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United States District Court, D. Kansas.
IN RE: Application of Renate NICHOLSON, Petitioner,
v.
Patrick Owen NICHOLSON, Respondent,
No. 97-1273-JTM.

July 7, 1997.

MEMORANDUM AND ORDER

MARTEN, District Judge.

*1 On June 27, 1997, the court heard argument and evidence relating to petitioner Renate Nicholson's request for an order directing the return of a minor to her country of origin pursuant to the Convention on the Civil Aspects of International Child Abduction, Done at the Hague on 25 October 1980 (Hague Convention), and the International Child Abduction Remedies Act, 42 U.S.C. <section> 11601 (ICARA). Petitioner seeks return of the minor child, Marie Nicholson.

Both petitioner and the respondent, Patrick Nicholson, appeared at the hearing. Respondent appeared pro se. [FN1] Both petitioner and respondent testified at the hearing. For the reasons discussed herein, the court finds that an order of return is justified.

FN1. This hearing had been continued from two prior occasions. The first extension was granted by Judge Belot to allow respondent more time to prepare. A second extension was granted to allow respondent further opportunity to locate counsel.

Petitioner and respondent were married in Germany in 1985. Marie Nicholson was born December 12, 1986. Except for a period of approximately one year in 1989 when the couple moved to the United States, the Nicholsons lived in Germany until 1994. The Nicholsons lived in the United States from early 1994 until May of 1995, when Renate and Marie returned to Germany to visit her parents.

During this period, the couple experienced significant marital difficulties,

and at the end of June 1995, Renate decided to remain in Germany. Shortly after learning of this decision, respondent Patrick Nicholson traveled to Munster, Germany.

Respondent abducted Marie in October 1996, and brought her to the United States. At the time of the abduction, Marie had been living in Germany for a year and a half. At the time of the abduction, Renate Nicholson had custody of Marie. Due to the "emotion impact" of the separation between himself and Renate, Patrick Nicholson was unable to see Marie for more than about six hours once a month.

In the period immediately prior to the abduction, respondent's behavior grew erratic. Respondent beat a drum and shouted loudly outside Renate's residence. On another occasion, Renate was physically attacked. She was unable to directly identify her attacker, but subsequently identified a walking stick left behind by the attacker as one belonging to respondent.

Respondent made an appointment to visit Marie on October 27, 1996. Prior to this time, Renate had told respondent that she planned to file for a divorce. Respondent denies this, but admitted during the hearing that he knew "something was in the works." Respondent took Marie for a drive. Subsequently respondent twice called Renate's residence and left messages that he was on his way back with Marie. In fact, respondent was in the process of taking Marie with him to the United States.

Respondent has lived with Marie in this country since October 27, 1996. During this time he has refused to give Renate Nicholson either a telephone number through which she could speak directly with Marie, or a street address where she could write her. Instead, Renate was permitted only to contact her daughter indirectly by sending faxes to respondent's brother in Dallas, Texas.

*2 Renate Nicholson has obtained a temporary award of custody by a German court. A final divorce decree in Germany was expected to be issued on July 2, 1997. Respondent refuses to accept the impending termination of the marriage and indicates one of his motives for abducting Marie was to "save his family" by forcing petitioner to come and live with him in the United States.

Renate was forced to employ a private investigator to locate her daughter. At the time these proceedings commenced, Patrick and Marie Nicholson resided in Oxford, Kansas.

The general principles underlying claims of child abduction under ICARA and the Hague Convention were recently summarized by the Tenth Circuit in *Ohlander v. Larson*, 114 F.3d 1531, 1997 WL 291398 (10th Cir. June 3, 1997):

The Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), as implemented by both the United States Congress through the

International Child Abduction Remedies Act, 42 U.S.C. <section><section> 11601-11610 (1994), and Sweden, was adopted by the signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence." Hague Convention on the Civil Aspects of International Child Abduction, Dec. 23, 1981, Preamble, 51 Fed.Reg. 10494, 10,498 (1986). The Convention is meant to provide for a child's prompt return once it has been established the child has been "wrongfully removed" to or retained in any affiliated state. *Id.*, art. 1, 51 Fed.Reg. at 10498.

Under the Convention, a removal or retention is "wrongful" if:

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 removal or retention. *Id.*, art. 3, 51 Fed.Reg. at 10498. Once a removal is deemed "wrongful," "the authority concerned shall order the return of the child." *Id.*, art. 12, 51 Fed.Reg. at 10499. However, the Convention provides for several exceptions to return if the person opposing return can show any of the following: 1) the person requesting return was not, at the time of the retention or removal, actually exercising custody rights or had consented to or subsequently acquiesced in the removal or retention, *id.*, art. 13a, 51 Fed.Reg. at 10499, 42 U.S.C. <section> 11603(e)(2)(A); 2) the return of the child would result in grave risk of physical or psychological harm to the child, *id.*, art. 13b, 42 U.S.C. <section> 11603(e)(2)(A); 3) the return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," *id.*, art. 20, 51 Fed.Reg. at 10500, 42 U.S.C. <section> 11603(e)(2)(A); or 4) the proceeding was commenced more than one year after the abduction and the child has become settled in the new environment, *id.*, art. 12, 51 Fed.Reg. at 10499, 42 U.S.C. <section> 11603(e)(2)(B).

*3 Different standards of proof exist for the various defenses provided under the treaty. The respondent must establish the affirmative defense of settlement in a new environment for one year under Article 12 of the Hague Convention by a preponderance of the evidence. *Friederich v. Friederich*, 983 F.2d 1396, 1400 (6th Cir.1993); *Steffen F. v. Severina P.*, 966F.Supp. 922, 1997 WL 306461 (D.Ariz. Apr.16, 1997). In contrast, the human rights and grave risk of harm defenses under Articles 20 and 13 may only be established by clear and convincing evidence. *Id.* It is the function of the court not to determine custody of the wrongfully removed child, but simply to determine which of the contracting states under the Convention has jurisdiction to make this determination. *Friederich*, 983 F.2d at 1400; *In re Levesque*, 816 F.Supp. 662, 664 (1993).

The court finds petitioner has satisfied her burden under the Convention, having shown that at the time of the abduction she had custody of Marie and Marie's habitual residence was Germany. Habitual residence for purposes of the Convention, means "customary residence prior to the removal." *Friederich*, 983 F.2d at 1401. By October 1996, Marie had lived approximately 70% of her life in Germany. She had also lived there for the previous year and a half. In light of the facts presented, Germany was clearly the habitual residence of Marie Nicholson in October of 1996.

The court also finds respondent has failed to demonstrate the applicability of any of the defenses provided by ICARA. Since her removal in October 1996, Marie has not lived in the United States for more than a year and thus acquired a settled environment in this country. Renate Nicholson has not acquiesced in Marie's removal, but instead has vigorously attempted to protect and enforce her custodial rights. There is no evidence whatsoever that a return of Marie to the petitioner creates a risk of danger to her or is inconsistent with the human rights principles of the United States of America.

Respondent argues Marie should not be returned since she wishes to remain in the United States. Article 13(b) of the Hague Convention provides that a child need not be returned if the court finds "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views."

The child objection defense has been narrowly construed. See R. Nanos, "The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention," 22 *Brook. J. Int'l L.* 437, 448 (1996) (finding a "demonstrated disinclination by tribunals to defer to the child's objection as a basis for denying a Hague petition"). In *Tahan v. Duquette*, 259 N.J.Super. 328, 618 A.2d 486 (1992), the court ruled that the child objection defense "simply does not apply to a nine-year-old child." Courts have also refused to recognize certain types of objections. Thus, the defense has no application if the child's views have been influenced by an abductor, or if the objection is simply that the child wishes to remain with the abductor. See *Sheik v. Cahill*, 145 Misc.2d 171, 546 N.Y.S.2d 517 (1989); *In re S*, 2 All E.R. 683, 690 (C.A.1992).

*4 In the present case, the court need not determine whether Marie, who is now 10 years old, has reached the "degree of maturity" contemplated by the Hague Convention. The court spoke with Marie in camera and determined that she does not raise any substantial objection to returning to Germany. As with most children in her situation, she finds herself wishing the family could remain intact. She has indicated she loves both her parents and understands that both parents love her. She has stated she will miss whichever parent she is not living with; she will miss her puppy in Oxford if she returns to Munster; she will miss her rabbits if she remains in the

United States. The court finds respondent has failed to present evidence justifying application of the child objection defense under the Hague Convention or ICARA.

IT IS ACCORDINGLY ORDERED this 1997, that the request for order of return (Dkt. No. 1) is hereby granted.

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