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[19/03/1999; Court of Appeals of the State of Kentucky (United States); Appellate Court]
Janakakis-Kostun v. Janakakis, 6 S.W.3d 843 (Ky. Ct. App. 1999)

COURT PF APPEALS OF THE STATE OF KENTUCKY

March 19, 1999

Before: Emberton, Knopf and Schroder JJ.

G. Janakakis-Kostun (Appellant); In re the application of E. Janakakis (Appellee)

Brief For Appellant: William D. Rogers Kathleen A. Behan Laura K. McNally Layli Miller-Bashir Dinesh Verma Arnold & Porter Washington, DC; Stephen Miller Mulloy, Fore, Miller & Schwartz Louisville, KY; Amanda Anayati Tahirih Justice Center Falls Church, VA; Oral Argument For Appellant: Kathleen A. Behan Washington, DC Brief and Oral Argument; For Appellee: Stephen T. McMurtry McMurtry and Wolff Covington, KY

APPEAL FROM HARDIN CIRCUIT COURT HONORABLE T. STEVEN BLAND, J.

KNOPF, J.: This is an appeal by G.J.K. (G.) from an order of the Hardin Circuit Court granting the motion of appellee, E.J. (E.), to require G. to relinquish custody of the parties' daughter, B., to E. and permitting the return of the child to Greece. This matter arose on E.'s motion to return the parties' child, B., to Greece pursuant to the terms of the Hague Convention on the Civil Aspects of Child Abduction, October 25, 1980, 1988 WL 411501 (entered into force December 1, 1983) (hereinafter Hague Convention). The Hague Convention has been signed by the United States, and Congress has adopted procedures for its implementation by enactment of the International Child Abduction Remedies Act. 42 U.S.C. § 11601, et seq. Greece is likewise a signatory to the Hague Convention. We affirm.

E. is a citizen of Greece and a captain in the Greek Navy. In 1986, while on a two-year assignment to the United States Naval Base at San Diego, California, E. met G., a member of the U.S. Navy, and a relationship developed between the parties. In 1988, E.'s tour of duty in the United States ended, and he returned to Greece. At about the same time, G. decided to leave the U.S. Navy. In November 1988, G. traveled to Greece to be with E., and the parties were married on September 2, 1989. On October 2, 1991, B., was born in Chania, Greece, on the Island of Crete. Following B.'s birth, G. and B. made yearly visits to the United States to visit G.'s relatives, though, because of conflicting evidence, the trial court was unable to determine the exact dates and duration of the visits. However, G. and B. spent approximately three to four months in the United States in each of the years 1992, 1993, and 1994.

At some point the parties' marriage began to deteriorate, and sometime in 1995 G. threatened to leave with B. Consequently, E. began to have concerns about G. removing B. from Greece without his knowledge or permission. On February 24, 1996, G. told E. that she was going to the United States and was going to take B. with her. G. thereupon left the marital residence in Chania, taking B. with her, and went to Athens with the intention of flying to the United States and settling permanently. E. thereupon filed a criminal complaint charging G. with interfering with his custodial rights.

On February 27, 1996, E. filed a petition in the Lower Court of Athens, Security Measure Division, seeking temporary custody of B. The Court issued an order prohibiting the removal of B. from Greece and scheduled a hearing on the merits of E.'s petition. G. attempted to leave Greece with B. on February 27, but, pursuant to the court order, this was prevented by Greek authorities. G. alleges that subsequent to her detention, she and B. were abused by Greek authorities. On March 28, 1996, a

hearing was held in the Athens Court. On April 22, 1996, the Athens Court issued an order prohibiting the removal of B. from Greece until a final determination of custody.

On February 28, 1996, the aforementioned criminal charge was heard by an Athens Court. The charges were dropped after the hearing. E. claims that the charges were dropped because all he wanted was to keep B. in Greece, not actually prosecute G. G. claims the charges were dropped following an evidentiary hearing because the Judge found the charges to be without merit. In any event, the charges were dropped and G. was released from custody. G. and B. thereupon returned to live with E. at the parties' marital residence. On May 2, 1996, G. departed the marital residence with B. and went to the Greece hotel lodgings of her father, G.K. E. subsequently retrieved B. from the hotel and refused to allow G. to communicate with B.

Also on May 2, G. filed a petition in the Lower Court of Chania seeking custody of B. On June 28, the Chania Court issued an order, inter alia, assigning "temporarily to [G.] the care of . . . [B.] until issuance of the final judgment[.]" The Chania order recognized that the April 28 Athens order prohibited the removal of B. from Greece and did not set aside or otherwise disturb that prohibition. Pursuant to the Chania order, on July 1, E. relinquished custody of B. to G. G. alleges that upon B.'s return to her, B. was suffering from a variety of physical and emotional problems, though this is denied by E. A final hearing was set on G.'s custody petition for September 5, 1996. On July 4, E. filed a petition seeking specific rights of communication and visitation with B. On July 22, the Chania court awarded E. liberal visitation and communication rights with B. The order threatened G. with a fine and imprisonment for violation of the visitation and communication rights established therein.

When E. subsequently attempted to exercise his communication and visitation rights, he was unable to locate G. and B. As it turns out, sometime in late July or early August 1996, G., with the help of her father, a former Green Beret with multiple European contacts, smuggled B. out of Greece. Upon arriving in the United States, G. and B. initially stayed, variously, with G.'s father in Gray Hawk, Kentucky, with G.'s mother in Houston, Texas, and in Elizabethtown, Kentucky. Finally, sometime in the Spring of 1997, G. and B. came to Elizabethtown where they remained.

In the meantime, E. sought to find his daughter. On July 27, 1996, he filed another action in the Chania Court. A hearing was set on that action for January 16, 1997. On September 5, 1996, the hearing on G.'s petition was held as scheduled. While G., no longer in Greece, did not appear, E. testified that her attorney was present. That hearing was continued until January 16, 1997, so that all pending matters could be heard together. Following the January 16, 1997, hearing, by order dated February 28, 1997, the Lower Court of Chania assigned "exclusively to [E.] the exertion and care of [B.] [.]"

On November 14, 1996, E. applied for relief with the Greek Central Authority responsible for implementing the Hague Child Abduction Convention. He first sought enforcement of the Hague Convention in Houston in March of 1997. On March 28, 1997, E. filed a petition in Hardin Circuit Court pursuant to the Hague Convention, where service on G. was obtained. On November 13, 1997, the trial court entered an order sustaining E.'s motion for the return of B. to his custody and authorizing B.'s return to Greece. Following a denial of G.'s motion to alter, amend, or vacate, this appeal was taken. On February 11, 1998, this Court denied G.'s petition for an emergency stay of the trial court's order pending appeal; however, on March 20, 1998, Kentucky Supreme Court Chief Justice Robert F. Stephens granted a stay pending further order of the full Supreme Court. On May 14, 1998, the Supreme Court dissolved the temporary stay. On June 18, 1998, United States Supreme Court Justice John Paul Stevens denied G.'s application for a stay pending appeal. On June 29, 1998, G. delivered B. to E., and E. and B. returned to Greece.

The Hague Child Abduction Convention and the International Child Abduction Remedies Act each require an abduction or wrongful retention to trigger their provisions and protections. Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410, 413 (1996). Under Article Three of the Hague Convention, removal or retention is considered wrongful where there is a breach of custody rights under the law of the state in which the child was a habitual resident immediately before the removal or retention. Id. It follows that a child cannot be wrongfully removed or retained if the jurisdiction to which the child is taken can be considered its habitual residence. Id. G. first argues that the trial court erroneously

concluded that Greece was the habitual residence of B., and contends that B.'s habitual residence at the time of her removal was, in fact, the United States.

Neither the Hague Convention nor the International Child Abduction Remedies Act defines "habitual residence." Indeed, it was intended that this concept remain fluid and fact-based, without becoming rigid. Id., citing Brooke v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993); Friedrich v. Friedrich, 983 F.2d 1396, 1400-1401 (6th Cir. 1993). The definition of habitual residence must be determined by the facts and circumstances presented in each particular case. Id., citing Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). As reflected in Harsacky, the test for determining habitual residence under the settled purpose analysis is broader than domicile.

There are alternative approaches to determining a child's habitual residence, see Harsacky v. Harsacky, supra, however, this Court has previously decided that a determination of habitual residence "must focus on the child, not the parents, and examine past experience, not future intentions." Harsacky, 930 S.W.2d at 415 (quoting Friedrich v. Friedrich, 983 F.2d at 1401). Under this test, the record supports the trial court's determination that Greece was B.'s habitual residence immediately prior to her removal.

Following B.'s birth, the parties at all times maintained their home in Greece, and at no time lived together as a family unit in the United States with the intention of making the United States their permanent home. The evidence shows that B.'s permanent home, at all times following her birth and prior to her removal, was Greece, and that her three- to four- month trips to the United States in 1992, 1993, and 1994 were temporary visits to this country for the purpose of visiting her maternal relatives. Greece has been the center of B.'s life. G.'s argument that the United States was B.'s habitual residence because the parties held United States social security numbers, bank accounts, driver's licences, had once consulted with a U.S. realtor, and had plans to move and settle in the United States following E.'s retirement is unpersuasive. These connections do not overcome B.'s more prevalent and continuing contacts with Greece.

Also unpersuasive is G.'s assertion that her residence in Greece for the year preceding her departure "was not consensual." The Greek Court orders establish that E.'s efforts to prevent B.'s removal from Greece, though disapproved of by G., were pursuant to Greek law. Even if G.'s last year in Greece was "not consensual" - and the evidence is that she could have returned without B. to the United States at anytime - this would not alter B.'s habitual residence from Greece to the United States.

In view of the foregoing factors, the trial court properly concluded that B.'s habitual residence was Greece.

G. next contends that the trial court erroneously concluded that G. breached E.'s custody rights when she left Greece. The objective of the Hague Convention is to protect children who are "wrongfully removed" from their country of habitual residence. Hague Convention art. 1.

The Hague Convention art. 3 provides as follows:

"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, an institution or any other body, either jointly or alone, 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, either jointly or alone, or would have been so exercised but for the removal or retention."

"The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

The burden is on the petitioner, here, E., to establish that the minor child was wrongfully removed within the meaning of the Hague Convention by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1); In re Ponath 829 F. Supp. 363 (D. Utah 1993).

Rights of custody may arise by judicial decision. [FN1] Hague Convention art. 3. The Athens order of April 22, 1996, prohibited G. from removing B. from Greece pending a final resolution of the parties' custody dispute. Admittedly, the Chania decision of June 28, 1996, awarded temporary custody to G. The June 28 order, however, also cited the previous prohibition on removing B. from Greece. The June 28 order took no action to diminish or lessen the effect of the Athens prohibition of removal. In addition to this, the Chania decision of July 22, 1996, defined liberal and specific visitation rights for E. and threatened G. with fines and imprisonment if she violated the provisions of the order. These orders were entered prior to G.'s removal of B. and, together, establish beyond a preponderance of the evidence that E. had custodial rights to B. under Greek law by virtue of judicial decision.

G.'s argument, that since the June 28, 1996, Chania order awarded her sole temporary care of B., E. was divested of all custodial rights, is unpersuasive. The order as translated was, on its face, a temporary order, pending final resolution of the custody issue. Pursuant to the orders, E. had ongoing "custodial rights" and was, in fact, seeking as a final resolution permanent sole custodial rights for himself. Indeed, following G.'s removal of B., E. was granted custody of the child by the Chania court in its February 28, 1997 order.

Visitation rights alone, such as those granted to E. in the July 22, 1996, Chania order have been held to fall within the meaning of "custodial right." See David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y.Fam. Ct. 1991). David S. acknowledged that visitation rights may not always equate to custodial rights. The case nevertheless held that such a distinction was meritless where a respondent, i.e., the removing parent, engaged in "contemptuous conduct" in removing the child from its habitual residence. In view of the pending court orders prohibiting the removal of B. from Greece, G. similarly acted in contempt of Greek court orders by nevertheless removing B. Accordingly, David S. provides a rule appropriate to this case.

Finally, in view of E.'s active and ongoing legal efforts prior to, at the time of, and subsequent to G.'s removal of B., it is clear that E. was exercising his custodial rights, or would have but for G.'s removal of B.

G. next contends that the trial court did not properly consider G.'s evidence that returning B. to Greece would subject her to a grave risk of physical and psychological harm under Article 13b. Article 13b establishes an affirmative defense to an otherwise wrongful removal and provides that

"the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that - -"

". . . ."

"b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

". . . ."

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

A respondent who opposes the return of the child has the burden of proving that the exception set forth in article 13b exists by clear and convincing evidence. 42 U.S.C. 11603(e)(2). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934).

G. alleges that, at trial, she established that B. would face an "intolerable situation" if returned to Greece. G. further alleges that she has established the insufficiency of the Greek judicial system and

its unwillingness to protect the interests of non-Greek citizens. In support of this position, G. cites several examples of violent behavior by E. toward herself and B. Among these: (1) E.'s regular manner of punishing B. is to "give her a smack on the back"; (2) on one occasion E. went into a violent rage, destroyed items in the house, and pushed G. and B. to the floor; (3) on one occasion E. pulled G.'s hair so violently during a quarrel that she was hospitalized with severe neck injuries; and (4) on one occasion E. tore up B.'s passport. G. also refers us to the June 28, 1996, Chania order which recounts accusations of violence by E. toward herself and B.

G. moreover presented the testimony of a child psychologist who testified that B. was suffering from (1) post-traumatic stress syndrome; (2) probable sexual, physical and emotional abuse; and (3) probable child neglect. The psychologist recommended that B. not be returned to Greece. The trial court made a specific finding that it "does not find the psychologist's testimony compelling," and that "[i]t is lacking in substantiation and does not establish that returning B. to Greece would subject her to grave and intolerable injury."

We adopt the following analysis of G.'s 13b argument from the order of the trial court:

"The 13(b) exception under the [Hague] Convention must be narrowly construed. Rydder v. Rydder, 49 F.2d 369 (8th Cir. 1995); Nunez-Escudero v. Tice-Menley, 58 F.2d 374 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Most of the evidence presented by G. was more closely akin to that which might be relevant in a custody proceeding. That type of evidence is not relevant in a 13 (b) hearing. Tahan v. Dugquette, 613 A.2d 486 (N.J. Super. A.D. 1992); In Re Petition For Coffield, 644 N.E.2d 662 (Ohio App. 11 Dist., 1994). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) [ ] Judge Boggs' opinion very succinctly states how the court should view the 13(b) exception:"

"The exception for grave harm to the child is not license for a court to speculate on where the child would be happier. That decision is a custody matter, and reserved to the court in the country of habitual residence." Id. at 1068.

Judge Boggs then goes on to define exactly when the 13(b) exception should apply:

"[w]e believe that a grave risk of harm for the purposes of the [Hague] Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." Id. at 1069.

The evidence offered by G. in support of her 13(b) argument, psychological and otherwise, simply does not establish that B. faces a grave risk of harm if she is returned to Greece. There is absolutely no competent evidence before the Court that B. has been abused or neglected by E., or that B. faces certain danger in Greece. Likewise, there is no evidence that the courts in Greece cannot protect B. Indeed, the last order issued before G. left gave G. temporary custody, subject to certain conditions. This court has absolutely no reason to believe that the Greek Courts will not properly and adequately decide the ultimate issue of custody, and protect B.'s interests in so doing. The Court concludes that G. has failed to satisfy her 13(b) burden.

G. next alleges that the trial court did not properly consider her evidence that returning B. to Greece would violate fundamental principles of human rights under Article 20 of the Hague Convention. More particularly, G. alleges that (1) the actions of the Greek police in physically removing her and B. from a plane in Athens, holding her in isolation at the station for several days without food, water or restrooms, and subjecting her to physical and verbal abuse violated various articles of the International Covenant on Civil and Political Rights, December 16, 1966, 6 I.L.M. 368 (entered into force March 23, 1976) (hereinafter ICCPR); (2) that various articles of the ICCPR were violated when E. destroyed B.'s passport and Greek authorities forcibly prevented her and B. from moving freely from one place to another; and (3) she was denied assistance of counsel in custody proceedings in violation of the ICCPR. The burden is on G. to establish an Article 20 exception by clear and convincing evidence. 42 U.S.C. § 11603(e)(2).

We adopt the trial court's analysis of this issue:

"G. also asserts that the return of B. to Greece should be denied pursuant to Article 20 of the [Hague] Convention. G.'s burden under this Article is to show, again by clear and convincing evidence, that the return of B. "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.["] [Hague Convention art. 20]. "With respect to an Article 20 defense, it places a heavy burden on the respondent." Caro v. Sher, 687 A.2d 354 (N.J.Super.Ch., 1996). The court in Caro relied on the Explanatory Report as to the adoption of the [Hague] Convention, prepared by Elisa Perez-Vera, to explain Article 20:"

"To be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the [Hague] Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with those principles . . . A study of the case law of different countries shows that the application by ordinary Judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the [Hague] Convention has in view."

"This exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." Caro, supra at 359.

"In G.'s case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different than those this Court has heard many times before from defendants in proceedings in Kentucky. This Court finds no evidence that the Nation of Greece is suspect in its treatment of G. and/or B. G.'s Article 20 defense is totally without merit."

Finally, G. alleges that the trial court's findings of fact should be set aside as clearly erroneous. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to Judge the credibility of the witnesses." Ky. R. Civ. Proc. (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. See Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1965). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

G. identifies three examples of erroneous findings by the trial court: (1) the trial court's assertion that "there is simply no evidence in the case before the court that G. was ever prevented from leaving Greece;" (2) the trial court's erroneous characterization of G.'s departure from Greece as a violation of the Athens court order; and (3) the trial court's disregard of the corroborated testimony provided by G.'s child psychologist witness which documented B.'s fragile psychological condition and the severe emotional harm she would suffer if separated from her mother. There was conflicting evidence regarding each of these matters and the trial court, as the finder of fact in this proceeding, was in a better position to weigh the credibility of the witness and resolve the conflicting evidence. There was substantial evidence to support the trial court's findings of fact, and hence we may not set aside those findings.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

[FN1] Under the Hague Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residency, Hague Convention art. 3; Friedrich, 938 F.2d at 1402. Neither the trial court, nor either party on appeal, applied or cited relevant Greek statutory or case law relevant to the issue of whether E. had existing "custody rights" to B. at the time of B.'s removal and whether E. was "exercising" those "custody rights" at the time of her removal. However, as discussed infra, the record established by a

preponderance of the evidence that E. had custodial rights by "judicial decision," and the ongoing custody litigation in the Greek courts supports that by a preponderance of the evidence he was attempting to "exercise" those rights.

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