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[28/12/1994; United States District Court for the District of Massachusetts; First Instance] Falls v Downie, 871 F.Supp. 100 (D. Mass. 1994)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

December 28, 1994

Before: Ponsor, D.J.

In the application of V. Falls (Petitioner) v. R. Downie (Respondent)

I. INTRODUCTION

The petitioner V.F. seeks an order from this court pursuant to the Hague Convention and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. Secs 11601-11610, requiring the respondent R.D. to return their two-year-old child P.F. to her. These cases are always difficult but this one, arriving as it did two days before Christmas, was especially painful.

The court heard testimony from both the mother and father on December 23, 1994 and rendered its decision orally. Findings of Fact are set forth below. In summary, the court has concluded that P.F. was not a "habitual resident" of Germany at the time of the alleged wrongful retention by the father, respondent D. Given this, neither the Convention nor ICARA applies and this court lacks subject matter jurisdiction. The petition will therefore be denied and the court will order that this matter be dismissed.

II. FINDINGS OF FACT

F. and D. met each other in Germany when he was stationed there in the Army, and she was working as a cook at a United States Army base. The two began a relationship and in February 1992, F. became pregnant. By that time, D. and she were living together in her apartment, though he maintained a room at the base.

In the spring of 1992, the pair began building their own house on land given to F. by her mother, and on November 11, 1992, the parties' son, P., was born.

D. had been separated from his American wife since August of 1990 and a divorce was pending in the United States. It was the parties' plan that, once the divorce was final, they would get married.

In March of 1993, D.'s period of enlistment expired and he left the military. For the balance of that year, D. tried unsuccessfully to find work in Germany. The family's financial situation became dire. F. was working full time but needed between thirty-five and forty percent of her salary simply to pay the mortgage on the land and house they were building. The situation darkened further when F. discovered that she was again pregnant in November of 1993.

At about this time, F. and D. decided that D. should return to the United States and attempt to find work as a police officer in his home community in Western Massachusetts. He had previously worked as a police officer in Amherst. Just before D.'s departure, when the arrangements for P.'s day care unexpectedly fell through, both parties agreed that D. would take P. with him to the United States, where both he and the boy would live with his parents.

The decision by F. to permit D. to take P. to the United States was entirely voluntary. Moreover, F. understood when D. left with P. that he and their child would be staying in the United States for an indefinite period of time. Although the couple had not married, they considered themselves a family. The plan was that F. would maintain close contact with D. and her son over the next few months, then come to the United States in June of 1994 for her maternity leave after the birth of her child, marry D. and begin residing indefinitely in the United States.

Following up on these plans, D. left Germany in January of 1994 with P. and moved in with his parents in Amherst, Massachusetts. He was able to obtain part time work as a police officer, but could not find a full time job. Unfortunately, in February of 1994, F. suffered a miscarriage. Despite this setback, she and D. continued in a loving relationship for the next few months and sustained their hope that D. would find full time employment, and she would join him and P. in the United States. Because of the miscarriage, F. lost the right to maternity leave and postponed the planned trip to the United States to August 1994.

In June of 1994, during a phone call F. mentioned to D. for the first time that she wished that P. could come back to Germany because she missed him very much. D. stated that they should talk about it when she came to the United States in August.

Meanwhile, P. settled down in Amherst, Massachusetts, living at his grandparents' three-bedroom home. He was cared for by, and developed a close relationship with, his father. In addition, he developed a close relationship with his grandparents, who took care of him when his father was at work.

In August of 1994, F. came to the United States and stayed with D. and his parents in Amherst. It was clear that—for reasons that were not explored at the hearing -- a shadow of some sort had fallen over the relationship. Despite this shadow, both parties still had hopes that they would eventually marry and make a family. Petitioner raised the issue of returning with P. to Germany several times during the August visit, but at this time the respondent D. refused to permit P. to leave. His reason for this, as stated at the hearing, was that P. had become used to the environment in his grandparents' home, and he did not think the disruption of a removal to Germany was in the boy's best interest. At this point, due to the passage of time and the child's young age, P. barely knew his mother.

On August 30, 1994, F. returned to Germany, leaving P. with D. against her will. In Germany, she attempted to institute legal proceedings to obtain appropriate court orders giving her custody of P. Delays occurred in this process. Eventually, she did obtain an order from the Police Court in Regensburg, Germany, holding that she was entitled to custody of P. It is undisputed that under German law the mother has sole custodial rights over an illegitimate child.

Despite these legal developments, both parties testified that even as late as September 1994, following the return of F. to Germany, they each clung to the hope that they would reunite as a family. As of the date of the hearing, December 23, 1994, both F. and D. appeared to have abandoned that hope. It is unclear at what point the relationship became irretrievable.

III. DISCUSSION

Although the facts of this case are somewhat tangled, the legal issue is simple. The Hague Convention is directed at undoing the wrongful removal or retention of a child. Under Article III of the Convention, the retention of a child is wrongful where (1) it is in breach of the rights of custody attributable to a person under the law of the state in which the child was a habitual resident immediately before the removal or retention, and (2) where the custody rights were being exercised by the petitioner.

A key prerequisite to exercise of jurisdiction under the Convention is that the child be removed or retained from its "habitual residence." *Ponath v. Ponath* (D. Utah, C.D. 1993) 829 F.Supp. 363, 365.

To invoke the protection of the Convention, the taking or retention of a minor child must have occurred from a place where the child habitually resides.

Meredith v. Meredith (D. Ariz. 1991) 759 F.Supp. 1432, 1436

The first time that the conduct of the respondent in this case could conceivably be characterized as "wrongful," would be in August of 1994 when F. asked to take P. back to Germany and D. refused to let him go. The petitioner bears the burden of proving by a preponderance of the evidence that P. at that time was a "habitual resident" of Germany.

This burden has simply not been carried. Courts have frequently noted in cases under this statute that the term "habitual residence" has never been defined either in the Convention itself or in the case law. *Ponath*, 829 F.Supp. at 365.

In determining habitual residency, 'the court must look back in time, not forward . . . future plans are irrelevant to our inquiry.' *Friedrich v. Friedrich* (6th Cir. 1993) 983 F.2d 1396, 1401. 'To determine the

habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.' Friedrich, at 1401. Slagenweit v. Slagenweit (N.D. Iowa 1993) 841 F.Supp. 264, 268 .

What is required is that there be a "degree of settled purpose." Id. at 268, quoting In re Bates, No. CA 122.2-89 High Court of Justice, Family Division Court, Royal Court of Justice, United Kingdom 1989.

In this case, as of August 1994, this twenty-one-month old boy had been living in the United States, with the agreement of his mother, and with the prospect of an indefinite continuance of residence, for eight months. He had become completely accustomed to life in this country with his father and grandparents; he barely knew his mother. It simply defies common sense to suggest under these circumstances that P. was, as of that date, a "habitual" resident of Germany. In every significant respect, the boy had by August 1994 settled with the consent of his mother indefinitely in this country.

This conclusion ends the discussion with regard to the application of the Hague Convention and ICARA. To say there was no wrongful retention, of course says nothing about the ultimate issue of custody. This court's decision simply signifies that a competent court of the Commonwealth of Massachusetts will be making the judgment with regard to custody. The child is not subject to immediate return to Germany under the terms of the Convention.

IV. CONCLUSION

For the foregoing reasons, the Petition For Return of the Child is hereby DENIED and this matter is DISMISSED for lack of subject matter jurisdiction. An appropriate order will issue.

MICHAEL A. PONSOR

U.S. District Judge

ORDER

December 28, 1994

PONSOR, D.J.

For the reasons set forth in the Memorandum issued today, this case is hereby DISMISSED .

It is So Ordered.

MICHAEL A. PONSOR

U.S. District Judge

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