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[13/02/1992; District Court of Horgen (Switzerland); First Instance]
K. v. K., 13 February 1992, District Court of Horgen (Switzerland)

Unofficial Translation

District Court of Horgen

4891072U/ER4SV/ez

Single Judge in Summary Proceedings

Vice President lic.iur. Handloser assisted

by court secretary lic.iur. Schnyder

Decree of February 13, 1992

in the case of

K.,

petitioner,

vs.

K.,

defendant,

concerning return of a child

Petition

"1. To order the immediate return of the child of the petitioner and the defendant, D., born on October 3, 1989, citizen of the United States of America and Switzerland, U.S. [Social] Security no. *, U.S. passport no. *, Swiss passport no. *, resident at *, Michigan, U.S.A., at present with the defendant at * Thalwil, to the petitioner at his residence in Wyandotte, Michigan, U.S.A.;

2. to order the defendant under threat of punishment in accordance with the provisions of Art. 292 of the Penal Code and the threat of enforcement to return the child within a short period, to be determined by the court, to the petitioner at his residence in Wyandotte, and to charge an appropriate agency (town administration, youth welfare office, or guardianship office) with supervising the return;

3. in case the return of the child to the petitioner's residence does not take place within the stipulated period, to order the competent town administration or, as the court sees fit,

another appropriate agency, such as the guardianship office or the youth welfare office, to enforce the return of the child as decreed in this decision, if necessary by force and with the aid of the police as well as other appropriate agencies, and to take the official measures necessary and appropriate for the return of the child;

4. further to order the defendant to reimburse the petitioner for all necessary past, present, and future costs incurred within the meaning of Art. 26, paragraph 4 of the Hague Convention on the Civil Aspects of International Child Abduction."

Motions

By petitioner: to approve the petition.

By the defendant:

"1. to reject all points of the petition

2. to decree that the costs of the proceeding be borne by the state.

3. to order the petitioner to pay the defendant an appropriate compensation for the proceedings."

The Facts of the Case:

I.

1. On September 6, 1991, the above-mentioned petition dated September 5, 1991, was received at the Horgen District Court (act. 1). On September 12, 1991, the parties were summoned to a hearing on October 16, 1991 (act.4/1-4), while a decree dated September 17, 1991 excused the petitioner from appearing in person (act. 6). On the occasion of the hearing, the petitioner filed the following additional motion (act. 17):

"That the petitioner be furnished free of charge with a court-appointed attorney, and that the person presenting the motion be appointed as such."

Since the defendant credibly proved to the court during the hearing of October 16, 1991, that the return of D. could result in a serious danger of physical or psychological harm to the child (act. 19; Prot. p. 13 ff.), an order was issued on November 8, 1991 (act. 26), to commission an expert opinion on that matter. In a letter dated November 19, 1991, (act. 29), Dr. Michael von Aster of the Psychiatric University Hospital for Children and Adolescents was asked to provide a short expert opinion. On December 6, 1991, the expert opinion dated December 5, 1991 was received by the court (act. 30). On that same day, the parties were given the opportunity by a court order to comment on the matter (act. 31). In his reply of January 8, 1992, the petitioner submitted a number of new motions (act. 38), based on Art. 115 of the Code of Civil Procedure. Whether the preconditions exist for a consideration of these motions in accordance with Art. 115 of the Code of Civil Procedure, may be left open, since these proceedings are governed by the principle of ex officio proceedings, and the new motions introduced are not relevant to the decision, as made clear by the considerations mentioned below. For that reason, there is no need for the defendant to comment on the newly introduced allegations.

2. The petitioner's motions are based on the following uncontested facts: the petitioner and the defendant were - married in 1986 in the United States (act. 1; Prot. p. 15). On October 3, 1989, their son, D., was born (act. 2/3). The K. lived together at * Wyandotte, Michigan,

U.S.A. (act. 1, 2/2, 14/2). On May 30, 1991, the defendant left the United States for Switzerland with the child in order to spend a month's vacation with her parents in Thalwil. Their return flight was booked for July 3, 1991 (act. 1, 2/5; Prot. p. 14). About one week after her arrival in Switzerland, the defendant decided not to return to the United States with the child D. (Prot. p. 16 and 19). On June 18, 1991, the defendant filed for divorce in the magistrate's court of Thalwil (Prot. p. 16), and instituted formal proceedings at the Horgen District Court on July 5, 1991 (act. 1 and 19). Meanwhile, on July 4, 1991, the Federal Ministry of Justice, which is the Swiss central authority, received a petition by the petitioner via the American central authority, based on the Hague Convention on the Civil Aspects of International Child Abduction (SR 0.211.230.02) hereinafter referred to as the Hague Convention), which has been ratified both by the United States and Switzerland, for the return of the child D. (act. 1, 2/1, 14/1). The Federal Ministry of Justice instructed the Horgen District Court on August 7, 1991, to suspend the divorce proceedings for the time being in accordance with Art. 16 of the Hague Convention until a court decision on the return of the child D. has been issued (act. 3). According to the petitioner, divorce proceedings have also been instituted in the United States (Prot. p. 3).

1. The Hague Convention on the Civil Aspects of International Child Abduction is applicable to children who were residents of one of the Contracting States directly before their custody was violated and who are not yet 16 years of age (Art. 4 of the Hague Convention). This is intended to assure the immediate return of children taken illegally to another Contracting State and held there, and to guarantee that the custody and visiting rights existing in one Contracting State will actually be respected in the other Contracting States (Art. 1 of the Hague Convention). The implementation of the Convention is to take place as quickly as possible (Art. 2 of the Hague Convention). In the Canton of Zurich, this is a summary proceeding in accordance with Art. 222, no. 3 of the Civil Code, whereby there is no need to set a time in accordance with Art. 228 of the Civil Code, since the Hague Convention creates substantive law, but not substantive evaluation of the law (ZR 88 No. 24, p. 63).

The petitioner bases his motion on the Hague Convention; the defendant challenges its applicability. She claims that this is not a case of child abduction, but a divorce case involving parties with different nationalitites, that from the procedural point of view, the preconditions of Art. 222 no. 3 of the Code of Civil Procedure do not exist, and furthermore, that the defendant is not holding the child D. illegally within the meaning of Art. 3 of the Hague Convention (act. 19, Prot. p. 11 f.).

2. Both the United States and Switzerland are Contracting States of the Hague Convention. Furthermore, the child D. James, born on October 3, 1989 (act. 2/3), clearly has not completed his 16th year. His last regular residence directly before being withheld from his father as claimed, was at *, Wyandotte, Michigan, U.S.A., where the petitioner, the defendant, and D. were living together. At the time the child was being withheld by the defendant, no court proceedings, i.e. divorce proceedings, had been initiated between the parties, and most importantly, no decision had been made concerning custody of the child (see Erw. 1.2.). Thus the child D. has been in Switzerland against the will of the petitioner since July 1991.

Therefore, the Hague Convention on the Civil Aspects of International Child Abduction is, on principle, applicable to this case.

3. a) In accordance with Art. 3 of the Hague Convention, the transfer or holding of a child is deemed illegal when this violates the custody rights which a person has either alone or jointly with another person under the laws of the state in which the child had his regular residence directly before being taken away, and when these custody rights were actually

being exercised or would have been exercised by one person or jointly at the time the child was taken away, if he had not been taken away or withheld. Custody rights can exist by law and include especially the physical care of the child as well as the right to determine his residence (Art. 5 letter a of the Hague Convention).

b) Directly before the child D. was withheld [from the petitioner], his last regular residence was *, Wyandotte, Michigan, USA. Therefore it must be determined in accordance with the laws of the State of Michigan whether the custody for D. rested jointly with the parents, i.e. also with the father. The petitioner submitted appropriate quotes from Bergmann/Ferid, International Marriage and Parent- and Child Law (act. 16), a certification by consular officer John Dixon Markey of the Child Custody Division of the U.S. Department of State (act. 2/1, 14/1), as well as by B. Deschenaux of the Federal Ministry of Justice (act. 2/6). These quotes prove that under American law in the State of Michigan, petitioner and defendant had joint custody.

c) The defendant raises the objection that the custody rights had not been exercised jointly at their last joint residence in Wyandotte, Michigan. Only the defendant had taken care of the child, for instance, it had always been the defendant who took the child to see the doctor. Therefore she claims that the precondition of actual exercise of custody rights in accordance with Art. 3, letter b, of the Hague Convention (act. 19; Prot. p. 12 ff.) does not exist.

It has been determined and not contested, that Mr. and Mrs. K. lived together in the same apartment until May 30, 1991 (act. 1; Prot. p. 13 ff.). This is sufficient for these proceedings to assume actual jointly exercised custody. It is furthermore consistent with general experience in life that a couple living together jointly exercises custody of their child. The question of who took care of the child for how long or most of the time cannot have a bearing on the question of the actual exercise of custody in accordance with Art. 3, letter b, of the Hague Convention. Art. 5, letter a, of the Hague Convention especially defines the concept of custody as the right, among other things, to determine the child's place of residence, regardless of who provides most of the care for the child.

d) The defendant further objects that Art. 222, no. 3 of the Code of Civil Procedure cannot provide the basis for the order requested by the petitioner, since on the one hand, divorce proceedings have been pending before the Horgen District Court, and on the other hand, the petitioner is not suffering any irremediable damage if D. continues to stay with his mother. It must be assumed that the divorce judge will entrust the two-year-old to the care of his mother as a precautionary measure (act. 19; Prot. p. 5).

When questioned personally, the defendant stated that she had decided about one week after arriving in Switzerland, i.e. around June 6, 1991, to remain here together with D. (Prot. p. 6). This is the decisive date from which the child has been withheld. Consequently, it must be noted that at the date from which the child was being withheld, there was no decision concerning custody, nor had proceedings in this regard been initiated. The divorce proceedings have only been pending before the Horgen District Court since July 5, 1991 (act. 1 and 19). Even if the conciliation request of the defendant were applicable, the withholding dates back even farther, since the former is dated June 18, 1991 (Prot. p. 16).

The procedure for a court order in accordance with Art. 222, no. 3 of the Code of Civil Procedure requires that the petitioner is threatened with an irremediable disadvantage. This is obviously the case with the violation of his custody rights, which according to Art. 5, letter a, of the Hague Convention can also consist in determining his child's place of residence.

It is immaterial for these proceedings who may be better suited to take care of the child, or who might receive custody in a custody proceeding. The Hague Convention does not concern

a substantive settlement of custody, but the restoration of the status quo ante, i.e. it is intended to reverse the factual conditions created by the withholding of a child and to place the custody decision into the hands of the judge at the place of the child's regular residence (ZR 88, No. 24, p. 60). Therefore, Art. 16 of the Hague Convention expressly provides that the Contracting States must not make any decisions concerning custody before it has been determined whether a child must be returned on the basis of the Hague Convention. For that reason, in accordance with Art. 19 of the Hague Convention, the decision of the judge in this case cannot be considered a decision concerning custody. Instead, the custody situation which pertained before the child was withheld from the petitioner is deemed to be the valid legal status, which must be restored. Therefore, the Hague Convention classified with international assistance in civil matters.

4. In summary, it must be noted that the Hague Convention on the Civil Aspects of International Child Abduction is applicable to this case, and that within the meaning of Art. 3 of the Hague Convention, the defendant is illegally retaining the child D. in Switzerland.

III.

1. In accordance with Art. 12 of the Hague Convention, the competent court must order the immediate return of the child, if a child is being kept illegally, within the meaning of Art. 3 of the Hague Convention, and if the child has been retained less than a year at the time the Swiss central authority, or the court, receives the petition.

In this case, the petitioner's request was received by the Federal Justice Ministry, the Swiss central authority (compare Art. 6, paragraph 1 of the Hague Convention), on July 4, 1991, and was filed with the Horgen District Court the next day, September [sic] 5, 1991. The defendant, according to her own statements, decided in early June of 1991 not to return to Wyandotte, Michigan with the child (Prot. p. 16). Thus the period of one year provided by Art. 12, paragraph 1 of the Hague Convention applies, and for that reason, the immediate return of the child D. must be ordered.

2. a) Regardless of the principle of return in accordance with Art. 12 of the Hague Convention, the judge is not obliged to order the return of the child if the person opposing the return can prove that the return would entail a serious danger or physical or psychological harm to the child, or if it would place the child in an unconscionable situation in other ways (Art. 13, paragraph 2, letter b, of the Hague Convention).

b) The defendant bases her argument on this exception to the rule and opposes the return of D. (act. 19, p. 5 ff.; Prot. p. 13 ff.). Essentially, the defendant claims that she has been the child's only caregiver since his birth, and that for this reason, a separation of the mother and the two-year-old child would lead to serious danger to D. This was corroborated by the child's pediatrician, Dr. Th. Schwank as well as day-care provider Mrs. Silvia Meier. A medical opinion by Dr. Th. Schwank dated October 26, 1991, confirming the strong ties between mother and child, as well as the corresponding danger in case of a separation, was filed by the defendant (act. 22). The defendant herself credibly claimed during personal questioning on October 16, 1991 that the ties between her and her son D. are extraordinarily close. She also stressed that she is the child's only caregiver (Prot. I p. 14 ff.). This argument, that a separation between the defendant and her child would amount to risking a serious danger of psychological harm to the child, was expressly confirmed by the summary expert opinion by the Psychiatric University Hospital for Children and Adolescents of December 5, 1991 (act. 30).

It must therefore be assumed that in case of a separation of mother and child, the child D. would be exposed to a grave risk of physical or psychological harm within the meaning of Art. 13, paragraph 1, letter b, of the Hague Convention.

c) The purpose of the Hague Convention is the quickest possible restoration of the factual custody situation that existed before the withholding of the child (see Art. 1 of the Hague Convention). From this point of view and considering the basic claim for the return of the child, the objections must be interpreted in accordance with Art. 13 of the Hague Convention. They must therefore present a compelling argument against the return of a child (ZR 88 No. 24, p. 60). Concerning the case at hand, this means that the defendant must be absolutely unable to return with the child, and that therefore the child would have to return by himself.

The defendant objects to this on the grounds that she would have better opportunities for making a living in Switzerland than in the United States and that her chances in the divorce proceedings are better in Switzerland, too, since in the United States, she would be facing the petitioner's entire 'clan' all by herself (Prot. p. 13 ff.).

Such objections on the part of the defendant are insufficient to prove that her return to the United States is impossible. The defendant can definitely be expected to return together with D. She is holding D. arbitrarily in Switzerland (see. Erw.II), and it is clear that she opposes the return, among other things, because she herself does not want to return to the United States. However, the purpose of the Hague Convention is the restoration of the status quo ante. The Convention is not intended to produce a substantive decision on custody. It is intended to prevent the surreptitious creation of jurisdiction of the home country of one of the spouses. The abductor or withholder must initiate regular proceedings in the jurisdiction which he sought to avoid (ZR 88, No. 24). Thus neither the defendant's better expectations in the divorce proceedings nor in the job market justify the violation of the petitioner's custody rights, or to claim that she cannot return to the United States. After all, the Hague Convention does not require the defendant to again take up marital relations with the petitioner or to live in his household if she returns to Wyandotte, Michigan. For the rest, the petitioner has submitted a sworn statement (act. 39/1, No. 2 - act. 41/1), declaring his willingness to provide housing and to bear the costs if she were to return to the United States while custody proceedings are pending.

d) But the above explanation also shows the unhappy consequences of the Hague Convention. It only requires the return of the child, while actually it should also require the return of the defendant. However, this drawback is not overwhelming in the case at hand. As a responsible mother who has the interest of her child at heart, and in view of her own description of her extraordinarily close ties with D. (Prot. p. 14 ff), as well as the confirmation of that fact by the summary expert opinion of December 5, 1991 (act. 30), and the pediatrician's certificate of October 26, 1991, which she filed herself (act. 22), the defendant will hardly refuse to accompany the child on his return. Should she refuse and thereby expose her child to a serious danger of physical or psychological harm, it will have to be assumed that she places her own welfare above that of the child.

Thus it is exclusively up to the defendant whether D. will be exposed to a serious risk of physical or psychological harm within the meaning of Art. 13, paragraph 1, letter b, of the Hague Convention. This is not sufficient under the existing jurisprudence and case law to deny the return of the child in accordance with Art. 13 of the Hague Convention (Zœi 88 no. 24 with sources).

e) The defendant claims that giving the child D. to the petitioner would create an unconscionable situation in accordance with Art. 13, paragraph 1, end of letter b, of the Hague Convention. She claims that the petitioner is an unsuitable parent who could not guarantee the care of the child, being both an alcoholic and drug addict (act. 19; Prot. p. 5 ff.).

The petitioner emphatically denies these accusations (Prot. p. 3 ff.). As can be seen from the petitioner's request for unpaid counsel (act. 17, 18), he works at the Ford Motor Company and has a monthly income of about $1,800.00. The accusations concerning alcohol and drug abuse therefore do not appear credible, since the petitioner is obviously capable of earning a regular income. Furthermore, the statements by acquaintances and authorities (act. 2/12-21) submitted by the petitioner attest to the fact that he is socially integrated. It is true that these statements were credibly relativized by the defendant (Prot. p. 17 -19), but not sufficiently so to allow the conclusion that the petitioner is a drug addict living on the fringes of society. These objections on the part of the defendant may gain relevance within the framework of the custody proceedings, but in this proceeding, they cannot be considered grounds for an exception in accordance with Art. 13, paragraph 1, letter b, of the Hague Convention. It must be pointed out once more that the Convention is not intended to provide a substantive decision with regard to custody (Art. 19 of the Hague Convention). Therefore, the question of who will provide better care for the child is totally irrelevant to the question of returning the child. The Hague Convention is intended only to reverse the factual situation created by the withholding of the child. The custody decision must be left to the judge at the place of [the child's] previous regular residence (ZR 88 no.24, p. 60).

3. In summary, the case appears to be such that no grounds for exceptions under Art. 13 of the Hague Convention exist, for which reason the principle of Art. 12 of the Hague Convention must be applied, and the child D. must be returned to Wyandotte, Michigan. On principle, this must be done immediately (Art. 12, paragraph 1 of the Hague Convention). Since it is to be assumed that the defendant will accompany her child in the latter's interest, it appears appropriate to allow her a period until March 15, 1992 to prepare for the return of the child D. The defendant will have to bear the costs for the return (Art. 26, paragraph 4 of the Hague Convention).

IV.

In points 2 and 3 of the petition, the petitioner requests that the court guarantee the execution of this decision.

On the occasion of the hearing of October 16, 1991, the defendant made a good impression and described emphatically her concern for the welfare of her child D. (Prot. p. 13 ff.). Therefore it does not appear probable that the defendant will try to prevent the court-ordered return oœ the child. On the one hand, she must be well aware that the court would make the necessary arrangements should she refuse. On the other hand, it must be assumed that she will not only comply with the court order, but will accompany her child in the interest of his welfare (see the explanations in Erw. III e).

It must be assumed at this time that there is no immediate urgency to act in order to guarantee compliance with this decision through the kind of measures demanded by the petitioner in points 2 and 3 of his petition. For that reason, points 2 and 3 of the petition will not have to be considered because there is no present need for it.

V.

1. On the occasion of the hearing of October 16, 1991, the petitioner requested a court-appointed lawyer (act. 17, 18).

In accordance with Art. 26, paragraph 2 of the Hague Convention, a petitioner may not be charged for costs arising from appointing a lawyer. This does not apply if a Contracting State has registered a reservation in accordance with Art. 26, paragraph 3 of the Hague Convention and has declared that it will be bound by this only to the extent that the costs arising from the appointment of a lawyer are covered by its system of legal aid. Switzerland has not registered such a reservation, and therefore the costs arising from the appointment of a lawyer must be assumed independently of the petitioner's financial situation. The Federal Ministry of Justice, the Swiss central authority, advised the petitioner by fax on August 7, 1991, to avail himself of the services of a Swiss attorney (act. 2.7), and on August 14, 1991, proposed by fax attorney lic.ir. R. Horlacher as a suitable attorney. Thus attorney lic.iur. R. Horlacher is appointed counsel for the petitioner free of charge.

2. In point 5 of the response to the petition (act. 19, p. 7), the defendant's attorney announced a future motion for a free attorney for the defendant, however, since he did not actually apply for one during the course of the proceeding, it must be assumed that the defendant did not request a court-appointed attorney.

VI.

No court costs will be charged for these proceedings (Art. 16, paragraph 2 of the Hague Convention). However, as the losing party, the defendant must pay the petitioner compensation for the proceedings, which, due to the fact that he was granted free counsel, must be paid directly to the petitioner's attorney (Art. 89, paragraph 1 of the Code of Civil Procedure).

The Court Orders:

1. The defendant is ordered to return the child D.K., born on October 3, 1989, immediately, or no later than March 15, 1992, to his former place of residence, i.e. Wyandotte, Michigan, or to have him returned there.

2. Points 2 and 3 of the petition will not be considered.

3. The court appoints Attorney lic.iur. Rene Horlacher, Kernstrasse 8/10, 8026 Zurich, as counsel for the petitioner free of charge.

4. No court costs are charged.

The remaining costs, such as:

Fr. 100.00 for summonses

Fr. 635.00 for clerical expenses

Fr. 225.00 for transmission

Fr. 925.25 for expert opinions

Fr. 600.00 for translation

will be discharged by the Horgen Court.

5. The defendant is ordered to compensate attorney lic.iur. Horlacher for his expenses in the amount of Fr. 2,000.00.

6. The parties will be notified in writing against receipt, as will the III. Division of the Horgen District Court (Docket 0291128).

7. An appeal of this decision may be filed within 10 days of receipt, in writing, in duplicate, and by annexing this decision, with the Superior Court of the Canton of Zurich, Second Civil Division. The appeal must contain the arguments for the appeal and the grounds (Art. 276 of the Code of Civil Procedure).

HORGEN DISTRICT COURT

Judge in Summary Procedure

The Clerk of the Court:

lic.iur. Schnyder

Dispatched on February 14, 1992<

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