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[25/01/2001; District Court of Zweibruecken (Germany); First Instance]
W. v. W., 25 January 2001, District Court of Zweibruecken

W. v. W.

District Court of Zweibruecken

Docket Number 1 F 3709/00

Certified translation of a German court order in the matter of W. v. W. obtained from http://www.Hiltonhouse.com

Docket no 1 F 3709/00

ORDER

In the family mater of:

W., K.,

residing at * Herzliya, Israel**

Petitioner

Represented by attorney at law Donald J. Cramer.

vs.

W., M.,

residing at * Landstuhl, with L.B.**

Respondent

For physical custody of the child

The District Court, Family Court of Zweibruecken by Judge at the district court Marscheck-Schaefer has ordered on 25 January 2001 as follows:

1. It is ordered that physical custody of the child H., born 12 June 1999 is transferred to the Petitioner in order to immediately return the child to Israel.

The Petitioner or every other person who has the child in his/her care is required to hand over the mentioned child to the Petitioner or to a person designated by him for the mentioned purpose.

2. The court bailiff is ordered to take the child from the Respondent and to hand over the child to the Petitioner or to a person designated by him right there and when the child is taken from the Respondent.

3. The court empowers the bailiff to use force to enforce this order, in particular to break any resistance by the Respondent, to search her premises and to use the assistance of the police. However there is no force to be used against the child.

4. The Respondent who is required to turn over the child is warned that in case the child cannot be found she can be required to attend a court hearing designed to require her to file an affidavit concerning the whereabouts of the child, that she can be brought to court for that purpose and that the court may commit her to prison for up to 6 months for that purpose.

5. Costs of the proceedings have to be paid by the Respondent.

6. The Petitioner's request to remove the order of the family court of Zweibruecken of 21 December 2000 is denied.

Reasons:

The parties are married to each other and are serving in the US Forces, the Petitioner in active duty, the Respondent as a major of the reserves. There is one child from their marriage, H., born 12 June 1999. Since 1997 the parties were stationed in Germany.

According to their joint intentions for their life the Petitioner was transferred to the US Embassy in Israel. The Respondent and the child from their marriage were also stationed in Israel as dependents where they had lived since the beginning of June 2000 in a joint apartment.

The Respondent is as a major of the reserves required to do two months of military duty within every calendar year, this can be served in pieces. Because of a military order she went to Ramstein Air Base and served there from 8 October 2000 until 15 October 2000 and from 30 October 2000 until 22 November 2000. Her departure from Israel occurred with consent by the Petitioner as well that she took the child with her.

Already in November 2000 she informed the Petitioner of her intentions to separate and to divorce him. He took a few days leave and went to Ramstein where marriage counseling was done with a chaplain colonel which failed. Meanwhile the Respondent had filed a petition to allow her and their joint son to return early to the States since she wished not to return to Israel. Such a permission is necessary since the Respondent as member of the Armed Forces must not leave the place where he/she is stationed early, before the end of the tour of duty. This is detailed in the ERP (Early Return Program) for which the Respondent applied.

With a petition of 18 December 2000, filed with the court on 21 December 2000, the Petitioner asks for the return of the child H. to him to Israel because, as he alleges, the Respondent wrongfully withholds the child. He alleges that it was jointly agreed that after serving her reserve duty she would return to him to Israel and that she would live there with him until the end of his 3-year tour of duty. He says she broke this agreement by informing him that after a short stay in Italy she would not return to him but rather go the States. Meanwhile, he says, he does not insist that the Respondent returns to Israel, but however that it is urgently necessary that the child be returned to his habitual residence.

He states that in no case is there a military order for the Respondent to return stateside. Rather this is the opening of a possibility of an early return and there are orders to attend a school which, however, only starts in August 2001. This however does not, he says, change anything regarding the civil law obligation to return the child.

The Respondent opposes a return of the child. She maintains that there is no wrongful withholding of the child. She says that H. did not have his habitual: residence in Israel since the parties had been living there only since June of 2000. She says that even if the parties jointly - at least factually if not expressly - had jointly assumed before her trip to Germany that she would return with the child to Israel after the end of her service duties there, this agreement would be obsolete by now because now she has decided to file for divorce in Texas. She says that such a petition for divorce has been filed on 17 January 2001 with the court of jurisdiction.

As regards further details reference is made to the briefs exchanged between the parties and their affidavits.

The petition of the Petitioner for return of the child H. is granted.

Such a claim for return is based on Art. 12 subs.1 of the Hague Convention on the Civil Law Aspects of International Child Abduction.

The legal prerequisites for that are met. The child H. is being wrongfully retained by the Respondent within the meaning of Art. 3 of the Hague Convention, by not returning him to Israel.

As regards this the court finds that at the time of the departure of the Respondent the child had his habitual residence in Israel. In order to determine the habitual residence a number of requirements have to be met with the courts requiring a certain time element. In this case however the parties had been residing only for 4 months in Israel. It has to be taken into account that the parties had been ordered to be stationed there, that they had their own home there and that therefore the centre of all their activities was in Israel.

The court finds that the parties had agreed before the departure of the Respondent that she would return with the child to Israel after the end of her military service duties. The behavior of the Respondent which is inconsistent with this agreement violates the joint custodial rights according to which both parents jointly determine the whereabouts of the child. Such a joint custody determination is contained in Sections 14, 15 of the Israeli law, Israel is since 1995 a member state of the Hague Convention.

The Respondent herself alleges that it was the original plan of the parties that she should return after her reserve duty services to Israel. Her allegation that this agreement would be now obsolete is not suitable to remove the wrongfulness of her behavior.

In contrast her behavior is absolutely one sided and it constitutes the termination of an agreement against the wishes of the Petitioner and father of the child. It may be so that she is free not to continue the marriage with the Petitioner. It may be so that for that purpose she has already filed for divorce in Texas/USA. By virtue of joint custody she is not entitled to bring the child stateside against the wishes of the Petitioner. It is to the contrary the reason and purpose of the Hague Convention to provide in cases like this one the immediate return of the child to the place of his habitual residence.

The allegation by the Respondent that she has been ordered militarily back to the States is not correct in this form. Her return has only been ordered because the Respondent has

applied for such an order arguing that she does not wish to return to Israel. She is free to make use of the early return program. She is not free to take the child with her since the Petitioner does not agree to this.

She cannot rely on her allegation that the Petitioner had never indicated his wish of a return to Israel, at least of the child. The opposite is true as manifested by the filing of the return request of 18 December 2000.

Also the fact that she has meanwhile filed with a court in Texas is no block in the way of an order according to the Hague Convention.

Reasons which would bar the return within the meaning of Art. 13 are not to be found. In particular the Respondent needs to be alerted to the fact that the violent disturbances in the Near East occur not only since October 2000 but already at a point in time when it was in accordance with their life plan to live in Israel.

Therefore the return of the child had to be ordered.

An order for immediate effectiveness within the meaning of Section 8, subsection 1, 2d sentence of the Custody Rights Treaty the court found not warranted here because the interests of the Petitioner are sufficiently safeguarded by the order of 21 December 2000 and because the Respondent needs to have the opportunity to protect her interests by filing an appeal. Therefor the order remains in force.

The order for costs is based on sect. 13 a statute for Civil Matters in connectIon with Art. 26 subsection 4 of the Hague Convention.

/s/ Marscheck-Schaefer

Judge at the District Court

Certified copy

/s/ (signature)

Court Clerk

(stamp for the district court of Zweibruecken)

As licensed translator for the English language for the State of Bavaria I hereby confirm that the above is a complete and correct translation of the order of the district court of Zweibruecken of 25 January 2001 in the matter of W. v. W.

Muenchen, 12 February 01 Dr. Donald J. Cramer, Muenchen

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