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[02/08/1995; United States District Court for the Southern District of New York; First Instance]
Brooke v Willis, 907 F. Supp. 57 (S.D.N.Y. 1995)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Decided: August 2, 1995; Filed: August 4, 1995

Before: Scheindlin, D.J.

J. Brooke (Petitioner) v. T. Willis (Respondent)

Petitioner J.B. ("Petitioner") has filed this Complaint and Petition under the Hague Convention on the Civil Aspects of Child Abduction ("the Convention") and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. s. 11601 et seq., against his ex-wife T.W. ("Respondent"). Petitioner seeks to compel Respondent to appear in court with their daughter D. to show cause for the alleged wrongful retention of the child in the United States. Pursuant to the goals of the Convention, Petitioner then seeks a court decision ordering the immediate return of D. to England. For the reasons set forth below, the petition is granted.

I. FACTUAL BACKGROUND

Petitioner was born in England and is a British citizen. Respondent was born in China but is a naturalized citizen of the United States. See Child Abduction and Custody Act Questionnaire, dated September 9, 1994 ("Questionnaire"), at pp. 1-2. Although the facts regarding family history are somewhat sketchy, the parties were married in Wheaton, Illinois and W. later gave birth to D. on May 22, 1984. See Telephone Conference, dated June 16, 1995 ("Tel. Conf."), at p. 7. [FN1] In 1987, the parties were formally divorced. See Questionnaire at p. 4. Although it is not stated in the record, it appears from later court documents that the parties were residing in California at the time of their divorce.

On July 9, 1990, the Superior Court of California, County of Marin, executed a Stipulation and Order Regarding Child Custody and Visitation. The Order provided for joint legal and physical custody of D. and stated that the child should spend fifty percent of her time with each parent. See Stipulation and Order at 11113, 4. In addition, paragraph 4 pronounced that "the parties intend that half of D.'s education be in the United Kingdom and the remaining amount in the United States of America." Both parties stipulated that this agreement would be effective in all countries, including the United States and the United Kingdom. *Id.* at 118. At this time, the parties also signed an agreement specifying the time periods D. would spend with each parent and in school in England and the United States. Affidavit of J.B., dated September 8, 1994 ("B. Aff."), at pp. 1-2.

Petitioner decided to move back to England permanently in the summer of 1990. *Id.* at p. 2. Pursuant to the Stipulation and agreed upon timetable, D. accompanied Petitioner to England in July, 1990. D. lived with Petitioner and his parents in Bradford Yorkshire, England throughout the summer. See Declaration of J.B. (Petitioner's father), dated December 9, 1990. In accordance with the custody timetable, Petitioner returned D. to Respondent in California on August 28, 1990. See B. Aff. at p. 2.

Respondent failed to return D. to England in December, 1990 in violation of the Stipulation and Order and the timetable. *Id.* Petitioner then left England and went to California to contact Respondent and D. At first, Respondent allowed Petitioner to visit with his daughter several times, but she then filed an ex-parte restraining order against him in a California state court. Petitioner claims that before it was time for the parties to appear in court, however, Respondent fled the state with the child. This same series of events later took place in Virginia. See Tel.Conf. at pp. 4-5. As a result of Respondent's evasive behavior, state misdemeanor warrants were issued for her arrest in both California and Virginia. *Id.* at p. 5. These warrants remain outstanding and Petitioner has been unable to exercise his custody rights since the summer of 1990.

Petitioner last saw his daughter on October 25, 1993 in Virginia. B. Aff. at p. 3. He last spoke to his daughter and Respondent in late March or early April of 1994. Around this time, Respondent provided Petitioner with a White Plains, New York address. Tel.Conf. at p. 6.

II. THE PRESENT PETITION

Petitioner first became aware of the Hague Convention on the Civil Aspects of Child Abduction on or about August 30, 1994. B. Aff. at p. 1. He claims that had he known about this remedy at the time of the initial abduction in December, 1990, he would have made an application under the Convention at that time. Id. at p. 3.

On October 5, 1994, Petitioner filed a Complaint and Petition under the Hague Convention and ICARA in the United States District Court for the Southern District of New York seeking: 1) a writ of habeas corpus ordering Respondent to appear in court with D. to show cause why the child has been kept from Petitioner; 2) a warrant in lieu of a writ of habeas corpus authorizing any United States peace officer to take D. into protective custody without the knowledge of Respondent; 3) an order directing the Federal Marshal or other peace officer to enter D.'s name into the national police computer system (N.C.I.C.) missing persons section; 4) an order giving any United States peace officer the authority to search any place where D. is reasonably believed to be present; 5) an order directing the prompt return of D. to Petitioner; and 6) an order for a Hague Convention hearing. Petitioner would also like the court to reserve the right to award Petitioner costs, fees, travel expenses and attorney's fees.

Federal Marshals have attempted to personally serve Respondent at both the White Plains address she gave Petitioner and at a Manhattan address furnished to Petitioner by the U.S. State Department, Office of Children's Issues. See Tel.Conf. at pp. 7-8. Petitioner also claims to have verbally informed Respondent of his petition and to have mailed her copies of all relevant papers. Id. at pp. 10-11.

III. DISCUSSION

The Hague Convention was adopted in 1980 "to protect children internationally 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." Hague Convention, Preamble. ICARA, which implements the Convention in the United States, provides that state courts and United States district courts have concurrent original jurisdiction of actions arising under the Convention. See 42 U.S.C. s. 11603(a).

Under Article 19 of the Convention, a federal district court may determine the merits of a wrongful abduction claim but may not decide on the merits of the underlying custody dispute. See *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). Initially, the court must determine whether the petitioner may invoke the protection of the Hague Convention for an alleged wrongful abduction of the child. See *Meredith v. Meredith*, 759 F.Supp. 1432, 1434 (D.Ariz. 1991).

A. Notice

As a threshold matter, due process requirements dictate that proper notice of the proceedings be given in order that the other parent can appear or otherwise inform the court of his or her position. *Meredith*, 759 F.Supp. at 1435. Although the Convention itself does not specify any notice requirements, ICARA provides that notice be given in accordance with the applicable law governing notice in interstate child custody proceedings. See 42 U.S.C. s. 11603(c).

In the United States, the Parental Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction Act ("UCCJA") govern notice in interstate child custody proceedings. See *Klam v. Klam*, 797 F.Supp. 202, 205 (E.D.N.Y. 1992). Section 4 of the UCCJA and Part (e) of the PKPA provide that reasonable notice and opportunity to be heard must be given to all parties before a custody determination is made. Section 5 of the UCCJA further provides that notice "shall be given in a manner reasonably calculated to give actual notice."

Here, several attempts were made by Federal Marshals and by Petitioner to personally serve Respondent and to mail her the relevant papers at her last two known New York addresses. These attempts were apparently unsuccessful because of Respondent's evasive tactics. In light of the circumstances, it does not appear that Petitioner could have done any more to notify Respondent. Furthermore, Petitioner claims to have given Respondent particular details regarding the proceedings over the phone, including the case number and the location of the Court. See Tel.Conf. at p. 11.

Both state and federal courts have found service to be sufficient and proper under similar circumstances. In an interstate custody case where personal service was impossible due to the flight of the respondent, the court allowed substituted service in any manner "reasonably effective to give the defendant notice of the suit." See *Ingram v. Ingram*, 463 So.2d 932, 936 (La.App.1985). The court further noted that although there was no personal service, the record reflected the respondent's actual knowledge of the pending litigation. Id. at 934. And in a federal case dealing with a petition under the Hague Convention, the court found service to be proper where the father sent papers to the mother's parents and specifically informed the mother of the proceedings

over the phone. See Meredith, 759 F.Supp. at 1433. In light of these precedents, and the history of Respondent's prior conduct, I conclude that here Respondent has received actual notice of Petitioner's application under the Convention.

B. Requirements under the Convention

Several requirements must be met by Petitioner in order to invoke relief under the Convention. First, both countries involved must be signatories to the Convention. See generally Lon Vinion, *When Custody Conflicts Cross the Border*, 15 Fam.Advoc. 30 (Spring, 1993). Both the United States and England are signatory countries. Second, the child must be under sixteen years of age. See Hague Convention, Article 4. Here, D. is eleven years of age. Third, Petitioner must show by a preponderance of the evidence that under the Convention, the child was wrongfully removed or retained from the place of habitual residence. See Wanninger v. Wanninger, 850 F.Supp. 78, 80 (D.Mass. 1994) (emphasis added).

Article 3 of the Convention provides that "the removal or 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 . . . or would have been so exercised but for the removal or retention."

Petitioner alleges that at the time of the wrongful retention of D. in the United States, D. was a habitual resident of England and Petitioner had rights of custody pursuant to the Stipulation and Order. B. Aff. at p. 2. He further alleges that Respondent's actions violate his rights of custody under the law of England. See Memorandum in Support of Verified Complaint, dated October 5, 1994 ("Mem."), at p. 1.

1. Habitual Residence

The term "habitual residence" was purposely left undefined by the Convention so that its meaning could be determined according to the specific facts and circumstances of each case. See Meredith, 759 F.Supp. at 1434. Courts should not interpret the term technically or restrictively, but should examine every situation free from presuppositions. See Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995). Place of habitual residence is determined more by a state of being than by any specific period of time; technically, habitual residence can be established after only one day as long as there is some evidence that the child has become "settled" into the location in question. See Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & The Hague Convention*, 20 N.C.J. Int'l L. & Comm.Reg. 137, WL * *19-20 (Fall, 1994).

Here, although D. spent only one summer in England, the record reflects that she was well accustomed to her surroundings. Petitioner's parents attest to the fact that the child enjoyed living in their home and visiting with her aunt and cousins. See Declaration of A.B., dated December 14, 1990. Furthermore, according to neighbors, D. was happy and well taken care of during her stay, and she even stood in the town square with a flag in hand and recited the British Pledge of Allegiance. See Petition of Neighbors, dated December 14, 1990. This evidence is sufficient for the Court to conclude that England was D.'s habitual residence in July of 1990. [FN2]

2. Custody Rights

In order to determine whether Petitioner possessed lawful custody rights of D. at the time of Respondent's retention of the child in the United States, the Court looks to the law of the child's place of habitual residence. Friedrich, 983 F.2d at 1402. Pursuant to the Convention, there are three possible sources of custody rights under the law of the child's habitual residence: judicial or administrative decisions; legally binding agreements between the parties; and operation of the law of the State. See Herring, *supra*, at WL *25. Although the 1989 Stipulation and Order regarding custody of D. was made by a California court rather than a British court, the explanatory report accompanying the Convention provides that a judicial decision regarding custody may originate in a country other than the place of habitual residence. *Id.* (citing Explanatory Report by Elisa Perez-Vera). Furthermore, when custody rights are exercised in the place of habitual residence based on a foreign custody decree, it is not necessary for the state of habitual residence to formally recognize that decree. *Id.*

As discussed above, the existing Stipulation and Order dictates that both parents have joint physical and legal custody of D. This judicial decision also reflects the parties' desire to have D. spend half of her time in England and half of her time in the United States. Most importantly, both parties clearly agreed that the Stipulation and Order would be "effective in all countries, including but not limited to the United States of America, the United Kingdom, Hong Kong, Macau and Canada." Stipulation and Order at p. 3. In light of these facts, there is no

doubt that Petitioner possessed legal custody rights under the law of England at the time of D.'s retention in the United States by Respondent.

3. Exercise of Custody Rights

The Convention presumes that the person who held lawful custody rights at the time of the removal or retention was actually exercising, or would have exercised, such custody rights but for the removal or retention; the burden of proof is on the Respondent to prove that the Petitioner was not exercising his or her custody rights at the time. Herring, supra, at WL *29. Respondent has never argued in any court that Petitioner did not possess custody rights to D. at the time the child was detained in the United States. Therefore, Petitioner has satisfied the elements of a claim for wrongful retention under Article 3 of the Convention.

III. RELIEF

Pursuant to due process requirements, United States courts dealing with petitions under the Convention to immediately return children to their alleged places of habitual residence have usually required a hearing to allow both parents to present arguments before deciding whether the child should be returned for further custody proceedings on the merits. See, e.g., *In re Prevot*, 855 F.Supp. 915 (W.D.Tenn. 1994); *Currier v. Currier*, 845 F.Supp. 916 (D.N.H. 1994). In order to initiate such a preliminary hearing, Petitioner has requested a writ of habeas corpus ordering Respondent to produce the child in court and show cause why the child has been removed and retained away from Petitioner. Petitioner has also requested a warrant in lieu of the writ of habeas corpus.

In light of the fact that Respondent has purposely evaded Petitioner for almost five years and has fled the jurisdiction of two state courts in the past when she was ordered to appear, it is doubtful that Respondent will voluntarily comply with an order to bring D. into court. For this reason, the Court will issue a writ of habeas corpus and allow Respondent fourteen days to comply with the order; however, if Respondent has not complied after fourteen days, the Court will then issue a warrant in lieu of the writ of habeas corpus, which will allow any United States peace officer to bring D. into court without the consent of Respondent.

Respondent will be given seven days to appear in court from the time D. is taken into custody, after which time the Court may hold a Hague Convention hearing to decide if the child should be immediately returned to England with Petitioner. The Court notes that if D. is in fact delivered to the court pursuant to the warrant, and Respondent does not appear immediately, the Court can grant temporary custody of the child to Petitioner pending the resolution of these proceedings. See *Currier*, 845 F.Supp. at 919.

The Court will also order the child's name to be entered into the national police computer system (N.C.I.C.) missing persons section in order to aid in identifying her whereabouts. The Court will reserve judgement on an award of costs, fees, travel expenses and attorney's fees until such time as the Court decides whether the child should be returned to England with Petitioner.

The Court's Order embodying this relief is annexed hereto as Exhibit A.

IV. CONCLUSION

Because Petitioner has satisfied both the threshold requirements for a petition under the Hague Convention and the applicable notice provisions, the above relief is awarded pending the final determination of the petition.

SO ORDERED.

EXHIBIT A

United States District Court Southern District of New York

J.B., Petitioner,

v.

T.W., Respondent.

94 CV 7943 (SAS).

ORDER

SCHEINDLIN, District Judge.

Petitioner's application is hereby granted:

- 1) The name of the child, D.B., shall be entered into the national police computer system (N.C.I.C.) missing persons section.
- 2) A Writ of Habeas Corpus shall issue ordering Respondent to appear in this Court with D. to show cause why the child has been kept from Petitioner. Respondent shall be given fourteen days to comply with such Writ.
- 3) If Respondent has not complied with such Writ after fourteen days, a Warrant in lieu of the Writ shall issue allowing any United States peace officer to bring D. into this Court without the consent of Respondent. Respondent shall be given seven days to appear in this Court from the time D. is taken into custody.
- 4) If D. is delivered to the Court pursuant to such Warrant and Respondent does not appear immediately, the Court may grant temporary custody of the child to Petitioner pending the resolution of these proceedings.
- 5) If Respondent has not appeared within seven days from the time D. is taken into custody, the Court will then hold a Hague Convention hearing to decide if the child should be immediately returned to England with Petitioner.

SO ORDERED.

Dated: New York, New York

August 2, 1995

FOOTNOTES

1. On June 16, 1995, the Court conducted an ex parte telephone conference with Petitioner. As detailed below, Petitioner's attempts to serve and contact the Respondent were unsuccessful. However, these efforts were sufficient to satisfy due process notice requirements. See *infra* pp. 59-60.
2. Due to the peculiar circumstances of this case, it is arguable that D. is also a habitual resident of the United States under the Convention. However, for purposes of this petition it is only crucial to determine if England can be considered D.'s habitual residence.

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