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[31/01/1991; Family Court of New York, Kings County (United States); First Instance]
David S. v. Zamira S., 151 Misc. 2d 630, 574 N.Y.S.2d 429 (Fam. Ct. 1991)

FAMILY COURT OF NEW YORK, KINGS COUNTY

January 31, 1991

Before: Hepner, J.

D.S. vs Z.S.

On December 18, 1990 an order of the Supreme Court of Ontario, dated November 27, 1990, was filed in this Court by the petitioner. The order was filed pursuant to Section 75-p [9 ULA 15] of the Domestic Relations Law of New York State. On this same day, the petitioner filed a petition for enforcement of the Canadian order, which granted him temporary custody of the parties' two children, P.S., and S.S., and directed their return to Canada.

A warrant was issued for the respondent to produce the children and before the end of the day, the respondent and the two children were before this Court. Pursuant to s. 1022 of the Family Court Act, the children were remanded to the temporary custody of the Commissioner of Social Services of the City of New York to assure their continued presence in this jurisdiction. [FN1]

On December 19, 1990 the parties and their attorneys appeared before this Court and entered into a stipulation by which the children would be released from foster care and the petitioner would be afforded visitation pending the outcome of the these proceedings. [FN2] On December 20, 1990 the parties returned to Court, and based on the respondent's compliance with all of the conditions precedent in the stipulation, the Court issued temporary orders of custody and a temporary order of protection, and released the children to the Court's designated caretaker, R.W.

The petitioner's application for enforcement of the Canadian decree is made pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10499 (1986) [hereinafter cited as "Hague Convention"], and, according to the Hague Convention's provisions, this Court advised the parties that it lacks jurisdiction to adjudicate the merits of the underlying custody dispute. [FN3] Since this Court's power initially is confined solely to matters pertaining to the removal of the children from Canada, counsel for the parties were given an opportunity to brief the following points prior to the Court's ruling on the petitioner's application for enforcement:

(a) Whether the petitioner can prove that the children were "wrongfully removed" from Toronto, Canada, where they resided from birth until October 5, 1989;

(b) Whether respondent can prove that the removal of the children was not "wrongful," within the meaning of the Hague Convention; and

(c) Whether, assuming the petitioner establishes "wrongful removal," the respondent can prove that any of the statutory exceptions contained in the Hague Convention apply, and thus this Court is not bound to order the return of the children to Canada.

HISTORY OF THIS MATTER

The parties are both Canadian nationals. They were married on December 20, 1981. Two children, P. and S., were born of the marriage. P. was born on February 7, 1988 and S. was born on September 21, 1989. Owing to marital difficulties, the parties separated sometime in January, 1989, and thereafter lived apart. On February 2, 1989, the petitioner gave the respondent a religious divorce. No civil divorce has occurred as yet.

On April 6, 1989, the parties entered into a separation agreement which gave custody of P. to the respondent and provided regular visitation between the petitioner and his son. The separation agreement further provided that the respondent "shall make P. available [to the petitioner] within the Metropolitan Toronto vicinity, and should either party plan on relocating outside of the Metropolitan Toronto vicinity, then a mutually agreed-upon intermediary will decide how and where [the petitioner] will be able to continue visiting P." Finally, the agreement provided that "should either party be experiencing any hardships regarding any of the above conditions, he or she has the right to take matters to a rabbinic or secular court."

S. was not born at the time of the separation agreement, and therefore, it is silent as to her. This Court is not aware of any custody or visitation agreement reached between the parties subsequent to her birth. [FN4] Nor has the respondent offered any evidence of a court order giving her custody of S. After S.'s birth, the petitioner applied for an interim order from the secular courts of Ontario preventing the respondent from removing the children from Ontario and form obtaining passports for them. On October 5, 1989 the Supreme Court of Ontario issued the orders the petitioner requested. [FN5]

On or about October 5, 1989, the respondent and the children left Ontario. Respondent followed the procedures set forth in the Hague Convention to secure the return of the children. On December 5, 1989, the Ontario Ministry of the Attorney General forwarded an application for the return of P. and S. to the United States Department of State, the agency designated as the "central authority" pursuant to the Hague Convention with responsibility for carrying out its provisions. The Attorney General of Ontario requested verification of the children's residence and the return of the children.

Subsequently, on a date unknown to this Court, the Department of State communicated with the New York State Clearinghouse for Missing and Exploited Children. It is believed that this agency contacted the New York City Police, verified the children's residence in Brooklyn. Sometime in August, 1990, the petitioner was advised by the New York State Division of Criminal Justice Services that his children were in Brooklyn, New York.

In August, 1990, the petitioner returned to the Supreme Court of Canada for an interim order granting him temporary custody of both children. On September 21, 1990, on inquest, the Supreme Court of Ontario made a finding that the respondent "wrongfully and improperly removed the said children from this jurisdiction [Ontario] and evaded or refused service, although duly served with the Order of this Court, dated October 5, 1989." The Court issued an order giving temporary custody of the children to the petitioner, directing the local law enforcement offices or authorities to assist in the return of the children, and scheduling a hearing on interim custody within seven days of the children's return.

On November 27, 1990, the Supreme Court of Ontario issued another order, substantially equivalent in its terms to the order of September 21, 1990. This order reiterated the Court's finding that the respondent "wrongfully removed" the children from Ontario and supported its order further by adding that she is "currently withholding the said children from [the petitioner] who is entitled to custody and access to the said children." On or about December 5, 1990, the New York State Division of Criminal Justice Services advised the petitioner to contact the Brooklyn Family Court. Petitioner filed the instant motion for enforcement of the November 27, 1990 order on December 18, 1990.

CONCLUSIONS OF LAW

The preamble to the Hague Convention declares that it was adopted by the signatory states "to protect children 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." 51 Fed. Reg. 10498 (1986). The United States and Canada are signatories to the Hague Convention. The United States Congress enacted procedures to implement the Hague Convention in the United States in 1988 by adopting the International Child Abduction Remedies Act, 42 U.S.C. s. 11601 (1988) [hereinafter cited as "ICARA"]. The regulations promulgated thereunder are published at 22 C.F.R. Part 94.

Under Article 3 of the Hague Convention, "wrongful removal" is defined as "the removal or the retention of a child in breach of the rights of custody attributed to a person under the law of the State in which the child was habitually resident . . . providing that at the time of removal those rights were being actually exercised, or would have been so exercised but for the removal." [FN6] "Wrongful removal," as defined in ICARA, includes "a removal or retention of a child before the entry of a custody order regarding the child." 42 U.S.C. s. 11603(f)(2). This court finds that both children were "habitually resident" in Ontario immediately prior to their removal and that the petitioner was exercising his rights, as to P., and would have exercised his rights, as to S., but for her removal.

Article 3 of the Hague Convention further provides that rights of custody "may rise by operation of law, by reason of a judicial decision, or by reason of an agreement having legal effect under the law of the State." Under the ICARA, "full faith and credit" shall be accorded by the court of the United States "to the judgment of any other contracting State's court ordering or denying the return of a child, pursuant to the Convention, in a action brought under this chapter." 42 U.S.C. s. 11603(g).

Finally, in determining whether a child shall be returned, the Hague Convention contains specific provisions which govern the decision-making process. Article 12 provides that when a proceeding for the return of the child is commenced less than one year from the date of the wrongful removal, the court shall order the return of the child. If the proceeding for the return of the child is commenced more than one year after the wrongful removal, the court shall order the return of the child "unless it is demonstrated that the child is now settled in its new environment." Article 13 of the Hague Convention provides that a requested State (e.g. New York) is bound to order the return of the child unless the respondent can show: "(a) that [the petitioner] was not actually exercising the custody rights at the time of removal, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk the [child's] return would expose the child to the physical or psychological harm or otherwise place the child in an intolerable situation." [FN7] 51 Fed. Reg. 10499-10500 (1986).

The ICARA establishes which party has what burden of proof with respect to these issues. It is the petitioner's burden to show, by a preponderance of the evidence, that the removal was wrongful. 42 U.S.C. s. 11603(a)(1). The respondent has the burden of showing, by clear and convincing evidence, that the child should not be returned because of the exceptions set forth in Articles 13(b) or 20. 42 U.S.C. s. 11603(e)(2)(A). The respondent has the burden of showing, by a preponderance of the evidence, that the child should not be returned because of the exceptions set forth in Articles 12 and 13(a). 42 U.S.C. s. 11603(e)(2)(B).

The legal analysis of the circumstances of this case begins with the laws of the Province of Ontario. This Court takes judicial notice of Children's Law Reform Act, Part III, Custody, Access and Guardianship. Subsection 20(1) thereof provides that "the father and mother of a child are equally entitled to custody of the child." Subsection 20(7) provides that "any entitlement of custody or access is subject to alteration by an order of the court or by separation agreement."

The evidence provided to this Court shows that the parties entered into a separation agreement on April 6, 1989, which gave the respondent custody of Pinhus and the petitioner visitation with

the child. Therefore, it appears to this Court that petitioner's statutory right to custody of P. was suspended by virtue of the separation agreement.

There was no such formal agreement for the younger child S. Thus, with respect to her, the petitioner and respondent had an equal right to custody. According to the April 6, 1989 separation agreement, contrary to respondent's assertion, her ability to relocate her residence with the children outside the metropolitan Toronto area was restricted. If she desired to do so, she was obligated to obtain the services of an intermediary to decide how and where the visitation would be continued. The respondent did not do this prior to leaving Toronto, and, therefore, this Court finds she violated the terms of the separation agreement. Since the petitioner feared the respondent would take the children from Ontario, he sought and obtained an order of the Supreme Court of Ontario on October 5, 1989, prohibiting her from leaving the Province with the children. In its order of September 21, 1990, the Ontario Supreme Court found that the respondent was duly served with the October 5, 1989 order and nonetheless left the country. Based on the foregoing, this Court finds that the respondent acted in contempt of the Supreme Court's order of October 5, 1989 by leaving the country.

Respondent's contention that the petitioner is not entitled under the Hague Convention to have Pinhus returned, because he only had visitation ("access") rights and not custody, might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which give temporary custody of both children to the petitioner. Moreover, respondent's argument overlooks the fact that S. was not included in the provisions of the separation agreement. Therefore, the petitioner had an equal right to custody of S. when the respondent left Ontario. Under s. 11603(f) of ICARA, this Court can find there was a "wrongful removal" in the absence of any formal declaration of custody.

Even though this Court did not request the petitioner obtain a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, [FN8] this Court finds that the Ontario Supreme Court's orders of September 21, 1900 and November 27, 1990 constitute such a declaration. Accordingly this Court gives full faith and credit to the orders of the Supreme Court of Ontario, including the findings made therein, and holds that the Petitioner has met his burden of showing, by a preponderance of the evidence, that the removal of these children from Ontario was "wrongful." Were this Court to make its own independent finding, this record affords an ample basis for this Court to find the respondent's removal and retention of the children was "wrongful" as that term is defined in the Hague Convention, since the removal was in violation of the laws of the Province of Ontario governing the Custody and Guardianship of Children (as to S.), the terms of the parties' separation agreement (as to P.), and the orders of the Supreme Court of Ontario (as to both children).

The remaining question before the Court is whether this Court must order the return of the children of Ontario. The only exceptions in Articles 12, 13 and 20 which respondent seeks to invoke are the exceptions contained in Article 12 and Article 13(a). Pursuant to Article 12, respondent alleges that the children should not be returned to Ontario because the petitioner delayed commencing this proceeding for more than a year after the wrongful removal, and in the interim they are now "settled in their new environment." Pursuant to Article 13(a), respondent alleges that the petitioner's delay in commencing these proceedings amounts to his acquiescence to their removal and retention.

The respondent contends that she and the children have "established a home, friendships, ties to the community and a way of life that affords stability and meaning to them." These children are ages three and almost one and one half. They are not yet involved in school, extra-curricular, community, religious or social activities which children of an older age would be. The children have not yet formed meaningful friendships. The respondent does not allege the children attend nursery school, pre-kindergarten, religious services or instruction. She offers no evidence to show that despite their young ages they have already established significant ties to their community in Brooklyn. Respondent's personal needs to be in Brooklyn so she can be close to Boro-Park's

"population of available Orthodox Jewish men" [FN9] and search for a new husband does not satisfy her burden of proof. This Court believes the respondent has not met the burden of showing, by a preponderance of the evidence, that children are so settled in their new environment that they should not be uprooted and returned to Ontario. Beyond this, respondent has not rebutted the inference that these children continue to have substantial, meaningful connections to Ontario. Specifically, the children have numerous relatives (maternal and paternal) living in Ontario, friends and acquaintances of both parents reside there, there is a sizeable Orthodox Jewish community in Toronto in which the children can become involved, and the respondent continues to maintain an apartment in Toronto.

The Hague Convention prescribes a detailed procedure to be followed by persons seeking the return of children wrongfully removed. Under Article 8, the processing must be commenced by application to the Central Authority of the country where the children are believed to be. Upon receipt, the Central Authority has certain responsibilities it must carry out, which are set forth in Articles 7 and 10, and which include ascertaining the location of the children and working toward their voluntary return. The fact that the petitioner suspected he knew where the children were residing at the time of his application to the Central Authority in December, 1989 does not constitute "acquiescence" on his part, because he did not institute legal proceedings until December, 1990. The Hague Convention was adopted to deter "self-help" and contains no procedure whereby the petitioner could bypass its provisions. The petitioner's claimed "acquiescence" must be judged by when he initiated the application to the Central Authority (December 5, 1989--three months after the children's wrongful removal); by when he received a response from the Central Authorities of the United States (August, 1990); by when he was advised to seek the assistance of this Court (December 5, 1990); and by when he instituted legal proceedings (December 18, 1990). Under the circumstances presented herein, this Court does not find the petitioner's proceeding to return the children was untimely nor does this Court find he acquiesced in their removal.

Finally, respondent is not correct in asserting that this Court is obligated to conduct a de novo hearing on the issues of custody and visitation. By filing his application to enforce the decrees of the Supreme Court of Ontario, this petitioner, unlike the petitioner in Sheikh v. Cahill, 145 Misc.2d 171 (Sup. Ct. 1989), did not submit himself to this jurisdiction so that this Court could make a de novo custody determination.

Having found that the respondent's removal of the children was wrongful, that the respondent has not met her burden of proving that one of the exceptions bars the return of the children of Ontario, Palle v. Palle, Ill. Cir. Ct., Cook Cty., 16 Fam. L. Rep. 1262 (1990) (no showing of grave risk of physical or psychological harm or an impending intolerable situation); Becker v. Becker, NJ Super. Ct., Morris Cty., 15 Fam. L. Rep. 1605 (1989) (no showing of grave risk of psychological harm); Navarro v. Bullock, Calif. Super. Ct., Placer Cty., 15 Fam. L. Rep. 1576 (1989) (no showing that the children were exposed to psychological harm), This Court concludes that both children should be returned to Ontario forthwith, where a preliminary hearing may be held, in accordance with the Ontario Supreme Court's order of September 21, 1990, to determine the issues of interim custody and visitation. The temporary order of protection and the temporary orders of custody are discontinued. Ms. W. is directed to release the children to the petitioner, who has temporary custody of the children under the September 21, 1990 and November 27, 1990 orders of the Supreme Court of Ontario. The petitioner shall immediately return the children to the Province of Ontario and immediately advise the Supreme Court and the Central Authority upon their return. A copy of this decision will be transmitted by fax to the Central Authority of Ontario, so that the petitioner's compliance with this order can be monitored. Upon release of the children to the petitioner, counsel for the respondent may return to her the passports and money he has been holding in escrow.

Petitioner asks this Court to order the respondent to "help defray the costs and expenses incurred by [him] in implementing the return of [his] children." The Hague Convention provides that "judicial authorities may, where appropriate, direct the person who removed a child . . . to pay

necessary expenses incurred by or on behalf of the applicant. [FN10] The provisions of ICARA also address the costs incurred in civil action. ICARA specifically states that "any court ordering the return of a child pursuant to section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including Court costs, legal fees, foster home or other care during the course of the proceedings, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate." 42 U.S.C. s. 11607(b)(3). [Emphasis added.] Respondent has not opposed this application nor made any legal arguments in response to it.

When the petitioner's initial application was filed with the Central Authority, he listed his occupation as "computer programmer" and the respondent's occupation as "homemaker." During the pendency of these proceedings, this Court was made aware of the respondent's limited financial resources. Notwithstanding the respondent's bad acts, she, too, has experienced financial hardships in supporting herself and the children for one and one half years in Brooklyn on the income she has from a small trust fund. She has done this without child support from the petitioner. While this Court does not condone her actions, this Court believes it is not appropriate to grant the petitioner's request for monetary relief, beyond requiring the respondent to pay for the plane tickets to return the children to Canada.

The foregoing constitutes the decision and order of this Court.

FOOTNOTES

FN1 The Central Authorities of the Contracting States to the Hague Convention "shall take appropriate action to prevent further harm to the child or prejudice to the interested parties by taking or causing to be taken provisional measures." Article 6(b) of the Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10498 (1986). In the United States, the authority of courts in furtherance of Article 7(b) includes the power to "take or cause to be taken measures under Federal or State law . . . to protect the well-being of the child involved the final disposition of the petition." International Child Abduction Remedies Act, 42 U.S.C. s. 11604 (a). This power is limited, in that "no court may order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied." 42 U.S.C. s. 11604(b). When the children were returned on the warrant and this Court was faced with the very real issue of how to protect the children and assure they would not be removed from New York, either by the father or the mother, the only resource immediately available to this Court was the Commissioner of Social Services. Accordingly, the children were remanded on an emergency, interim basis to the Commissioner, for this Court believed they would have been in imminent danger if returned to either parent. If either parent absconded with them, the children's emotional well-being would have been at risk. The children were remanded pursuant to s. 1022 of the Family Court Act of New York and were released two days later. The parents were provided with the name and telephone number of the agency social worker as soon as it became known on the morning after the remand was issued.

FN2 After conducting a hearing on the limited question of where the children could reside pending the resolution of these proceedings, a stipulation was entered into by the parties and approved by the Court. Pursuant thereto, the children were to be released to the temporary, protective custody of R.W., a neighbor and landlord of the respondent. Ms. W. was directed to arrange for the children to reside, sleep and eat in her home. She was directed not to permit the mother or father to remove them from her home. She was directed to supervise all visitation between the children and their mother and father. Another individual was named to whom Ms. W. could delegate these responsibilities in an emergency. To secure the children's presence in Ms. W.'s home and the respondent's presence in court, the respondent deposited $10,000.00 in cash, to be held in escrow, subject to forfeiture to the petitioner if she and/or the children fled the jurisdiction. In addition, the passports of the respondent and both children were surrendered and

placed in escrow as well. Finally, the Court issued a temporary order of protection to further assure that neither the petitioner nor the respondent would interfere with Ms. W.'s care and custody of the children.

FN3 Article 16 of the Hague Convention provides that, "After receiving notice of a wrongful removal or retention of a child, the judicial authorities of the State to which child has been removed or in which it has been retained shall not decide the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." [Emphasis added.]

FN4 Appended to the respondent's papers is a photocopy of what purports to be a separation agreement drafted sometime in April, 1990. This agreement (which provides for custody and visitation of both children) does not appear to have been signed by the parties, and lacks any legal force or effect.

FN5 The Supreme Court issued the order upon the respondent's default, having found that she was properly served with notice of the proceeding.

FN6 Article 14 of the Hague Convention provides that "the judicial authorities of the requested State [e.g. New York] may take notice directly of the law of, and of judicial . . . decisions of the State of the habitual residence of the child without recourse of the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable." A similar provision exist in ICARA, 42 U.S.C. s. 11605.

FN7 Article 20 provides that the return of the child may also be refused "if this would not be permitted by the fundamental principles of the requested State [e.g. the United States] relating to the protection of human rights and fundamental freedoms." This ground is clearly unavailable to the respondent under the facts of this case.

FN8 Article 15 of the Hague Convention provides that a Court may, "prior to making an order for the return of a child, request that the applicant obtain from the authorities of the State of habitual residence of the child, a decision or other determination that the removal was wrongful within the meaning of Article 3 of the Convention.

FN9 Affirmation of Respondent's Counsel, January 17, 1991, 16.

FN10 Under Article 26, authorized expenses include travel, costs incurred to locate the child, legal representation fees for the applicant, and expenses in returning the child.

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