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[22/11/2000; United States District Court for the Northern District of Illinois, Eastern Division; First Instance]
Janzik v. Schand, 22 November 2000, United States District Court for the Northern District of Illinois, Eastern Division; First Instance]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

November 22, 2000

Before: Darrah, D.J.

In re application of U. Janzik (Petitioner) v. S. Schand f/k/a S. Wanner (Respondent)

Counsel: For petitioner: Jeffrey Robert Platt, Rolwes & Platt, Chicago, IL. For respondent: Pro se, Winnetka, IL, Robert H. Dachis, Chicago, IL.

MEMORANDUM OPINION AND ORDER

DARRAH, D.J.: Petitioner, U.J., currently residing in Germany and a German citizen, filed a Petition for Access Under Article Twenty-One of the Hague Convention against respondent, S.S., currently residing in Winnetka, Illinois and a United States citizen, requesting that he be allowed access to his son, M.W., for four days, November 25, 1999 through November 28, 1999. Currently before the Court is the Court's sua sponte issue regarding whether the federal court has jurisdiction over petitioner's claim.

I. BACKGROUND

Petitioner and respondent had a son during their marriage, born January 5, 1989. Pursuant to an agreement reached as part of their divorce in July 1993, petitioner was granted the following right of access to their son: "The father's right of access to the child shall be provisionally arranged in such a way that he has the right to see the child twice a year and be with him for at least one full day." The agreement granted sole custody of M.W. to respondent who resides with M.W. in Winnetka, Illinois.

In October 1999, petitioner, then residing in Germany, filed in federal court a Petition for Access Under Article Twenty-One of the Hague Convention (Hague Convention on the Civil Aspects of International Child Abduction, done Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, reprinted in 51 Fed. Reg. 10,498 (Convention)), as adopted by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. s. 11601, et seq., seeking the right of access to his son from November 25, 1999 through November 28, 1999. In July 2000, the Court found that it appeared that it lacked subject matter jurisdiction over the case and allowed petitioner time to file a memorandum addressing the Court's jurisdiction.

II. ANALYSIS

This Court first need address whether petitioner's claim should be dismissed as moot because petitioner's requested dates of access have past. Petitioner's claim is not dismissed as moot because it is capable of repetition yet evading review. Petitioner's action was too short in its duration to be fully litigated prior to its expiration, and there is a reasonable expectation that he would file a similar petition that would subject the parties to the same action and require this court to address if it has jurisdiction. See Spencer v. Kemna, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). Furthermore, this Court recognizes the need to resolve custody and visitation issues in a timely manner so not to impede on the parent-child relationship and protect the interest of the child.

Under the ICARA, state and federal district courts have concurrent original jurisdiction over actions arising under the Convention. 42 U.S.C. s. 11603(a). Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements organizing or securing effective exercise of rights of access may do so by commencing a civil action by filing a petition for relief in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 42 U.S.C. s. 11603 (b).

Article 12 of the Convention addresses the wrongful removal or retention of a child and allows commencement of proceedings "before the judicial or administrative authority of the Contracting State where the child is [located]." Hague Convention, art. 12, 51 Fed. Reg. at 10,499. Wrongful removal or retention, as used in the Convention, "include a removal or retention of a child before the entry of a custody order regarding that child." 42 U.S.C. s. 11603(f)(2). Whereas, "rights of access" mean visitation rights. 42 U.S.C. s. 11602(7). Article 21 addresses the rights of access, stating: "An application to make arrangements for organizing or, securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting State in the same way as an application for the return of a child." Hague Convention, art. 21, 51 Fed. Reg. at 10,500. In addition, the Convention does not preclude a person claiming a breach of custody or access rights from directly applying to the judicial authorities for relief under other applicable laws. Hague Convention, arts. 18, 29, 34, 51 Fed. Reg. at 10,499-501; State Department Legal Analysis of Convention (State Department), 51 Fed. Reg. 10,514.

In Bromley v. Bromley, 30 F. Supp. 2d 857 (E.D. Penn.) the district court dismissed a petition seeking access rights, finding that it did not have subject matter jurisdiction over claims for right of access. After reviewing Article 21 of the Convention, the court found that the Convention did not provide a remedy for obstacles to rights of access absent a "wrongful" removal of a child. Bromley, 30 F. Supp. 2d at 860. The court found additional support for its holding in the State Department's legal analysis of the Convention which addressed remedies for breach of access rights. The State Department found: "'Access rights,' which are synonymous with 'visitation rights', are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights are those enunciated in Article 21 and do not include the return remedy provided by Article 21." State Department, 51 Fed. Reg. 10,513. The Bromley court concluded that when "the Respondent has legal custody of the children and has neither 'wrongfully' removed or retained them from the country of their habitual residence, there is no cause of action under the Convention." Bromley, F. Supp.2d at 861.

This Court agrees with the Bromley holding. Article 21 states that a petition is to be presented to the Central Authority; it does not provide for presentation to the judicial authority as found in Article 12. Hague Convention, arts. 12, 21, 51 Fed. Reg. at 10,499-500.

The State Department's analysis of the remedies for violations of rights of access further supports this finding. In addition, in its analysis of the "Central Authority", the State Department found: "In addition to creating a judicial remedy for cases of wrongful removal and retention, the Convention requires each Contracting State to establish a Central Authority with the broad mandate of assisting applicants to secure the return of their children or the effective exercise of their visitation rights." State Department, 51 Fed. Reg. 10,511. This conclusion further supports the conclusion that the Convention created a judicial remedy for cases of wrongful removal, not rights of access. See also Viragh v. Foldes, 415 Mass. 96, 612 N.E.2d 241, 247 (Mass. 1993) (finding "the Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access").

Here, as in Bromley, respondent has legal custody of M.W., and there are no allegations he was wrongfully removed or retained from the country of his habitual residence (Illinois). Therefore, there is no cause of action under the Convention, and the petition is dismissed for lack of jurisdiction.

The Court notes that its finding may appear to leave petitioner without recourse, but it does not. The Convention does not preclude the petitioner from filing a claim for visitation rights in state court under the state's visitation statute. See Hague Convention, arts. 18, 29, 34, 51 Fed. Reg. at 10,499-501; 750 ILCS 5/607. In addition, petitioner may file a petition with the Central Authority pursuant to the Convention to aid in his request to visit with M.W. Hague Convention, art. 21, 51 Fed. Reg. at 10,500.

Petition dismissed.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
