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(W.D.N.Y.))

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United States District Court,  
W.D. New York.  
Anke PRINZ, Petitioner,  
v.  
Keith FASO, Respondent.  
No. 03-CV-6653T.

May 12, 2004.

Amy B. Egitton, Scolaro, Shulman, Cohen, Fetter & Burstein, Syracuse, NY, for  
Petitioner.

David C. Boysen, Harris Beach LLP, Pittsford, NY, Richard L. DeValk, Zecher, Capacci,  
DeValk & Hendricks, P.C., Sodus, NY, for Respondent.

#### FINDINGS and CONCLUSIONS; DECISION and ORDER

TELESCA, J.

#### INTRODUCTION

\*1 Anke Prinz, ("Prinz") a German national and the mother of her infant son Oliver Faso, ("Oliver"), a citizen of the United States and Germany, brings this petition pursuant to the International Child Abduction Remedies Act, ("ICARA" or "the Act"), codified at 42 U.S.C. <section> 11601 et. seq., seeking the return of her son to Germany, and an Order confirming that Germany is the proper venue for the determination of the custody of Oliver. Specifically, petitioner contends that Oliver is a habitual resident of Germany, that he was wrongfully removed from Germany by his father Keith Faso, and that under ICARA, Oliver should be returned to Germany for the purpose of determining the future custody of Oliver.

Respondent Keith Faso, ("Faso"), a citizen of the United States, opposes Prinz' petition, and contends that Oliver was not wrongfully removed from Germany on grounds that Oliver was and continues to be a citizen, and habitual resident, of the United States. He claims that Oliver was never a habitual resident of Germany, and there was never any intention that Oliver become a habitual resident of Germany. Faso argues that the issue of Oliver's custody should be determined in the United States.

For the reasons set forth below, I find that Oliver Faso was not a habitual resident of Germany at the time he was removed from that country and returned to the United States. I therefore deny petitioner's request for an Order directing the return of her son to Germany, and dismiss the petition.

HEARING TESTIMONY On May 10 and 11, 2004, I held an evidentiary hearing pursuant to ICARA for the purpose of determining whether or not Oliver was wrongfully removed from Germany. At the hearing, petitioner testified on her own behalf, and introduced into evidence the deposition testimony of six additional witnesses. The respondent testified on his own behalf, and called six additional witnesses to testify in support of his contention that Oliver was not a habitual resident of Germany at the time Oliver was removed from Germany and returned to the United States. Additionally, each party introduced several exhibits into evidence. I have considered all of the relevant testimony and documentary evidence offered by the parties and their witnesses in making my determination.

#### FINDINGS AND CONCLUSIONS A. Factual Background

Anke Prinz and Keith Faso met in October 1997, when they both lived in Newton, Massachusetts. Shortly thereafter, the two began living together in Faso's apartment. Two months later, Prinz, a German national who was studying in Boston, returned to Germany to work on her PhD. Faso visited Prinz in March, 1998, and the two discussed marriage. In May, 1998, Faso returned to Germany, where the two planned a wedding in Denmark for the purpose of expediting the receipt of a "green card" which would allow Prinz to live and work in the United States. On June 12, 1998, the couple married in Denmark.

The couple remained in Germany until August 1998, at which time Faso returned to the United States. One month later, Faso traveled to Germany, and remained with Prinz until February, 1999.

\*2 In February, 1999, the couple returned to the United States, and again resided in Newton, Massachusetts. Prinz became employed at the Museum of Science in Boston in June, 1999. In October, 1999, Prinz returned to Germany to work in a laboratory where she had been doing research for her PhD. Prinz remained in Germany from October 1999 to January or February, 2000.

Prinz returned to Newton, Massachusetts in early 2000, and remained in the United States until December, 2002, with the exception of returning to Germany in June, 2000 to defend her PhD thesis, and in December, 2001, for a two-week vacation.

In October, 2000, Prinz learned that she was approximately three months pregnant. The couple thereafter bought a home in Williamson, New York. On April 24, 2001, Prinz gave birth to their son Oliver in Newton Massachusetts, where the

couple continued to reside despite having purchased the home in New York. In January, 2002, the couple moved to New York, where they resided with Keith Faso's parents pending renovation of their home. In June, 2002, the couple moved into their home, though the home was not completely finished.

In August, 2002, the couple planned a two-month trip to Germany. Prinz purchased round-trip tickets and arranged to leave at the end of December 2002, with a return date at the end of February, 2003. In October, 2002, however, Prinz became aware of a job opening at a university near her hometown in Germany. The two discussed the opportunity, and Faso agreed that if she applied for and received the position, they would move to Germany and try to live there. According to Faso, the couple agreed that if one of them was unhappy living in Germany, they would return to the United States. Prinz contends that they agreed that they would strive to work things out if Keith became unhappy living in Germany. Prinz applied for and did receive the job in Germany, which was to extend for two years.

Prinz and Faso testified that when they informed Faso's family that they would be moving to Germany, the family was told that the move was not permanent. Prinz testified that Faso asked her to tell his family members that the move would not be for a long period of time to avoid upsetting his close-knit family. Faso testified that he told his family the move to Germany was on a trial basis, and that if it didn't work out, they would return to the United States.

Before leaving for Germany, the couple decided not to sell or rent their home in Williamson, New York. Prinz contends that they intended to sell it, but only after renovations were complete. Faso testified that the house was not sold because the move to Germany was on a trial basis, and they would need the home if they decided to return to the United States. The couple also kept all three of their cars in the United States. Faso allowed his father to use his work truck, and either parked or intended to park one car at his sister's home in Newton, Massachusetts. The couple sold a boat previously owned by Faso's father that had been sitting behind a barn on the couple's property and received \$999.00.

\*3 Both Prinz and Faso testified that they retained a joint checking account in New York, along with some small investment accounts. Prinz indicated that they retained the checking account as a matter of convenience because it was accessible via the internet, and was linked to at least one loan that was automatically debited from the account. When the couple moved to Germany, Prinz established a separate bank account in her name only, and did not include Faso's name on the account. Faso testified that he had no bank accounts in Germany and that Prinz kept possession of the German account bank book.

The couple, along with their son Oliver, traveled to Germany with several suitcases, but did not ship items such as furniture, household goods, or

Faso's tools and equipment used in his work as a carpenter. Prinz testified that the cost to ship these items was prohibitive given the family's budget, but that they planned to ship those items in a large industrial shipping container. She testified that she had obtained quotes to move the family's large items prior to leaving for Germany.

Once the family arrived in Germany, they stayed in an apartment owned by Prinz' mother located above a bar owned and operated by Prinz' family. Prinz, Faso, and Oliver were registered as residents of the Town of Felsburg. Faso registered as a resident alien in Germany. Oliver was enrolled in a playgroup that met once per week for two hours, and Faso enrolled Oliver in a pre-school class that would begin in August, 2003.

The couple began their search for an apartment in the area, and according to the petitioner, they agreed on an apartment that had a basement area which Faso believed could be used as a workshop. In accordance with German custom, they signed a lease with an indefinite rental term, and agreed to move in once certain renovations were complete. Prinz testified that Faso participated in renovating the apartment by doing some painting. Prinz also testified that Faso had requested that old windows removed from the apartment be saved so that he could use them to make a playhouse for Oliver.

The couple moved into the apartment after April 1, 2003. Faso testified that by that time however, the marital relationship had substantially deteriorated, principally because he wanted to return to the United States, and Prinz wanted to stay in Germany. Faso testified he felt isolated in Germany because he couldn't speak German, and Prinz often failed to translate conversations for him. Faso also testified that Prinz had possession of his and Oliver's passports and had hidden them. He felt isolated and unhappy.

Sometime on or before April 14, 2003, Faso located his passport, as well as Oliver's, and after an argument with Prinz, unilaterally decided to take Oliver back to the United States. Faso left the family apartment under the pretense of going to make a phone call, but instead boarded a train, and ultimately arrived at an airport in Hamburg where he purchased round-trip tickets to the United States, and returned to the United States with Oliver. Neither Faso nor Oliver have returned to Germany since April 14, 2003. Both parties have commenced divorce and custody proceedings in their respective countries.

## B. Legal Standards under ICARA

\*4 The International Child Abduction Remedies Act was enacted by Congress in accordance with an October 25, 1980 Hague Convention Treaty. The Act provides for judicial review of a petitioner's claim that his or her child was wrongfully abducted from a foreign country and brought to the United States.

The Act allows a District Court Judge to consider the merits of the child abduction claim, but does not allow the District Court to determine the ultimate issue of a child's custody. Rather, the Act provides that a District Court Judge shall determine whether or not the child at issue was wrongfully abducted; where the issue of the child's custody should be determined; and where the child should be located pending the custody determination. 42 U.S.C. <section> 11603; See also, *Journe v. Journe*, 911 F.Supp. 43 (D.P.R.1995) (purpose of ICARA is to return children to their country of habitual residence for resolution of custody dispute); *Currier v. Currier*, 845 F.Supp. 916 (D.N.H.1994)(district court not authorized to resolve underlying custody dispute between parents who were parties to a petition filed pursuant to ICARA).

In evaluating a petition filed pursuant to ICARA, the court must determine, as a threshold matter, the location of the child's "habitual residence." Once the child's habitual residence is determined, the court must then determine whether or not the child was wrongfully removed from his or her habitual residence. A petitioner must establish by a preponderance of the evidence that the child was wrongfully removed. 42 U.S.C. <section> 11603(e). If the child was wrongfully removed from his or her habitual residence, the Act provides that the Court may order the return of the child to his or her habitual residence for the purpose of resolving any custody disputes.

#### C. The United States is the Habitual Residence of Oliver Faso

The determination of the habitual residence of child under ICARA is a question of fact. A survey of the case-law decided under the Act reveals that there are few general guidelines to be followed when determining a child's habitual residence, and that the ultimate determination of a child's habitual residence will be based on a totality of the circumstances, including, but not limited to, such factors as: where the child was born; the length of time spent in one location; where the child attends school; the intention of the parents with respect to their habitual residence; how well the child is acclimated to a particular location; and the nurturing and support received from family and primary caregiver.

In the instant case, I find that the balancing of relevant factors weighs in favor of a determination that the United States was Oliver's place of habitual residence at the time he was taken from Germany to the United States. Oliver was born in the United States, and except for a brief vacation in Germany, spent the first 19 months of his life in this country. See e.g., *Lops v. Lops*, 140 F.3d 927 (11th Cir.1998), rehearing denied, rehearing and suggestion for rehearing en banc denied 150 F.3d 1199, certiorari denied 525 U.S. 1158, 119 S.Ct. 1068, 143 L.Ed.2d 71 (holding that Germany was habitual residence of children despite fact that wife had lived with children in Belgium for four months prior to removal from Belgium, where children were born in Germany and

had lived there since birth); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir.1993)(Germany was habitual residence of child born in Germany to American mother serving in the United States military despite mother's intention to return to the United States with the child upon discharge from military service); *Freier v. Freier*, 969 F.Supp. 436 (E.D.Mich.1996) (Israel was habitual residence where, inter alia, parents had lived in Israel continuously for years prior to child's birth, child was born in Israel). While a child's place of birth and length of residency in a country is certainly not determinative of the issue of habitual residence, in this case, the birth place and length of residence provide some evidence tending to demonstrate that the United States is Oliver's place of habitual residence.

\*5 Without question, however, the parents of an infant child can relocate to a different country and establish a habitual residence in that country even if the child was not born in that country, and even if the parents and child have lived in the new country for only a short time. See e.g., *Brooke v. Willis*, 907 F.Supp. 57 (S.D.N.Y.1995)(England was habitual residence of child despite fact that child had spent less than two months in that country). Rather than mechanically applying such factors as the length of time spent in a country or the location of the child's birth, courts, when appropriate, look to the intent of the parents to determine the child's habitual residence. See *Brooke*, 907 F.Supp. at 61 ("place of habitual residence is determined more by state of mind than by any specific period of time...."; *Harsacky v. Harsacky*, 930 S.W.2d 410 (Ky.App.1996)(intention to bring family to United States for an indefinite period of time, combined with moving of possessions and interviewing for jobs demonstrated an intent to relocate family to United States).

When determining the intent of the parents, courts look to the shared intent to determine whether or not the parents intended to change their habitual residence. For example, in *Tsarbopoulos v. Tsarbopoulos*, 176 F.Supp.2d 1045 (E.D.Wash.2001), the court held that Greece was not the habitual residence of minor children removed from that country where only one parent intended that Greece be their habitual residence, and the parents did not share a common intention that Greece be their new habitual residence. In *In re McKenzie*, 168 F.Supp.2d 47 (E.D.N.Y.2001), the court held that Germany was the habitual residence of a minor child where one of the parents believed that a move to the United States would be on a trial basis, and that the family would return to Germany if one of the parties wanted to do so.

In this case, based on the testimony of the petitioner and the respondent, I find that the parties did not share an intent to establish Germany as Oliver's habitual residence. It is clear that the lines of communication between Faso and Prinz had broken down even prior to leaving for Germany, and that the two arrived in Germany with very different intentions and expectations. While Prinz may have understood the relocation to Germany to be permanent, or at

least indefinite, Faso believed that the parties had agreed that if either family member was unhappy in Germany, the family could and would return to the United States. Considering the totality of the evidence in the record, there is ample evidence to suggest that the move was made on a trial basis. The parties maintained their home in New York, maintained their New York bank and investment accounts, and maintained their automobiles in the United States. Many of the family's belongings remained in the United States. While the petitioner provided plausible explanations as to why the home was not sold, why large items were not shipped, why certain accounts were kept open, and why the couple maintained their vehicles in the United States, the fact that the parties maintained such substantial holdings in the United States indicates that there was an intent, at least on behalf of Faso, that the family could return to life in the United States immediately if any family member became disenchanted with life in Germany.

\*6 Furthermore, the fact that Prinz concealed from Faso the location of his and Oliver's passports, in an apparent attempt to prevent them from returning to the United States using the original return tickets, is not indicative of a common or shared intent to establish a habitual residence in Germany. Similarly, the fact that Prinz established a German bank account in her name only does not evince a joint resolution on the part of the couple to establish Germany as the family's habitual residence. Accordingly, I credit Faso's testimony that the move to Germany was to be on a trial basis, and find that from the time Oliver arrived in Germany to the time he was removed from that country, there was no shared intent on the part of his parents to establish Germany as his habitual residence. I therefore conclude that the United States was Oliver Faso's habitual residence at the time he was taken from Germany.

#### D. Oliver Faso was not Wrongfully Removed from Germany

ICARA provides in relevant part that a child is "wrongfully" removed from a sovereign country if the child is a habitual resident of that country, and is removed from that country in violation of one parent's custodial rights. Because I have determined that Oliver was not a habitual resident of Germany at the time he was removed from that country by his father, Oliver, as a matter of law, was not wrongfully removed from Germany for purposes of ICARA.

**CONCLUSION** For the reasons set forth above, I find that Oliver's habitual residence at the time he was returned to the United States from Germany in April, 2003, was the United States. Accordingly, because Oliver was a habitual resident of the United States, he could not have been, as a matter of law, wrongfully removed from Germany.

My determination that Oliver Faso was not wrongfully removed from Germany is of course, relevant only to this proceeding and has no bearing on the underlying issue of Oliver's custody, which remains to be decided. I am

confident that a court in this jurisdiction will be able to reach a fair and just resolution with respect to Oliver's custody, and that Ms. Prinz will not be prejudiced by having custody determined in this country rather than in her home country. New York State courts have a long and considered history of respecting the custodial rights of parents regardless of their nationality. I therefore have no doubt that Oliver's best interests will be considered paramount in the pending state-court custody proceeding, and that each of the parties' rights in that proceeding will be respected, protected, and enforced.

ALL OF THE ABOVE IS SO ORDERED.