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[14/07/2000; Supreme Court of Kansas (United States); Appellate Court]
Dalmasso v. Dalmasso, 9 P.3d 551 (Kan.2000)

SUPREME COURT OF KANSAS

July 14, 2000

Before: Larson, J.

E.D. Dalmasso (Appellant) v. J.D. Dalmasso (Appellee)

Counsel: Frank D. Taff, of Topeka, argued the cause and was on the brief for appellant; Allan A. Hazlett, of Allan A. Hazlett, P.A., of Topeka, argued the cause and was on the brief for appellee.

SYLLABUS BY THE COURT

1. The Hague Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10498 et seq., and the International Child Abduction Remedies Act, 42 U.S.C. s. 11601 et seq. (1994), provide for the return of children wrongfully removed or retained from their habitual residence.

2. Under the Hague Convention, habitual residence refers generally to the child's usual or customary residence prior to the removal.

3. To prove a wrongful removal of a child under the Hague Convention, a petitioner must show that he or she was exercising lawful custody rights over the child at the time of the removal. The question of whether lawful custody rights were being exercised at the time of the removal must be determined under the law of the child's habitual residence.

4. If the petitioner establishes a wrongful removal, the burden shifts to the respondent to show an exception to the Hague Convention applies.

5. Where findings of fact and conclusions of law have been made by the trial court, the appellate court's function is to determine if the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance so as to form a basis of fact from which the issues can be reasonably resolved.

6. A negative finding that a party did not carry its requisite burden of proof will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice.

7. In considering the exceptions of Article 13 of the Hague Convention, the trial court should take into account any information relating to the child's social background provided by the

Central Authority or other competent authority of the child's habitual residence. Hague Convention, Art. 13, 51 Fed. Reg. 10499.

8. In a court-ordered return of a child to his or her habitual residence in an alleged international child abduction case, although the surroundings to which the child will be returned and the personal qualities of the people located there are relevant to the inquiry of whether the child will be exposed to a grave risk of harm, the Article 13(b) exception to the Hague Convention was not intended to be used as a vehicle to litigate the child's best interests and must be narrowly construed. The person opposing the child's return must show the risk to the child is grave and not merely serious.

9. The Hague Convention anticipates that all necessary expenses incurred to secure the child's return will be shifted to the abductor, both to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place.

LARSON, J.: This appeal raises issues under the Hague Convention on the Civil Aspects of International Child Abduction (the Convention), 51 Fed. Reg. 10498 et seq., and the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq. (1994). E.D. appeals from an order granting her husband, J.D., the return of the couple's three sons to France plus attorney fees and transportation costs pursuant to the Convention and ICARA.

Procedural and factual background

The trial court's memorandum decision sets forth findings of fact describing the marriage, the birth of the children involved in these proceedings, and the history of this litigation in the following manner:

"E.D. and J.D. were married February 2, 1991 in Kansas City, Missouri. Mrs. D. was born in Chicago, Illinois. Mr. D. is a citizen of France. The couple met in 1989 when Mr. D. was teaching at ** University. In August, 1991, the D.s moved to France.

"Mr. and Mrs. D. have four children. G. was born May 22, 1992 in France. D. was born November 8, 1993 in France. J. was born January 7, 1995 in Canada. A. was born June 20, 1997 in France.

"Prior to January 12, 1999, the children resided with their parents in France, Canada and the United States. A., now two years old, has always resided in France. She is currently living in France with Mr. D. The D. boys have been living with their mother in St. Marys, Kansas, since January 12, 1999. From March, 1996 through early January, 1999, the boys lived with Mr. and Mrs. D. in France. G. and D. resided with their parents in Quebec, Canada, from September, 1994, through July, 1995. J. resided in Canada from his birth until July, 1995. From July, 1995, until March, 1996, the boys lived with their parents in St. Marys, Kansas.

"On January 11, 1999, Mrs. D. left France with G., D. and J. Mrs. D. explained why she departed France with her sons. She was dissatisfied with her marriage. She said Mr. D. had neglected her, refused to share the same bed, had obsessive relationships with men, threatened to commit suicide, threatened her life and had struck her in front of the children.

"In November, 1998, Mr. D. had threatened suicide. He told Mrs. D. if she left him he would kill himself. During the Christmas holidays, Mrs. D. described her husband's mood as depressed. The parties argued over the children's passports. Mrs. D. said that Mr. D.

swallowed several Prozac pills in front of his mother, Mrs. D. and two-year old A. Mr. D. was hospitalized January 2 and released the next morning.

"Mrs. D. testified she could not handle the stress. She felt that Mr. D.'s parents did not support her. They blamed her for Mr. D.'s suicide attempt. Mrs. D. did not feel safe staying in France. She sought advice from her family in the United States and from United States Embassy representatives. Mrs. D. decided she would leave France after being told that if her husband started legal procedures in France, she would never be able to leave France with the children. Mrs. D., with the assistance of the United States Embassy personnel, returned to her family in St. Marys, Kansas, on January 12, 1999.

"Mr. D. also described marital dissatisfaction. He said that Mrs. D. had suffered depression and had been traumatized in her childhood from a dysfunctional relationship with her mentally ill father. He denied that his taking of Prozac was a serious suicide attempt. He downplayed the incident as a stupid mistake.

"After Mrs. D. left France with the boys, Mr. D. commenced legal proceedings in the courts of Dinan, France. On January 29, 1999, the French Court entered a Provisional Order declaring that G., D., J. and A. should reside with Mr. D. An authenticated copy of the Order with translation has been provided to this Court.

"On April 12, 1999, Mrs. D. filed a Petition for Divorce in Shawnee County, Kansas. She sought temporary orders for custody of her children. A hearing on the temporary orders was scheduled in the Shawnee County, Kansas, District Court on May 7, 1999. On May 6, 1999, however, Mr. D. transmitted by facsimile a hand-written Petition informing this Court that he had made application for return of his children under the Hague Convention and apprising the Court of the proceeding initiated in France. By May 6, the Court had already been notified by the United States Department of State that Mr. D. had applied for return of the children under the Hague Convention.

"On May 7, 1999, at this Court's Temporary Orders Docket, the Court declined to enter an Order of Temporary Custody in favor of Mrs. D. The Court scheduled a telephone status conference between the parties, Mr. Taff [Mrs. D.'s counsel], and Mr. D.'s French counsel, Yves DeMorhery. The telephone conference was held on May 12, 1999. During the conference, the parties stipulated that Mr. D. was exercising custody rights when the children left France with their mother. It was further stipulated that the recitation of the children's residences in the Petition for Divorce was accurate. Mrs. D., however, claimed that the children had not been wrongfully removed from France and that exceptions existed for denial of Mr. D.'s Petition for Return of the Children.

"A hearing was scheduled but subsequently continued by the Court to permit Mr. D. time to obtain local counsel. Mr. Polier, who replaced Mr. DeMorhery as Mr. D.'s French counsel, arranged for the retention of Allen Hazlett who entered his appearance on Mr. D.'s behalf. Mr. Hazlett filed a formal Petition for Return of the Children to Mr. D., Declaration Establishing the Habitual Residence of the Children and submitted several other documents including the affidavit of Mr. Polier explaining French law. During the pendency of this proceeding, Mr. D. also submitted other documents, including medical certificates and letters of reference. Mr. Hazlett also filed a Motion and Brief in Support of Summary Judgment on Mr. D.'s behalf."

Local counsel for both sides were present at the hearing on J.D.'s petition, as were E.D. in person and J.D. and his French counsel by telephone from France. At that hearing, the court stated that it had reviewed the file and subsequent filings and was prepared to rule preliminarily based on the stipulations in the record that the children's habitual residence

was in France; J.D. had and was exercising custody rights at the time E.D. removed the children; and the evidence showed a wrongful removal, although the court was willing to hear any further argument or evidence on the question of wrongful removal before making a final determination on that issue. Otherwise, the primary purpose of the August 1999 hearing would be to determine if E.D. could establish by clear and convincing evidence an exception to the requirement of returning the children. Testimony was given by E.D. and J.D. and exhibits were introduced.

Later, it its memorandum decision, the trial court concluded: France was the appropriate forum state for determination of custody issues; J.D. had shown by a preponderance of the evidence that E.D. had wrongfully removed the children; and E.D. failed to establish by clear and convincing evidence that return of the children to France would subject them to grave risk of physical or psychological harm or that their return should not be permitted under fundamental principles of human rights and fundamental freedoms. The court ordered E.D. to return the children to France; ordered J.D. to advance the expenses of transporting the children back to France, with E.D. to reimburse him; and ordered E.D. to pay J.D.'s attorney fees and expenses as well as the costs of the action.

E.D. appeals. Our jurisdiction is pursuant to K.S.A. 20-3018(c).

The Convention and ICARA

Both France and the United States are signatories to the Convention. ICARA was enacted to implement the Convention in the United States. We have recently considered similar issues to those raised herein in Sampson v. Sampson, 267 Kan. 175, 176, 975 P.2d 1211 (1999). As explained in Sampson, the Convention and ICARA provide for the return of children wrongfully removed or retained from their habitual residence within the meaning of the Convention. 267 Kan. at 177.

E. contests the finding that she wrongfully removed the children from their "habitual residence" which is the child's usual or customary residence prior to the removal. Wrongful removal or retention was identified in Sampson as existing 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 the 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 an agreement having legal effect under the law of that State.' Convention, Art. 3, Fed. Reg. at 10498." 267 Kan. at 178.

The petitioner seeking return of a child must prove by a preponderance of the evidence that the removal was wrongful. 42 U.S.C. § 11603(e)(1)(A) (1994). "That is, the evidence must show he or she was exercising lawful custody rights over the child at the time of removal." 267 Kan. at 179. The question of whether lawful custody rights were being exercised at the time of the removal must be determined under the law of the child's habitual residence. Convention, Art. 3(a), 51 Fed. Reg. at 10498; Freier v. Freier, 969 F. Supp. 436, 441 (E.D. Mich. 1996).

If the petitioner establishes a wrongful removal, the burden shifts to the respondent to show an exception to the Convention applies. Two such exceptions are (1) that there is a "grave risk" that return of the child would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation, and (2) that 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." Convention, Arts. 13(b), 20, 51 Fed. Reg. at 10499-10500. Pursuant to ICARA, the respondent must prove these exceptions by clear and convincing evidence. 42 U.S.C. § 11603(e)(2)(A).

Standards of review

Where findings of fact and conclusions of law have been made by the trial court, our function is to determine if the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial evidence is evidence which possesses both relevance and substance so as to form a basis of fact from which the issues can be reasonably resolved. Tucker v. Hugoton Energy Corp., 253 Kan. 373, 377, 855 P.2d 929 (1993).

The trial court herein made a negative finding that E. failed in her burden of proof on the issue of "risk of harm." We have said that "a negative finding that a party did not carry its requisite burden of proof will not be disturbed on appeal absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice." Beech Aircraft Corp. v. Kansas Human Rights Comm'n, 254 Kan. 270, 275, 864 P.2d 1148 (1993).

With this background in mind, we turn to the issues raised on appeal.

Wrongful removal

E.D.'s first argument is that J.D. failed to show by a preponderance of the evidence that her removal of the three children from France to the United States was a wrongful removal within the meaning of the Convention.

The parties stipulated that J.D. was exercising custody rights when E.D. left France. The court noted that, except for roughly 19 months when the children lived in Canada or the United States, the two older children had resided in France and, further, that the three older children had been residing with their parents in France for at least the 33 months preceding their removal by E.D. Based on this evidence, the court's finding that E.D. had wrongfully removed the children from their habitual residence was clearly supported by the evidence.

E.D.'s argument that the United States became the children's habitual residence once she removed them to this country ignores the fundamental purpose of the Convention and the meaning of habitual residence.

E.D.'s assertion that the French provisional custody order did not establish that a wrongful removal occurred fails to recognize that the trial court never so found. In light of the stipulations and undisputed facts, the trial court's ruling on this issue is correct irrespective of any consideration of the French custody order.

E.D.'s further assertion that she had as much right to take the boys to the United States as J.D. did to take A. back to Brittany in Northwestern France where the family's home was located and where J.D. was employed ignores the facts and the law. Further, her contention that the trial court impermissibly shifted the burden of proof to her on this issue is not supported by the record. The appropriate standard and burden of proof was employed.

Finally, the argument that this issue was based on inadmissible hearsay is also not supported by the record. The wrongful removal ruling was largely based on stipulations of the parties and undisputed direct evidence. The trial court's finding of wrongful removal by E.D. must be affirmed.

The grave risk exception to return of the children

E. next asserts that contrary to the trial court's ruling, she established by clear and convincing evidence that "there is a grave risk that [the children's] return would expose the children to physical or psychological harm or otherwise place [them] in an intolerable situation." Convention, Art. 13(b), 51 Fed. Reg. at 10499.

This contention fails principally because of our standard for reviewing the trial court's negative finding that E. failed to carry the requisite burden of proof. The standard for reviewing a negative finding was previously set forth. The trial court's specific findings on this issue were set forth in its well-reasoned memorandum decision as follows:

"Once the petitioning party meets the burden of proof as to wrongful removal, the burden shifts to the other party to show by clear and convincing evidence that an exception to the Convention exists. 42 U.S.C. 11603(e)(2). In this regard, Mrs. D. contends that return of the children would expose them to physical or psychological harm and that return of the children would not be permitted under fundamental principles relating to the protection of human rights and fundamental freedoms. [The latter ground appears to have been abandoned on appeal, and, in any event, was an argument without merit in this case.] Despite a showing of wrongful removal, the Court is not bound to order the children's return if there are extenuating circumstances that present a grave risk of harm to the children.

"Mrs. D. expressed concerns about the safety of the three children. She said Mr. D. had threatened and attempted suicide, and has been abusive toward her and the children. Because of these factors, Mrs. D. believed it is 'possible' that Mr. D. would be a danger to the children.

"The evidence presented by Mrs. D. does not establish any serious risk that Mr. D. or anyone associated with him would jeopardize the children's welfare or place them in grave risk of physical or psychological harm. There is no evidence that Mr. D. has ever neglected or failed his children or placed them in actual danger. Mrs. D. said that Mr. D. struck the children with a belt. Mr. D. explained that he did in fact use corporal punishment as did Mrs. D.

"Nothing presented even remotely tends to establish, by clear and convincing evidence, that the children's social background in France presents a grave risk of either physical or psychological harm. It is noted that Mr. D. continues to care for his two-year old daughter. In addition, the Court has considered documents and information submitted in support of Mr. D.'s Petition. A medical certificate filed by Dr. Cordier reflects an examination that showed no signs of any psychological or psychiatric abnormality of Mr. D. Mrs. D. has failed to persuade the Court that return of the children to France would place them at risk of harm."

In addition to the standard for reviewing negative findings, some general principles relating to the Convention and ICARA guide our review of this issue. In considering the exceptions of Article 13, the trial court should take into account any information relating to the child's social background provided by the "Central Authority or other competent authority of the child's habitual residence." Convention, Art. 13, 51 Fed. Reg. at 10499. Although the

surroundings to which the child will be returned and the personal qualities of the people located there are relevant to the inquiry of whether a child will be exposed to a grave risk of harm, the Article 13(b) exception was not intended to be used as a vehicle to litigate the child's best interests and must be narrowly construed. See Hague International Child Abduction Convention, Text and Legal Analysis (Legal Analysis) III(I)(2)(a), (c), 51 Fed. Reg. 10494, 10509-10510. Elisa Perez-Vera's Explanatory Report is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of its provisions. See Legal Analysis, 51 Fed. Reg. at 10503. As stated in the Perez-Vera Report, P 34, the exceptions to return of the child are "above all . . . to be interpreted in a restrictive fashion if the Convention is not to become a dead letter." The person opposing the child's return must show the risk to the child is grave and not merely serious. Legal Analysis, III (I)(2)(c), 51 Fed. Reg. at 10510.

In Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995), the court, quoting a decision by the Supreme Court of Canada in Thomson v. Thomson, 119 D.L.R. (4th) 253, 286 (Can. 1994), concluded that although the word "grave" modifies "risk" and not "harm," this language

"must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.'"

E.D. first asserts that she proved this exception by showing J.D.'s violent behavior and his threats and attempts at suicide. J.D. contends none of the evidence presented by E.D. rises to the level required by Article 13. We agree.

E.D. cites two cases, Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997), and Rodriguez v. Rodriguez, 33 F. Supp. 2d 456 (D. Md. 1999), to support her argument. While both cases did result in rulings denying return of the child, they are clearly factually different from the situation we face and do not require the result E.D. desires.

E.D. did not show regularly inflicted abuse but rather described two distinct incidents of physical violence towards herself: an incident in 1997 when J.D. hit her and pulled her hair during an argument and an incident in December 1998 when he hit and kicked her backside during a holiday train trip. The only evidence of acts by J.D. against the children was E.D.'s testimony that he struck them with a belt during meals, apparently because J.D. did not want them speaking during meals. The trial court noted there was evidence that E.D. had also used corporal punishment on the children.

E.D. has not shown either a factual or legal basis for the reversal of the trial court. There was substantial evidence to support the trial court's findings of fact and legal conclusions and the court did not arbitrarily disregard undisputed evidence or show prejudice in rendering its negative finding on E.D.'s claim of risk to the children. The narrow interpretation required for Article 13(b) exceptions was properly utilized. We must affirm the trial court's rulings on this issue in all respects.

Hearsay evidence and the trial court's consideration of documents not formally received into evidence at the hearing on J.D.'s petition

E.D. next asserts the trial court committed reversible error in relying on hearsay evidence and documents not formally received in evidence at the hearing on J.D.'s petition.

The claims relating to the wrongful removal issue were not based on hearsay despite E.D.'s claims to the contrary because the trial court largely relied on stipulated facts. We therefore focus on E.D.'s hearsay claims relating to the "risk of harm" issue.

E.D. first complains that the trial court relied in its memorandum decision on an affidavit of Jonathon Polier describing French divorce law. The information described in the affidavit is readily available by resort to texts on the same issue (see Pollard, Sourcebook on French Law, pp. 305-366 [2d ed. 1998]), and the affidavit was only considered by the trial court on the issue that was abandoned by E.D. on appeal (the question of whether returning the children should be prohibited under principles of fundamental freedom and human rights). In short, the Polier affidavit is of no moment for purposes of this appeal.

E.D.'s complaint that the trial court improperly relied on medical certificates relating to J.D. and letters of reference that he supplied must be considered despite J.D.'s claim that she did not make a proper objection. The record reflects an objection by E.D.'s counsel to the trial court's ruling that there could be no valid objection on the basis of hearsay under the Convention.

E.D.'s reliance on 42 U.S.C. § 11604 (1994) is misplaced, as that provision only relates to provisional orders for protecting the child and for preventing his or her removal or concealment pending final determination of a petition and is simply not applicable to our facts. Likewise, J.D.'s reliance on 42 U.S.C. § 11605 (1994) is also misplaced as it relates to the dispensing of certain authentication requirements for documents relating to the petition or application and does not govern E.D.'s hearsay concerns.

Under the Convention,

"any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States." (Emphasis added.) Convention, Art. 30, 51 Fed. Reg. at 10501.

This provision was intended to resolve the problem which existed in some member states regarding the admissibility of documents; it seeks to facilitate the admission of applications and documents attached thereto and submitted either directly to judicial or administrative authorities or through the Central Authorities. Perez-Vera Report, P 140. Under this provision, hearsay concerns would be dispensed with for items appended to the Hague petition or provided by the Central Authority because Article 30 makes such items admissible without qualification in the courts of the Contracting States. See In re Walsh, 31 F. Supp. 2d 200, 202 n. 1 (D. Mass. 1998) (acknowledging the hearsay nature of one of petitioner's affidavits but considering it as evidence anyway as required by the Convention because it was among the materials attached to the petition).

In this case, however, the documents in issue were not attached to the petition but appear to have been provided later and, in some instances, at the request of the trial court.

The language of a statute should be interpreted to avoid absurd or unreasonable results. State v. Le, 260 Kan. 845, Syl. P 4, 926 P.2d 638 (1996). Such a rule should likewise apply to the interpretation of the Convention. It seems illogical that if attached to the petition or provided by a central authority, documents are admissible, while, if provided later, they are not. Article 30 was intended to give deciding courts and administrative agencies access to relevant evidence despite the barriers of time, expense, and geography which might

otherwise make it impracticable or unduly expensive in international disputes for such evidence to be gathered and presented in the face of hearsay or other evidentiary concerns.

A flexible and sensible interpretation of Article 30 should be adopted allowing trial judges to consider any document offered in support of a Hague petition, whether affixed to the petition or not, with any hearsay concerns to be considered by the trial court mainly in deciding the weight and credibility which the documents warrant.

We note in this case that the hearsay documents relevant to the "risk of harm" issue were in addition to direct testimony received from both sides. One of the hearsay documents was a letter from the principal of J.D.'s school which spoke of his qualifications as a teacher, his passage of regular school medical assessments, and his fitness to teach and work with children. The second item was a letter from J.D.'s priest vouching in rather summary terms for J.D.'s parenting skills. The final relevant hearsay item was the medical certificate from a Dr. Cordier who had examined J.D. on June 2, 1999, and stated that J.D. showed no signs of psychological or psychiatric abnormality.

The trial court's decision does not appear to have been particularly dependent on the content of the above documents, and the trial court only referred to them in its memorandum decision after reaching its primary conclusion that E.D. had not established by clear and convincing evidence the "grave risk" to the children required by Article 13(b).

Under our facts here it is clear that the substantial rights of the parties were not prejudiced by the trial court's consideration of these documents. Even if we were to view the trial court's consideration of these documents as error, we would consider the error to be harmless. See K.S.A. 60-261.

Attorney fees, costs, and transportation expenses

Finally, E.D. asserts that J.D. "comes from wealth" and she is poverty stricken and that, for this reason, the trial court erred in ordering her to pay the costs and fees generally required by 42 U.S.C. § 11607(b)(3) (1994), which states:

"Any court ordering the return of a child pursuant to an action brought under section 11603 [an action under the Convention for return of a child wrongfully removed or retained] 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 in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate."

See Convention, Art. 26, 51 Fed. Reg. at 10500 (giving discretion for such an order).

E.D.'s argument is based on her testimony that J.D.'s parents were wealthy and that she never had any money because J.D. never gave her any spending money and she flew back to the United States using a consulate loan.

Although J.D. expressly requested fees and costs pursuant to 42 U.S.C. § 11607 in his petition, E.D. never addressed the issue in her trial court brief in which she responded to J.D.'s petition or in any other document that is part of the record on appeal, and she never mentioned the issue in her arguments at the August 1999 hearing on J.D.'s petition. To defeat a request for fees and costs, E.D. had the burden of establishing to the trial court's satisfaction that an order for such fees and costs would be "clearly inappropriate," yet we see no place in the record where she made such an assertion or otherwise contested J.D.'s request for fees and costs. She may not raise this issue for the first time on appeal. See Ripley

v. Tolbert, 260 Kan. 491, Syl. P 6, 921 P.2d 1210 (1996) (issues not raised before the trial court cannot be raised on appeal).

Even if considered, E.D. has failed show that the order of costs and expenses was "clearly inappropriate" in this case. The Convention anticipates that all "necessary expenses incurred . . . to secure the children's return" will be shifted to the abductor, both "to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place." See Legal Analysis, III (J)(2), 51 Fed. Reg. at 10511.

The ultimate amounts have yet to be considered by the trial court who remains in control of the actual amounts allowed. The trial court's ruling as to fees, costs, and expenses was not erroneous.

Affirmed.

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