Translation from the German language

Official Copy

The order was
- delivered to the court registry on April 7, 2020
and thereby issued in accordance with Sec. 38 Subsec. 3 *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*).
Judicial employee as clerk of the registry at the Higher Regional Court

[crest]

Higher Regional Court

Order

Ref. No.: 16 UF 22/20 April 6, 2020

13 F 8440/19
Pankow/Weißensee Local Court

In the family matter

concerning the retention of the child [redacted]

born on [in handwriting: XX December 2013],

currently residing with the mother [redacted]
[redacted] Berlin,

Guardian ad litem:
Lawyer [redacted]

Further parties involved:
[redacted]

Mother, Respondent, and Complainant in the Appeal:
[redacted]
[redacted] Berlin,

Legal counsel:
Lawyer [redacted]

Father, Applicant and Respondent in the Appeal:
[redacted] U.S.A.,

Legal counsel:
Lawyer [redacted]

the 16th Division for Civil Matters of the Higher Regional Court, as the Chamber for Family Matters, represented by Presiding Higher Regional Court Judge [redacted] and the Higher Regional Court Judges [redacted] and [redacted], has, on April 6, 2020, decided:

1. The order of Pankow/Weißensee Local Court dated January 31, 2020 in the version of the rectifying order dated February 3, 2020 is hereby rectified due to a manifest typing error: The correct name of the Mother and Respondent is “[redacted]”

2. The complaint (*Beschwerde*) appeal lodged by the mother against the order named above is refused; the mother shall bear the costs of the proceedings.

3. The cost of the complaint appeal proceedings is EUR 5,000.

Reasoning

I.

The complaint (*Beschwerde*) appeal of the mother, which was received by the court on February 17, 2020 is directed against the order of Pankow/Weißensee Local Court which was served on her on February 13, 2020. The order obligates the mother to return the child [redacted] to the district of the place of residence of his father in the United States of America (hereinafter: USA). The reasoning provided by the Local Court was that the mother was wrongfully retaining the child [redacted] in Berlin following a visit. According to the court, the child's habitual residence had previously been with the child's father in the USA. In terms of the details, reference is made to the order which is the subject of the complaint appeal.

In her grounds for the complaint appeal, the mother states that the father, for his part, had wrongfully retained [redacted] in the USA. She says that the child's habitual residence had previously been in the Dominican Republic with family there. She also says that [redacted] is staying in Berlin with the consent of the father; not wrongfully. She says that returning the child would entail a complete breakoff of contact with [redacted], as she could not expect that the father [redacted] would bring the child to see her voluntarily. She, however, could not get a US visa, she states. She claims that due to the coronavirus pandemic, the US authorities would not allow [redacted] to travel to Germany for the purposes of a visit. Finally, a transfer of [redacted] would be associated with an unusually grave endangerment of the child's wellbeing, she claims.

The father defends the decision reached by the court of first instance and declares that he is prepared to receive [redacted] in Amsterdam for the journey back.

II.

The complaint appeal, which was submitted on time and fulfilled the requirements in terms of form, is not well-founded. The Local Court was right to obligate the mother to return [redacted] to the USA. Neither the grounds provided in the complaint appeal, nor the supplement in the statement dated 31 March 2020, give rise to any other assessment of the case.

1. In its correct reasoning, the Local Court reached the conclusion that before the journey made by the child's mother to Berlin in August 2019, [redacted]'s habitual residence as defined by Article 4 first sentence of the Hague Convention on the Civil Aspects of International Child Abduction (HCAC) had been in the USA with his father. It came to this conclusion in a convincing fashion, derived from a host of actual circumstances (see *Indizien für einen gewöhnlichen Aufenthalt Senat* (Indications of Habitual Residence, Court Chamber), *FamRZ* (*Zeitschrift für das gesamte Familienrecht* – Magazine on all Aspects of Family Law) 2018, 39). Reference is made to the arguments made on pages 8 and 9 of the grounds for the order.

2. The arguments given in the grounds for the complaint appeal relating to the living situation of [redacted] with the mother and her family in the Dominican Republic before his stay in the USA are, in legal terms, not relevant to the decision. In accordance with Article 4 first sentence Hague Child Abduction Convention, what is decisive is the child's place of habitual residence immediately before the custody or access rights violation from which the dispute arose. This place of residence was in the USA. This is not cast into doubt by the fact that the

child in question lived in the Dominican Republic at an even earlier point in time, and possibly had family and other social ties there.

Just as irrelevant for determining the place of habitual residence is the matter of which legal framework said social integration took place in. The notion [of habitual residence] relates to the facts of the case. The decisive aspect is the actual location of the centre of vital interest, and not the legality of the residence (see also Article 12 para. 2 Hague Child Abduction Convention: if, after one year has elapsed since the removal or retention of the child, it is established that the child has settled in to his or her new surroundings, then this constitutes an impediment to the ordering of a return – even if it was [the result of] wrongful [actions]). As such, [redacted]'s integration in the U.S.A. would not be called into question if – as the mother assumes – the father had, for his part, retained him wrongfully there.

3. The circumstances of the alternating long-term stays and visits of [redacted] in/to the Dominican Republic and the USA do not give the mother the right to retain the child in Germany as a form of self-redress, independently of any family court decisions issued in Germany.

a) As a rule, the mother cannot derive any right to retain [the child] on any legal basis other than the Hague Child Abduction Convention. The Convention provides a binding framework for rule-of-law-based proceedings with regard to the return of children who have been wrongfully removed to or retained in a Contracting State. In order to do so, it lays down conditions relating to substantive law and contains regulations on procedural law. If the parents accuse each other of wrongfully removing or retaining [child(ren)], proceedings may be instituted with regard to a return in the opposite direction, which require particular attention to be paid to the child's best interests (see German Federal Constitutional Court (*Bundesverfassungsgericht*), NJW 1999, 631). In the end, the proceedings under the terms of the Convention thereby guarantee that the competent family courts in the relevant countries are able to reach decisions on disputes relating to custody and access rights. This leaves no scope for parents to take decisions relating to the child's residence into their own hands.

b) No other conclusion can be reached on the basis of what has happened in this case. The mother cannot justify her current retention of [redacted] by indicating that the father had persistently misled her about the extent to which he was prepared to return the son to her after his stay in the USA, as a result of which, she claims, she had no basis on which to institute Hague Child Abduction proceedings against him. After the father did, in the end, let [redacted] travel to Germany to see her, the issue of potential Hague Child Abduction

proceedings in the opposite direction would no longer have arisen anyway. With regard to issues relating to custody rights and the right to determine the child's residence, the mother will have the right to call upon whichever family court is competent after the return has been completed. Inasmuch as she has, as yet, not done this, instead – as she stated herself – seeking help from organisations such as embassies, the police, the foreigners' office (*Ausländerbehörde*) and even a TV show in the USA, then these were unsuitable steps to take, as these organisations are clearly not competent for making decisions in family law matters. It provides no justification for taking the law into one's own hands.

c) What is more, following a one-week visit to the Dominican Republic in December 2018, [redacted] traveled back to the USA; it is clear that this was with the consent of the parents. This can hardly be reconciled with the claim of wrongful retention since the end of May 2018.

4. The representations made in the grounds for the complaint appeal (page 5 thereof), according to which [redacted] moved to Berlin from August 2019 onwards with the knowledge and oft-declared consent of the father, stand in direct and unresolved contradiction to the declarations made by the mother at the above-mentioned hearing at the Local Court. The notes on the session state: "When an access visit occurred in November 2017, we had, with the Applicant, a parent-to-parent conversation about the child moving to Germany. The Applicant vehemently rejected this." It is also stated: "In July 2018 I demanded the return of the child to me in Germany – a country which had good developments for me. The Applicant refused this."

5. The arguments made in the complaint appeal petition and in the statements dated 31 March 2020 do not justify the refusal to return the child in accordance with Article 13 para. 1 Hague Child Abduction Convention. The provision requires, in particular, proof that the return would entail a grave risk of exposing the child to physical or psychological harm or otherwise place the child in an intolerable situation.

That such a situation exists cannot be concluded on the basis of the arguments brought forward by the Complainant, upon whom the burden of providing explanations and proof lies (on the burden of proof, see *MüKoBGB* (*MüKoBGB: Münchener Kommentar zum Bürgerlichen Gesetzbuch* – Munich Commentary on the German Civil Code)/Heiderhoff, 7th edition 2018, Article 13 Hague Child Abduction Convention, margin no. 18 with further references). The argument that a return would lead to a complete breakoff of contact – which, after the indication given by the Appellate Court Division on 24 March 2020, was repeated in the statement dated 31 March 2020 – is immaterial to the proceedings under the

Hague Child Abduction Convention. Following a return, it is typical for the question to arise as to how access with the other parent will take place. This question is to be dealt with by the court which is competent at that point; not in the proceedings under the Hague Child Abduction Convention.

6. There are therefore no grounds for a renewed inquiry into the facts by way of a renewed hearing of the parties to proceedings and of third parties, as called for by the mother.

III.

The decision on costs has been made based on Art. 26 para. 4 Hague Child Abduction Convention.

This order cannot be contested, as per Sec. 40 Subsec. 2 sentence 4 IFLPA (International Family Law Procedure Act – Act to Implement Certain Legal Instruments in the Field of International Family Law – *Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts*).

issued
Berlin, 7 April 2020
[redacted]
Judicial Employee
[seal]