Daunis v. Daunis

C.A.2 (Conn.),2007.

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PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS
PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF
APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A
SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE
CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION:
"(SUMMARY ORDER)", UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE
WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE
AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST
FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE
SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE
ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND
THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED. Summary orders prior

to January 1, 2007 are subject to additional limitations. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Second Circuit Rule U.S.Ct. of App. 2nd Cir. s 0.23, 28 U.S.C.A. (Find CTA2 Rule 0.23)

United States Court of Appeals,Second Circuit.

Michael L. DAUNIS, Petitioner-Appellant,

v.

Laura A. DAUNIS, Respondent-Appellee.

No. 06-3518-cv.

March 15, 2007.

Background: Husband filed petition under the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA) requesting the return of his two children for custody proceedings in Italy, where he was stationed with the Navy, following his wife's removal of the children from Italy. The United States District Court for the District of Connecticut, following an evidentiary hearing, dismissed the petition. Father appealed.

Holding: The Court of Appeals held that parties possessed a shared intent that their habitual residence of their children was not Italy, but rather the United States, and thus District Court did not err in denying husband's request for the return of his children.

Affirmed.

West Headnotes

Child Custody 76D k 804

76D Child Custody

76DXI International Issues

76Dk804 k. Habitual Residence. Most Cited Cases

Parties possessed a shared intent that their habitual residence of their two children was not Italy but, rather, the United States, and thus district court did not clearly err in denying husband's request for the return of his two children for custody proceedings in Italy where he was stationed with the Navy; even though
children had resided in Italy for three years, they spent about half of that time in the United States, wife had presented a separation agreement wherein the parties had agreed that she would be the primary custodial parent and that the children would reside with her, and husband had filed for divorce and custody in Louisiana before wife left Italy with the children, thereby electing his forum in the United States.

*33 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the
decision of the district court denying the District Court denying the Hague Convention petition be affirmed.FN*

FN* Respondent filed a motion to dismiss on the grounds that this matter was
moot. We deny the motion.

Appeal from the District Court of Connecticut (Chatigny, J.).

Andrew D. Glasgow, Atlas Advocate International Law Firm, P.C., Pittsburgh, PA, for Petitioner-Appellant.

Erick M. Sandler, Day, Berry & Howard LLP, Hartford, CT (Michael P. Shea, on the brief), for Respondent-Appellee.

Present: Hon. JOSEPH M. McLAUGHLIN and Hon. RICHARD C. WESLEY, Circuit Judges,
Hon. WILLIAM K. SESSIONS, III, District Judge.FN**

FN** The Honorable William K. Sessions III, of the United States District Court of Vermont, sitting by designation.

SUMMARY ORDER

**1 Familiarity by the parties is assumed as to the procedural context and the facts, which we reference only as needed to explain our decision.

On May 8, 2006, Michael Daunis ("Michael") filed a Petition under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention"), Oct. 25, 1980, 51 Fed.Reg. 10498,19 I.L.M. 1501, and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. ss 11601-11611, with the United States District Court for the District of Connecticut. He requested that the court return his two children, Alana and Nathan (collectively the "Children"), for custody proceedings in Italy, where he was stationed with the Navy. His wife, Laura Daunis ("Laura") removed the Children from Italy on December
24, 2005.

Following an evidentiary hearing, based on its assessment of the credibility of Laura and Michael, the court dismissed Michael's*34 petition in an oral ruling, finding that Michael had not established that Italy was the Children's habitual residence.

To prevail on a Hague Convention child custody claim, a petitioner must establish by a preponderance of the evidence that: "(1) the child was habitually resident in one State and has been removed to ... a different State; (2) the removal ... was in breach of the petitioner's custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal." Gitter v. Gitter, 396 F.3d 124, 130-131 (2d Cir.2005) (citing 42 U.S.C. s 11603(e)(1)(A)).

First, a court must determine the child's habitual residence. To do this, the court determines the parents' (or other custodians') most recent "shared intent" regarding where the child should live by considering the parents' representations and actions. Id. at 134. "Normally the shared intent of the parents should control the habitual residence of the child," and if the parents agree about the habitual residence, a court will generally concur with them. Id. at 133-34. When the parents dispute the location of the child's habitual residence, the court must consider "the intentions of those entitled to fix the child's residence at the time those intentions were mutually shared." Id. at 133. The parties' shared intent is "a question of fact to which we defer to the district court." Id. at 132 (quoting Mozes v. Mozes, 239 F.3d 1067, 1076 (9th Cir.2001)).

Second, regardless of the intent of those entitled to determine the child's habitual residence, we must consider whether "the evidence points unequivocally to the conclusion that the child has become acclimatized to his new surroundings and that his habitual residence has consequently shifted." Id. at 133. To determine if a child has acclimatized, we must consider if "requiring return to the original forum would now be tantamount to taking the child 'out of the family and social environment in which its life has developed.' " Id. at 134 (quoting Mozes, 239 F.3d at 1081). Only in "relatively rare circumstances" will the child's acclimatization to a new location "be so complete that serious harm to the child can be expected to result from compelling his return to the family's intended residence." Id. As a result, courts should be "should be 'slow to infer' that the child's acclimatization trumps the parents' shared intent." Id.

**2 We review a district court's credibility determination regarding the parent's testimony about their shared intent for clear error. Id. at 135. Here, the Court concluded that "[b]ased on the testimony that has been presented ... the respondent's version of the key events should be credited and ... the petitioner, who has the burden of proof, has failed to sustain that burden because I think his version should not be credited." It credited Laura's testimony that there "was a written, signed, notarized Separation Agreement consistent with" a partial document she provided to the court, and found persuasive her claim that the Separation Agreement contained the parties' agreement that she would be the primary custodial parent and the Children would reside with her. The court also found that Michael had "as late as the fall of 2005, ... manifested his agreement that she would take the [C]hildren back to Connecticut to live."

The court noted that Michael had filed for divorce and custody in Louisiana before Laura left Italy with the Children, "thereby electing his forum, an election that is consistent with the United States being the habitual place of residence of these [C]hildren." While the Children did live in Italy three years, they spent about *35 half of that time in the United States, and Laura and Michael had "agreed to live abroad for a limited period of time ... and then return to the United States." As a result, the court concluded that Michael "failed to sustain his burden of proving that the habitual place of residence of the [C]hildren as of the time they were removed to the United States was actually Italy." Next, the Court determined that the Children had not been acclimatized to Italy "to any meaningful degree." Because Italy was not the habitual residence, the court held, Michael had not established the "'jurisdictional

predicate' required under the Hague Convention," and dismissed the case.FN2

FN2. The court did not reach the issues of whether the removal was in breach of Michael's custody rights or whether Michael was exercising his rights at the time the Children were removed. Gitter, 396 F.3d at 130-31.

In our view, the district court did not clearly err in finding that the parties' shared intent supported a finding that their habitual residence was not Italy or that the Children had not acclimatized.

Finally, Michael claimed that the District Court did not give him a fair hearing. Having carefully reviewed the record in this case, we conclude that this contention is without merit. The District Court granted Michael a full and fair hearing, which was properly expedited as required by the Hague Convention. See42 U.S.C. s 11601(a)(4).

For the foregoing reasons, the motion to dismiss is DENIED and the district court's decision dismissing the petition is AFFIRMED.

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