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[24/06/1996; Venice Juvenile Court (Italy); First Instance]
A. v. S., 27 June 1996, Venice Juvenile Court (Italy)

Unofficial Translation

VENICE JUVENILE COURT

The Juvenile Court, in Chambers composed of the following Judges:

Presiding Judge: Lucieno Fiscon

Judge: Valeria Zancan

Judge: Savio Stocco

Judge: Maria Luisa Levi

issued the following

DECREE

Pursuant to Art. 7 of Law Ro. 64 of January 15, 1994, the Public Prosecutor of the Venice Juvenile Court has urgently requested that: "The Juvenile Court give immediate custody of the minor J., born on February 25, 1993, to the father and order his immediate return to the State of California".

The request to obtain the immediate return to California had been made to the Public Prosecutor, via the Central Authority, by the minor's father who, on May 21, 1996, filed the relevant application with the Central Authority alleging that his wife, A.S., abducted their minor child from the United States on December 13, 1995 to take him to Italy without his consent.

The abduction of J. was in violation of the father's custody rights, as held by the Supreme Court of California, Santa Clara County, that on April 15, 1996, upon the father's request, with a decree that the father has filed in this proceedings, stated: a) that the State of California was the habitual residence of the minor, b) that both parents had custody rights over the child; c) that J.'s removal to Italy on December 13, 1995 had been made without the father's consent and was therefore wrongful.

Both parents were present at the hearing scheduled for the parties' interrogation. During the discussion the father reiterated the requests made in his application dated May 21, 1995 before the Central Authority, and explained the circumstances under which his son had been abducted from him.

The mother filed a defensive brief with documents attached and requested:

1) the rejection of the application made by the father as the Hague Convention is not applicable due to the fact that J. is legally residing in Italy, that she be given temporary

custody over the minor, that the case be assigned to the Padova Court where the separation proceeding has been filed.

2) to reject the father's application as:

- he did not effectively have custody over the minor pursuant to Art. 3(b) of the Hague Convention;

- the minor, if returned, could be exposed to serious psychological problems pursuant to Art. 13.b of the Hague Convention,

- more than one year has passed since the removal of the child, who is now well integrated in the new environment, pursuant to Art. 12 of the Hague Convention.

3) that she be given custody of the minor, even in the case the minor be returned to California.

4) reimbursement of legal expenses from the father.

As far as the investigative activity is concerned, the mother requested that a psychological appraisal be made by the appropriate social services department of the Central Authority, to verify J.'s relationship with her.

The Court received and read the report made by the Social Services Department of the Central Authority regarding the personal and family situation of the minor. The Court read the findings of the parties and the request of the Public Prosecutor that the father's application be accepted. The Public Prosecutor pointed out that the Juvenile Court is only requested to enforce the application, without examining its merits.

The Court on June 24, 1996, in Chambers, has issued a decree.

REASONING

First of all the Juvenile Court states that P.A., father of the minor, did not have custody over the minor as opposed to that which P.A. declared in his application to the Central Authority. In fact, to date, no judicial authority has issued a custody order and the separation of the spouses has yet to be declared.

The above, however, does not exclude the applicability of the Hague Convention of October 15, 1980 as Art. 3 of such Convention states that the allegedly violated custody rights of the applicant can also be established by law in the place of habitual residence.

In this case, the Supreme Court of the Santa Clara county has stated: that the habitual residence of the minor prior to the removal to Italy was California, that according to Californian law, non separated spouses have equal custody rights over the children; that, therefore, the consent of both spouses is necessary to move a child to another country.

This Juvenile Court is in agreement with such a statement of the Supreme Court of Santa Clara.

As far as the issue of the habitual residence is concerned, it is relevant that the child was born in the United States and lived there until May 1995 with both parents who, at the date of the alleged wrongful removal, were still married and living in a marital house from where the minor was removed. The fact that both spouses had chosen California to be their family residence is also relevant.

On the contrary, it is not relevant that on November 22, 1995 (which is to say prior to the alleged wrongful removal) the Padova Municipality issued A.S.'s certificate of residence and family certificate, which have been filed in this proceedings, to show that the minor has already been included in the Italian family certificates. In fact A.S., not having sole custody over the minor, was not entitled to make her own decisions as to the minor's place of residence (see Article 5 of the Hague Convention).

The fact that on December 13, 1995 the minor was in California only ten days, having been in Italy during the past six months, is not relevant, as the father had not consented to the removal of the child.

Therefore the Court cannot accept the mother's request that Italy be considered the place of habitual residence.

The Court has therefore determined that the Californian law is applicable and that, according to such law, both parents had custody rights over the minor. Now, in order to ascertain whether the removal of the child was wrongful or not, the first problem is to determine whether the father consented to the child's transfer.

During the interrogation both parents clarified that the transfer of A.S. and J. to Italy on December 13, 1995 was made without the father's knowledge, and in such a way that he could not express his opinion with that respect.

Mrs. S. affirms, however, that the father had consented to the transfer of the child to Italy in May 1995. It is in fact true that since May 4, 1995 the child was in Italy with his mother, with the father's consent, and that the child returned to Italy only in the period from 4 to 13 December 1995.

The parents report different and inconsistent explanations as to the reasons justifying the long period during which the minor was away from his father.

The father said that, certainly, he consented to the May 1995 trip for the sole purpose and duration strictly necessary to process the application directed at obtaining the Green Card: as a result, Mr. A. intended the wife's return to Italy as a definitive return to marital life.

On the other hand, the mother affirms that even prior to May 1995 she had realized the deterioration of her marriage with P.A., and had informed her husband that she intended to return to Italy to divorce and obtain the Green Card which she did not manage to obtain in the United States. According to Mrs. S., the husband's consent to the May 1995 trip was intended to expressly authorize that the child remain in Italy with the mother, while the return to the USA in December 1995 was for the sole purpose of finally clarifying the relationship with the husband and to collect her personal effects.

The Court has no possibility of determining the actual extent of the consent given by P.A. to the May trip to Italy in May 1995. Therefore, the Court can only stipulate that the lack of communication between the spouses has caused a misunderstanding as to the nature of the May 1995 trip to Italy. Such misunderstanding had, however, been clarified on November 11, 1995 when the father sent a letter to Mrs. S. saying that he did not intend to continue with the marital relationship.

On December 13, 1995, there was no doubt that J.'s parents were in a conflict and that both intended to divorce.

According to the above circumstances, notwithstanding the father's consent to the May 1995 trip, the return of the child to Italy should have been decided jointly by both parents and not only by the mother.

The Court therefore held that on December 13, 1995, according to article 1, paragraph one of the Hague Convention, A.S. removed the minor child to Italy in violation of the father's custody rights pursuant to Californian law.

Art. 3 of said Convention on child abduction, however, demands a further requirement to determine that the removal was wrongful: the custody rights had to be effectively exercised at the time in which the removal took place [Art. 3(b)].

Based on the foregoing, the Court believes that P.A. in May 1995 did not effectively exercise his custody rights over the child, not because he was deprived of said rights by the mother, but because he had, for months, accepted to take no direct care of the child and had consented that the child remain with the mother in Italy. Mr. A. visited the child only once in August 1995 and only because the mother had stated, during such period he had basically not financially contributed to the child's maintenance, so accepting that the mother took complete care of the child during that six month period. Such a period, considering the child's youth, is very significant in order to determine who effectively exercised custody rights.

The 1980 Hague Convention is aimed at protecting the factual situations. Therefore the effective exercise of custody rights is to be considered in its actuality, regardless of the situation according to the law.

There is no doubt that the fact that Mr. A. lived with the minor in the marital house for ten days in the USA, does not have any influence on the factual situation which was already in place, as the spouses were in a conflict.

Based on the foregoing the Court held that A.S.'s behaviour was unjust and is to be censured, as it was made in violation of the rules on custody over the minor child. However, such behaviour does not constitute a wrongful removal of the minor to Italy pursuant to Art. 3 of the Hague Convention as the father was not effectively exercising the custody rights at the time in which the removal took place.

As to the other requests, the Court believes that Art. 12 and 13 of the Convention are not applicable to the subject case.

Article 12, paragraph 2, is not applicable as it is not true that more than one year had passed from the date of the wrongful removal (December 13, 1995) to the date of filing of the Hague application (May 21, 1996). The fact that more than one year had passed from the transfer to Italy, made on May 4, 1995, is not relevant, as the father had not contested the legitimacy of said transfer.

Art. 13 paragraph b, which provides for cases in which it is possible to not order the immediate return of the child pursuant to Art. 12 paragraph 1, is not applicable. In fact, such rule requires that the removal be wrongful, while the Court held that it was not.

Even had the Court believed that the father effectively exercised custody rights of J. at the time in which the child was abducted and that the abduction made by the mother was wrongful, the Court held that, should the child be returned to California, there was the grounded danger that he could be exposed to psychological problems.

J.'s sudden separation from his mother, and from the family and environment in which he is now perfectly established, would be an extremely disheartening situation for a three year old child and could have negative psychological influences. This is even truer if we consider that J. has not seen his father for more than one year and would find himself in a totally different environment without being prepared.

Such reflections must not effect the custody issue. What is deemed to be dangerous to the psychological status of the child is only the immediate return to California, according to the present family situation. The Court does not intend to express an opinion on the respective parent's educational and custodial capacities.

Any further request of the mother is to be rejected.

This Court is not competent to make a decision on the custody issue. There are other judicial proceedings pending in this respect.

The Court does not deem it necessary to order that an appraisal be run on the present psychological status of the child, as this is not deemed necessary for the current purpose of the Juvenile Court. In addition, the report made by the Central Authority and the father's declarations exclude the necessity of such further investigation.

The legal expenses for such proceedings remain assigned to each party.

BASED ON THE ABOVE

pursuant to Art. 7 of law 64/94 and 3, 12, 13 of Hague Convention dated October 25, 1980 the Court

REJECTS

the application made by the Public Prosecutor

STATES

that the return of the minor J., born on February 25, 1993, to the father's house must not be ordered,

STATES

to not be competent to render any decision as to the temporary custody of the minor.

REJECTS

any other requests.

To be communicated to the parents, the Public Prosecutor and to the Central Authority.

Venice, June 24, 1996

The Presiding Judge

Lucieno Fiscon

The Judge

Valeria Zancan

The Clerk

Sandro Bianchi

Filed on June 27, 1996 in Venice

The Clerk

Sandro Bianchi

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