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[22/01/1993; United States Court of Appeals for the Sixth Circuit; Appellate Court]
Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

January 22, 1993

Before: Boggs and Siler C.JJ. and Lambros C.D.J.

E. Friedrich (Petitioner-Appellant) v. J. Friedrich; D.H.; and S.H. (Respondents-Appellees)

On Appeal from the United States District Court for the Southern District of Ohio.

BOGGS, Circuit Judge, delivered the opinion of the court, in which SILER, Circuit Judge, joined. LAMBROS, Chief District Judge, delivered a separate dissenting opinion.

BOGGS, C.J.: This is a case of first impression, requiring us to determine when the removal of a child from one country to another by one parent, without the consent of the other, is "wrongful" as defined by the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") as implemented by the United States Congress in the International Child Abduction Remedies Act ("the Act"), 42 U.S.C. s.s. 11601-11610. E.F. appeals from the denial of his petition for the return of his son, T., to Germany. T. was removed from Germany to the United States by his mother, J.F., a few days after the F.s informally separated. The district court found that Mrs. F. did not wrongfully remove T. from Germany within the meaning of the Convention because at the time of removal T. was a "habitual resident" of the United States and Mr. F. was not exercising his parental custody rights. For the reasons that follow, we reverse the district court's ruling and remand the case for a determination of whether, under German law, Mr. F. had custody rights at the time of the removal that he was exercising or would have exercised but for the removal, and for consideration of any affirmative defenses that Mrs. F. might raise.

I

In December 1989, E.F. married J.F. in the Federal Republic of Germany. Mrs. F., a citizen of the United States, was a member of the United States Army stationed in Bad Aibling, Germany. Mr. F., a citizen of Germany, was employed on the military base as a bartender and club manager.

On December 29, 1989, the F.s' only child, T. F., was born in Bad Aibling. During 1990 and early 1991, T. lived with both of his parents in Bad Aibling off the military base. The F.s' marriage was a rocky one from the start. Their first informal separation occurred in June 1990, but only lasted a weekend. The F.s informally separated for a second time in March 1991. For the majority of this separation, Mr. F. and his parents retained physical custody of T. Mrs. F. lived on the military base. In early May 1991, while still separated, the F.s agreed that T. would accompany his mother on a ten-day visit to her parents' home in Ironton, Ohio. Upon T.'s return to Germany, the F.s reunited, and T. lived with both of them until late July 1991.

On the evening of July 27, 1991, the F.s had a heated argument at their apartment. During the argument, Mr. F. ordered Mrs. F. to leave the apartment with T. and put most of their

belongings in the hallway, including some of T.'s toys. Mrs. F., however, did not leave the apartment until the next morning when she obtained assistance from friends in the United States Army. Together, they took T. and removed her possessions to on-base visiting quarters, where she lived with T. for the next four nights, until August 1, 1991. Mr. F. did not interfere with the removal of Mrs. F.'s possessions or with the removal of his child. He explained that he was intimidated by the soldiers and wanted to avoid a scene in front of T.

The on-base visiting quarters are not designed for permanent residence and the daily rate is expensive. Therefore, Mrs. F. immediately sought alternative, less expensive accommodations. Under military regulations, Mrs. F. could not live in the barracks on the base with her son. Mrs. F. testified that she quickly concluded that she had nowhere to live with her son in Germany and that her only recourse was to return to the United States. In the late evening of August 1, 1991, without Mr. F.'s permission, consent or knowledge, Mrs. F. left Bad Aibling en route to the United States with T.

Between the time she left the family apartment on July 28, and the time she left Bad Aibling on August 1, 1991, Mrs. F. met with Mr. F. at least twice to discuss their separation and T.'s welfare. On July 29, 1991, Mr. F. visited with T. for four hours. On August 1, 1991, the F.s planned specific times for Mr. F. to visit with T. during the following week.

Mrs. F. arrived in Ironton, Ohio on August 2, and initiated a divorce action in Lawrence County, Ohio on August 9, 1991. Although the court issued a Letter Rogatory to the appropriate German authorities, Mr. F. claims that he never received the letter or any notice of the judicial proceedings in Lawrence County, Ohio. On August 11, 1991, Mrs. F. returned to Germany without her son and immediately sought an emergency discharge from the United States Army. On August 28, 1991, the Lawrence County, Ohio, Court of Common Pleas issued a temporary order in favor of Mrs. F. and ordered that T. not be removed from Ohio until further order of the court. On September 15, 1991, Mrs. F. was discharged from the United States Army, and she returned to her parents' home in Ironton, Ohio.

Mr. F. discovered that T. had been removed to the United States on August 3, 1991, and filed a claim in Germany seeking to obtain parental custody soon afterward. On August 22, 1991, a Municipal Court-Family Court in Rosenheim, Germany granted Mr. F. parental custody of T. Mrs. F. did not receive notice of that judicial proceeding.

Mr. F. filed this action on September 23, 1991, alleging that Mrs. F. had wrongfully removed T. from Germany in violation of the Hague Convention on Civil Aspects of International Child Abduction. On January 10, 1992, the district court denied Mr. F.'s claim.

II

The Convention on Civil Aspects of International Child Abduction was adopted by the signatory nations in order ``to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'' Hague Convention, Preamble. The United States ratified the Convention on April 29, 1988. Germany is also a signatory nation to the Convention. Pursuant to Article 19 of the Convention and section 2(b)(4) of the Act, a United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. It is important to understand that "wrongful removal" is a legal term strictly defined in the Convention. It does not require an ad hoc determination or a balancing of the equities. Such action by a court would be contrary to a primary purpose of the Convention: to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.

Under the Convention, the removal of a child from one country to another is wrongful when:

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of agreement having legal effect under the law of that state.

Hague Convention, Article 3.

Under the Act, Mr. F. has the burden of showing by a preponderance of the evidence that the removal was wrongful. 42 U.S.C. s. 11603(e)(1). If Mr. F. meets his burden, the burden shifts to Mrs. F. to show 1) by clear and convincing evidence that there is a grave risk that the return of the child would expose the child to physical or psychological harm; Hague Convention, Article 13(b), 42 U.S.C. s. 11603(e)(2)(A); 2) by clear and convincing evidence that the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms"; Hague Convention, Article 20, 42 U.S.C. s. 11603(e)(2)(A); 3) by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child has become settled in its new environment; Hague Convention, Article 12, 42 U.S.C. 11603(e)(2)(B); or 4) by a preponderance of the evidence that Mr. F. was not actually exercising the custody right at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; Hague Convention, Article 13(a), 42 U.S.C. s. 11603(e)(2)(B).

Therefore, as a threshold matter, Mr. F. must prove by a preponderance of the evidence that 1) Mrs. F. removed T. from his "habitual residence," and 2) Mr. F. was exercising his parental custody rights over T. at the time of removal, or that he would have exercised his rights but for the removal, under the law of the state of T.'s habitual residence. If Mr. F. meets this burden, Mrs. F. may fall back on one of the four affirmative defenses. The district court held that Mr. F. failed to prove both parts of the test. Instead, the court found that 1) T.'s habitual residence was "altered" from Germany to the United States when Mr. F. set some of T.'s belongings out in the hallway on July 27, 1991, and 2) Mr. F. "terminated" his custody rights when he "unilaterally expelled" Mrs. F. and T. from the apartment. The district court did not reach the merits of any affirmative defenses.

III

A

The Convention does not define "habitual residence." Little case law exists on the Convention in general; no United States cases provides guidance on the construction of "habitual residence." The British courts have provided the most complete analysis. In Re Bates, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989), the High Court of Justice concluded that there is no real distinction between ordinary residence and habitual residence. Id . at 10. The court also added a word of caution:

"It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."

Id. (quoting Dicey & Morris, The Conflicts of Laws 166 (11th ed.)). We agree that habitual residence must not be confused with domicile. To determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions.

T. was born in Germany to a German father and an American mother and lived exclusively in Germany except for a few short vacations before Mrs. F. removed him to the United States. Mrs. F. argues that despite the fact that T.'s ordinary residence was always in Germany, T. was actually a habitual resident of the United States because: 1) he had United States citizenship; 2) his permanent address for the purpose of the United States documentation was listed as Ironton, Ohio; and 3) Mrs. F. intended to return to the United States with T. when she was discharged from the military. Although these ties may be strong enough to establish legal residence in the United States, they do not establish habitual residence.

A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward. All of the factors listed by Mrs. F. pertain to the future. Moreover, they reflect the intentions of Mrs. F.; it is the habitual residence of the child that must be determined. Mrs. F. undoubtedly established ties between T. and the United States and may well have intended for T. to move to the United States at some time in the future. But before Mrs. F. removed T. to the United States without the knowledge or consent of Mr. F., T. had resided exclusively in Germany. Any future plans that Mrs. F. had for T. to reside in the United States are irrelevant to our inquiry.

The district court appears to agree that before the argument of July 27, 1991, T. was a habitual resident of Germany. The district court, however, found that T.'s habitual residence was "altered" from Germany to the United States when Mr. F. forced Mrs. F. and T. to leave the family apartment.

Habitual residence cannot be so easily altered. Even if we accept the district court's finding that Mr. F. forced Mrs. F. to leave the family apartment, no evidence supports a finding that Mr. F. forced Mrs. F. to remove T. from Germany; Mr. F. was not even aware of the removal until after the fact. T.'s temporary three-day stay on a United States military base did not transfer his habitual residence to the United States, even if it was precipitated by Mr. F.'s angry actions in a marital dispute. As a threshold matter, a United States military base is not sovereign territory of the United States. The military base in Bad Aibling is on land which belongs to Germany and which the United States Armed Services occupy only at the pleasure of the German government. See Dare v. Secretary of Air Force, 608 F. Supp. 1077, 1080 (D. Del. 1985).

More fundamentally, T.'s habitual residence in Germany is not predicated on the care or protection provided by his German father nor does it shift to the United States when his American mother assumes the role of primary caretaker. T.'s habitual residence can be "altered" only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur before the questionable removal; here, the removal precipitated the change in geography. If we were to determine that by removing T. from his habitual residence without Mr. F.'s knowledge or consent Mrs. F. "altered" T.'s habitual residence, we would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence.

This is a simple case. T. was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore, we hold that T. was a habitual resident of Germany at the time of his removal.

B

The district court also found that Mr. F. "terminated his actual exercise of his parental custody rights" when he "unilaterally" expelled Mrs. F. and T. from his residence. We are doubtful that

the evidence supports a finding that Mr. F. unilaterally expelled Mrs. F. and T. from the family apartment. It is undisputed that during the heated argument on July 27, 1991, Mr. F. removed some and maybe even all of T.'s toys from the apartment. Yet, Mrs. F. and T. remained in the apartment through the night. Mrs. F. was the one who actually removed T. from the residence and did so with the help of the United States Army.

Even if we accept the district court's finding that Mrs. F. removed T. from Mr. F.'s residence only because she was forced to do so by Mr. F., we doubt that Mr. F. terminated his custody rights. Mr. F. continued to have contact with both Mrs. F. and his child. Mr. F. assisted Mrs. F. in establishing quarters on the base and helped her move T.'s crib on to the base. On July 29, 1991, Mr. F. visited his child for four hours. On August 1, 1991, Mr. F. met with Mrs. F. to discuss the future of their relationship and the custody of T. Although they gave conflicting accounts of the meeting, both stated that plans were made for Mr. F. to visit T. within the next week.

Under the Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residence. Hague Convention, Article 3. We have determined that T. was a habitual resident of Germany when Mrs. F. removed him to the United States. Neither the district court, nor either party on appeal, applied German custody law to the above facts. At oral argument, however, both parties agreed that German custody law is similar to American law. Under American law, custodial rights can only be terminated by judicial action, or by circumstances much more extraordinary than those presented here. We would be surprised if Mr. F.'s actions terminated his custody rights under German law, but we do not make that factual determination. Instead, we remand to the district court with instructions to make a specific inquiry as to whether, under German law, Mr. F. was exercising his custody rights at the time of T.'s removal.

IV

Every family dispute has its own unique set of facts, and the case before us certainly is no different. However, there is a central core of matters at which the Hague Convention was aimed: situations where one parent attempts to settle a difficult family situation, and obtain an advantage in any possible future custody struggle, by returning to the parent's native country, or country of preferred residence. That is exactly what happened here. The rights and wrongs of the actions of the respective parents are not before us for disposition on the merits. But it is clear, as shown both by actions at the time and by the subsequent strenuous course of this litigation, that both parents maintained a lively interest in their relationship with their child, T.

Under such circumstances, the Hague Convention is clearly designed to insure that the custody struggle must be carried out, in the first instance, under the laws of the country of habitual residence, which is Germany in this case.

The affirmative defenses of Section 11603(e)(2) of the Act offer an opportunity, in extraordinary cases, for a court in the country of flight to consider the practical realities of the situation. However, it is the clear import of the Convention that in most cases the duty of that court, when the niceties of the convention are met, is to return the child to the country of habitual residence for resolution of the custody dispute under the laws of that country.

V

For the foregoing reasons, we REVERSE the district court's denial of the petition and REMAND the case to the district court with instructions to determine whether, under German law, Mr. F. was exercising his custody rights over T. at the time of the removal and to consider any affirmative defenses Mrs. F. might raise.

THOMAS D. LAMBROS, Chief District Judge, dissenting. For reasons set forth below, I believe the decision of the trial judge in denying the return of T.F. to Germany should be affirmed. The trial judge's laudable efforts in seeking a voluntary resolution of the dispute over the child's custody and his determination that the mother did not wrongfully remove the child from Germany are compatible with the objectives and imperatives of The Hague Convention on the Civil Aspects of International Child Abduction.

The findings of fact made by the judge shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a). I believe the trial judge's decision to deny return of the child to Germany is supported by the evidence produced at trial and is therefore not clearly erroneous.

Respondent testified, "[h]e threw everything I owned and my baby owned out of the house. There was nothing left in that house." Petitioner's testimony corroborates this:

Question: ... [with] regard to your asking her to leave, requesting her to leave, and removing her personal belongings and your son's personal belongings into the hallway outside the apartment. Did that occur?

Answer: yes, sir.

Focusing on the totality of the testimony given, there may be a dispute as to whether petitioner threw out respondent and her son however, the trial judge sitting as trier of fact, determining credibility of the witnesses and the value of testimony given, found that petitioner expelled the wife and child from the apartment and terminated actual exercise of his parental custody rights over the child. This finding by the trial judge is not clearly erroneous.

A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Anderson at 573. I have no definite and firm conviction that a mistake has been made.

With regard to the treaty itself, Article 13 provides: ... the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that- (a) the person,... having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention....

In defining the rights of custody, Article 5 of the Convention includes rights relating to the care of the person of the child and the right to determine the child's place of residence. By expelling the child from the apartment, petitioner gave up his right to determine the child's place of residence which means that there was no right of custody to assert in the district court. Since there was no right of custody because petitioner gave it up, there was no breach of the rights of custody. Thus, removal was not wrongful under the terms of The Convention.

For these reasons, I believe the district court's decision should be affirmed.

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