Translation from the German language

Certified copy

File number:
13 UF 67/20
181 F 390/19 Koblenz Local Court

[crest]

Higher Regional Court Koblenz

Order

In the family matter

[redacted] Madrid, Spain
– Applicant and Appeal Respondent –

Legal counsel: Lawyer [redacted]
[redacted] Madrid, Spain

vs.

[redacted], Trier
– Respondent and Complainant in the Appeal –

Legal Counsel: Lawyer [redacted]
[redacted] Luxembourg

Further parties involved:

Child:
[redacted], born on [redacted] March 2018

Guardian ad litem: [redacted] Andernach

Jugendamt (Youth Welfare Office):
Youth Welfare Office of Trier Municipal Administration, Eurener Straße 15, 54294 Trier, Germany

for handover of the child

The 13th Civil Chamber, 1st Chamber for Family Matters at Koblenz Higher Regional Court, as represented by Higher Regional Court Judge [redacted], Higher Regional Court Judge [redacted], and Local Court Judge [redacted], decided on 9 March 2020 as follows:

1. The complaint appeal [*Beschwerde*] lodged by the Respondent against the Order issued by Koblenz Local Court – Family Court dated 9 January 2020, File No. 181 F 390/19 is rejected to the extent that the return ordered under point I is to take place not to Madrid specifically, but to Spain.

2. The Respondent shall bear the costs of the appeal proceedings.

3. The value of the appeal proceedings shall be set at € 3,000.00.

The reasons for this are:

I.

The proceedings concern the return of the child [redacted] to Spain.

The respondent gave birth to the child on 15 March 2018. On 28 May 2018, the Applicant acknowledged, with the consent of the mother, paternity of the child, which was officially certified by the City of Trier Youth Welfare Office by deed of the same day.

On 8 July 2018, the family moved from Trier to Barcelona and soon after to Madrid, where they rented an apartment from 1 December 2018 and were added to the Residence Register on 18 October 2018. Furthermore, the child was enrolled at a local pre-school by the name of “Happyschool” for the 2019/2020 school year. The child also saw a doctor in Madrid on several occasions.

The Applicant and the Respondent separated in early September 2019. On 17 September 2019, the Respondent removed the child to Trier, against the Applicant’s express wishes as made known to her. The Applicant did not subsequently acquiesce to this.

In a motion dated 7 January 2020, the Respondent initiated proceedings at Trier Local Court contesting paternity; these proceedings have not yet been concluded

The Applicant applied at the court of first instance for the return of the child to Spain under the terms of the Hague Child Abduction Convention and for an order pertaining to enforcement. Explaining his reasoning, he stated that the child had been taken wrongfully to Germany. He

stated that the mother, in the past, had failed to take adequate care of the child and was incapable of doing so. He said he spent much of his free time with the child. For example, he went for walks with [the child] for two to three hours every day.

The Respondent contested this application. Explaining her reasoning, she stated that the Applicant had de facto not been exercising his rights of parental custody, as he had not been looking after the child. She claimed that he spent large amounts of time working, and what free time he did have he dedicated to playing video games. She claimed that he had frequent fits of rage and threatened, shoved and hit her. She said she was in a position to care for the child and visited two toddler groups with him. Furthermore, she was looking for a place at a daycare centre.

The Guardian ad Litem stated that, after one failed attempt at access, a second attempt at access between the child and father had been more successful. In her view, nothing stood in the way of [the child] returning to Spain, however, this should occur in the company of the mother. She also stated that she was in favour of [the child] living with the mother on a permanent basis.

The representative of the Youth Welfare Office also spoke in favour of [the child] being accompanied by the mother on the return, as this could otherwise result in the child, who needs both parents, being placed in an intolerable situation.

By order dated 9 January 2020, the Family Court ordered the return of the child to Spain in accordance with the application; this was accompanied by an enforcement order.

In its reasoning, the court stated that the father's joint rights of parental custody had come into being when the child's habitual residence was moved to Spain, as per Art. 14 (4) Hague Child Protection Convention (correction: Art. 16 (4) Hague Child Protection Convention), as Art. 154 of the Spanish Civil Code (*Código Civil*) (correction: Art. 156 *Código Civil*) provides for joint rights of parental custody regardless of marriage. It further stated that paternity being contested did not change anything with regard to the existing rights of custody, as the Applicant was still the legal father of the child. It stated that it was not possible to suspend the return proceedings until the issue of paternity had been clarified, as this would contradict the principle of expediency in the return proceedings. For this reason, the fact that the child was taken to Germany without the consent of the Applicant was wrongful, for which reason the child had to be returned to Spain under Art. 12 Hague Child Abduction Convention. None of the exceptions laid out in Art. 13 Hague Child Abduction Convention applied.

It was said not to have been demonstrated that the father had de facto not exercised his rights

of custody. Specifically, the court said that, from the way in which the child responded to its father, it could be seen that the opposite was the case. Furthermore, there would be no more damaging consequences to the child's physical and psychological wellbeing than those normally associated with a return, primarily because the mother was within her rights and could be reasonably expected to return with the child to Spain. Due to the young age of the child, it is not possible to ascertain that the child is against such a return.

The order was served on the Respondent on 17 January 2020. In a written submission dated 27 January 2020, received on the same date, the Respondent lodged a complaint appeal (*Beschwerde*) against this decision, requesting that the decision be overturned and the Applicant's applications be rejected.

She is of the view that the child has not established an habitual residence in Spain, as the child's primary place of abode remains in Trier, where the child has spent several extended periods while the father was working in the Netherlands. For this reason, she claims, the Applicant was not entitled to joint parental custody. Furthermore, she claims, that under Art. 9 (4) of the Spanish *Código Civil,* German law is to be applied to rights of custody for the child.

The Applicant is defending the decision made by the court of first instance. He regards the complaint appeal as delayed. Furthermore, he claims the testimony regarding the change of the place of residence to Spain as contradictory.

II.

The complaint appeal, which is otherwise admissible under the terms of Sec. 40 Subsec. 2 International Family Law Procedure Act (IFLPA – *IntFamRVG*) in conjunction with Secs. 58 et seq. Act on Proceedings in Family Matters (*FamFG*), has been unsuccessful in this matter.

1.

The Chamber is making a decision on the appeal, without hearing the parties as this is without foundation and so as to avoid unnecessary additional expenses. The Family Court heard comprehensive statements from all parties, including the Guardian ad Litem appointed to the child, as recently as 8 January 2020. The Chamber thus doubts – even taking into account the claim made in the appeal motion – that hearing the parties again would add anything new to its understanding and is thus dispensing with such.

a supprimé: ,

The court of appeal is not required, neither on the basis of German constitutional law, nor by

Art. 8 of the European Convention on Human Rights, to carry out a hearing in cases – such as this one – where the Local Court undertook all necessary investigations without legally significant error (see Federal Court of Justice, Family Law Magazine 2011, 805) and it has neither been presented, nor is it apparent to the court, what the benefit would be in terms of additional findings if a further oral hearing were held with the involvement of the parties (see Federal Constitutional Court, Family Law Magazine 2016, 1917, 1921 and European Court of Human Rights, Family Court Magazine 2018, 350). This is admissible even against the express will of one or more of the parties (Federal Court of Justice Family Law Magazine 2017, 1668).

The points of attack raised in the Respondent's appeal can be judged solely on the grounds of investigations carried out to date as well as the written statements of position. They do not hold water legally speaking.

2.

The Family Court was correct in both its decision and its reasoning to order the return of the child to Spain.

It was correct in its presumption that the Respondent is obliged under Art. 12 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 to return the child to Spain, because she had wrongfully taken it from there to Germany, and none of the exceptions set out in Art. 13 Hague Child Abduction Convention applies.

The complaint appeal is thus only successful as pertains to the part of the decision which orders the return of the child specifically to Madrid. This is because the decision to return the child can only order the return to the country the child had been living in prior to the abduction. This does not mean the precise geographical location at which the child was living before the abduction (see *Münchner Kommentar* on the Act of Proceedings in Family Matters/Botthof 3rd edition 2019, Art. 12 Hague Child Abduction Convention margin No. 13, order of the Chamber dated 19 February 2019, File No. 13 UF 676/18 juris and Family Court of Australia at Sydney, Case Murray v. Director, Family Services (1993) FLC 92-416, [1993] *FamCA* 103, 16 *Fam LR* 982 and https://www.incadat.com/en/case/113)

3.

The Hague Child Abduction Convention is substantively relevant in this case as it applies in both Spain in Germany.

4.

The scope of Art. 4 (1) Hague Child Abduction Convention is applicable as the child had its habitual residence in a state signatory prior to the potential violation of the rights of custody. In this respect, it is irrelevant whether the habitual residence of the child, as claimed by the Applicant party, was in Spain, or as claimed by the Respondent, in Germany, as both of these countries are states signatory to the Hague Child Abduction Convention.

5.

The removal of the child from Spain to Germany was wrongful as per Art. 3 Hague Child Abduction Convention as it represented a violation of the father's rights of custody and he would have exercised his rights of custody but for the removal.

a.

The Applicant is the father of the child. It is German law that decides upon the paternity of the child. Presuming that the child's habitual residence were established in Spain, Spanish law would apply as per Art. 19. (1) Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*). However, Art. 9 (4) sentence 1 of the Spanish *Código Civil* makes reference to the law of the place of habitual residence at the time parental responsibility was legally established. This was, both at the time of the birth and of the acknowledgement of paternity, in Germany. German law allows the matter to be referred back to German law, as per Art. 4 (1) sentence 2 of the Introductory Act to the German Civil Code. Accordingly, the Applicant is, as per Sec. 1592 No. 2 German Civil Code, the legal father of the child. He has officially acknowledged his paternity of the child in the form required. The mother's contestation of [his] paternity does nothing to change this, as he remains the legal father of the child until such time as it is established in law by a binding decision that he is not. The Family Court was correct, on the grounds of the principle of expediting proceedings under the Hague Child Abduction Convention, to deny a suspension of the return proceedings for the purposes of clarifying paternity.

b.

The Family Court was also correct in its presumption that the Applicant had acquired rights of parental custody under Art. 16 (4) of the Hague Child Protection Convention. Under the terms of this provision, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence, if the child's residence changes.

In this case, such a change of the child's habitual residence to Spain is, contrary to the views

of the Respondent, adjudged to have taken place.

While the lodging of the complaint appeal was not delayed on the part of the Respondent, as Sec. 115 Act on Proceedings in Family Matters does not apply to child custody matters, the appeal has no substantive foundation.

The term “habitual residence” under Article 16 is to be construed autonomously, i.e. without reference to the law in the states signatory (see BeckOGK/Markwardt, 1 January 2020, Hague Child Protection Convention Art. 5 margin No. 8, Hausmann, *Internationales und Europäisches Familienrecht* (International European and Family Law), 2nd edition, margin No. 421). In this context, the use of the term is to be considered in the sense of Art. 1 Hague Protection of Minors Convention (see Saarbrücken Higher Regional Court, *NZFam* (New Family Law Magazine) 16, 528) and other Hague Conventions relating to child custody and maintenance (Hausmann, ibid.). Furthermore, the precedent of the European Court of Justice and that of the member states’ courts concerning Art. 8 Section 1 of the Brussels II Regulation (see ECJ, *BeckRS* (Commentary on Precedent) 2011, 80085) and German legal practice in international contract and procedure law should be taken into account, because this is guided to a great extent by the provisions of the Hague Conventions (Karlsruhe Higher Regional Court, *NJW-RR* (New Legal Magazine – Precedent Report) 2015, 1415; Erman/Hohloch, Commentary on the German Civil Code, 15th edition., on Art. 24 of the Introductory Act to the German Civil Code, margin No. 17).

According to this, the habitual residence is the place where the child has their centre of vital interest, where he or she has his or her social, familial and educational connections (see ECJ, *BeckRS* (legal magazine) 2018, 24929, *BeckOGK*/Markwardt, 1.1.2020, Hague Child Protection Convention Art. 5 margin No. 8).

These factors should be determined by taking account of the entire circumstances, such as the duration, regularity and conditions of the stay in the territory of the contracting State, the reasons for the move to the contracting State, the child's nationality or nationalities and his or her linguistic knowledge (see *BeckOGK* ibid; ECJ, *BeckRS* 2011, 80085; ECJ *BeckRS* 2018, 24929; Hanke *FamRB* (Family Law Information Service) 2020, 39). In doing this, reference is to be made to the child’s circumstances and not generally to those of the parents, however, very young children naturally share the environment of parents they are dependent on (see ECJ, *BeckRS* 2011,80085; *BeckOGK* ibid).

In the case at hand, these circumstances show that the child has established an habitual residence in Spain.

This is based on a stay in Spain of more than a year, of which 10 months were spent in Madrid. While an habitual residence is not established by virtue of any specific time period, a stay of more than six months provides a clear indication that a habitual residence has become fixed (see *MüKoFamFG/Wiedemann*, 3rd edition, 2019, Hague Child Protection Convention, Art. 5 Rn. 12; Karlsruhe Higher Regional Court, *NJW-RR* 2015, 1415; KG, *BeckRS* 2015, 5918).

It should further be considered that the parents had planned to stay on a permanent basis, as manifestly demonstrated by the fact that they rented an apartment and registered their residence in Madrid (see ECJ, *BeckRS* 2011, 80085). The will to remain there is also expressed by the fact that they registered the child at pre-school.

This enrolment is a further indication of the child having been integrated into the social environment.

Another indication of a centre of vital interest having been established in Spain can be inferred from the fact that the child received medical treatment there, as can be seen from the medical history provided (file p. 63f).

An indication of integration into the familial and social environment in Spain is also indicated by the photographs (file p. 38 and 39) which show the child's birthday being celebrated in Spain with guests present.

It should also be taken into account that the parents, on the basis of a joint decision, moved to Spain and lived there for almost a year as a couple with the child.

The general picture painted by the factors mentioned above to establish an habitual residence in Madrid are not contradicted by the fact that the child, in this period, had several stays in Trier and was still officially registered with the local authorities as living there while the father was working in the Netherlands. This is because these stays were not intended to be permanent, a fact that is even referred to in the Respondent's testimony. According to this, it was clearly the case that it was intended that the child would stay in Trier on a temporary basis for as long as the father was in the Netherlands for work reasons. This is also shown by the fact that the parties always returned to the apartment in Madrid. The Respondent's testimony does not contain mention of any specific dates which would enable the assessment as to how much time the child actually spent in Trier. Nor does the fact that the apartment in Trier was kept detract from the establishment of an habitual residence in Madrid, as this is not dependent on the registration with the police; furthermore, the Respondent's testimony did not make any mention of the apartment in Trier being retained for the purposes of returning there.

Finally, the mere fact that the child possesses German nationality does not detract from an habitual residence having been established in Spain.

Nationality appears only to be a weak indicator of habitual residence in this case, given the fact that the parents are of different nationalities and that it is not unusual for individuals working for international employers to be living in a country other than that of their own nationality.

Under Art. 16 (4) Hague Child Protection Convention, the judgment as to parental custody following a move is made under the law of the state in which the child has established a new habitual residence. In this case, this is Spanish law.

Contrary to the Respondent's view, Art. 9 (4) of the Spanish *Código Civil* does not lead to parental custody being decided on under German law as this is the very provision that refers the law on the exercising of parental custody to the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

Under the applicable Spanish law, the parents are entitled to joint custody under Art. 156 (1) *Código Civil*. No distinction is made under Spanish law whether the children were born in or out of wedlock. Rather, Art. 108 (2) *Código Civil* states that matrimonial and non-matrimonial descent shall have the same effects.

The Family Court was correct in its presumption that the separation of the parents did not result in the revocation of the joint parental custody, as Art. 159 (1) *Código Civil*, which is analogous to Sec. 1671 German Civil Code, requires a decision by a judge.

The removal of the child to Germany on 17 September 2019 did not result in the loss of the Applicant's joint custody rights, because Art. 16 (3) Hague Child Protection Convention states that parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State.

d.

Accordingly, the Respondent should only have taken the child to Germany with the permission of the Applicant. This was not in place, in fact, the Applicant had even expressly spoken out against this, meaning that the Respondent's actions were wrongful.

6.

The Family Court was also correct to establish that the criteria for an exception under Art. 13 of the Hague Child Abduction Convention, which would lead to a return not being ordered, were not fulfilled.

In this context, the inconveniences and difficulties which are part and parcel of a return cannot be considered in the judgment. Only unusually severe threats to the child's wellbeing in individual cases can stand in the way of the aims of the Hague Convention; these must be especially significant, specific and current in nature (Federal Constitutional Court, *NJW* (legal magazine) 1996, 1402).

a.

When weighing up these reasons, the Family Court was correct to establish that the Respondent, upon whom the burden of proof lay as per Art. 13 Hague Child Abduction Convention, did not provide any proof that the Applicant was not actually exercising custody rights at the time to call upon the exemption as per Art. 13 (1) (a) of same; she thus has to accept the negative consequences of not having provided the proof required (see Hamm Higher Regional Court, order dated 22 December 2016, file No.: 11 UF 194/16 - juris, Rostock Higher Regional Court, order dated 4 July 2001, file No. 10 UF 81/01 - juris). There is no evidence in the file to support the allegations made by both sides towards the other that they had not looked after the child; this cannot be found in the file. The testimony of both parents seems, in light of the proceedings and the conflict between them, to have been embellished and implausible. Furthermore, the child's behaviour when with the father is an indication that the father has been taking care of the child.

b.

The Family Court was also correct to establish that Art. 13 (1)(a) clauses 2 and 3 of the Hague Child Protection Convention do not apply, as no prior permission or subsequent acquiescence was apparent on the part of the Applicant with regard to the child's removal to Germany.

c.

Nor can the presumption be refuted either, that the reason provided by Art.13 para 1b Hague Child Abduction Convention not to order the return does not apply here, as there are no threats to the child's physical and psychological wellbeing going beyond the stress associated with such a return for the child; the complaint appeal does not challenge this in any way.

In this context, while it is true that the Guardian ad Litem and the Youth Welfare Office are sceptical about any return without the mother, it is nevertheless reasonable to expect the mother to return to Spain with the child as she was the person who brought about the wrongful circumstances in the first place (see Bremen Higher Regional Court, Order dated 16 March 2017, File No. 4 UF 26/17 - juris).

She will thus also have to tolerate the associated inconveniences, such as the financial disadvantage or that caused by renting a new apartment (see ECHR, *FamRZ* (Family Law Magazine) 2007, 1527 et seq., Stuttgart Higher Regional Court, *NZFam* (New Family Law Magazine) 2019, 121).

Neither does the Respondent's testimony carry any weight that she was apparently threatened, shoved and hit in the presence of the child, as, although a parental conflict being carried out in front of the children can have a negative effect on the child's wellbeing, the Respondent is not obliged to return to live in the same household as the Applicant with the child (see Rostock Higher Regional Court, Order dated 15 April 2019 – 10 UF 212/18 - margin No. 45, juris).

d.

The Family Court was also correct to deny the existence of an exemption under Art. 13 (2) Hague Child Abduction Convention, as it is not possible to obtain the child's opinion on the topic of a return, given that the child is just under two years old.

Accordingly, the return of the child to Spain is to be ordered, and thus the complaint appeal was rejected.

7.

The decision on costs has been made as per Sec. 14 No 2 IFLPA, Art. 26 (4) Hague Child Abduction Convention and Section 84 Act on Proceedings in Family Matters. The Respondent shall bear the costs of proceedings of her unsuccessful appeal.

The value of the complaint appeal proceedings is set in line with Sec. 40, 45, Subsec. 1 No. 4 Act on Court Fees in Family Matters.

[redacted]	[redacted]	[redacted]
Higher Regional Court Judge	Higher Regional Court Judge	Local Court Judge

Issuance of the judgment (Sec. 38 Subsec. 3 sentence 3 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*FamFG – Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*)):
Submitted to the Registry on 11 March 2020

[redacted] *Justizinspektorin [German judicial title]*
as clerk of the registry at the Court

Certified

[Official seal of Koblenz Higher Regional Court]

[signature illegible]

[redacted], *Justizinspektorin* [German judicial title].

as clerk of the registry at the Higher Regional Court

Sprachendienst Bundesamt für Justiz
AVS-Nr.: 6337-2020