RENDERED: July 9, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000224-MR

BIANCA SOUCY — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 98-CI-01384

STEPHEN S. SOUCY III — APPELLEE

OPINION
REVERSING AND REMANDING WITH DIRECTIONS

** ** ** ** **

BEFORE: KNOPF, McANULTY, and MILLER, Judges.

MILLER, JUDGE: Bianca Soucy (Bianca) brings this appeal from a December 30, 1998, order of the Hardin Circuit Court. We reverse and remand with directions.

The relevant facts are these: Bianca is a citizen of Germany. Appellee, Stephen S. Soucy III (Stephen), is a citizen of the United States and a career soldier in the U.S. Army. The parties met while Stephen was stationed in Germany and married in Denmark in March 1992. Some time thereafter, Stephen was notified that he would be transferred to the United States for duty in Georgia. The couple moved to the States, where their

child, a son, was born in May 1994. It appears the child possesses both American and German citizenship. Bianca obtained a visa to work in the United States and a Georgia driver's license. Stephen contends the couple's intent was to remain in the U.S. indefinitely.

In December 1996, Stephen was to begin serving a one-year tour of duty in Korea. As Bianca and the child were not permitted to join him, they moved in December 1996 to Bremen, Germany, to be with Bianca's family. The record indicates that Bianca rented an apartment in February 1997. During leave in July 1997, Stephen visited his family for 30 days in Germany. At that time, Bianca claims that she informed Stephen of her intent to live separately from him and to remain with the child in Germany. Since August 1997, the child has attended school in Germany and has received medical care from military installations. Sometime in 1997, the record reveals that Bianca and the child visited Stephen in the States. In January 1998, Bianca refused to move to the States with Stephen. On August 7, 1998, Stephen arrived in Bremen, Germany, to visit the child. During the visit, Stephen requested permission to take the child for a 14-day visit to the United States. The parties apparently agreed that the child would be returned to Bianca in Germany on August 26, 1998. On that day, Bianca waited in vain at the airport for the child's return. Stephen later telephoned Bianca to inform her of his intent to keep the child in the States.

On September 3, 1998, Stephen filed a petition for dissolution of marriage in the Hardin Circuit Court and requested

custody of the child. In response, Bianca entered a "Special Appearance to Defend on Jurisdiction Venue and the Hague Convention," contending that pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* October 25, 1980 (Hague Convention), the child should be returned to Germany for custody determination. Under Hague Convention provisions, Bianca claimed that the child's habitual residence was in Germany and that Stephen was wrongfully retaining custody of the child. Thus, she argued, the child should be forthwith returned to Germany. Bianca also pointed out that a German court had concluded that the child was wrongfully abducted under the Hague Convention and should be returned promptly to Germany. Stephen countered that the child's return was not compelled under the Hague Convention. Stephen maintained that the United States was the child's state of habitual residence and, as such, his retention of the child was not wrongful. The court ultimately agreed with Stephen and concluded that under the Hague Convention the United States was, in fact, the child's habitual residence; thus, the child's retention was not wrongful. This appeal followed.

Both Germany and the United States are contracting States to the Hague Convention, which was implemented in the United States by Congressional enactment of the International Child Abduction Remedies Act 42 U.S.C. §§ 11601 et seq. The primary purpose of the Hague Convention is 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** . . . . " (Emphases added.) Hague Convention, Preamble. Parties to the Hague Convention consider that

> the removal of a child by one of the joint holders without the consent of the other is wrongful, and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

Levesque v. Levesque, 816 F. Supp. 662, 664-665 (D. Kan. 1993), (quoting Elisa Perez-Vera, Explanatory Report by Elisa Perez-Vera, *in* 3 Actes et documents de la Quatorzieme session 426, 447-48 (1982)).[1]

The Hague Convention requires a child wrongfully removed from his habitual state of residence to be returned unless a narrow exception applies. Hague Convention, Articles 1, 3, 4, and 13. Under the Hague Convention, the removal or retention of a child is wrongful where

[1]Elisa Perez-Vera was the official Hague Convention reporter. Her Explanatory Report is recognized as the official history and commentary on the Hague Convention.

> *(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 the removal or retention.
>
> The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, Article 3. Bianca has the burden of proving by a preponderance of the evidence that the retention was indeed wrongful. 42 U.S.C. §11603(e)(1). If Bianca meets this burden, thereafter Stephen bears the burden of proving that one of four narrow exceptions apply:

> 1) by clear and convincing evidence that there is a grave risk that the return of the child would expose the child to physical or psychological harm; Hague Convention, Article 13*b*, 42 U.S.C. § 11603(c)(2)(A); 2) by clear and convincing evidence that 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"; Hague Convention, Article 20, 42 U.S.C. § 11603(e)(2)(A); 3) by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child has become settled in its new environment; Hague Convention, Article 12, 42 U.S.C. 11603(e)(2)(B); or 4) by a preponderance of the evidence that . . . (Bianca) was not actually exercising the custody right at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; Hague Convention, Article 13*a*, 42 U.S.C. § 11603(e)(2)(B).

Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993). As a judicial authority in the State of refuge, our role is to determine the merits of the abduction claim but not the merits of the underlying custody claim. See Friedrich, 938 F.2d 1396.

For the child's retention to be considered wrongful, Bianca must specifically establish by a preponderance of the evidence that (1) Germany is the child's habitual residence and (2) she was exercising parental custody rights over the child at the time of the removal or that she *would have* exercised her parental rights but for the removal under the law of the child's habitual residence. We shall first address whether the United States or Germany is the child's habitual residence.

The circuit court concluded that the United States was the child's habitual residence and, thus, Stephen's retention of the child was not wrongful. We disagree. We are of the opinion that Germany was the State of the child's habitual residence. The Hague Convention does not define the term *habitual residence*. The term was intentionally left fluid and undefined. See Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410 (1996). It is well understood, however, that *habitual residence* should not be equated with *domicile*. To determine habitual residence, the courts must look to

> 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. We further believe that a determination of whether any particular place satisfies this standard must focus 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. (Emphasis added.)

Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995).

The term *settled purpose* has been elucidated as follows:

> The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. **All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled**. (Emphasis added.)

Levesque, 816 F. Supp. at 666 (quoting In Re Bates, No. CA 122/89, High Court of Justice, Family Division Court, Royal Court of Justice, United Kingdom (1989)).

The facts indicate that the child and his mother had been living in Germany from December 1996 to August 1998, a period of approximately two years. The child attended kindergarten in Germany, and his mother and he lived in an apartment in Germany. It also appears that in July 1997 Bianca and Stephen at the least experienced marital difficulties. In January 1998, the parties' marriage was irretrievably broken. For approximately two years, it is undisputed that the child's environment was centered in Germany. We believe the child's

residence in Germany achieved "a sufficient degree of continuity" so as to constitute a settled purpose to remain there. Indeed, one can glean from the record that such settled purpose was shared by both Bianca and Stephen. The mere fact that Stephen agreed to return the child to Germany after a short visit to the United States evidences this settled purpose. Upon the whole, we are compelled to conclude the evidence overwhelmingly points to Germany as the child's habitual residence. Having so concluded, we shall now address whether the child's removal contravened Bianca's custody rights under German law.

In *Amtsgericht Bremen-Blumenthal Geschäfts-Nr.* 72a F 0528/98 [Circuit Court Bremen-Blumenthal], a German Court determined that the child's removal violated Bianca's custody rights because (1) German Civil Code §1687 1 Sub. 2BGB, granted Bianca, as the parent with whom the child habitually resided, authority and jurisdiction to exclusively decide matters of the child's daily life, and (2) the parties had entered an oral agreement that the child be returned to Germany after a short visit to the United States. We, therefore, believe Stephen's removal of the child contravened Bianca's custody rights under German law.

In sum, we hold that Bianca has proved by a preponderance of the evidence that Germany is the child's habitual residence and that his removal violated her custody rights under German law. As such, we think the child's retention in the United States is wrongful under Article 3 of the Hague Convention.

Even if the child's retention were indeed wrongful, Stephen seeks to thwart the child's return to Germany by relying upon an exception found in Article 13 of the Hague Convention:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that
>
> . . .
>
> *b* there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Stephen specifically alleges that Bianca has used marijuana in the child's presence and "has demonstrated an unwillingness to find employment." The evidence offered by Stephen to support the marijuana allegation is, at best, scant. In any event, we do not believe these allegations rise to a level sufficient to support a claim of grave risk to the child under Hague Convention, Article 13*b*. We simply are unpersuaded that the evidence clearly and convincingly establishes that the child's physical or mental well being would be jeopardized by his return to Germany. See Freier v. Freier, 969 F. Supp. 436 (E.D. Mich. 1996).

We view Stephen's remaining contention centering upon the Uniform Child Custody Act without merit.

Upon remand, we direct that the circuit court order the child forthwith returned to Germany. We hold that Stephen should bear all costs associated with the child's return. Hague Convention, Article 26.

For the foregoing reasons, the order of the Hardin Circuit Court is reversed, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Michael L. Boylan
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Paul Musselwhite
Radcliff, KY