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[09/12/1991; California Superior Court, Los Angeles County (United States); First Instance] D'Assignes v. Escalante, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991)

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

December 9, 1991

Before: Kaufman, J.

P. d'Assignies and S. Escalante

The present action arises under the provisions of the 1980 Hague Convention Treaty dealing with the civil aspects of international child abduction (Hague Convention) and the congressional act known as the International Child Abductions Remedy Act (ICARA) which establish procedures to implement the Hague Convention.

Both France and the United States are contracting states under the terms of the Hague Convention. The fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions. Contracting states are obliged by Article 2 to take all appropriate measures to implement the objectives of the Convention as set forth in Article 1: (1) To secure the proper return of the children wrongfully removed to or retained in any contracting states; (2) To ensure that rights of custody of access under the law of one contracting state are effectively respected by another contracting state. If the Convention applies, a child wrongfully removed or retained within the meaning of the Convention is to be promptly returned unless one of the narrow exceptions set forth in the Convention applies.

The wrongful removal of minors from one country to another country is not novel and, in fact, is quite common. This particular case is unique in that the father, after filing a petition under the Hague Convention for the return of the two children, wherein he alleged they were wrongfully abducted from France by the natural mother, abducted the children midway into the hearing in violation of the Court's Orders of October 25, 1991, and orders still in effect with respect to Case No. CF026066 of August 2, 1991.

Congress found that international abduction or wrongful retention of children is harmful to their well-being. It declared that persons who obtain custody of children by virtue of their wrongful removal should not be permitted to obtain custody of children. It found that international abductions and retentions are increasing and only concerted cooperation pursuant to an international agreement can effectively combat the problem.

The actions of the parties in this case amply demonstrate the problem. Between March 17, 1991 and October 27, 1991 there have been three abductions; the first took place within France and the last two were international abductions.

In the pending action, petitioner/father seeks the return of his two children who were removed by their mother from France to the United States.

PRELIMINARY FACTS

The parties, S.E. (hereinafter referred to as mother) and P.D.A. (hereinafter referred to as father), never married and have lived together both in France and the United States.

Both of the minor children of the parties were born in the United States. The minor Y.D.A. (hereinafter referred to as Y.) was born June 15, 1985, and minor A.D.A. (hereinafter referred to as A.) was born September 23, 1987.

On October 2, 1987, mother filed a Complaint to establish her parental relationship in the Los Angeles Superior Court, Case No. CF026066. She requested an order for the children's custody. On that same day, October 2, 1987, mother filed an Order to Show Cause for child custody, subject to father's rights of reasonable visitation. She did not seek support in her Order to Show Cause. In the Complaint she sought sole custody of the children and an order that the father not remove the children from California without the written consent of the mother and ordering the father not to take the children to Europe without permission of the mother.

Father at the time (October 1987) was staying in Los Angeles. The mother had returned to California to give birth to the child A., and at said time Y. was also in California. Father was served in Los Angeles County on October 3, 1987 with a copy of the Complaint and Order to Show Cause, which was set for October 30, 1987.

Other than a Substitution of Attorneys being filed by mother, no further documents were ever filed in the 1987 California case until 1991. The father did not appear in said action until 1991. No trial was ever held and no default was ever entered against the father.

The parties and the children returned to France in November of 1987 and although mother traveled to the United States during 1988, 1989 and 1990, sometimes with one or both of the children, the parties and the children lived most of the time in France in the father's home at La Bastide.

The Declarations of both parties indicate they were estranged starting in late 1990 and the early months of 1991. By March of 1991, father realized that he had not perfected legal custodial rights to the children under French law. At the time that the father abducted the children from the mother in March of 1991, mother could have left France with the children without need of the father's permission.

According to father's declarations, of which there have been several filed in the present case, he believed in March of 1991 that mother was about to leave France with the children. The father decided to abduct the children and hide them from the mother which he did on or about March 17, 1991. The French police, at the urging of the mother, as well as the local French prosecutor, aided the mother in helping her to locate and obtain the eventual return of the children. The father and the children were missing for over a month and although father called and allowed the children to speak to the mother he would not disclose to the mother where either he or the children were located.

While the father was hiding the children from the mother in May of 1991, he caused to be filed an action in the domestic Relations Court of the Superior Court of Carcassonne. His Order to Show Cause was filed May 13, 1991 and the hearing was set for May 21, 1991.

The Order to Show Cause required the mother to appear in said court regarding father's claim for custody of the minor children. Father alleged that he and the mother had lived in the United States from 1984 to 1986 and had lived in his estate in La Bastide since 1986. He alleged that the mother was threatening to take the children to the United States. He asked the Court to grant him an exercise of parental authority over the children, and that their primary residence be established at his residence at La Bastide, subject to visitation by mother, but with an Order restraining her from leaving France because of the risk that she might take the children out of France.

On May 22, 1991, both of the parties were in the Matrimonial Court in Carcassonne before Judge Collette Perault. The Judge ironed out a Stipulation between the parties that postponed any Ruling on the father's request to exercise parental authority and determination of the primary residence of the children pending a custody evaluation as well as a psychological evaluation of the children. The Court ordered that the primary residence of the children would be with the mother at a residence close to father's community, granting certain visitation and overnight visitation to the father during certain days of the week. The Court ordered father to pay financial support for the children. Mother told the judge that the American passports for the children were lost. The judge ordered that the French passports for the children be turned over to the Court and further ordered mother not to leave France and its territories with the children until a decision was reached by the Court.

Under the French Court's order of May 22, 1991, mother was able to obtain an order for the physical custody of the children. The children were finally turned over to her by the father on May 24 pursuant to said order. According to mother's declaration she believed father would remove the children from France and take them to Africa. Her fears were based upon the father's statements, his behavior in the presence

of the children, and alleged acts of physical and psychological abuse against her. Thus, the mother, after agreeing not to leave and the Court having ordered the mother not to leave pending the custody evaluation and psychological study, disobeyed the French Court's Order and left France with the two children on May 30, 1991 and returned to California.

After the mother left France, the father brought this matter to the attention of the French Court which granted an ex parte type of hearing that was held on June 10, 1991. The Judge who had previously entered an order for custody to the mother modified and changed the order granting custody of the minor children to the father. Said order granted custody of the minor children to the father subject to visitation by the mother dated June 20, 1991.

Mother upon her return to California filed an Order to Show Cause on July 11, 1991 in the original California case CF026066 with a hearing date set before August 2, 1991. In the Order to Show Cause mother sought permanent custody of the minor children. Father was served in France.

Father, through his California attorneys, made a special appearance in the California action on September 6, 1991. The father was granted the opportunity to continue the hearing and numerous documents were filed by his attorney in his behalf. At father's request, the Order to Show Cause of mother was again continued to October 10, 1991. On September 10, 1991, father filed a Motion to Stay or Dismiss the mother's Order to Show Cause because of lack of jurisdiction. Father again on September 19, 1991 filed a voluminous "Notice to Dismiss for Lack of Subject Matter Jurisdiction or Forum Non Conveniens" alleging that France was the "Home State."

The essence of father's contentions were that the custody issue should be determined in France not the United States. On October 10, 1991, all of the matters were before the Court including declarations, briefs, points and authorities and other pleadings.

On October 10, 1991, father, through his attorneys, invoked the provisions of the Hague Convention and requested relief under the Hague Convention. Father's application in the present case invoking the Hague Convention had the affect of staying the California case as it had proceeded up to October 10, 1991. Father, by invoking the Hague Convention, had nothing to lose. He still retained his rights under the underlying UCCJA action if for any reason the Hague Convention did not apply.

Father had already set the groundwork for his application under the Hague Convention when he advised the "Central Authority" in the United States of his intent to apply under the Hague Convention for return of his two children. This Court had received such a written notice on September 10, 1991 from the State Department (Central Authority) of father's claim and possible application by father to this Court of a Hague Convention petition.

The notice which is attached to this order and marked as Exhibit "A" makes it quite clear that if such petition is filed, the court must not decide the case on the merits or rights of custody until it has decided whether the children are to be returned under the Hague Convention.

The father came to California several times during the proceedings in September and October of 1991. On these occasions, over the protest of mother and her counsel, both of whom expressed fears that the father would abduct the children if he had the chance, the Court ordered visitation to be accorded to the father. Initially, the monitoring of the visitation was conducted by the father's own attorney. On the father's insistence at the hearing on October 25, 1991, monitoring was changed to allow for monitoring every 4 hours by the mother while father visited with the children on Saturday the 26th, and Sunday, the 27th of October.

On Monday, the 28th of October, 1991, the Court was advised by mother's attorney, father's attorney being present in Court, that father had failed to return the children on the visitation schedule for Sunday the 27th and had abducted the children. This information came to the Court at a time when the Court was in the process of considering the issues raised in the present case as well as reviewing the declarations that had been filed by the parties in support of their positions regarding jurisdiction under the Hague Convention.

Although the petitioner in this case has violated the Court's orders with respect to the removal of the children from the State of California pending petitioner's Hague convention application filed on October 10, 1991), the Court did authorize petitioner to file a declaration. The Court's reasons were based on the

safety of the children. Father's several declarations exceed 32 pages and indicate that he is in Paris at this time. The whereabouts of the children are unknown.

Father acknowledges in paragraph 7 of this declaration the opportunity the Court has given him and he asks the Court to carefully read and thoroughly consider his declaration. Father sets forth his reasons for leaving California with the children and defends his abduction on the basis that mother is the guilty one in this custody battle, that he is the best parent, in his opinion, to raise the children and that the Court is biased against him.

Father acknowledges in paragraph 17 that prior to October 10, 1991, the date father filed his petition under the Hague Convention, the Court was proceeding under applicable California law, including the UCCJA. in said proceedings in Case No. CF026066 father contested the jurisdiction of the California Court and requested the Court to enforce the French Court orders of May and June of 1991.

Father challenges the Court and accuses the Court in his statement on page 7 of his declaration that he has not been given equal protection of the law and particularly criticizes the Court for its limitation of visitation privileges pending the outcome of the case.

Father points out in paragraph 37 of his declaration that the mother may have been right in her demand for the posting of bonds and appointment of monitors because, as father admits, he did exactly what the mother said she expected him to do - abduct the children. Father then indicates in paragraph 37 that he is basically enforcing the French Court orders and that somehow he has been given that mandate.

Father fails to understand that it is the Hague Convention that gives this Court the jurisdiction to determine jurisdiction at this time and in particular fails to understand that he is not the one authorized to make decisions in this case.

The father in his declaration alleges that the Court has failed to read certain declarations filed in this case. Attached to this decision, marked Exhibit "B", is a list of documents that have been filed since October 10, 1991, in just this case alone, some of which the Court did not have the ability to read prior to October 25, 1991, and which the Court was in the process of reading when the abduction by the father took place on the 27th of October, 1991.

The father continues in his declaration to ask this Court under the Hague Convention to consider the best interests of the children.

it appears that the father is arguing in this declaration that the French judgment and orders are the paramount orders in this case and not the provisions and article of the Hague Convention.

The father in his declaration has now set himself up as the expert in terms of what are the present needs and future needs of the children as well as where they would be safest.

Starting with paragraph 123 of father's declaration, he goes on at great length to remind this Court of past actions of the mother and what are the duties of the Court in his opinion.

Father, starting on paragraph 109, indicates that as far as he is concerned, he has already decided the issue before the Court and how the Hague Convention provisions should be applied and specifically argues that his abduction of the children to France, his failure to disclose the whereabouts of the children either to the Court or to the mother, is not an "intolerable situation."

The overall tenor of the father's declaration demonstrates, as he has on several occasions, that he is not trustful of the judicial system, particularly the system as set forth under the Hague Convention, the very law that he requested this Court to apply.

His declaration goes beyond the issues as prescribed by the Hague Convention and allege statements regarding the best interests of the children which runs counter to his original arguments when he filed his application under the Hague Convention.

FACTS PERTAINING TO THE HAGUE CONVENTION PETITION

Father in his Hague Convention Petition alleged the children had been wrongfully removed from the contracting state of France, that the children were habitual residents of France and were abducted from

France by the mother who at the time of the abduction was under an order of the French Court not to remove the children from France. He further alleged in his petition that the French Court had ordered both a custody and psychological evaluation although mother had been granted custody of the minor children subject to specified times for visitation by the father. Father in his petition requested the Court to recognize the French Orders of May 22, 1991 and June 20, 1991. Father claims his rights of custody are under Article 5(a) and that the children should be found to be habitual residents under Article 3(a). Father alleged a wrongful removal on or about May 30, 1991 by the mother, as well as a wrongful intention by the mother in violation of Article 3 of the Hague Convention. Father requested a Stay of All Proceedings in Case No. CF026066 which was granted. Father even requested the Court in the present case to issue an immediate order preventing the removal of the children from the State of California by the mother and asked that the mother be required to post a bond of \$50,000. Father requested that the two cases be consolidated. Father requested attorney's fees and costs pursuant to Article 26.

FINDINGS AND DECISION

The Hague Convention involves not just the parents and their children but involves the respective contracting countries (France and the United States) as well as the various judicial tribunals which have been given general jurisdiction to hear such Hague Convention applications.

HABITUAL RESIDENCE

"Habitual residence" is an undefined term in the convention. According to commentators on the convention, this was a matter of deliberate policy, "the aim being to leave the notion free from technical rules which can produce rigidity and inconsistencies as between different legal systems," *The Conflict of Laws*, Dicey and Morris, Eleventh Edition, pg. 166. Habitual residence is often compared to the requirements for residence and domicile. These commentators go on to say that it "is greatly hoped that courts will resist the temptation to develop detailed and restrictive rules as to habitual residence which may make it as technical a term of art as common law domicile."

Habitual residence is concerned with the length of time a party actually resides in a location, but it is also concerned with employment, education, health care, and other connections established by the party, *Re Bates*, High Court of Justice, Family Division, United Kingdom; February 23, 1989.

Finally, several cases have pointed out that the habitual residence of a child (particularly a young child) must be analyzed with respect to the "custodial parent." In *re Bates*, supra at pg. 5, the court stated that "[i]n the case of a child as young as Tatjana the conduct and overtly stated intentions and agreements of the parties during the period preceding the act of abduction are bound to be important factors . . ."

Both Y. and A. were born in Los Angeles. Y. was born June 15, 1985 and A. on September 23, 1987. Yet during the entire period from June 1985 until March 1988 there were several trips and moves between the countries, and the parties disagree as to whether France or Los Angeles was the principal residence. The Los Angeles paternity complaint was filed during this time (October 2, 1987).

In early 1988, Y. and A. began residing continuously in France. On March 19, 1991, petitioner fled to Southern France with the children for approximately two months. The parties appeared at the May 30, 1991 proceedings in France, but respondent left for Los Angeles with the children a few days later. The children remained in Los Angeles for approximately five months before the petitioner again abducted the children, apparently taking them back to France.

Petitioner's argument is simply that France has been the children's habitual residence since March 1988 (notice that the arguments set forth by petitioner and respondent were contained in their declarations and given as testimony before the most recent abduction).

Respondent's argument is that France ceased to be the habitual residence at the moment respondent left France. Respondent attempts to support his argument by noting the various ties she currently has in Los Angeles, and clearly declaring her intent to remain.

Only one court has taken the view that habitual residence can be terminated by a parent simply removing the child from the country; In *Re J* (1990) 3 W.L.R. 492. The case is cited at length in respondent's Points and Authorities. The Court stated that "[i]t may take time - I do not say it does - to establish habitual residence, but I cannot see that it takes any time to terminate it. There is not doubt in my mind that the

mother ceased to be habitually resident in Western Australia from the moment she left Western Australia bound for England, with the intention of remaining permanently in this country."

In *Re J* must be considered with its factual setting. Under the law of Western Australia, an unmarried mother has exclusive rights to her child, unless the court confers rights on the father. The Court expressly stated in the last paragraph of the *In Re J* opinion that "in the ordinary case of a married couple, in my judgment, it would not be possible for one parent unilaterally to terminate the habitual residence of the child by removing the child from the jurisdiction . . ."

In *Meredith v. Meredith*, 759 F.Supp. 1432 (D. Ariz. 1991), the court held that a parent should not be allowed to establish a new habitual residence through unlawful abduction. In *Meredith* the mother took the child from Arizona to England without the father's knowledge (father and husband).

The court stated that "the only reason that [the child] left Arizona was to accompany her mother . . ." To equate the temporary removal and subsequent sequestration of the minor child to legal status of habitual residence in another country would be to reward petitioner for her ability to conceal the child . .

France was the habitual residence of the children at the time of respondent's abduction having resided in France almost continuously from March 1988 until the events surrounding the current proceedings began.

WRONGFUL REMOVAL

Article 3 provides that a removal is wrongful only if it is a breach of a party's right of custody, and at the time of removal those rights were being exercised (notice that wrongful retention is not an issue in the case since respondent's May 30 departure was not approved or consented to by petitioner). The issue in dispute under Article 3 is whether petitioner has a right of custody pursuant to the French order of May 30, 1991.

Respondent maintains that under French law she has all rights with respect to the child. The applicable Article in the French Civil Code reads as follows: ". . . if both parents have legally acknowledged the Child, parental authority is to be exercised by the mother," Article 374, French Civil Code. According to respondent, authority can only be exercised jointly if a request is made at the public prosecutor's office.

Petitioner maintains that the May 30 order gave him a clear right of custody within the meaning of the Convention. The order provided for primary residence, visitation, directed mother to live near father, and stated that respondent was "not to leave French territory with her children until a decision on the primary residence of the children is rendered." Based on these orders, petitioner states that he has shared custody rights with the respondent.

Again, it is useful to see how commentators have interpreted Article 3. The authors of the Federal Legislative Analysis (cited in petitioner's Points and Authorities) give a broad meaning to the term "rights of custody." They state that the wrongful removal arises because the abducting parent has disregarded the rights of the other parent and has interfered with their normal exercise. Also, Article 3 itself defines the term by stating that it includes rights relating to care of the child and the right to determine place of residence. Although rights of custody can be determined by referring to an actual custody ruling or order, the term seems to have a broader meaning within the Convention.

Respondent argues that because petitioner was not given the authority to determine the place where the children live, he was given no rights with respect to the children. She points out that the order itself only mentions visitation.

Two cases have determined that a right of custody existed because of a parent's right to prohibit the removal of the child. In *C v. C* (1989) 1 W.L.R. 654, the parties had a consent order whereby the mother was granted custody and neither parent could remove the child from the country without permission from the other. The court held that this conferred a right of custody. In *Costa v. Costa*, August 21, 1991, the High Court of Justice, England, the court found that New York law prohibits removal regardless of the language of the order.

Petitioner contends that it is relevant that respondent could not leave France with the children and that this aspect of the order impliedly provides that the court and the father (petitioner) must be given notice

before the children are taken. This appears to be the better view. Petitioner had no right to determine residence because there was a restriction placed on respondent.

Further, the right to determine residence is just one element of the right of custody. The privileges that petitioner received as part of the May 30 order are sufficient to confer a right of custody. The Court finds that the petitioner was exercising his right of custody when mother removed the children from France in May of 1991. Additionally, none of the provisions made by the Court on that date were permanent. They were intended to preserve the status quo until a full custody determination was rendered.

ARTICLE 13 EXCEPTIONS

A court is not bound by the Hague Convention to order the return of the children if the respondent can establish the applicability of one or more of the exceptions to the return obligations. Such provisions are to be narrowly construed and the courts are advised under the provisions of the Hague Convention that they should not involve themselves with determining the best interests of the children.

Under Article 13(b), if the respondent establishes that the child's return will pose a great risk of physical or psychological harm, or otherwise place the child in an intolerable situation, then the court is not obligated to return the child.

Section 4(e)(A) of the Federal Act (ICARA) provides that in United States proceedings the respondent must establish this exception by "clear and convincing evidence", which is a very high civil burden of proof.

There is no precise definition or example given as to what constitutes an intolerable situation, but it appears to this Court that governments, individuals, as well as judges, have the ability to make this determination.

The two children in question have doubtlessly been placed in an intolerable situation. The children have been victims of two wrongful kidnappings by the father, the last one coming within 48 hours after the Court had granted the father visitation rights pending his Hague Convention application.

At the October 25, 1991 hearing this Court explained that it hoped to make a quick decision as to whether the children would be returning to France. The father was then granted weekend visitation privileges. Father abducted the children at some point during the October 27 weekend, subjecting the children to further uncertainty.

The older child, Y., is very bright and impressed the Court on October 25, 1991, by his expressed concerns. He was concerned and expressed anxiety about return to France, particularly without his mother. The children are young, too young to be able to decide which country they should reside in (Hague Convention Article 13(c)) and far too young to cope mentally and emotionally with the traumatic events that are enveloping them by reasons of their father's most sudden and recent abduction.

The present situation is intolerable. The father's present actions coupled with the declarations and testimony of Dr. Allen Gottfried clearly demonstrate and the Court so finds that there is a grave risk that continued custody by the father in France would expose the children to psychological harm, placing the children in an intolerable situation.

Father asks this Court to disregard his present act of abduction, in violation of the Court's order and contrary to the spirit and express provisions of the Hague Convention, and asks that he be allowed to reopen the hearings in France based on the best interests of the children.

The Court finds that the father abducted the children on October 27, 1991, while his application under the Hague Convention was pending exposing the children to psychological harm and that any return of the children to France would expose the children to further psychological harm within the meaning of Article 13(b) of the Hague Convention. The presence of the children in France by reason of father's abduction of October 27, 1991, or any return that might be ordered by this Court would place the children in an intolerable situation within the meaning of Article 13(b) of the Hague Convention.

The children at the present time, while not physically in California, are still under the Court's jurisdiction pursuant to the legal authority granted to this Court under the terms of the Hague Convention and ICARA.

The Court finds that petitioner's actions as outlined above clearly violate established principles of comity of nations and international law. Under international law and the Hague Convention, once jurisdiction is obtained over the person, that jurisdiction continues throughout the action and cannot be defeated by a voluntary withdrawal or an abduction of the children, such as was done in this case.

At this time, although there may be conflicting orders with respect to the custody of the children and conflicting orders regarding jurisdiction to hear matters involving the custody of the children, this Court finds that this Court has jurisdiction over the children although they are not presently domiciled in California. The obvious illegal act of self-help undertaken by the father cannot be a basis for establishing or re-establishing jurisdiction in any other court, including the French Courts, to hear matters relating to the custody and visitation of the children at this time.

By this decision, this Court asks the respective central authorities in the respective countries in France and the United States to make every effort and to carry out their responsibilities and duties under the Hague Convention and under the implementing legislation in the respective countries to bring about the immediate and prompt return of the children to California. This Court respectfully asks the appropriate tribunals in France to take all measures to have the children return to California so that this Court can complete and fulfill its obligations under the Hague Convention. Pursuant to the terms of ICARA and Hague Convention, Respondent is entitled to reasonable fees and costs.

DATED: 12-9-91

/s/ C. Bernard Kaufman

C. Bernard Kaufman

Judge of the Superior Court

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