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[11/04/1997; United States District Court for the Northern District of California; First Instance]
In re K. v. K., No. C 97-0021 SC (N.D. Cal. Apr. 11, 1997)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

April 11, 1997

Before: Conti, D.J.

In re Application of K. (Petitioner) v. K. (Respondent)

I. INTRODUCTION

Petitioner, Mr. K., brings this action for return of his 32-month-old child, R.K., to Australia pursuant to The Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. 11601 et seq. Respondent, Ms. K., asserts that petitioner's request should be denied because petitioner consented to respondent's trip to the United States and the return of the child to Australia would expose the child to grave risk of physical or psychological harm. [FN1]

II. BACKGROUND

Mr. and Ms. K. were married on December 24, 1992 in Suva, Fiji. Soon after, the couple moved to Australia where Mr. K. resided. On or about May 10, 1996, Ms. K. left the matrimonial home in Merrylands, New South Wales, Australia, with the child following an argument with Mr. K. During this argument, Ms. K. called the Australian police to intervene and the police took Mr. K. into custody. According to the police report, Mr. K. slapped Ms. K. across the face and threatened her with a knife and a belt; however, the police did not find any visible injuries to Ms. K. Mr. K. returned to the matrimonial home on May 11, 1996, where he discovered that Ms. K. had left the home with the child and a number of the family items. The charges against Mr. K. were dismissed on August 6, 1996, as Ms. K. had left Australia prior to the hearing on the case.

On May 12, 1996, Ms. K. departed from Australia with the child to Union City, California, to live with the maternal grandparents. Prior to Ms. K.'s departure for the United States, Mr. K. gave Ms. K. the child's passport after one of Ms. K.'s relatives in San Francisco requested that he do so during a phone conversation with him. Ms. K. alleges that Mr. K. gave her the child's passport with the knowledge that Ms. K. was planning to travel to the United States. Mr. K. alleges that he gave Ms. K. the child's passport with the understanding that she planned to move elsewhere in Australia. The evidence, however, indicates that he understood that she planned to leave the country. On May 12, 1996, Mr. K. attempted to speak to his wife through his wife's brother, but his request was denied. Mr. K. has spoken to his wife and son on a number of occasions since she has resided in the United States.

The evidence of Mr. K.'s abuse of Ms. K. is relatively limited and there is just one statement by Ms. K. alleging any direct threat Mr. K. posed to the child. Ms. K. alleges that Mr. K. has regularly beat her since her son's first birthday and that Mr. K. beat her seriously on five separate occasions. The police were first notified of these incidents on May 5, 1996. The May 10, 1996, incident is the only time that Ms. K.'s allegations have been corroborated, although this "bad beating," according to the police report, did not leave any visible signs and the charges against Mr. K. were later dismissed, as described above.

Ms. K. alleges that her son's health and emotional well being have dramatically improved since she left the matrimonial home in Australia. Moreover, the child has become attached to his grandparents and his uncle and aunt. Ms. K. and the child have lived in the United States for almost a year and Ms. K. greatly fears returning to Australia--where she has no immediate family members upon which she can rely. Ms. K. is in the process of applying for citizenship through her parents and has applied for a divorce, including resolution of child custody rights, in Alameda County. According to Ms. K., the custody and visitation issues can be resolved in the Superior Court of California. Similarly, Ms. K. asserts that Mr. K. is in a far better position to resolve the dispute in California, rather than Australia, because of his greater financial resources. Mr. K., however, asserts that Ms. K. could receive support from the Australian welfare system.

Mr. K. concedes that long-standing marital problems have plagued his relationship with Ms. K. and that these problems were serious. Mr. K. asserts that he never gave Ms. K. permission to take the child outside of Australia.

Mr. K. also alleges that he was exercising full rights of custody and guardianship of the child at the time Ms. K. left Australia. Mr. K. is asking for the return of his son to Australia in order to resolve the custody issues there, not the return of Ms. K. and the child to the matrimonial home. Moreover, Mr. K. asserts that the Australian government has numerous social programs that will safeguard and support Ms. K. during custody proceedings in Australia, i.e., Ms. K. could live on welfare through the course of the proceedings.

III. LEGAL STANDARD

Under the Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq. ("ICARA"), Mr. K. has the burden of showing by a preponderance of the evidence that the removal was wrongful. 42 U.S.C. §11603(e)(1). As a threshold matter, Mr. K. must show that: (1) Ms. K. removed the child from his habitual residence; [FN2] and (2) Mr. K. was exercising his right of custody.

If Mr. K. meets his burden, the burden shifts to Ms. K. to show:

(1) by clear and convincing evidence that the return of the child to his or her country of habitual residence presents a grave risk of physical or psychological harm to the child, 42 U.S.C. §11603(e)(2)(A);

(2) by clear and convincing evidence that the return of the child would violate principles of human rights and fundamental freedoms, 42 U.S.C. §11603(e)(2)(A);

(3) by a preponderance of the evidence that, where the petition was commenced more than one year following the abduction, the child is settled in his or her new home, 42 U.S.C. §11603(e)(2)(A); or

(4) by a preponderance of the evidence that Mr. K. was not exercising his custodial rights at the time of removal or had consented to or subsequently acquiesced in the removal or retention of the child, 42 U.S.C. §11603(e)(2)(B);

If Ms. K. demonstrates that any one of these affirmative defenses is applicable, the mandatory return of the removed child is made discretionary. This discretion, however, is generally limited: The affirmative defenses . . . offer an opportunity, in extraordinary cases, for a court in the country of flight to consider the practical realities of the situation. However, it is the clear import of the [ICARA] that in most cases the duty of that court, when the niceties of the convention are met, is to return the child to the country of habitual residence for resolution of the custody dispute under the laws of that country. Friedrich, 983 F.2d 1403.

IV. DISCUSSION

In the extant case, Mr. K. has provided ample evidence for the court to conclude that he was exercising his custodial rights at the time the child was removed to the United States; specifically, the child lived with Mr. K. and Mr. K. was the primary means of support for the child. Mr. K. has also supplied a letter from the Solicitor of the Supreme Court of New South Wales stating that under Australian law Mr. K. was exercising his custodial rights.

Mr. K. provides compelling evidence to support his contention that Merrylands, Australia, was the child's habitual residence at the time the child was removed to the United States. Other than one (or perhaps two) brief trip to the United States, the Merrylands' home was the residence in which the child had lived until that point in time. Accordingly, the court finds that Mr. K. has met his burden with respect to the threshold issues required under ICARA.

As discussed above, the burden then shifts to Ms. K. to show that one (or more) of the four exceptions to ICARA is applicable to her case. Ms. K. argues that the first and fourth exceptions apply to this case. First, Ms. K. contends that the violence that Mr. K. has exhibited in the past is a prima facie basis for concluding that return of the child to Australia would pose a grave risk to his well being. Moreover, Ms. K. asserts that, because of her limited means and her family being based in the United States, she would be almost entirely reliant on Mr. K. or the Australian welfare system were she to return to Australia.

Mr. K. contends that he has never posed a direct threat to the child and that, in any event, the child would never be threatened by him because he is not requiring Ms. K. and the child to return to the matrimonial home to live with him. Moreover, the court is empowered to condition the child's return on specific undertakings which would safeguard the child. See Feder v. Evans-Feder, 63 F.3d 217, 227 (3rd Cir. 1995).

In light of the prior history of alleged abuse and discord that has existed between the parties, the court finds that the return of the child to Australia would pose a grave risk to the child's well being. Although there is little evidence that relocation of the child to Australia poses a grave threat of physical harm to the child, the court finds that there is compelling evidence establishing the potential for serious psychological harm. It is clear from the evidence that the relationship between Mr. and Ms. K. is a tempestuous one, which has caused considerable psychological stress to both parents and child. Return of the child to Australia would only serve to reinstate the child in a highly stressful and psychologically damaging environment, particularly because Ms. K. has relatively

limited familial support in Australia. Moreover, the child is currently well settled in United States where a divorce proceeding has been filed and can been expedited to minimize the costs to Mr. K.

Second, Ms. K. argues that Mr. K. either consented to the child's removal or acquiesced to it by virtue of his alleged silence following her departure to the United States. Mr. K. disputes both of these contentions on the basis that he never consented to the removal, though he did anticipate her moving out of the family home to a residence elsewhere in Australia, and that he attempted to contact Ms. K. immediately following her departure and has spoken to her on several occasions since her relocation to the United States.

Mr. K., however, freely provided Ms. K. with the child's passport after a discussion he had with one of Ms. K.'s relatives who resides in the United States, who informed him of Ms. K.'s intention to come to the United States. The court can find no reason for this action other than that Mr. K. was acceding to the child's removal from Australia, as it would be unreasonable to transfer the child's passport to Ms. K. for any other reason. The court, therefore, finds that Mr. K. either implicitly or explicitly consented to the child's removal to the United States.

Finally, there is no evidence that Ms. K. is forum shopping, which is one of central issues the Act was designed to mitigate. Rather, she moved to the United States because her parents and brother, upon whom she now relies, are domiciled in Union City.

Accordingly, the court finds two bases upon which to deny Mr. K.'s motion: First, the child's return to Australia would expose him to grave psychological harm because of the discord and alleged abuse that exists between the parties. Second, Mr. K. consented to the child's removal to the United States by transferring the child's passport to Ms. K.

V. CONCLUSION

For the foregoing reasons, Mr. K.'s request for return of his child, R.K., to Australia is DENIED.

IT IS SO ORDERED.

N.D.Cal.,1997.

[FN1] Respondent also argues that the child is well settled in the United States. This contention is irrelevant, however, unless the petition is commenced more than a year after the child's abduction. 42 U.S.C. §11603(e)(2)(A).

[FN2] United States courts have determined that: [o]n its face, habitual residence pertains to customary residence prior to the removal ... [and that] habitual residence can only be 'altered' by a change in geography and the passage of time ... The change in geography must occur before the questionable removal. Friedrich v. Friedrich, 983 F.2d 1296, 1401-1402 (6th Cir. 1993).
