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[15/04/1994; United States District Court for the District of Massachusetts; First Instance] Wanninger v. Wanninger, 850 F. Supp. 78 (D. Mass. 1994)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

April 15, 1994

Before: Ponsor, D.J.

Wanninger v. Wanninger

I. INTRODUCTION

Petitioner, M.W. ("M.") alleges that his wife C.W. ("C.") wrongfully retained their children in the United States without his consent. He now seeks the immediate return of his three minor children to Germany. On April 11, 1994, M. appeared before this court ex parte seeking a warrant in lieu of a writ of habeas corpus for the return of his children pending further action pursuant to the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. 11603(b). The court denied this request but did require that the respondent, C.W., appear with the three children before the court later the same day. At that hearing, with both parties present, the court established a scheduling order and set the matter down for further hearing today.

In ruling on petitioner's motion, the court must decide whether C.'s conduct -- remaining in the United States with the three children and not returning to Germany -- was "wrongful" as defined by the Hague Convention. As Justice Rigler noted in *Sheikh v. Cahill* (1989) 145 Misc.2d 171 [546 N.Y.S.2d 517], modern advances in travel has produced numerous benefits to society. However, this increase in mobility has also caused major problems in the areas of matrimonial law and custody rights. "One of the hardest problems concerns the removal of a child from the jurisdiction by one parent without the consent of the other." *Id.*, 546 N.Y.S.2d at 518. This case is no exception.

II. FACTS

The facts of this case are as follows. M. is a German citizen who met his wife C., a U.S. citizen, while studying at the University of Massachusetts in Amherst. They married and took up residence in Germany in November, 1987. The couple has three children: N., age six; T., age four; and S., age three. All three children have lived in Germany their entire lives.

On November 25, 1993, C. took the children to Amherst, Massachusetts for a visit with her parents. Originally, her plan was to stay in the United States for six weeks. But after she arrived to the United States, she had second thoughts about returning to Germany with her children and, it seems, questioned her marriage to M. On January 12, 1994, C. contacted a German neighbor and asked her to tell M. that she had decided to stay in the Amherst area with the children and would not return to Germany.

At first, M. attempted to reconcile his problems with C. He came over to the United States in mid-February to convince her to return home with the children. After learning that C. did not intend to return to Germany with the children, M. sought relief in the German courts; On April 6, 1994, the German Family Court (Court of Schwetzingen) issued a ruling that C. had violated the Hague Convention by wrongfully retaining the children in the United States. M. then petitioned this court, pursuant to 42 U.S.C. 11603(b), for relief under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention") implemented by ICARA. M. seeks an order by this court to allow him to return to Germany with his children immediately.

III. DISCUSSION

The Hague Convention is an international treaty designed "to protect custody rights on a global scale" and was adopted

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. 10,498 (1986); Meredith v. Meredith (D. Ariz. 1991) 759 F.Supp. 1432, 1433.

In order to establish this goal, the Convention requires signatories to act promptly to restore the situation that existed prior to a child's removal from his or her habitual residence. Currier v. Currier (D.N.H. 1994) 845 F.Supp. 916. Both the United States and Germany are signatories to the Hague Convention.

In 1988 Congress passed the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. 11601 et seq. (1988), in order to establish procedures to implement this aspect of the Hague Convention in the United States. David S. v. Zamira S. (1991) 151 Misc.2d 630 [574 N.Y.S.2d 429]. Taken as a whole, these procedures are aimed at maintaining the status quo and deterring parents from crossing international boundaries in search of a more sympathetic court. Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993).

The Convention authorizes a federal district court to determine the merits of the abduction claim but does not allow it to consider the merits of the underlying custody dispute. Currier v. Currier (D.N.H. 1994) 845 F.Supp. 916, citing Friedrich v. Friedrich (6th Cir. 1993) 983 F.2d 1396, 1399; Meredith v. Meredith (D.Ariz. 1991) 759 F.Supp. at 1434. Therefore, the court's inquiry is limited to whether C.'s retention of the children was "wrongful" under the Convention.

In order to prevail, the petitioner has the burden of proving by a preponderance of the evidence that the three children were "wrongfully retained" within the meaning of the Convention. Currier v Currier (D.N.H. 1994) 845 F.Supp. 916, 42 U.S.C. 11603(e)(1)(A). "Wrongful retention" occurs 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.

Convention, Art. 3.

If the petitioner carries his burden of proving that the retention was "wrongful," the court is required to order immediate return of the children unless the respondent meets one of four limited exceptions. These exceptions are: (1) grave risk that return of the children would expose them to physical or psychological harm; (2) violation of fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms; (3) delay more than one year after the children have become settled in a new environment; or (4) consent by the petitioner to the removal or retention. The first two exceptions must be proved by clear and convincing evidence, while the latter two need only be proved by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(A) and (B).

Based on the facts before it today, the court is compelled to grant petitioner's request to return to Germany with the three children. There is no dispute that, except for a few visits to C.'s parents in the United States, the three children have lived in Germany. All three children were born in Germany and attend school there. This being the case, the court finds that the children were "habitually resident" in Germany immediately prior to their removal by C. Moreover, prior to their removal, petitioner was exercising his lawful rights of custody over the children. The issue of custody must be addressed under German law. Friedrich v. Friedrich, 983 F.2d at 1402. Petitioner has attached a copy of the relevant provision of the German Civil Code which gives both parents joint custody of the children. See Petitioner's Exhibit D, German Civil Code 1626. Because the children were habitually resident in Germany and because M. is entitled to joint custody, they must return to Germany absent some exception.

None of the statutory exceptions applies to this case. It is undisputed that the children arrived in the United States some time in November of 1993, less than one year from the time M. instituted this proceeding to return the children to Germany. Therefore, the exception relating to the children being

settled in a new environment for more than one year is inapplicable. Respondent is left with only three exceptions, all of which are construed very narrowly, and are not warranted by the facts in this case.

Respondent's central argument is that, even if petitioner has met his initial burden of proof, the children should not be returned to Germany because petitioner acquiesced to the retention of the children in the United States. To invoke this exception, respondent must prove by a preponderance of the evidence that petitioner consented to or subsequently acquiesced to their retention. Even if one of the exceptions is found applicable, the court is not required to refuse a return order. *Levesque v. Levesque* (D.Kan. 1993) 816 F.Supp. 662, 667.

In support of her position, C. offers the following evidence. First, during an argument sometime in August or September of 1993, M. told her to "pack up and go with the children back to the United States." Second, C. claims that when she had resided in Amherst for about one month, M. wrote to her and informed her that he would travel to the United States to talk about reconciliation. During this period, M. wrote to C. and expressed an interest in solving their marital problems. C. claims that in these letters M. acquiesced to the children's retention in the United States and that he reaffirmed this position when he visited in February of 1994. According to C., M. wanted to reunite the family and agreed that she and the children could stay in Amherst during the period of attempted reconciliation. *Id.* at paragraph 13. C. maintains that this evidence is sufficient to support a finding that M. acquiesced to the children staying in Amherst.

In making its determination, it has not been necessary for the court to take evidence. The facts are largely uncontested. The sole area of confusion revolves around whether M. had knowledge of and consented to C.'s initial decision in November 25, 1993, to travel to the United States with the children. The personal letters written by M. to C. after she left Germany seem to contradict his position that he did not know that C. and the children were leaving for the United States. However, even accepting C.'s position that M. consented to her taking the children to the United States for a limited period, it does not follow that M. acquiesced to the children's permanent retention in the United States once he realized that his marriage was irreconcilable. The Hague Convention covers both wrongful removal and wrongful retention.

The sequence of events and actions taken by M. strongly supports the conclusion that M. did not agree that the children remain in the United States for an indefinite period of time. C. and the children left Germany on November 25, 1993. By January of 1994 M. had communicated to C. his intention to visit her and the children to work out their marital difficulties. This visit was postponed at the request of C., who asked M. to delay his trip. Nevertheless, in mid-February M. arrived in Amherst unannounced and stayed for approximately two weeks. During this time, he visited the children and participated with C. in counseling sessions with a priest of the * Church in Amherst.

After realizing that his attempt to reunite his family was fruitless, M. returned to Germany. Within a few days of arriving home, he filed a petition with the German courts for the return of his children. Moreover, throughout the entire period when the children and C. resided in Amherst, M. attempted to keep in continual contact with them by writing letters and calling on the telephone. Based on these facts, C. cannot prove by a preponderance of evidence that M. acquiesced to the children's retention in the United States.

In further support of her position that M. acquiesced that the children should remain in the United States, C. points to statements made by M. in personal letters to written to her and to conversations with Reverend C. This evidence, C. claims, shows that M. agreed that the children should remain in the United States while they continued to work on their marriage. As a preliminary matter, the court is doubtful as to the admissibility of Reverend C.'s statements regarding conversations he had with the W.s in his role as a pastoral counsellor. However, even if respondent were able to get over this hurdle and show this is not privileged information or that M. waived his privilege, the court's decision is not altered by Reverend C.'s submission.

The letters and conversations between C. and M. relate to M.'s attempt to reconcile his marriage and return home to Germany with his wife and their three children. These conversations do not support a finding that he acquiesced to the retention of the children in the United States. The facts of the English cases offered by respondent are inapposite. To conclude, if a custody dispute is to occur, it will be in Germany and not the United States.

Instructive in the court's ruling is *Currier v. Currier* (D.N.H. 1994) 845 F.Supp. 916, whose facts are remarkably similar to those before the court. *Currier* involved a custody dispute between petitioner G.C., the children's mother, a German citizen, and R.C., the children's father, an American citizen. A German

court gave temporary custody of the two children to G. during separation proceedings. After counseling proved fruitless, the C.s decided to divorce.

On January 27, 1994, G. signed an agreement drafted by R.'s attorney granting R. sole custody of the children. The next day, realizing the full effect of her decision, G. attempted to revoke the agreement, claiming that she signed it under duress and in response to threats by R. In an ex parte decree, a German Family Court ordered R. to return the children to G.

After she obtained the order, G. attempted to contact R. and demand return of the children. However, G. was too late. While she was attempting to obtain a court order, R. and the children boarded a plane to the United States and settled in New Hampshire.

G. petitioned the United States District Court of New Hampshire for relief under the terms of the Convention, requesting the return of the two children to Germany. After a thorough analysis of this situation, the district court granted G.'s petition and ordered that the children be sent back to Germany. The court reasoned that R.'s removal of the children was "wrongful" within the meaning of the Convention because, under German law, G. had the right to custody of the children at the time they were removed. Finding that R. failed to meet any of the exceptions under the Convention, the court ordered that the children return to Germany with their mother.

Similarly, in this case, the court is left with only one conclusion. The court must grant the petitioner's motion and will allow him to take the children back to Germany.

IV. CONCLUSION

For all of the reasons stated above, the court hereby **ALLOWS** the Petition for Return of Children to the Petitioner. The parties' three children, N., T. and S., are ordered to return to Germany in the custody of the petitioner. In addition, counsel for petitioner will be given until April 23, 1994, to file a request for attorney's fees and costs. Counsel for respondent will file his opposition by May 1, 1994.

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