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United States District Court,
N.D. Texas, Fort Worth Division.
Maude CLAUSIER, Petitioner,
v.
Robb J. MUELLER, Respondent.
No. 4:03-CV-1467-A.

April 27, 2004.

Mary Jo Earle, Law Office of Mary Jo Earle, Dallas, TX, for Petitioner.

Jeffrey N. Kaitcer, Loe Warren Rosenfield Kaitcer & Hibbs, Fort Worth, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

MCBRYDE, J.

*1 On April 27, 2004, came on for hearing the petition of Maude Clausier for return of Cyrus Anthony Mueller, a minor child (hereinafter "child"). Petitioner and respondent, Robb J. Mueller, appeared in person and by and through their respective attorneys of record. The court, having heard the testimony, the arguments of counsel, having accepted as true all of the facts set forth under the heading "List of Uncontested Facts" set forth in the pretrial order signed April 22, 2004, as well as other facts as stated on the record, and having considered the record and applicable authorities, makes the following determination.

Plaintiff seeks return of the child under the Hague Convention. She alleges that the child was wrongfully retained by respondent in the United States following an agreed visit.

In order to prevail, petitioner must establish, by a preponderance of the evidence, that the child was wrongfully retained within the meaning of the Hague Convention. 42 U.S.C. <section> 11603(e)(1)(A). To meet that burden, she must prove that (1) the child was "habitually resident" in France at the time respondent retained him in the United States; (2) the retention was in breach of petitioner's custody rights under French law; and (3) petitioner had been exercising those rights at the time of

retention. Miller v. Miller, 240 F.3d 392, 398 (4th Cir.2001).

The Hague Convention does not define "habitual residence." The courts have noted that there is no real distinction between ordinary residence and habitual residence. See Miller, 240 F.3d at 400 (citing cases). "A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the [retention]. The court must look back in time, not forward." Id. (quoting Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir.1993)). A child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose from the child's perspective. Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir.1995).

The determination of whether any particular place satisfies the standard focuses on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there. Id. The concept of habitual residence must entail some element of voluntariness and purposeful design. In re Ponath, 829 F.Supp. 363, 367 (D.Utah 1993). The conduct, intentions, and agreements of the parents during the time period preceding the retention are important factors to be considered, particularly where young children are involved. Bocquet v. Ouzid, 225 F.Supp.2d 1337, 1343 (S.D.Fla.2002). As one court has noted:

It is entirely natural and foreseeable that, if a child goes to live with a parent in that parent's native land on an open-ended basis, the child will soon begin to lose its habitual ties to any prior residence. A parent who agrees to such an arrangement without any clear limitations may well be held to have accepted this eventuality.

*2 Mozes v. Mozes, 239 F.3d 1067, 1082 (9th Cir.2001).

Here, the evidence establishes that the child's habitual residence prior to his retention by respondent was in France. Although the child was born in the United States and lived here for some period of time, his habitual residence changed gradually to France. Petitioner took the child to France with her as was her right under the Texas Family Code. Tex. Fam.Code Ann. <section> 151.001(a)(1) (Vernon Supp.2004); Thornlow v. Thornlow, 576 S.W.2d 697, 700 (Tex.Civ.App.--Corpus Christi 1979, writ dism'd). The child left the United States on August 22, 2000, and has continuously resided in France since that time. Petitioner did not abscond with the child for the purpose of taking advantage of the laws of France. Nor did she intend to secrete the child from respondent. Rather, petitioner had hoped that respondent would seek her out and that they would be able to reconcile their marriage.

Petitioner and respondent communicated by mail, email, and telephone. Respondent went to France three times to visit the child. By agreement, respondent brought the child to Texas for a visit in December 2001 and returned him to France in February 2002. Respondent appeared twice in court in Lyon,

France, for proceedings initiated by petitioner. He appeared in October 2001 and again on February 25, 2002. Respondent never lodged any objection to the proceedings there. Petitioner filed a divorce petition in France on July 30, 2002. Respondent was served in Fort Worth, Texas, with the petition on September 13, 2002. Respondent filed no response to the French divorce petition. On June 11, 2003, a French divorce order was entered. Prior to that time, the parties had agreed that respondent would have possession of the child from June through August, 2003. On June 15, 2003, respondent went to France and on June 16 brought the child with him back to Texas with the agreement that he would return the child to France in August 2003. Respondent instead kept the child and refused to return him. Petitioner immediately filed her application under the Hague Convention for return of the child.

Under French law, parental authority is exercised jointly by both parents. See unnumbered eighth page of Exhibit B to First Amended Petition for Return of Child to Petitioner; Bocquet, 225 F.Supp.2d at 1345. The retention of the child by respondent was in breach of petitioner's custody rights under French law. Bocquet, 225 F.Supp.2d at 1345. Petitioner had been exercising those rights at the time the child was brought to Texas in June 2003 by respondent.

Thus, petitioner is entitled to return of the child unless respondent has established one of four available defenses. 42 U.S.C. <section> 11603(e)(2). In this case, however, respondent is not urging the existence of any defense. Accordingly, because petitioner has established that the child was wrongfully retained by respondent within the meaning of the Convention, she is entitled to an order for return of the child. Any dispute over custody of the child is to be litigated in the place of the child's habitual residence, which is France. Friedrich v. Friedrich, 78 F.3d 1060, 1063 (6th Cir.1996); Journe v. Journe, 911 F.Supp. 43, 46-47 (D.P.R.1995).

*3 The court ORDERS that the child be returned in the company of petitioner to France and that any peace officer in the State of Texas or any federal officer is hereby commanded to enforce the instant order allowing petitioner to remove the child from the United States and to allow petitioner to accompany the child to France without interference.

The court further ORDERS that:

(1) by 6:00 p.m. on April 30, 2004, respondent deliver the child, along with the child's passport and the necessary ticket(s) for the child to accompany petitioner by plane from the United States to Paris, France, and further by train from Paris to Lyon, France, to petitioner at the address petitioner has provided; and

(2) respondent pay to petitioner the sum of $15,256.97, which is comprised of $10,140.00 as reasonable attorney's fees, $1,149.88 for expenses incurred by petitioner's attorney, and $3,967.09 in expenses incurred by petitioner in pursuing this action.