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United States District Court,
D. Alaska.
Artur LEBIEDZINSKI Petitioner,
v.
Iris CRANE, f/k/a Iris Lebiedzinski Respondent.
No. A03-0248 CV(JKS).

April 13, 2005.

ORDER

SINGLETON, J.

*1 Artur Lebiedzinski sued his former wife, Iris Crane, charging wrongful withholding of the parties' minor son, Artur Lebiedzinski, Jr. ("Artur, Jr.") under the Convention on Civil Aspects of International Child Abduction (the "Hague Convention") and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. <section><section> 11601-11610. Docket No. 1. After prevailing, Lebiedzinski moved for costs and attorney fees. Docket Nos. 37 (Mot.); 41 (Opp'n); 45 (Reply); 47 (Order). In opposition to the motion Crane contends that Lebiedzinski owes her substantial arrearage for amounts assessed against him in previous state court actions and that these amounts should be applied to offset any amount to which Lebiedzinski is entitled. The matter was initially referred to the Honorable Harry Branson, United States Magistrate Judge. Judge Branson held an evidentiary hearing on the matter and filed a report and recommendation. Docket Nos. 61 (Trans.); 62 (Initial R & R); 70 (Final R & R).

Following objections to his initial report and recommendation, Judge Branson submitted a final report and recommendation that incorporates the initial report and recommendation. Docket Nos. 62 (Initial R & R); 69 (Pet.'s Objections); 70 (Final R & R). In the report and recommendation Judge Branson recommends that Lebiedzinski be awarded \$37,978.05, less an offset of \$17,943.97, for a total award of \$20,034.08.

Lebiedzinski objects to the recommendation on three grounds. He argues that (1) offset of state court judgments against the amount due under this action is inappropriate because the actual amount due is uncertain and because doing

so subverts the purpose of the Hague Convention and ICARA; (2) the Court should allow reimbursement of costs for Lebie dzinski's criminal proceedings; and (3) the Court should not reduce the attorney fee award for administrative overhead or secretarial work. Docket No. 69. The objections are addressed in that order.

Having the full benefit of the hearing transcripts and Judge Branson's report, the Court respectfully agrees in part and disagrees in part with Judge Branson's recommendation, as set out more fully below.

DISCUSSION

Costs and fees are explicitly provided for under the Hague Convention and ICARA:

Any court ordering the return of a child pursuant to an action brought under section 11603 of this title shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, foster home or other care during the course of the proceedings in the action, and transportation costs related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

42 U.S.C. <section> 11607(b)(3). The purpose of shifting expenses to the abductor is both "to restore the applicant to the financial position he or she would have been in had there been no removal or retention, as well as to deter such conduct from happening in the first place." 51 Fed.Reg. 10494-01, 10511.

The only limitations on reimbursable expenses are that they be "necessary" and not "clearly inappropriate" and that they were incurred "during the course of the proceedings in the action." 42 U.S.C. <section> 11607(b)(3).

I. Offsets

*2 In referring this case to Judge Branson, the Court requested a recommendation of an award "expressly allowing any offsets to which Crane proves she is entitled." Docket No. 55. Judge Branson held a hearing to afford Crane an opportunity to prove entitlement to offsets. Docket No. 61. He recommends offsetting Lebie dzinski's cost award by amounts awarded to Crane in 1996 by Alaska Superior Court Judge Donald D. Hopwood on monetary claims arising from the parties' divorce. At that time Lebie dzinski was awarded sole legal custody of Artur, Jr. The judgment on money claims ordered Lebie dzinski to pay Crane the following sums: (1) child support of \$629.72 per month for the months of April and May 1996 and \$50 for the month of June; (2) spousal support in the amount of \$370.28 per month for the months of April and May, 1996 and \$600 for the month of June 1996; and (3) \$10,000 in attorney fees. Docket No. 62 at 9. The total amount awarded was \$12,650, with an interest rate of 10.5% per annum since June 1996. Interest brings the total amount due to \$29,101.44. To date Lebie dzinski has not paid any of this amount. Also, as part of the 1996 divorce decree, Crane was ordered to pay Lebie dzinski \$50 per month in child support. Id. at 11. Crane claims to have made two or three

payments, while Lebiezinski claims she has made none. Docket No. 61 at 40, 81. Crediting Crane for three payments and calculating interest, Judge Branson concluded that the amount Crane owes Lebiezinski in child support arrearage totaled \$11,157.47. Subtracting this amount from the amount Lebiezinski owes Crane as a result of the divorce proceedings, Judge Branson arrived at a total offset amount of \$17,943.97. Id. at 11.

Specific authority for offsetting an award of costs and fees under the Hague Convention and ICARA by amounts due under a prior judgment is apparently unavailable. When the Court referred this case to Judge Branson, the Court believed Crane should receive credit for offsets that she could prove she was entitled to. Further reflection convinces the Court that while the issue is close, allowing offsets would undermine the Convention's policies. The report and recommendation does not engage in a legal analysis of whether such an offset is appropriate before determining the amount of offset in this case, and the Court's referral order did not specifically call for such an analysis. The parties cite virtually no case law supporting or disallowing such a procedure. Indeed, the Court's independent research has yielded very little. However, the language and stated purpose of the Hague Convention and ICARA lead the Court to the conclusion that offsetting costs and fees due under ICARA by amounts due under a prior state court judgment is inappropriate. See also *Whallon v. Lynn*, 356 F.3d 138, 140 (1st Cir.2004) (declining to "use a fee award determination arising out of Hague Convention proceedings as a means of rectifying past violations of child support obligations" where a motion for reconsideration was filed over two years after the original opposition).

*3 The purpose of awarding costs and fees under the Hague Convention and ICARA, as noted above, is twofold. The first objective is "to restore the applicant to the financial position he or she would have been in had there been no removal or retention." 51 Fed.Reg. 10494-01, 10511. Thus the relevant starting time period for determining costs and fees due to an applicant is the time immediately preceding the wrongful removal. The Court's aim under the stated purpose of the Hague Convention and ICARA is to make Lebiezinski financially whole as if the wrongful removal had not occurred. It would be inappropriate in this action to attempt to weed through the imbroglio of debts that arose long before the wrongful removal occurred. Instead, the Court should only attempt to rectify the wrongful removal and retention of Artur, Jr., by awarding the sums arising from this proceeding.

The second stated purpose of awarding costs and fees under the Hague Convention and ICARA--deterrence--also supports the conclusion that offsets not be included in calculating the amount due to Lebiezinski. In this case were the Court to include offsets in the calculation, the deterrent aspect of the provision would be thwarted. Collecting judgments is complicated, particularly when one party resides in a foreign country. Prior to this action Crane had apparently made no attempt to collect the amount due to her as a

result of the 1996 judgment. Under the circumstances, allowing her to offset is the virtual equivalent of allowing her to benefit from the wrongful retention of Artur, Jr.

None of this is to say that Lebiezinski does not owe Crane money, as stated in the 1996 judgment. However, the Court will not facilitate the satisfaction of that judgment as a direct result of Crane's unlawful retention of the parties' son. Crane and Lebiezinski are free to pursue the respective amounts owed as a result of the 1996 judgment in the normal manner through state proceedings. Because offsetting prior debts from the award under the Hague Convention and ICARA does not serve the underlying purposes of the award provision, the Court will not offset the amount due from Crane to Lebiezinski as a result of the instant action.

II. Reimbursement for Related Criminal and Custodial Proceedings

In his cost bill, Lebiezinski included attorney fees and costs incurred in a criminal case arising out of his arrest in New York on an outstanding 1999 Alaska warrant for custodial interference, as well as subsequent Alaska state court custody proceedings. Judge Branson concludes that these costs are not recoverable in the instant action. Docket No. 62 at 12-15. Because the statute explicitly provides that recovery may only be had for "necessary expenses incurred by or on behalf of the petitioner ... during the course of the proceedings in the action," the Court agrees with Judge Branson's conclusion. See 42 U.S.C. <section> 11607(b)(3). The costs and fees awarded to Lebiezinski will not include expenses associated with the factually related criminal and custodial proceedings.

III. Reduction of Award for Administrative Overhead

*4 Judge Branson recommends eliminating "billings for what are clearly secretarial or administrative overhead." Docket No. 62 at 15. Lebiezinski objects to this determination, arguing that ICARA is not an attorney fees provision in the usual sense because its aim is to restore the petitioner to his/her financial standing before the wrongful retention of the child. Docket No. 69 at 4. The specific disputed billing costs arise predominantly from the work of paralegals with Mendel & Associates.

The Hague Convention and ICARA provide for reimbursement of "necessary expenses." 42 U.S.C. <section> 11607(b)(3). In defining "necessary expenses" under ICARA, at least one federal district court has determined that even where paralegal fees are generally recoverable, fees for work done by a clerk that appeared to be "ministerial and incidental to the preparation of the case" were not recoverable. *Freier v. Freier*, 985 F.Supp. 710, 712 (E.D.Mich.1997). *Freier* counsels against awarding fees associated with the work of non-attorneys as part of an attorney fees award. It is useful to note that the

express purposes of the fee shifting provision in ICARA is not cited or alluded to by the Freier court.

Arguments in favor of awarding the cost of work performed by clerks and paralegals include interpreting the statute broadly to better serve its deterrent purpose. Cf. *Holloway v. United States*, 526 U.S. 1, 9 (1999). In addition to serving the deterrent purpose, awarding the fees actually paid by the successful petitioner--including fees for work done by paralegals and clerks--goes further toward putting the petitioner back in the financial position he enjoyed before the wrongful removal and retention of the child. In this case, another supporting argument is that the total fees sought in connection with this action, including the paralegal and clerk fees, are very reasonable. Demonstrating the reasonableness of the fees is the fact that Crane's costs in defending this action were significantly higher than Lebiedzinski's costs. See Docket No. 61 at 31-32 (testimony by Crane that she spent \$66,291.53).

The question of whether Lebiedzinski's fees and costs award should include work done by paralegals and clerks is a very close one. On balance, the Court concludes that it is wiser to not follow the path of Freier and to include in Lebiedzinski's award the cost of work done by paralegals and clerks. Including paralegal and clerk costs in the total better effectuates the restorative and deterrent aims of the Hague Convention and ICARA. For the work associated with this case, including work by paralegals and clerks, the total recoverable attorney fees amount is \$26,877.96.

IT IS THEREFORE ORDERED:

The Court agrees with Judge Branson's conclusion that Crane has the resources to pay costs and fees to Lebiedzinski. Lebiedzinski is entitled to an award of \$38,848.80. The amount is the sum of the following costs and fees:

Attorney Fees	\$26,877.96

Plane Ticket From Kodiak to Anchorage,	\$240.35
1/1/04 For Artur, Jr. to be returned to Lebiedzinski. Pet.'s Ex. 7.	

Two plane tickets from Anchorage to Berlin,	\$1,270.00
1/30/04, for return home to Poland with Artur,	

Jr. Pet.'s Ex. 8.

Payless Car Rental, 8/2/03, while staying in \$147.55

Anchorage. Pet.'s Ex. 9.

Alamo Car Rental, 12/24/03, while staying in \$1,804.06

Anchorage. Pet.'s Ex. 10.

Executive Suite Hotel, 7/31/03, while staying \$136.19

in Anchorage. Pet.'s Ex. 11.

Sheraton Hotel, 1/30/04, while staying in \$6,344.40

Anchorage. Pet.'s Ex. 12.

Receipt for room rental, 3/17/04, while staying \$1,800.00

in Anchorage. Pet.'s Ex. 13.

Good Samaritan Counseling Center, 1/26/04, \$160.00

for child due to trauma of proceedings. Pet.'s

Ex. 14.

USPS Fee for National Center for Missing \$13.65

Children, 10/15/03, for documents needed for

cases. Pet.'s Ex. 15.

Office Max, 10/25/03, supplies to organize \$54.64

documents for case. Pet.'s Ex. 16. _____

TOTAL \$38,848.80

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