. On January 30, 1996, S.P. filed a petition to establish child custody in the Superior Court of the State of Arizona, Pima County.

18. The Pima County Superior Court declined to exercise jurisdiction concerning J.F.'s custody. This is reflected in an order dated April 3, 1996.

19. On April 15, 1996, S.F. filed with the United States Central Authority an application for assistance under the Hague Convention on Child Abduction, seeking the return of J.F.

20. The Landstuhl District Court, Family Law Division, entered an order June 13, 1996, awarding custody of J.F. to S.F., for the duration of the parties' separation.

21. S.P. was granted a dissolution of her marriage to S.F. in August 1996 by the Pima County Superior Court. That dissolution decree did not address any custody issues involving J.F.

22. After S.P. obtained the dissolution decree in Pima County Superior Court, S.F. sought permanent custody of J.F. in Germany. He was awarded custody by the Landstuhl District Court, Family Law Division on February 24, 1997.

23. On July 25, 1996, S.F. filed a Petition for Return of Child Pursuant to the Hague Convention in this Court.

24. Substantial evidence exists that T.P. has been sexually abused at some point in time. The identity of the molester was not clearly established.

25. Based on the testimony of Dr. Jerry Day, a psychologist, it is clear that J.F. is bonded and attached to his mother, Respondent S.P., and that removal of J.F. from his mother at this time would pose a grave risk of harm to J.F.

26. Based on the testimony of Dr. Jerry Day, J.F. is not bonded and attached to his father.

27. Based on the testimony of Dr. Jerry Day, it is highly unlikely that J.F. would bond and attach to S.F. or any other person if J.F. were removed from his mother.

Conclusions of Law

The Court makes the following conclusions of law:

1. This Court has jurisdiction pursuant to the Convention on the Civil Aspects of Child Abduction signed at the Hague on 25 October 1980 and the International Child Abduction Remedies Act, 42 U.S.C. s. 11601 et seq.

2. The three elements of a cause of action for return of an abducted child under the Hague Convention are: (1) the child was an habitual resident, of the country from which the child was abducted; (2) the petitioning parent had either sole or joint rights of custody of the child, and (3) at the time of wrongful removal, the petitioning parent was exercising those rights. 42 U.S.C. s. 11603 (e)(1)(A); Hague Convention, Art. 13.

3. At the time S.P. removed J.F. from Germany, Germany was J.F.'s country of habitual residence within the meaning of the Hague Convention, Art 3, and 42 U.S.C. s. 11603(e)(1)(A).

4. Under the German Civil Code S. 1626, S.F. and S.P. had joint custody of J.F. up until November 13, 1995, when S.P. left Germany with J.F.

5. At the time J.F. was removed from Germany, S.F. was exercising his custody rights within the meaning of the Hague Convention.

6. S.P. removed J.F. from Germany wrongfully because she removed J.F. to the United States in derogation of S.F.'s custody rights which he was exercising at the time of the removal.

7. The Court finds by a preponderance of the evidence that S.F. has established the elements of a cause of action under the Hague Convention.

8. Once a petitioner has made a prima facia case under the Hague Convention, respondent must prove the applicability of one of the delineated affirmative defenses under the Convention.

9. Respondent has failed to prove by a preponderance of the evidence that J.F. has settled into his new environment and that S.F. permitted than one year to expire before initiating proceedings for return of J.F., based upon 42 U.S.C. s. 11603(e)(2)(B) and the Hague Convention, Art. 12.

10. Respondent has failed to prove by clear and convincing evidence that J.F. should not be returned to Germany because his return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," based: upon 42 U.S.C. s. 11603(e)(2)(A) and the Hague Convention, Art. 20.

11. Respondent has failed to prove by clear and convincing evidence that S.F. sexually abused T.P.

12. Proof that a child has attached and bonded with a parent and that the child would become detached and unbonded in the event of removal from that parent may constitute a grave risk of harm under the Hague Convention, Art. 13(b), and 42 U.S.C. s. 11603(e)(2)(A)

13. Respondent has established by clear and convincing evidence that there is a grave risk that J.F.'s return would expose him to grave risk of psychological harm, as set forth in 42 U.S.C. s. 11603(e)(2)(A) and the Hague Convention, Art. 13(b), because J.F. has bonded and attached to his

mother, S.P., and removal from her for an extended period of time would likely cause unbonding and detachment and a grave risk of harm to J.F.

For the foregoing reasons,

IT IS ORDERED that Petitioner's Petition for Return of Child Pursuant to the Hague Convention is DENIED and that J.F. not be returned to Germany at this time.

IT IS FURTHER ORDERED that J.F. remain in the custody of his mother, S.P. until such time as custody of J.F. is awarded by a court of competent jurisdiction. This Order does not preclude Petitioner S.F. from visiting his son under reasonable conditions.

IT IS FURTHER ORDERED that the Order of Custody Pendente Lite filed March 6, 1997 is VACATED.

FOOTNOTES

1. See, 20 Am.Jur.2d Courts s. 164.

2. See James L. Demiis, Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent, 54 La. L.Rev. I (1993).
