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[06/12/1996; United States District Court for the Eastern District of Pennsylvania; First Instance]
Burns v. Burns, No. Civ. A. 96-6268 (E.D.Pa. Dec. 6, 1996)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December 6, 1996

Before: Buckwalter, J.

L. Burns (Petitioner) v. P. Burns (Respondent)

MEMORANDUM

I. Introduction

On September 15, 1996, L.B. filed a petition in this court pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, alleging that her four children had been wrongfully retained in the United States by her husband, P.B. She seeks relief in the form of an order mandating the return of the children to the United Kingdom, which she contends is their "habitual residence" under the meaning of the Hague Convention.

A hearing on the merits was held before this court on October 21, 1996, where testimony was taken from Mr. and Mrs. B. Immediately prior to that hearing, Mr. B. through his counsel raised jurisdictional objections to the present action, contending that the Lehigh County, Pennsylvania Court of Common Pleas had previously decided a Hague Convention petition brought by L.B., and that its ruling was *res judicata*. This court took those jurisdictional objections under advisement pending receipt from the chambers of Common Pleas Judge William E. Ford of copies of filings in the state court action.

Upon review of those filings, and of the papers submitted by both parties in this action, the court finds that the merits of this dispute were indeed decided by the Lehigh County Court prior to the filing of Mrs. B.'s petition in federal court. Accordingly, the court declines to exercise jurisdiction over this action.

II. Background

A. Applicable law

Both the United States and the United Kingdom are signatory nations to the Hague Convention, which is aimed at protecting children internationally from the harms of abduction and wrongful retention away from their country of "habitual residence." Convention, Preamble; 42 U.S.C. § 11601(a). Under Article 3 of the Convention, removal or retention of a child is 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 . . . or would have been so exercised but for the removal or retention.

Convention, Article 3. Subject to certain narrow exceptions, the Convention mandates that a child found to have been wrongfully removed or retained be returned promptly to his place of habitual residence. Convention, Article 12; 42 U.S.C. § 11601(a)(4).

The International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 et seq., is the law that implements the Convention. [FN1] Pursuant to ICARA, state courts and the United States district courts have concurrent jurisdiction over actions arising under the Convention. Id. § 11603(a). State and federal courts alike are statutorily required to give full faith and credit to "the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention. . . ." Id. § 11603(g).

B. Relevant facts

Because the court is not ruling on the merits of this dispute, it will dispense with a recitation of the detailed factual background presented to it in multiple filings by both parties, and limit its discussion to those facts pertinent to the jurisdictional issue at hand.

A brief discussion of the recent history of controversy between Mr. and Mrs. B. is necessary to set the stage. On July 22, 1996, L.B. and the four B. children travelled from the town of Olney in Buckingham Shire, England, where they have resided since September 1993, to Allentown, Pennsylvania. They came for a visit with P.B., who has worked and lived in Allentown since November 1994. Mrs. B. alleges in her petition that the very next day Mr. B. confiscated the children's passports and told her that the children would never leave Pennsylvania and that he had trapped her into bringing them to the state. Petition, P 4.2. Mr. B. admits to "securing" the children's passports, but states that this was done to prevent Mrs. B. from fleeing the United States with the children. Answer, P 4.2. As evidenced by this controversy, marital relations between L. and P. B. were strained at best. Legal action was initiated by Mr. B., who filed for divorce in the Court of Common Pleas of Lehigh County. On July 29, Mrs. B. was served with the divorce papers. By way of response to Mr. B.s' complaint in that action, she filed a "Petition for Special Relief Pursuant to the Uniform Child Custody Jurisdiction Act and the Convention on the Civil Aspects of International Child Abduction [the Hague Convention]" on August 6, 1996, and an Amended Petition for Special Relief under the same on August 23. [FN2] She advanced her belief that "the retention of the children in the United States by Respondent would be considered wrongful pursuant to [the Hague Convention]." Amended Petition, P 21. In an Order dated September 3, 1996, Judge Ford denied Mrs. B.s' Amended Petition.

Less than two weeks later, on September 15, Mrs. B. filed the present action in this court. Mr. B. answered by arguing, in pertinent part, that Mrs. B. was wrongfully attempting to bring her petition in federal court when the state court had already ruled on the matter. Answer, PP 1.1, 2.1. Responding to these jurisdictional objections, Mrs. B. contends that the Hague Convention was not properly before the Lehigh County Court because the papers she filed in that court did not fulfill the formal requirements of a "petition" under the Hague Convention. Memorandum of Law: Requirement That Petition Be Filed, PP 1.3, 1.8.

III. Discussion

P.B. contends that under the doctrines of res judicata and collateral estoppel, L.B. cannot retry in federal court an issue that she already tried and lost in state court. Answer, P 3.3. The only question for this court is whether the issue was decided by the Court of Common Pleas. If it was, this court must accord full faith and credit to the state court's decision under 42 U.S.C. § 11603(g), supra.

It is clear from a review of the state court filings that the issue was decided. By denying Mrs. B.s' Amended Petition in his September 3rd order, Judge Ford signified that he had rejected her arguments under the Hague Convention (and, indeed, under the Uniform Child Custody Jurisdiction Act as well). [FN3] Having lost in state court, Mrs. B. is not permitted a "second bite at the apple" in front of this court. Her only recourse is to pursue whatever avenues of appeal she may have through the Pennsylvania court system.

L.B.s' contention that in fact she did not file a formal petition before Judge Ford is meritless. She cites in support the Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, issued by the Department of State, which discusses pleading requirements under the Convention. 51 Fed. Reg. 10,503, 10,508 (1986). That publication provides suggestions for what a Hague Convention petition should contain to appraise a court of all necessary information. Specifically, a petition should contain the following information required under Article 8 of the Convention (which itself sets forth the requirements for placing an application before a so-called Central Authority for the return of a child):

- a. information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b. where available, the date of birth of the child;
- c. the grounds on which the applicant's claim for return of the child is based; [and]
- d. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

Convention, Article 8. In addition to such information, the State Department guidelines state that petitions should allege that the child was wrongfully removed or retained in violation of the petitioner's custody rights, what the source of those custody rights are, the date of the wrongful conduct, and the child's age at that time. 51 Fed. Reg. at 10508. Finally, the prayer for relief should request the child's return and an order that the parent who wrongfully retained the child be required to pay the petitioner's expenses in securing the child's return. Id.

These elements were sufficiently contained in L.B.s' Amended Petition before Judge Ford. She included information about the identity of herself, her husband and the four children; set forth the dates of birth of those children; stated her belief that the alleged retention of the children by P.B. would be "wrongful" under the

meaning of the Convention; and made it clear that the children were with their father in Allentown at the time of filing. Amended Petition, PP 2-5, 9-11, 21. Further, she clearly stated the source of her alleged custody rights and the date of the alleged wrongful retention, and requested in her prayer for relief that she be allowed to return to the United Kingdom with the four children. Amended Petition, PP 7-8, 10-11, Prayer for Relief.

The only elements not satisfied on the face of petitioner's filing before Judge Ford were a statement of the age of the children at the time of the alleged wrongful taking, and a prayer for the awarding of costs. The court deems these "omissions" to be minor, and certainly not the type to render L.B.s' Amended Petition not a "petition" under the meaning of the Hague Convention. [FN4] Indeed, the caption on her state court papers denoted a petition and an amended petition "For Special Relief Pursuant to . . . the Convention on the Civil Aspects of International Child Abduction." For Mrs. B. to turn around now and argue that the state court could not have inferred that she had filed a petition for the return of the children, Memorandum of Law: Requirement That Petition Be Filed, P 1.3, simply strains belief. The court finds that Mrs. B. plainly did file a Hague Convention petition before Judge Ford, and that he ruled on that petition.

Accordingly, the court declines to exercise jurisdiction over the present action, and L. B.s' federal court petition is dismissed.

An order follows.

ORDER

AND NOW, this 6th day of December, 1996, upon consideration of petitioner's Petition for Return of Children to Habitual Residence and all of the briefs and memoranda in support of that Petition; and of respondent's Answer to said Petition and the briefs and memoranda in support of that Answer, this court hereby declines to exercise jurisdiction over this action, having found that the Court of Common Pleas of Lehigh County has already decided the merits of this dispute. Accordingly, the Petition is DISMISSED.

Footnotes:

1. Courts are empowered by ICARA only to determine rights under the Convention, not the merits of any underlying child custody dispute. 42 U.S.C. § 11601(b)(4).
2. It appears from a review of the original Petition and the Amended Petition that the latter was filed merely to correct an error in the designation of the parties in the prayer for relief.
3. As to the Amended Petition, Judge Ford's Order stated without further comment, "it is hereby ordered that the Amended Petition is denied." Order of Court, P 1.

In filings before this court, Mr. B. has gone to great lengths to characterize the meaning of that Order. He maintains that the Judge found that L.B. had wrongfully retained the children in the United Kingdom, and found that P. was "rightfully" retaining them in this country. Answer, PP 2.2.1, 3.3, 4.3. He also asserts that the Judge ruled that the Hague Convention was inapplicable to the B. case, since the parties were all United States citizens and Lehigh County residents. Declaration in Support of Answer, P 1.20.1.

This court emphasizes that the present ruling on the jurisdictional issue at hand is based only on the words of Judge Ford's Order, not on characterizations of that Order advanced by Mr. B.

4. The court notes that the State Department guidelines are only precatory in nature, not mandatory. Also, it should be added that if the failure to state in a petition the age of the children at the time of the alleged wrongful conduct renders the petition a nullity, then there would be no valid petition before this court, since the petition filed here did not so state.

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