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[10/04/1998; United States District Court for the District of Massachusetts; First Instance]
Zuker v Andrews, 2 F. Supp. 2d 134 (D. Mass. 1998)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

April 10, 1998

Before: Collings, D.J.

A. Zuker (Plaintiff) v. P. Andrews (Defendant)

I. INTRODUCTION

Petitioner, A.Z. ("Z."), a citizen of Argentina, [FN1] seeks relief under The Hague Convention on the Civil Aspects of Child Abduction ("the Convention"), as implemented by the International Child Abduction Remedies Act ("ICARA"), 42 U.S. C. s. 11601 et seq. He has filed an application with the United States Central Authority under The Hague Convention on the Civil Aspects of Child Abduction seeking the return of his child, S., to Argentina. S.'s mother, the respondent P.A. ("A."), is a citizen of the United States. [FN2] She and the child reside in Watertown, Massachusetts. A Petition for Return of Child to the Petitioner was filed in this Court on September 4, 1997. An evidentiary hearing was held on December 19, 1997. [FN3]

There is no dispute as to the times when S. and A. were in the United States and when they were in Argentina. S. was born in New York City on June 16, 1993. (Def. Exh. # 17) For a few weeks in April, 1994, S. and A. were in Argentina. From April to November, 1994, they were in New York City. From November, 1994 until May, 1995, they were in Argentina. From May, 1995 to November, 1995, they were in Waltham, Massachusetts residing at A.'s mother's home. From November, 1995 to June, 1996, they were in Argentina. They left Argentina and arrived in New York on June 14, 1996. From June, 1996 until the present, S. has lived in Massachusetts with A., first at his grandmother's home in Waltham and later at an apartment A. rented in Watertown. He has not returned to Argentina.

It is also not disputed that A. and S. went to Argentina in November, 1994 so that they could reside with Z. while he worked on a planned Compact Disc ("CD") (Exh. #8) and that Z. worked on the production and marketing of the CD in Argentina at least through June, 1996 when A. and S. returned to the United States. Z. alleges that A. wrongfully retained the child in the United States in June 1997, a year after she and S. returned to the United States. (Exh. 3, p. 2) The Court's task is to decide what was the "habitual residence" of the child at the time when the alleged wrongful retention is said to have occurred. This task actually breaks down into resolving subsidiary issues.

The Court is not bound to accept Z.'s allegation that the wrongful retention occurred in June, 1997. The date of the retention is important because Article 12 of the Convention provides that if the Court finds that S. has been wrongfully retained and the filing of the petition in this Court ("the judicial authority of the Contracting State") occurred more than a year after the wrongful retention, the Court cannot order a return of the child if " . , . the child is now settled in its [sic] new environment." Since the petition was filed on September 4, 1997, if the wrongful retention was more than a year prior to that date, the question of whether S. is now settled in his new environment would have to be resolved. The date on which the alleged wrongful retention occurred is important from another perspective. Article 3 of the Convention provides, in pertinent part, that:

The ... retention of a child is to be considered wrongful where --

(a) it is in breach of rights of custody attributed to a person ... 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. [FN4]

Thus, the question with respect to "habitual resident" is tied to that period of time "immediately before" the retention. The date of retention pinpoints the period of time at which the "habitual residence" of the child is to be determined.

II. S.'s HABITUAL RESIDENCE IN JUNE 1996

A. The Law Respecting Habitual Residence

In order to be entitled to the requested relief, Z. must show that respondent A. is wrongfully retaining their son S. from the place of S.'s "habitual residence." Wanninger v. Wanninger, 850 F.Supp. 78, 80 (D. Mass. 1994). Z. argues that Argentina is S.'s habitual residence.

The term "habitual residence" is not defined under the Convention. Instead, a child's "habitual residence" is to be determined by examining the specific facts and circumstances at hand. Meredith v. Meredith, 759 F. Supp. 143 2, 1434 (D. Ariz., 1991). Courts should not interpret the term technically or restrictively. Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995).

One of the most frequently cited explanations of the term "habitual residence" is that set out by the High Court of Justice In re Bates, No. CA 122-89, High Court of Justice, Family Div'n Ct. Royal Courts of Justice, United Kingdom (1989); see, e.g., Feder v. Evans-Feder, 63 F.3d 217, 222-24 (3rd Cir. 1995) (citing Bates); Falls v. Downie, 871 F. Supp. 100, 102 (D. Mass. 1994) (same); Slagenweit v. Slagenweit, 841 F.Supp. 264, 268 (N.D.Ia. 1993) (same); In re Ponath, 829 F.Supp. 363, 367 (D. Utah 1993) (same); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993) (same); Harsacky v. Harsacky, 930 S.W.2d 410, 413 (Ky.Ct.App, 1996) (same). The Bates court explained by quoting a speech by Lord Scarman in 1983 as follows:

[T]here must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

American courts have used this explication in their own determinations of where a child has his or her "habitual residence." In Feder, the Third Circuit cites Bates and explained:

[A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective . . . .

[A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parent, shared intentions regarding their child's presence there.

Feder, 63 F.3d at 224.

Cases similar to the one at bar illustrate further the requirement that there be a "settled purpose." For instance, in Slagenweit, the parents had agreed that the child would travel from Germany, where she lived with her mother, to live with her father indefinitely in Iowa. The parties agreed the child would live with her father while her mother prepared to return to school, and that while in Iowa the child would be able to obtain needed medical attention superior to that which had been available to her in Germany. Eight months later, the child's mother demanded her return, and the father refused. Slagenweit, 841 F.Supp. at 266.

The court found that the child was not being wrongfully retained in Iowa. While the parties agreed the child's habitual residence initially had been in Germany, it had changed to Iowa as "a result of a change in geography and a passage in time." Id. at 269. Over that period of eight months (which the court characterized as "a substantial passage of time," Slagenweit, 841 F.Supp. at 269, the court concluded the

child had become a resident of Iowa through her involvement with her father and his girlfriend and through the medical community responsible for her treatment. The court deemed it significant that the parents initially had agreed that the child would live in Iowa for an indefinite period of time, and by the time the mother objected to the child's continued presence there, she was well-established in her new home in Iowa. Id.

In Levesque, a German citizen attempted to reconcile with her estranged husband by moving with their child to the United States, where he (the child's father) had been transferred from his army post in Germany. They lived in Kansas for nearly a year, after which time she returned to Germany with their child to visit her family. She returned to Kansas five weeks later, only to go back to Germany with the child almost immediately. He (the child's father) agreed that she could return with the child to Germany, but he believed they would be gone only for a short time. Problems had developed in the marriage again, and shortly after the mother and child returned to Germany, it became apparent that she planned to remain in Germany with the child. Approximately three weeks later, the child's father flew to Germany, took the child without the mother's consent, and returned with the child to the United States. Levesque, 816 F.Supp. at 663.

The court ordered that the child be returned to Germany. Even though the child had lived with both parents in Kansas for nearly a year, the court concluded that the child's habitual residence switched to Germany after the couple agreed that the mother would return there with the child for an indefinite period of time. Id. at 666. This arrangement "amounted to a purpose with a sufficient degree of continuity to enable it properly to be described as settled." Id. (quoting Bates).

In Falls, a German woman agreed that her child and the child's father would move from the family's residence in Germany to the United States for an indefinite period of time. The couple was experiencing financial difficulty, so they intended that he and the child would live with his parents in Massachusetts and look for work. The couple's relationship deteriorated during the separation, and eight months later, she sought her child's return to Germany. Falls, 871 F.Supp. at 100-01. The court held that during those eight months, the child had become sufficiently settled in Massachusetts so that it had become the child's habitual residence. Id. at 102.

An additional factor which seemed important to the Falls court was the child's young age; he was twenty-one months old when his mother sought his return to Germany, after a stay in this country of eight months. The court remarked, "He [the child] had become completely accustomed to life in this country with his father and grandparents; he barely knew his mother." Falls, 871 F.Supp. at 102. Indeed, at least one other court has noted that a short period of time can be quite significant in the life of a young child. In Feder, the child's habitual residence was found to be Australia, even though he had lived there only six months. "Evan moved, with his mother and father, from Pennsylvania, to Australia . . . and stayed in Australia for close to six months, a significant period of time for a four-year old child." Feder, 63 F.3d at 224 (emphasis added). This approach is consistent with the directive in Feder that the court must look to the child's circumstances, and to whether the child has become acclimated to the new locale, in determining the habitual residence, rather than to the parents' future intentions for the child. Id

B. Findings of Fact Respecting S.'s Habitual Residence

Applying this law to the facts of this case, I find that for three periods (November, 1994 to May, 1995; May, 1995 to November, 1995; and November, 1995 to June, 1996), S. was a habitual resident of the country in which he was actually situated. This is certainly true from the point of view of S. It is also true from the point of view of the shared intentions of the parents. Both parents intended that A. and S. would live in Argentina while Z. finished the CD, both parents agreed to A. and S. returning to the United States for six months in 1995, and both parents agreed to A.' return with S. to Argentina in November, 1995. While I find that the expectation of both parents differed as to how long they and S. would stay in Argentina in on each occasion, each of the trips back and forth was essentially the product of an agreement between the parents, at least to the extent that the trips would take place. In fact, A.'s return to the United States in June, 1996 with S. was agreed to between the parents, [FN5] but there was no agreement at that time on the length of stay in the United States. [FN6]

While I credit A.'s testimony that she never intended that she and S. would live in Argentina forever and that when she moved to Argentina in November, 1994, she intended to come back to the United States when Z.'s work in Argentina was finished, that does not establish that S.'s habitual residence was not in Argentina during the months-long periods he and A. lived there. Thus, I find that in June, 1996, after

seven months in Argentina, Argentina was S.'s habitual residence even though A. wanted desperately to return to the United States with him months before the actual return.

III. DATE OF RETENTION

A. The Law Respecting When Retention Occurs

The court must first determine when the alleged wrongful retention began. As indicated, supra, Zucker contends that the wrongful retention commenced in July, 1997. In Slagenweit, the court held that the wrongful retention began when "the noncustodial parent ... clearly communicate[d] [the] desire to regain custody and assert[ed] [the] parental right to have [the child] live with [him or] her." Slagenweit, 841 F.Supp. at 270. In that case, the court determined that this occurred when the noncustodial parent first asked that the child be returned to her in Germany and the custodial parent refused. [FN7] And in Falls, the court likewise stated that the retention became wrongful, if at all, when the child's mother asked that the child be returned to her in Germany and the father refused. Falls, 871 F.Supp. at 102.

B. Findings of Fact as to Date of Retention

I find that Z. first asked that A. and S. return to live with him in Argentina in or about July, 1996, a month after A. and S. left Argentina. (Exh. 1) It is more difficult to determine when it was that A. refused to return to Argentina because she has admitted lying to Z., albeit allegedly under duress, as to her intentions. [FN8] She also admitted to giving mixed messages as to her intentions when she was in the United States in 1995. (Tr. 113).

There is also another dimension to the problem. On the record before me, although it is undoubtedly true that after her return to the United States in June, 1996, she told Z. that she did not want to return to Argentina, it was not until July of 1997 that she told him that she and Sasha would not live with him in the United States and that she did not "want anything to do with him." (Tr. 75) Evidently, it had been a shared intention for a long period of time that when Z. finished his work in Argentina, the couple would live together in the United States, perhaps in California. (Tr. 74, 110-111, 126, 13 1) While I credit A.'s testimony that by February, 1997 when she learned that Z. had been unfaithful to her, she resolved not to live with him again, there is nothing in the record to indicate that she informed Z. of this until July, 1997. While this was due to the fact that she wanted to be able to retrieve the property she had left in Argentina and to collect the money which Z. owed her, it nonetheless left Z. in the dark as to her true intentions.

However, the petition alleges that A. wrongfully retained S. in the United States away from his habitual place of residence which Z. alleges was Argentina. The retention occurred when Z. knew that A. was not going to return S. to Argentina. Until he knew that A. would not return, it would be unfair to require Z. to file a petition based on alleged wrongful retention.

Based on all the evidence, however, I find that A., by moving out of her mother's apartment and renting her own place in Watertown, clearly communicated to Z. that she was refusing to return to Argentina with S. Until that time, Z. more or less acquiesced in her remaining in Massachusetts. As he wrote on June 27, 1997 (Exh. I at p. 3):

After a month or so [after A. and S. went to the United States in June, 1996] I requested their return to Argentina to which P. answered that the summer was nice in [sic] USA and in Argentina was winter. She continued extending their visit with excuses like "I have some patients I'm treating", etc. During that time she requested some items which I sent, and some money, which I wired, always thinking it would help their promp [sic] return to Argentina.

However, as soon A. got her own apartment, it was clear to Z. that A. did not intend to comply with his request that she and S. return to Argentina. As he further stated on June 27, 1997 (Exh. 1 at p. 3):

To compose, produce, record and publish a CD is a very complex attainment with many people involved so I was busy and time was flying for me to realize what was going on. Suddenly a few months ago she moved out her [sic] mother's place and rented her own. For a while I didn't know where they were since although she was calling, she wouldn't give me her new address.

Accordingly, I find that applying the law to the facts of this case, that A.'s retention of S. occurred in or about February, 1997 when she moved into her own apartment in Watertown, Massachusetts because,

based on all that occurred up until that point, it was by that act that A. communicated to Z. that she was not going back to Argentina.

I further find that Z. knew that A. had moved into her own apartment shortly after it happened. (Tr. 101) He asked his friend, M., to help A. move. (Tr. 102) On May 7, 1997, he gave A. a document authorizing her to sell the New York City apartment and referred to A.'s Watertown address in the body of the document. (Exh. 14) In sum, the retention of S. from what was his habitual residence in June, 1996 did not occur until February, 1997.

IV. S.'s HABITUAL RESIDENCE IN FEBRUARY, 1997

The same reasoning which led to the conclusion that S.'s habitual residence from November, 1995 to June, 1996 was in Argentina leads inexorably to the conclusion that his habitual residence in February, 1997 was in Massachusetts. While I find that during the period June, 1996 to February, 1997 the expectation of both parents as to how long A. and S. would remain in the United States differed, their remaining here was in substance the subject of a tacit agreement, or at least, an acquiescence on Z.'s part. (Tr. 87-88) Accordingly, I rule that in February, 1997, S.'s habitual residence was in Massachusetts.

V. THE ALTERNATIVE ISSUE

As I indicated, I find that as of June, 1996, Argentina was S.'s habitual residence. If I am incorrect and that the retention occurred in July, 1996 when Z. asked A. to return S. to his habitual residence in Argentina, Z.'s petition was not filed until over a year later, i.e., in September, 1997. The issue becomes whether the requested return of S. to Argentina should be denied because at the time the petition was filed, i.e., September, 1997, S. had become "settled" in his new environment in Massachusetts.

A. The Law Respecting When a Child Has Become Settled

When the petition is filed more than a year after the retention, the respondent must show "evidence that the child [is] in fact settled in or connected to the new environment so that, at least inferentially, return would be disruptive with likely harmful effects. . .. [T]here must be 'substantial evidence of the child's significant connections.'" In re Robinson, 983 F.Supp. 1339, 1345 (D. Colo. 1997) (quoting Public Notice 957, 51 Fed.Reg. at 10,509).

In Robinson, the court found the children had become sufficiently settled in their new environment, since they enjoyed active involvement with the respondent's extended family, were enrolled in school and doing well, were active in extracurricular activities, and had established friendships. Id at 1346. In In re Wojcik, 959 F.Supp. 413 (E.D.Mich. 1997), the court likewise found the children were settled in their new environment because they had been attending school or day care consistently; they had friends and relatives in the area; and they attended church regularly with their mother. Id. at 421. In contrast, the court noted that the uncontroverted evidence demonstrated the father's family in France was "indifferent to the children at best." Id

The court in In re Petition for Writ of Habeas Corpus for Coffield, 644 N.E.2d 662 (Ohio Ct.App, 1994), held that the child in question there had not become settled in his new environment at the time the petition for his return had been filed. But the child's father apparently had been trying to conceal their whereabouts, and so over a period of three years he had exposed the child only to a limited group of friends and relatives, " i.e., people whom [the father] could trust." The child was not enrolled in school or other activities and had not made friends in the community at large. Thus, the court held the boy was not settled in his new environment, so the Article 12 defense did not apply. In re Petition for Writ of Habeas Corpus for Coffield, 644 N.E.2d at 666.

Both the Wojcik and Robinson courts relied in part on the fact that the children at issue in those cases were "old enough to allow meaningful connections to the new environment to evolve." Robinson, 983 F.Supp. 1345. Both courts contrasted David S. v. Zamira S., 151 Misc.2d 630, 574 N.Y.S.2d 429 (1991), in which the court held that children who were 3 and 1 1/2 years old were "not yet involved in school, extracurricular, community, religious or social activities which children of an older age would be," and so were not settled in their new environment. Id at 636, 574 N.Y.S.2d at 433. In contrast, the children in Wojcik were 8 and 5 years old at the time of the hearing, Wojcik, 959 F.Supp. at 421; the children in Robinson were approximately 10 and 6 years of age. Robinson, 983 F.Supp. at 1341.

B. Findings of Fact as to Whether S. was Settled as of September, 1997

As of September, 1997, S. was four years, two months old. Since June, 1996, he has attended the * Day Care Center on a full-time basis even though A. moved from her mother's apartment in Waltham to Watertown. (Exh. 9) The Executive Director states that since 1996, " . . . S. has grown and thrived academically and socially" and " . . . attends birthday parties and playdates at his home and at the home of his friends." (Exh. 9) He has "established relationships with teachers, children and other staff." (Id.) He sees his grandmother two or three times a week and has "bonded" with her. (Tr. 31)

This evidence is both substantial and persuasive. No contrary evidence was introduced. Accordingly, I find that as of September, 1997, S. had become "settled in his new environment. " [FN9]

VI. CONCLUSION

In sum, I rule that as of June, 1996, S.'s habitual residence was Argentina. I rule that it was in February, 1997 that A. communicated by both word and deed that she would not return to Argentina with S. as Z. had requested in July, 1996. Thus, any wrongful retention occurred in February, 1997. However, I further find that in February, 1997, S.'s habitual residence was in Massachusetts and it remained so. Thus, A.' retention of S. was not "wrongful" because she was not retaining him from what was then his habitual place of residence. Alternatively, if the date of A.' retention was July, 1996, I rule that when the Z.'s petition was filed over a year later on September 4, 1997, S. was settled in his new environment.

Accordingly, it is ORDERED that Z.'s Petition for return of S. to Argentina be, and the same hereby is, DISMISSED as without merit and judgment to that effect shall enter forthwith.

/s/

ROBERT B. COLLINGS

United States Magistrate Judge

10 April 1998

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FOOTNOTES

1 Z. is also a permanent resident alien of the United States.

2 Z. and A. never married.

3 Prior to the evidentiary hearing, the parties consented to have the case reassigned to the undersigned United States magistrate judge for all purposes, including trial and entry of judgment, pursuant to 28 U.S.C. s. 636(c).

4 There is no dispute in this case that at whatever time the retention, wrongful or otherwise, took place, Z. had rights of custody and was actually exercising those rights or would have been exercising them but for the retention. See Tr. 160.

5 Z. drove A. and S. to the airport and arranged for them to leave when Argentine authorities raised questions about the fact that they had over stayed the period in which they were allowed to be in the country. (Tr. 109, 131)

6 This fact distinguishes this case from the case of Levesque v. Levesque, 816 F.Supp. 662, discussed, supra, at pp. 7-8. In that case, the parents had agreed that the child would return to Germany with the mother for an indefinite period of time. I find that in the instant case, there was no agreement between the parents that S. would return to the United States with A. for an indefinite period of time in the sense that the period would be lengthy. It is true that there was no agreement on a "definite" period of time during which A. and S. would remain in the United States in the sense of agreement on a particular span of days or months. But Z. expected that the time would be short and A. expected that S. would never return to Argentina to reside. Put another way, I do not find that Z. agreed in June, 1996 that A.'s and S.'s visit to the United States would be more than a few weeks to a month.

7 In Schroeder v. Vigil-Escalera Perez, 76 Ohio Misc.2d 25, 664 N.E.2d 627 (1995), the court cited Slagenweit with approval in a case involving similar facts. The court in that case held that any wrongful

retention did not begin until the parties actually "began a battle over custody of the child." Id. at 33-34, 664 N.E.2d at 632 (citing Slagenweit).

8 When she and S. left Argentina in June, 1996, she told him that she'd come back for a visit when they had enough money and also told him that they would be back in two weeks. (Tr. 134).

9 The case of David S., 151 Msc.2d 630, 574 N.Y. S.2d 429, is not to the contrary. The holding of that case was based on a lack of evidence submitted that the children had become settled in their new environment. There was no evidence that the children had "formed meaningful relationships" or that they attended "nursery school." Id., 151 Msc.2d at 636, 574 N.Y.S.2d at 433.

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