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[31/05/1996; Supreme Court of New York, Appellate Division, Fourth Department; Appellate Court]
Brennan v. Cibault, 227 A.2d 965, 643 N.Y.S.2d (N.Y. App. Div. 1996)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

May 31, 1996

Before: Pine, J.P., Fallon, Callahan, Doerr and Davis, JJ.

In the Matter of W. Brennan, Respondent, v. A. Cibault, Appellant.

Order unanimously reversed on the law without costs, petition dismissed and application granted in accordance with the following Memorandum: Petitioner is a United States citizen and respondent is a French citizen. They met in New York in June 1990, while respondent was attending a summer session at Fordham University. Approximately one year later, petitioner moved to Paris, France, where the parties were married on November 30, 1991. Their daughter, Z., was born in France on February 17, 1994. With the exception of visits to petitioner's mother in Oswego, New York, the parties lived in France until June 26, 1995, when petitioner and Z. arrived in New York for a six-week visit with petitioner's mother. Petitioner had round-trip tickets, and was expected to return to France on August 4, 1995.

The marriage had been troubled, however, and in telephone calls during the months of July and August, the parties decided to separate. Petitioner indicated that he would not return to live in France if the parties were not going to remain together. They discussed sharing custody of Z., with her spending six months with each of them. Respondent testified at the hearing that she offered petitioner the first six-month period with Z. but informed him that she expected Z. to return to France on December 26, 1995. Petitioner admitted having those discussions but denied that he specifically agreed to the arrangement. In any event, in August 1995, respondent purchased round-trip tickets to fly to New York on December 30, 1995, and to return to France with Z. on January 1, 1996. Respondent agreed to allow Z. to remain with petitioner until December 30 to attend a family wedding.

In the fall of 1995, unbeknownst to respondent, petitioner sought legal advice about obtaining custody of Z. He was informed that Z. would have to live in New York State for six months in order for a New York court to have jurisdiction over a custody proceeding involving her. He did not inform respondent of that information.

On December 28, 1995, petitioner commenced a proceeding in Oswego County Family Court seeking custody of Z. Respondent was served with an order to show cause on the same day that she arrived in New York to pick up Z. The order to show cause granted temporary custody of Z. to petitioner and directed that Z. remain within the jurisdiction of the court pending determination of the petition.

At an appearance before Family Court on January 4, 1996, respondent made an oral application to dismiss the petition for lack of jurisdiction and on the further ground that Z. was being wrongfully retained in New York in violation of the Convention on the Civil Aspects of International Child Abduction (Hague Convention; reprinted in USCS International Agreements) and its enabling legislation, the International Child Abduction Remedies Act (ICARA; 42 USC § 11601-11610). Following a hearing on January 4, 1996, the court denied respondent's application to dismiss the petition. The court held that Z. was not a habitual resident of France within the meaning of the Hague Convention, and that, even if she were, she was not being retained wrongfully in New York because respondent had acquiesced to her residence in New York. Respondent appeals.

The court erred in concluding that Z. was not a habitual resident of France. Because the Hague Convention does not define the term "habitual resident", its interpretation has been left to the courts. Courts interpreting that term have held that it refers to a "degree of settled purpose", as evidenced by the child's circumstances in that place and the shared intentions of the parents regarding their child's presence there (see, Feder v Evans-Feder, 63 F3d 217, 224; Friedrich v Friedrich, 983 F.2d 1396, 1401). The focus is on the child rather than the parents, and on past experience rather than future intentions (Friedrich v Friedrich, supra, at 1401).

Application of those principles here compels the conclusion that France is Z.'s habitual residence. Z.'s parents were married there and had established professions and a home there, and Z. was born in France and lived there for the first 16 months of her life, before she left for what was to be a six-week visit with her grandmother in New York. Those facts reflect a settled purpose on the part of the parties to establish Z.'s life in France.

The court's reliance on In re Falls v Downie (871 F. Supp 100) is misplaced. In that case, the parties were not married and the child's mother, a German citizen, had given the child's father, a United States citizen, permission to take the child to live in the United States for an indefinite period of time. Here, when Z. left France, respondent had consented to Z.'s absence for only six weeks. Eventually, she gave her consent for Z. to remain until December 30, 1995, but she never agreed that Z. remain beyond that time and certainly never agreed that she remain indefinitely.

Because Z.'s habitual residence was in France, and petitioner wrongfully retained Z. in New York in derogation of respondent's equal right to custody of her under the laws of France, Family Court should have dismissed the petition and issued an order pursuant to article 12 of the Hague Convention requiring that Z. be returned forthwith to respondent in France. We hereby so order, noting, however, that, after the entry of the order on appeal, Family Court allowed respondent to return to France with Z. pending a full custody hearing scheduled in Family Court in late May. Any future custody application should be made in the courts of France but, should they decline to determine the issue of custody of Z., petitioner would then be entitled to commence a custody proceeding in New York (see, Ertel v Ertel, 197 A.2d 900, 901). (Appeal from Order)

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