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[08/05/1991; Colorado District Court, Adams County (United States); First Instance]
Collopy v. Christiodoulou, No. 90 DR 1138 (D. Colo. May 8, 1991)

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**DISTRICT COURT, COUNTY OF ADAMS, STATE OF COLORADO**

**May 8, 1991**

**Before: Vogel, D.J.**

**In re the Marriage of J. Collopy (Petitioner) and T. Christodoulou (Respondent)**

**This matter having come before this Court for hearing on the Respondent's Motion for Return of Child Pursuant to the Hague Convention and to Quash Service of Process and the Court having received the Briefs of the parties and having heard the testimony of the Petitioner and reviewed the Affidavit of the Petitioner and the legal argument of the parties and being fully advised in the premises does enter the following findings of fact and orders.**

**The Petitioner was born in Colorado on or about December 3, 1961. She has continuously maintained her legal residency in this state. In 1982 she left Colorado to go to school in Belgium, while there, she met the Respondent. She was in Belgium about four years and then returned to Colorado in 1986. In the summer of 1987 the Respondent came to Colorado; and on August 31, 1987, the Petitioner and the Respondent were married in Brighton, Colorado. Shortly, thereafter, there was a church wedding. The day after the church wedding, the parties left Colorado returning to England so that the Respondent could finish his doctoral work.**

**The Respondent is neither a U.S. citizen nor, apparently, an English citizen; he's a Greek Cypriot, and was and has been a Commonwealth citizen. During the relevant time periods, he had a temporary student visa which enabled him to stay in England and continue his studies. While in England, the Petitioner had a work visa which enabled her to work provided that her husband, the Respondent, was still in school.**

**The Petitioner remained in England until October 27, 1989, when she left England with the consent of the Respondent. She brought with her the minor child, that was born as issue of this marriage. K.C. was born on August 9, 1989. The Respondent consented to her visit. The Petitioner told the Respondent that she was coming to Colorado to be with her sister who had taken ill. The minor child was registered as a United States citizen, and it appears that the Respondent consented to this particular action.**

**When she came to Colorado in October of 1989, the minor child was approximately 2 months old. She stayed in Colorado at the Broomfield address, which happened to be her childhood home, and during the course of her stay here, had various conversations by telephone with the Respondent.**

**It appears that the Respondent never objected to her having the child here, and it wasn't until mid or late January of 1990, when the Petitioner informed the Respondent that she would no longer be returning to England; that he communicated to her in any fashion that he was withdrawing or revoking his permission to allow the minor child to remain with her in Colorado. At no time has the Respondent ever requested custody of the minor child, and it**

**appears although there has been some attempts at phone visitation, no actual visitation has taken place.**

**When the Petitioner brought the child to Colorado in October of 1989, she was still breast-feeding the child. She and the child had been living continuously with her parents at the Broomfield address since October of 1989. Her present intentions are to return to school in the fall and commence attending the University of Colorado college of law.**

**In January of 1990, when the Respondent first communicated to the Petitioner that he was objecting to the child remaining with the Petitioner in Colorado, the child was approximately 5 months old. At no time did the Petitioner ever change her permanent address; in fact, it appears that while she was in England and applying to various law schools or applying to take the LSAT so she could go ahead into law school, she was using her Broomfield address as her permanent residence. She continued to maintain the Colorado's driver's license, a U.S. passport, never changed, and also maintained her voter "registration in effect here in this state.**

**Further, although the parties left Colorado to return to England in 1987 following their-marriage in the church ceremony, some personal property was left behind, some of the wedding gifts that the parties had received were left at the Broomfield residence. The Respondent left part of his personal library behind and the Respondent maintained a personal account at a local Broomfield bank.**

**It appears that that child, who's now 20 months old, spends a great deal of time with--not only with the Petitioner, but with the Petitioner's extended family. It appears that the child, although 20 months old, is able to recognize the circle of individuals with whom she interacts at this point, It appears that the child spends time with various sisters, brothers, and relatives of the Petitioner.**

**The first issue that the Court wishes to address is the questions of whether the Court has jurisdiction over the Respondent.**

**The Respondent was not served in Colorado; the Respondent was served in England. The Petitioner contends that pursuant to the Colorado Long Arm statute 13-1-124(1)(e), that this Court does have jurisdiction over the Respondent for purposes of resolving the division of property issues that remain and also child support issues in the event that the Court rules in the Petitioner's favor with regard to the remaining issues.**

**The Colorado Long Arm statute provides, among other things, that anyone who has maintained a marital domicile within Colorado, submits him or herself to the jurisdiction of the Colorado courts with respect to all issues relating to obligations for support and any action for dissolution of marriage if one of the parties to the marriage continues without interruption to be domiciled within Colorado.**

**Clearly, in this case, the Petitioner, and I'll so find, has continued without interruption to be a domiciliary of the state of Colorado. The question becomes whether or not the Respondent has maintained a marital domicile within the state of Colorado.**

**The evidence has established, in this Court's opinion, that the Respondent has in fact maintained a marital domicile within the state of Colorado. The undisputed, uncontroverted testimony presented here today through the only witness who testified, the Petitioner, was that she and the Respondent--that she came to Colorado; the Respondent followed her; they were married in 1987, first in a civil proceeding before a judge and then in a church wedding.**

**The parties received marital gifts which are still--some of which, if not all of them, are still in the state of Colorado. They left Colorado leaving behind these various wedding gifts that they received. The Respondent left part of his personal library behind, and the Respondent, while he**

**was in Colorado, opened up a bank account at a local Colorado bank and maintained it, and in fact that account may still be in existence.**

**I think that although there's no direct evidence that he intended to establish a domicile, the Court can infer from all of this circumstantial evidence that in fact it was his intent to maintain a domicile, a marital domicile within the state of Colorado by virtue of leaving behind all of these items that were left behind. I can infer that at the time he came to Colorado to marry the Petitioner, that there was an intent at least to establish a marital domicile within this state.**

**The inquiry, however, doesn't end there. The Court still has to determine whether there was sufficient minimum contacts with this state under the International Shoe case.**

**This Court believes that exercising jurisdiction over the Respondent would not offend the mandates of International Shoe and would be in compliance with the language contained in, In Re the - Marriage of Ness, 759 P.2d 844, because the Court believes that the Respondent has maintained some minimum contacts with this state. As I previously found, the Respondent's spouse, until the decree of, dissolution entered, was here; the child of the Respondent is here; the Respondent apparently has maintained a bank account in this state, has left behind part of his personal library, and some of the wedding gifts.**

**The Court believes that under the applicable case law it would not offend basic concepts of due process and fairness for this Court to exercise jurisdiction over the Respondent to deal with the matters concerning the division of property and child support in the event the Court determines that it should enter a child support order.**

**The Court next wants to determine whether or not the Hague Convention applies. The Court believes that it does. The Court believes that the term "wrongful retention" as used in the Hague Convention, clearly that the Petitioner in taking the child from England and bringing the child to this country in the fashion in which the child was removed and then keeping the child beyond the time that the Respondent indicated he had authorized, that retention, I think, constitutes the kind of conduct that the Hague Convention was intended to address.**

**Having said that, the Court wishes to address the argument that return of the child should be denied since there is a grave risk of psychological harm if the child is ordered to be returned to England.**

**It states under Article 13(b), "A court in its direction need not order a child returned if there is a grave risk that return would expose the child to physical harm or otherwise place the child in an intolerable situation.**

**This provision was not intended to be used by defendants as a vehicle to litigate the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious."**

**Then it goes on the say that, "A review of deliberations on the Convention reveals that 'intolerable situation' was not intended to encompass return to a home where money is in short supply or where educational or other opportunities are more limited."**

**This Court has no difficulty concluding that the Petitioner has failed to meet her burden to establish by a preponderance of the evidence that if this Court were to order the child returned to England, that there would be a grave risk of psychological harm. The Court, of course, heard no expert testimony in that regard. At best, the Court heard from the Respondent who has provided the care that the child has needed. Her opinion--her lay opinion, to order the child returned to England, would cause psychological damage to the child. On cross-examination she**

**indicated that that also would depend on many variables: where they had to live, how long they were required to be in England, whether she could accompany the child or not.**

**In short, this Court believes that, although, at best, the Petitioner has shown that if this Court were to order the child to return to England, that it might put the child in a serious situation. The Petitioner hasn't shown that by so doing, by so ordering, there would be a grave risk that the child would be exposed to physical or psychological harm.**

**The next argument that the Court wishes to address is the argument of the Petitioner that the Convention doesn't apply because the child was a habitual resident in Colorado when Respondent allegedly withdrew his permission for the child to remain in Colorado; and although the Court has noted at the outset that it believes that the Convention does apply, I think the Court needs to address this particular issue a little more in detail.**

**Article 3 of the Convention provides that the retention of a child is to be considered wrongful where: (a) it is a breach of rights of custody attributed to a person under the law of the state in which the child was a habitual resident immediately before the retention: and (b) at the time of retention, those rights were actually exercised either jointly or alone or would have been so exercised but for the retention.**

**I think that in resolving this issue, it's important to recognize that what we're dealing with at the time that the retention of the child became wrongful is a child of about five months of age who had no significant ties to England, and arguably no significant ties at that point in time to Colorado.**

**I think that the--if the Hague Convention is to be given any meaning, that the Court needs to construe the terms "habitual resident" when dealing with a child of such tender age to in effect include or impute the habitual--as a habitual residence of this child, the habitual residence of the father. And I point that out because I think, as I recall reading through the provisions of the Hague Convention, custody rights-rights of custody include the right to determine the habitual residence of a child, so that although the Respondent consented initially to the child being in this state and being in the company of the Petitioner, clearly at that point, and I don't think there's a contention to the contrary, he was exercising rights of custody.**

**The court has to conclude that shortly after he told the Petitioner that the child was remaining in Colorado without his consent, that at that point he certainly was exercising rights of custody. The questions is whether during the interim from the point in time when the Petitioner communicated to him her intent to remain in this state and keep the child here, whether the period of time where he took no action until he voiced his complaint or his objection, whether he was exercising rights of custody.**

**This Court believes that he was. The Court believes that at all times he was exercising his rights of custody, which this Court has indicated includes the right to determine the habitual residency of a child. So that when we're dealing with a child that's only five months old, the child's habitual residency would in effect be, as the Court understands the Hague Convention, the residence of the Respondent.**

**So the Court will find that the Convention does apply because the child was a habitual resident of England where the child resided with the father before the wrongful retention and would have continued to exercise rights of custody but for the wrongful retention.**

**The last issue which the Court wants to address is, despite this Court having found that the Hague Convention applies and that the retention of the child beyond January 1990 was wrongful, that the Court should deny the Respondent's motion for return of the child because the motion was filed more than one year after Petitioner's wrongful retention and because the**

**child is now settled in its new environment. Clearly, the petition was filed more than one year after the Petitioner wrongfully retained the minor child.**

**Although, initially, I had some questions about when the years would start to run in the case after retention, because arguably the retention is a continuing sort of thing, so it would be difficult to determine the date--the controlling date.**

**I did find reference to it in the comments that, for purposes of this particular exception, that the controlling date is the date that, in some fashion or another, the moving party communicates his or her objection to the other party and expresses a desire that the child be returned. And for purposes of ruling on this particular argument, I'll find that the one-year period began to run in late January of 1990 so that clearly the motion for return of the child pursuant to the Hague Convention which was filed in this case shortly before the permanent orders hearing, which was conducted on February 22, [1991] was filed more than one year after the Respondent communicated his objection to the petition.**

**Even though a year has past the question becomes should the Court nevertheless order the child returned, and the Hague Convention provides that the Court has the discretion to deny the motion for return of the child if it finds that the child is now, settled in its environment.**

**Counsel for the Respondent has attached to his brief an opinion, a recent opinion, that appears in the February 1991 Family Law Reporter, which is an opinion of a New York family court which contains language this Court believes is helpful in the resolution of the issue of whether or not the child has been--is now settled in its new environment.**

**In that decision, the court points out that the Respondents in that case argued that the children had established a home, friendships, ties to the community, and a way of life that affords stability and meaning to them, arguments that are not unlike the arguments advanced by the Petitioner in this case. The Court notes that the children in that case are ages 3, and almost 1 1/2. They are not yet involved in school, extracurricular community, religion, or social activities, which children of an older age would be. The children have not yet formed meaningful relationships. Court noted that the Respondent was not alleging that the children attend--were attending nursery school prekindergarten, religious services, or instruction, and pointed out that the Respondent offered no evidence to show that despite their young ages, they'd already established significant ties to their community.**

**The court in that case concluded that the Respondent had not met her burden of showing by a preponderance of the evidence that the children were so settled in their new environment, that they should not be uprooted and returned. Beyond this, the court noted Respondent has not rebutted the information that these children continue to have substantial, meaningful connections to Ontario. I think that's significant because, in this case, there hasn't been any showing whatsoever that the minor child has any substantial nor meaningful connections to England.**

**Clearly, there hasn't been a showing that the child is in preschool, in nursery school, but there has been a showing that, and this Court will so -find that the child has established significant ties to this community by virtue of having been here as long as the child has been.**

**Although, as the Court has pointed out and so found, the child's retention is wrongful, but the Respondent has allowed considerable amount of time to lapse, enough time to allow this child to establish significant ties to this community so that this Court should not order that the child be uprooted and returned at this point.**

**In particular, those ties that this Court believes should preclude the Court ordering the return with the mother. The child has bonded with the extended family that the Petitioner has in her community. The child was baptized in this state. The child--it appears by virtue of the**

**Petitioner's testimony, she's a nanny and provides child care for other children, associates with those children, and Court has to infer from that kind of conduct that there is a bonding that has taken place.**

**And in the absence of any evidence to the contrary, the Court has to conclude that the Petitioner has met her burden of establishing by a preponderance of the evidence that the minor child is settled in her new environment, and because of that fact, the Court should deny the motion to return pursuant to the Hague Convention.**

**The remaining issues of permanent orders shall be heard on August 12, 1991 at 9:00 a.m.**

**DONE IN OPEN COURT this 8th day of May, 1991.**

**BY THE COURT: /s/ John J. Vogel**

**District Court Judge.**

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