Translation from the German language

Certified copy

Pankow/Weißensee Local Court
Department for Family Matters
File No.: 13 F8440/19

[crest]

Order

In the family matter

[Redacted], born on [handwritten: December XX, 2013]
- child concerned -

Guardian ad litem:
Lawyer [redacted]

Further parties involved:

Father and Applicant:
[redacted], United States of America

Legal counsel:
Lawyer [redacted]

Mother: [redacted], Berlin

Legal counsel:
Lawyer [redacted]

for an interlocutory order regarding handover of the child [redacted]

on January 31, 2020, Pankow/Weißensee Local Court, as represented by Local Court Judge [redacted], on the basis of the hearing on January 24, 2020, decided:

1. The Respondent is obliged to return the child [redacted], d.o.b. [in handwriting: December XX, 2013], current address: [redacted], to the United States, to district of the court competent for the Applicant's place of residence, within two weeks of this order becoming final and binding.

2. If the Respondent fails to meet the obligation set out under point 1, she and any other person with whom the child [redacted], d.o.b. [in handwriting: December XX, 2013] may be staying shall be obliged to hand over [said child] to the Applicant or a person nominated by him for the purposes of a return to Belgium.

3. Furthermore, applications shall be refused.

4. The Respondent is hereby informed that, for every case of non-compliance with an obligation as set out under points 1 and 2 of this order, Section 44 Subsec. 3 of the IFLPA – German International Family Law Procedure Act (*IntFamRVG – Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts*) in connection with Section 89 of the *FamFG* (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction – *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*) sets out that a coercive fine of up to €25,000.00 may be imposed; in the event that said coercive fine cannot be recovered or the ordering of such a fine is not likely to result in payment, coercive detention of up to six months may be ordered.

5. With regard to the enforcement of points 1 and 2, the following is ordered:

a) The court bailiff is instructed and authorized to remove the child as specified under point 1 from the Respondent or any other such person with whom the child may be staying and to return the child there and then to the Applicant or other person as designated by the Applicant.

b) The court bailiff is instructed and authorized, in order to ensure the handover is executed, to use direct force against any person who is obliged to carry out the handover and, if necessary, also against the child, in accordance with Section 90 Subsec. 2 *FamFG*.

c) The court bailiff is authorized to enter and perform a search of the home of the Respondent and the home of any other person the child [may be] staying with.

d) The court bailiff is authorized to call on the help of police law enforcement agencies.

e) The court bailiff is authorized to execute the above-mentioned enforcement measures at night time, on Sundays and/or official public holidays as well.

f) Reinickendorf von Berlin Youth Welfare Office is obliged, in accordance with Section 9 Subsec. 1 IFLPA (*IntFamRVG*), to

aa) take measures to ensure the safe handover of the child [redacted], d.o.b. [redacted], to the Applicant or a person designated by him, and

bb) give – once the handover has been executed – the child [redacted], d.o.b. [December XX, 2013], temporarily into the care of an institution or person deemed suitable, until the return.

6. An enforcement clause shall not be necessary.

7. The Respondent shall bear the costs of the proceedings, including the costs of the return.

8. The value of the proceedings shall be set at €5,000.

The reasons for this are:

I.

The child [redacted] born on [redacted] who is the subject of the proceedings, was born to the two parents outside of wedlock. He has citizenship of both the Dominican Republic and the United States of America.

The Applicant is a US citizen, while the Respondent is a citizen of the Dominican Republic.

The child was born in the Dominican Republic and initially lived there in the care of the child's mother and her family. At this point in time, the Applicant lived in the United States and the Respondent lived

in the Dominican Republic.

On 2 October 2014, the Applicant acknowledged paternity of the child at the Register Office of the second district of San Cristobal.

The Applicant used to visit the child several times a year. He made child support payments of varying amounts; at first directly to the Respondent/child's mother and then to her family. The Respondent worked night shifts. The child was cared for with the help of the Respondent's family.

In December 2015, the child travelled with the Applicant to the United States for the first time and then came back after one month as had been agreed. During the period that followed, the child visited the Applicant in the United States on several other occasions.

In August 2017, the Respondent registered the child with the local kindergarten in the Dominican Republic.

In October 2017, with the consent of the father, the mother travelled with the child to Germany. With regard to further details, reference is made to the copy of the translation of the authorization for travel dated August 15, 2017, as well as to Annex 2 of the transcript dated January 24, 2020, and page 93 of the file.

On January XX, 2018, the mother got married in Berlin. With regard to further details of this, reference is made to the copy of the marriage certificate dated January XX, 2018 as well as Annex 3 of the transcript dated January 24, 2020 and page 94 of the file.

Initially, the Applicant was not made aware of this.

In January 2018, the child returned to the Dominican Republic.

In a notarial agreement dated March 2, 2018, the parents agreed that the Applicant would travel to the USA with the child for 3 months. The Applicant travelled to the United States with the child in March 2018. With regard to further details of this, reference is made to Annex 1 of the transcript dated 24 January 2020 as well as page 91 of the file.

In May 2018 (while the child was staying in the United States), the Applicant/father came to know that the Respondent/mother was moving to Germany. He did not agree to the child moving to Germany and refused to hand over the child to the mother.

The Applicant registered the child at a kindergarten in the United States in March 2018. [Redacted] finished pre-school – see Annex A3 to the written statement dated 18 December 2019, as well as page 1 of the file. For the fall of 2019, the child had already been registered at an American school.

In November 2018, he brought the child to the Dominican Republic and left the child with the mother there for a week. The mother then flew back to Berlin and the child was brought back to the United States by the Applicant.

In May 2019, the Applicant brought the child to meet his maternal grandmother, who was visiting New York at the time. He collected the child again after three days.

In August 2019, the Applicant came to an agreement with the help of the mother's brother about the details of a visit of the child to Berlin; in the view of the Applicant, it was planned that the child would spend two weeks in Germany.

He flew to Berlin with the child on August 17, 2019. On the same day, the Applicant flew back to the United States. He took his son's American passport with him.

Two days later, the Respondent's brother asked him to send the child's passport. After around a week, the Applicant was asked by the Respondent's brother to extend the child's stay in Germany by around 1-2 more weeks. The Applicant did not agree to this wish. He requested that the mother's brother hand the child over to him.

During the time that followed, the Applicant requested that the mother hand the child over to him.

The mother and her family refused to hand over the child.

The Applicant claims that, on the occasion of the planned stay of the child for three months with him

in the USA from March 2018 onwards, the Respondent/mother had told him that she wanted to move to Germany at the end of 2018. He claims that the mother's move to Germany, which then took place earlier – in May 2018, had come as a complete surprise to him. He claims that no agreement was made as to where the child would stay after returning from the trip to America.

He says he had not brought the child back to the Dominican Republic in June 2018 as the mother was no longer there, and he had not wanted to hand over the child to the child's close relatives while handing over the child's passport. He said he was scared that the child would be taken to Germany.

In his written submission dated 12 December 2019, which was received in full by the court on 20 December 2019, the Applicant [redacted] petitions the court

as can be read in the operative provisions.

The Respondent petitions the court

that the child's father's application for handover of the child [redacted] – for the purposes of return – be dismissed. The follow-up applications are also to be dismissed.

In opposition to the application, it is petitioned that the Applicant be obliged to hand over the original US passport of the child [redacted] to the child's mother.

The Applicant petitions the court that this application be dismissed.

The Respondent claims that she has taken care of the child continuously since the child's birth.

In her view, the Applicant was obliged to hand the child over to her once the three months had elapsed which were planned for the child's journey with the Applicant in March 2018. She claims she had, at that time, already established her life in Germany and that she had – of course – wanted to bring the

child with her to Germany. She claims it had been agreed that the child should be brought to be with the mother in Germany after the child's stay in the United States in May/June 2018.

In July 2018, the Respondent says, she had requested that the Applicant hand over the child to her in Germany. The Applicant declined to do so, she says.

She says she was not able to initiate any court proceedings with regard to the return of the child, as she had no visa for the United States. The American Embassy had not wanted to help her either, she claims. It had been intended that the child already be brought to Germany on 12 August 2019.

The parties to proceedings and the child have been heard in person. With regard to the conclusions of the hearing, reference is made to the notes from January 21, 2020 (page 53 of the file) (child) and from January 24, 2020 (page 84 of the file) (main hearing).

The guardian ad litem in the proceedings submitted a statement at the hearing on January 24, 2020.

The Youth Welfare Office has been given the opportunity to make a statement. With regard to further details, reference is made to the written submission dated February 2, 2020 (p. 31 of the file).

With regard to the details of the submissions made by the parties, reference is made to the written submissions and annexes exchanged as well as notes from January 21, 2020 (page 53 of the file) (child) and from January 24, 2020 (page 84 of the file) (main hearing).

II.

The Applicant's admissible applications are well-founded.

In the case at hand, the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (HCAC) is applicable, which has been in force in the Federal Republic of Germany with the same status as federal German law since December 1, 1990, and has been applicable with regard to the USA since the same date.

The competence of the court seized in the matter is derived from Section 11 and Section 12 Subsec. 2 IFLPA.

The application for return was to be approved in accordance with Article 12 para. 1 HCAC, as the child [redacted], d.o.b. [redacted], was retained in Germany wrongfully as defined in Article 3 HCAC, i.e. without the consent of the Applicant and in violation of his joint right of custody, which he was actually exercising at the time; also, because no exceptional circumstances exist which would preclude a return.

The child concerned is under 16 years of age (Article 4 para. 1 HCAC).

At the time of the father's acknowledgement of paternity in the Dominican Republic, both parents had joint custody. The fact that the child was taken to USA or Germany did not later lead to any judicial alteration or any other such alteration with regard to this legal situation.

According to Article 67 of Law 136-034 (Dominican Code for the System of Protection and Basic Rights of Boys, Girls and Young People), both mother and father have equal custody rights for children who have not yet reached the age of majority. According to Article 67 of Law 136-03, the mother and father have equal rights. The fact that the child was not born in wedlock is of no relevance.

Before being retained in Germany, the child's habitual residence was in the United States (Article 4 para. 2 HCAC).

In stating this, the court does not deny the fact that the Applicant father may himself have wrongfully retained the child as defined in Article 3 HCAC in June 2018, in violation of the mother's joint right of custody, by not handing the child back to the mother in the Dominican Republic or in Germany following the three-month stay.

It must be noted, however, that the mother at no time initiated court proceedings with regard to the return of the child to her in Germany. Even if it were possible for her application for the dismissal of the child's father's application to be interpreted as an application for return as defined in the HCAC, the time limit of one year as set out in Article 12 para. 1 HCAC would already have expired by the time her application was received here on January 6, 2020.

Incidentally, it must also be noted that the fact that the mother moved to Germany would in no way

have impeded her ability to make such a return application. In general, a change of residence does not have a detrimental effect on the parent whose custody rights have been violated.

The Preamble of the Convention guarantees that the child be returned immediately to the state of his/her habitual residence. However, the idea that the return should have to be effected to the place of residence until the abduction was explicitly rejected during the negotiations preceding the Convention [Transcript No. 6, Actes XIV, p. 289]. It can be inferred from this that the return of the child may be effected to the current place of residence of the parent seeking the return [see Pérez-Vera, explanatory report, Bundestag official document (Bundestags-Drucksache) 11/5314, p. 50 para.110].

The court assumes, however, that the prerequisites for ordering a return of the child to the mother are not met, following the elapsing of the one-year time limit as set out in Article 12 para. 2 HCAC. In the view of the court, it has been demonstrated that the child has settled into his surroundings in the United States.

[Redacted]'s habitual residence as defined in Article 4 HCAC was there, in the United States, and the child is now integrated there.

With regard to the term "habitual residence", in its decision (see ECJ Judgment of the Court, Third Chamber, dated 9 October 2014 - - Case C-376/14 PPU: C./. M, *FamRZ* (*Zeitschrift für das gesamte Familienrecht* – Magazine on all Aspects of Family Law) 2015, 107), the European Court of Justice (ECJ) held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case; the Court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment. To that end, account must be taken of, in particular, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State. The Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case.

When measured against these criteria, there are grounds for stating that [redacted's] habitual residence is in the United States [Translator's note: sentence structure slightly unclear]. [Redacted] has now been living with his father in the United States since March 2018, and is looked after by him in all other matters of daily life, such as school and healthcare. [Redacted] has attended American childcare facilities (preschool) continuously since March 2018. He also holds US citizenship and still primarily speaks English as a mother tongue, as the court has been able to establish for itself in the context of the court hearing.

The court, which speaks fluent English and Spanish, gave the child the opportunity to speak in one of these languages. [Redacted] opted for English of his own accord.

Furthermore, the father himself brought the child to visit the mother (November 2018 in the Dominican Republic) or her family (maternal grandmother in New York) in May 2019). These journeys, from which the child always returned to the United States, indicate that the child's actual habitual residence was in the United States. Also in regard to the child's planned stay in Berlin in August 2019, the only agreements made between the parties were with regard to a journey. It is regrettable that, as stated by her legal counsel in the proceedings, the mother has decided to take matters into her own hands by retaining the child here, for the moment without a court decision.

The fact that the father was actually exercising his right of custody continuously from March 2018 onwards is not a matter of contention between the parties.

In order to justify the claim that it had been agreed that the child was meant to be brought to the Respondent in Germany after the stay in the United States in May/June 2018, the Respondent would have to provide more in-depth statements. The notarial travel authorization submitted does not provide any information on this. Neither is the court able to comprehend why the mother once again handed over the child to the father in November 2018.

The retention of the child in Germany since the end of August 2019 has impeded the Applicant from

exercising his joint right of custody.

When the Applicant's application for return was received in December 2019, the time limit of one year as defined in Article 12 para. 1 HCAC had not yet expired.

Neither are there any exceptional circumstances as set out in Article 13 or Article 20 HCAC which would preclude a return.

In this context, it is to be emphasised that Article 13 is a provision on exceptions, which is to be interpreted restrictively [German Federal Constitutional Court, *FamRZ* 1999, 885]. In a departure from the principle of ex officio investigation, the conditions set out under Article 13 Hague Child Abduction Convention are to be presented succinctly and proven by the abducting parent. This has not been done here.

The return may only be refused in case of an unusually grave endangerment of the child's wellbeing [Nuremberg Higher Regional Court *FamRZ* 2004, 726; Hamm Higher Regional Court *FamRZ* 2013, 1238], if the integrity of the child to be returned is currently in danger – not just a future danger or imaginable danger – however not every endangerment is necessarily sufficient, nor can even a [desire to] put the child in a more favourable position [Bamberg Higher Regional Court *FamRZ* 1994, 182; Hamm Higher Regional Court *FamRZ* 2017, 1679]. Only grounds relating to the child's person him/herself can constitute exceptional circumstances. The only factors which may be taken into account are those which relate to the child him/herself [Hamburg Higher Regional Court 10 December 2008, 2 UF 50/08 -juris]. Such circumstances have not been stated here, nor are they apparent.

Neither consent nor subsequent acquiescence as defined in Article 13 para. 1 a HCAC was given by the Applicant. The Respondent does not claim [that he gave] explicit consent or acquiescence.

The conditions of Article 13 para. 1 b HCAC have not been fulfilled. According to this provision, the

return would not be allowed to take place if it were to entail a grave risk of exposing the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The aim[s] of the Convention, i.e. to maintain the child's living conditions, to ensure an appropriate custody arrangement in the original place of residence, and to serve as a deterrent against child abductions in general, indicate that the ordering of an immediate return is, in principle, something which can reasonably be expected [of the parties in question]. For this reason, not just any hardship justifies application of the exception clause. Rather, only unusually grave encroachments on the child's wellbeing preclude a return; said encroachments must be shown to be particularly significant, specific and current. Nothing has been submitted in this respect.

Ultimately, Article 13 para. 2 Hague Child Abduction Convention does not preclude a return either.

[Redacted] is 6 years old and has therefore not yet reached an age at which it could be assumed that he has sufficient understanding in order to develop his own will which would be pertinent so as to preclude a return. Such a will cannot develop until the age of 8 to 10 years.

In her submission, the guardian ad litem emphasised the good bond between child and father, as well as his appropriate behaviour during access. [Redacted] also mentioned the father to the court several times during the hearing.

The return decision will only become effective when it becomes final and binding.

The warnings relating to the coercive measures, as well as the authorization of the court bailiff to use force, are based on Section 44 IFLPA (*IntFamRVG*), and Section 90 *FamFG*.

The decision on costs is based on Sec. 81 *FamFG* in conjunction with Article 26 para. 4 Hague Child Abduction Convention.

The Respondent brought about the proceedings at hand and the associated costs as a result of her wrongful behaviour. For this reason, she must bear all the costs.

Remedies:

A complaint (*Beschwerde*) appeal shall be admissible against this decision; such a complaint appeal must be submitted in writing or dictated for the record at the registry of Pankow/Weißensee Local Court – Family Court within two weeks of the decision being announced in writing.

Local Court Judge

Delivered to the registry
on 3 February 2020.

Judicial employee
Clerk of the registry at the Local Court

This copy is confirmed to be true to the original, at Berlin, 3 February 2020

[seal] Judicial employee
Clerk of the registry at the Court Certified using machine processing and thus valid without bearing a signature