

FILED
07 JUL 94
Clerk, U.S. District Court
Central District of California
Santa Ana Office

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE THE APPLICATION OF)	SA CV 94-452 AHS (BWRX)
SHELLEY STARK BROWN,)	
Petitioner,)	
v.)	FINDINGS OF FACT AND
ORANGE COUNTY DEP'T OF)	CONCLUSIONS OF LAW
SOCIAL SERVS. et al.,)	
Respondents.)	

The matter came on for hearing as noticed by Petitioner on June 27, 1994, and June 30, 1994. The Court, having considered the evidence presented and heard the arguments of counsel, issued its Order this date dismissing the Petition and now enters findings of fact and conclusions of law in addition to those set out in the Order.

In formulating these findings and conclusions, the Court has read and considered the proposed findings and conclusions lodged by all parties, which shall be maintained in the file.

FINDING OF FACTS

A. HABITUAL RESIDENCE

1. Shelley Stark Brown moved to Austria with respondent Brown in 1986 and she has returned to live there when not traveling abroad or visiting her family in California.
2. Shelley Stark Brown returned to California in December 1990 for the purpose of giving birth to Shoshana Brown in the United States. Shoshana B-own was born in California on January 16, 1992.
3. Shelley Stark Brown, John Lindsey Brown, and Shoshana Brown left California on February 9, 1992, and returned to Europe and Austria.
4. Shelley Stark Brown and Shoshana Brown visited California

for the period from September 9, 1992, to October 9, 1992. This was a temporary absence from Austria and did not change Shoshana Brown's habitual residence from Austria to California.

5. On November 15, 1992, Shoshana Brown was removed from Austria and taken to Australia by John L. Brown. Shoshana Brown was returned to Austria on December 24, 1992. This period of time was found by the Australian court to be a wrongful removal of Shoshana Brown and did not change her habitual residence from Austria to Australia.

6. On December 18, 1992, the Australian Court found that Austria was the habitual residence of Shoshana Brown pursuant to Art. 3 of The Convention.

7. On December 24, 1992, Shelley Stark Brown and Shoshana Brown returned to Austria from Australia.

8. On December 9, 1993, Shelley Stark Brown and Shoshana Brown came to California for a family visit.

9. On January 5, 1994, Shoshana Brown was taken from Shelley Stark Brown by the Orange County (California) Department of Social Services (DSS), which has retained Shoshana Brown in its custody or supervised her care in the custody of others ever since.

10. The retention by DSS did not change the habitual residence of Shoshana Brown from Austria to California.

B. RIGHTS OF CUSTODY

11. According to Art. 144 of the Austrian Civil Code, both parents of a child born in wedlock are entitled to care for the child, to administer his/her property, and to act as legal representatives of the child (joint parental responsibilities).

12. On November 19, 1992, Shelley Stark Brown commenced an action for the custody of Shoshana Brown in Austria.

13. On November 19, 1992, the Austrian Court granted Shelley Stark Brown interim custody of Shoshana Brown under Austrian law.

14. On December 18, 1992, an Australian court found that Shelley Stark Brown had a right of custody of Shoshana Brown under Austrian law pursuant to Arts. 3 and 5 of The Convention.

15. John L. Brown has appeared in the Austrian juvenile action for custody of Shoshana Brown by virtue of his petitioning the Austrian Court for sole custody of Shoshana Brown.

16. John L. Brown appeared in the Austrian juvenile action by petitioning the Austrian court to disqualify the Austrian judge on March 3, 1994.

17. The California Juvenile Court Petition was filed by the DSS on or about January 10, 1994.

18. Shelley Stark Brown filed an ex parte application to dismiss that action, citing the Hague Convention, on or about January 21, 1994.

19. Trial began in the Juvenile Court on or about January 31,

1994.

20. On or about March 28, 1994, while trial continued, the Austria court issued its final order granting Shelley Stark Brown sole custody of Shoshana Brown.

21. On or about April 5, 1994, the Juvenile Court issued an order that the child should be declared a ward of the court for the reasons cited in its minute order, of which this court has taken judicial notice, as stated in today's Order.

22. On or about April 14, 1994, Shelley Stark Brown served the Juvenile Court with a Notice of Wrongful Retention and asked the court to abate its action until a ruling could be obtained on a Petition brought pursuant to The Convention.

23. No petition relating to this alleged wrongful retention was filed in any court until the one filed in the District Court on May 11, 1994.

24. The Juvenile Court judge issued a formal Statement of Decision on May 31, 1994, which ruling is now on appeal through the state courts.

25. Under Austrian law, Shelley Stark Brown has had sole custody of Shoshana Brown ever since the interim order issued on November 19, 1992.

C. REMOVAL OF THE CHILD

26. Shoshana Brown was removed from Shelley Stark Brown on January 5, 1994, by the DSS.

27. The DSS has had the care, custody and/or control of Shoshana Brown since January 5, 1994.

28. On February 9, 1994, the DSS released Shoshana Brown to the custody of her paternal grandmother and John L. Brown.

D. ARTICLD 13 OF THE CONVENTION

30. Clear and convincing evidence has been presented to this court that the return of Shoshana Brown to Austria would expose her to physical and psychological harm and otherwise place her in an intolerable situation.

CONCLUSIONS OF LAW

31. Austria is the habitual residence of Shoshana Brown within the meaning of Art. 3 of The Convention.

32. Shelley Stark Brown has had a right of custody of Shoshana Brown within the meaning of Arts. 3 and 5 of The Convention.

33. The retention of Shoshana Brown by the DSS from January 5, 1994, to the present time is a wrongful retention within the meaning of Art. 3 of The Convention.

34. The retention by DSS and/or John L. Brown and the paternal grandmother since February 9, 1994, to the present time is a wrongful retention within the meaning of Art. 3 of The Convention.

35. Shoshana Brown should not be returned to Austria because she falls under the Article 13(b) exception to the Convention.

36. The DSS is a "person" within the meaning of 42 U.S.C. 11602(5).

37. The DSS is a "respondent" within the meaning of 42 U.S.C. 11602(5) and/or 42 U.S.C. 11607(b)(3).

38. The DSS has shown that an order for it to pay fees and costs pursuant to 42 U.S.C. 11607(b)(3) is clearly inappropriate.

39. The California Superior Court, Juvenile Division, is not personally liable for fees and costs.

40. John L. Brown is not liable for fees and costs pursuant to 42 U.S.C. 11607(b)(3).

41. Since clear and convincing evidence was presented to show that the return of Shoshana Brown to Austria would expose her to physical and psychological harm and otherwise place her in an intolerable situation, her return to Austria is not required pursuant to Art. 12 of The Convention.

The Petition is therefore dismissed.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of these Findings of Fact and Conclusions of Law on all counsel of record.

Dated: 07 Jul 1994

/s/ Alicemarie H. Stotler

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

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IN RE THE APPLICATION OF)
SHELLEY STARK BROWN,)
Petitioner,)
SA CV 94-452 AHS (BWRx)

v.

ORANGE COUNTY DEP'T OF
SOCIAL SERVS. et al.,

Respondents.

ORDER DISMISING PETITION
FOR RETURN OF CHILD TO
HABITUAL RESIDENCE

I. FACTUAL BACKGROUND

This case centers on Shoshana Rae Brown, the two-and-a-half-year-old daughter of petitioner Shelley Stark Brown and respondent John Lindsey Brown. Shoshana was born on January 16, 1992, in Newport Beach, California. A few weeks thereafter, she was taken to Europe by her parents. She spent the next seven months there, remaining in Austria for at least three of those months. In August or September of 1992, petitioner and the child traveled to Orange County, California, to visit petitioner's relatives there.

In September 1992, respondent Brown discovered some photographs in a dresser in the apartment in Austria where he and his wife were staying. These photographs, which petitioner now concedes she took, featured a naked Shoshana, at age five or six months, posed in various positions with two separate naked men, at least one of whom was sexually aroused. In several pictures, Shoshana's genitals are touching the genitals of one of the men; in others, Shoshana appears to be touching a man's erect penis or placing her head between a man's spread legs. Petitioner returned to Austria with Shoshana in October. On November 15, 1992, respondent Brown took Shoshana to Australia, where he is a citizen (he is also a British citizen), seeking to win custody of her there. Instead, on December 18, 1992, the Family Court of Australia ordered the child returned to Austria in the custody of her mother pursuant to the Hague Convention. In the meantime, in November 1992, petitioner had won temporary custody in an Austrian court in "emergency" proceedings in which respondent Brown did not participate and of which he apparently received no notice. Petitioner was awarded permanent custody by the Austrian court in March 1994, after proceedings in which respondent Brown did participate.

Shoshana and her mother returned to Austria on December 24, 1992. For the next year or so, petitioner and the child resided primarily in Austria, although they apparently took several trips elsewhere because petitioner's visa allowed her to stay in the country for only 90 days at a time.

On or about December 9, 1993, petitioner took Shoshana to Orange County, California, to visit her relatives. Respondent Brown found out about the trip and traveled to California himself. He contacted the Costa Mesa police and showed them the pictures of Shoshana his wife had taken. Both the Costa Mesa police and the Orange County Department of Social Services determined the photographs to be pornographic, and as a result the child was taken from the mother by the Department of Social Services on January 5, 1994. Shortly thereafter, social workers assigned to the case determined that there was substantial risk that the child would continue to be sexually abused if she were returned to her mother.

On April 5, 1994, Judge David Velasquez of the Orange County Superior Court, sitting as a Juvenile Court, found that by clear and convincing evidence Shoshana faced a grave risk of sexual abuse from her mother. He issued a disposition order declaring the minor a dependent of the court. On May 31, 1994, Judge Velasquez issued a Statement of Decision in the case, which petitioner here has now appealed to the state court of appeal.

II. PROCEEDINGS IN THE DISTRICT COURT

On May 11, 1994, Shelley Stark Brown filed a Petition for Return of Child to Habitual Residence (Austria), which was brought pursuant to the Hague Convention on Civil Aspects of International Child Abduction ("the Convention") and the International Child Abduction Remedies Act (ICARA). On the same date, she also filed supporting documents and memoranda. On June 10, 1994, respondent John Lindsey Brown filed his opposition to the petition. On June 14, 1994, respondent Orange County Department of Social Services filed its opposition. On June 20, 1994, petitioner filed her reply. On June 27, 1994, the Court heard oral argument on the matter, at which time it ordered supplemental briefing and reset the matter for further hearing on June 30, 1994.

On June 29, 1994, all three parties filed additional briefing as well as proposed Findings of Fact and Conclusions of Law. After hearing additional oral argument on June 30, the Court took the matter under submission.

By this Order, the Court concludes that the minor child should not be returned to her habitual residence because, for the reasons later discussed, she would be placed in an "intolerable situation" there.

III. DISCUSSION

This matter is governed by the Hague Convention, which is implemented by the ICARA, 42 U.S.C. 11601 et seq., an international treaty whose "fundamental purpose . . . is to protect children from wrongful international removals or retentions." 51 Fed. Reg. 10494, 10504 (1986) (legal analysis). The United States became a signatory to the Convention in July 1988; Austria became a contracting State in October 1988.

A. Evidentiary Issues.

As a preliminary matter, the Court notes that Article 30 of the Hague Convention provides that very lax evidentiary rules apply to proceedings brought pursuant to it: "Any application submitted to . . . the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto . . . shall be admissible in the courts . . . of the Contracting States."

Accordingly, the Court overrules respondent Brown's evidentiary objections. The Court takes judicial notice of all prior orders, opinions and decisions of other courts submitted in connection with this matter, both state and foreign, of the portions of the state court record that have been supplied to the Court.

Although Article 30 does not by its terms apply to documents submitted in opposition to petitions brought pursuant to the

Hague Convention, the Court applies the same expansive rules of admissibility in ruling upon petitioner's evidentiary objections in light of the Convention's stated goal of an expedited, summary review process. The Court therefore overrules all of petitioner's evidentiary objections except as to the following: Paragraph 2(g), (h), (i), (k) of respondent Brown's declaration; Paragraph 7(d), (e), (f) of Dr. Rogers' declaration.

B. Claim and Issue Preclusion

After a 12-day trial in which 10 witnesses were called, Judge Velasquez of the state Juvenile Court declared Shoshana a dependent of the court and placed her in the custody of the Department of Social Services; Shoshana was subsequently released to the custody of her father and paternal grandmother under the supervision of the DSS. Petitioner had a full and fair opportunity to participate in those proceedings: she was represented by counsel, called witnesses, presented evidence. On several occasions, petitioner raised her arguments concerning the Hague Convention to the Juvenile Court, orally and in writing, although she never actually filed a petition pursuant to the Convention in that court. The parties agree that a state court is a court of competent jurisdiction for filing a petition.

Article 17 of the Convention provides that "[t]he sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention." Petitioner argues that this means that no claim or issue preclusion should apply here as to the California Juvenile Court's decision. The Court notes, however, that technically the Juvenile Court proceedings did not concern the ultimate "custody" of the child as between the mother and father, but rather Shoshana's immediate welfare. The proceedings were initiated by the State of California to determine whether the child should be declared a dependent of the court; they were not brought by one or the other of the parents to determine custodial rights. As Judge Velasquez recognized in his Statement of Decision, the central issue before him was not "whether custody of the minor should be vested in either the mother or the father" but rather "whether or not the minor needs to be protected against either or both parents from abuse."

Further, as previously noted, petitioner had a full and fair opportunity to participate in the state court proceedings, and yet she did not formally submit notice of a wrongful retention to the state court pursuant to Article 16 of the Convention until April 14, after Judge Velasquez had issued his disposition order and fully three months since the start of the California court battle. See *Meredith v. Meredith*, 759 F. Supp. 1432 (D. Ariz. 1991) (considering petitioner's opportunity to participate in earlier court proceedings as one factor weighing toward dismissing petition brought pursuant to the Hague Convention).

The interests underlying the doctrines of claim and issue preclusion are undeniably weighty and are much in evidence here, particularly those of judicial economy and final resolution of a claim. The United States District Court is at least the third court in California, albeit the first federal one, that has been called upon to consider the issues in dispute among these parties.

The federal courts have traditionally adhered to the related

doctrines of claim preclusion and issue preclusion. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. The one general limitation repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (citing *Montana v. United States*, 440 U.S. 147 (1979)). Here, it seems that the same parties are appearing and that they all had a full and fair opportunity to litigate the issues raised by the Petition. Respondent goes so far as to argue that findings on each and every issue were also resolved against petitioner in the state court proceeding.

Ultimately, however, the Court need not rest its ruling on any finding of claim or issue preclusion because it independently determines that the return of the child to Austria is not warranted under the Hague Convention.

C. Wrongful Retention

In order to invoke the Hague Convention and the ICARA, as a threshold matter petitioner bears the burden of showing by a preponderance of the evidence that 1) Austria is the habitual residence of the child, and 2) she was exercising parental custody rights over the child at the time of the retention under the laws of the child's habitual residence. *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993). If petitioner can establish these two things, then the retention in question was wrongful pursuant to the Hague Convention. *Currier v. Currier*, 845 F. Supp. 916, 920 (D.N.H. 1994).

1. Habitual Residence

Neither the Convention itself nor the ICARA actually defines "habitual residence." However, it is clear from the stated purposes of the Convention that habitual residence is to be determined solely by looking at where the child lived prior to the allegedly wrongful retention; the residence of the parents is irrelevant, as is where the child has lived since the retention. To consider where the child has lived since the removal or retention would be to reward the abducting parent and would contravene the goals of the Convention. Thus, this Court is concerned only with where Shoshana resided prior to January 1994.

"Habitual residence must not be confused with domicile." *Friedrich*, 983 F.2d at 1401. Ties that are strong enough to establish legal residence, such as the possession of a passport issued by a certain country or a permanent address there, do not necessarily translate into habitual residence. Here, it is clear that both Shoshana and her mother have substantial and significant legal ties to the United States in general and California in particular. However, it is equally apparent that despite the peripatetic nature of her young life, Shoshana actually spent the majority of her first two years in Austria. Any future intent on the part of one or both parents to someday return to the United States to live permanently is irrelevant for the purposes of our determination of habitual residence. *Id.*

Further, the Court notes that both the Austrian and the Australian courts considering the issue found that Shoshana was a habitual resident of Austria. The Australian court, which, if

anything, might be expected to be biased in favor of respondent, a citizen of that country, stated in its December 1992 opinion that "the child's habitual residence immediately prior to her removal was Austria." Between December 1992 and January 1993, when the wrongful retention alleged here took place, the child was, according to both parents, living primarily in Austria. Thus, the child's habitual residence did not change in the intervening year between the Australian decision and the retention here.

Finally, the Court notes that in an incident report prepared by the Costa Mesa police in January 1994 based upon an interview with respondent Brown, the police officer wrote, "[Brown] resided with [petitioner] and his daughter in Vienna, Austria" See Respondent Orange County's Opp., Ex. A at 19. This would seem to be an admission by respondent Brown that the child was a resident of Austria.

For the foregoing reasons, the Court concludes that the habitual residence of Shoshana Rae Brown at the time of the allegedly wrongful retention in question here was Austria.

2. Custody Rights

The Court must next determine whether at the time of the retention petitioner was exercising valid custody rights under the laws of Austria. It seems clear that for the purposes of the Convention, she was. "Very little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child." 51 Fed. Reg. at 10507.

Here, at the time of the retention, petitioner had been awarded temporary custody of Shoshana by an Austrian court. She was also taking "physical care of the child." Thus, the Court finds that petitioner was exercising parental custody rights over the child at the time of the retention under the laws of the child's habitual residence.

D. Grave Risk

Once petitioner has established that a wrongful retention has taken place, the Court must order the child's return to her place of habitual residence forthwith unless respondents can show by clear and convincing evidence that to do so would subject the child to a "grave risk" or otherwise place her in an "intolerable situation." Art. 13(b); 42 U.S.C. 11603(e)(2)(A).

The legal analysis to the Hague Convention contained in the Federal Register stresses that the Article 13(b) exception is a very narrow one. The potential harm to the child must be not merely serious but actually "grave." The Court notes, however, that the one example of an Article 13(b) exception presented in the legal analysis applies here:

An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it

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against further victimization, and
the abusive parent then petitions for
the child's return under the
Convention, the court may deny the
petition.

51 Fed. Reg. at 10510. Here, the Orange County Juvenile Court found that petitioner has subjected her child to sexual abuse. Although Article 17 states that certain court decisions shall have no preclusive effect in proceedings brought pursuant to the Hague Convention, the article affirms that "the judicial authorities of the requested State may take account of the reasons for that decision in applying this Convention." The Court notes that the Vienna Juvenile Court Aid reached the same conclusion, that petitioner had subjected Shoshana to sexual abuse by taking the photographs. Further, the Austrian court did not have before it subsequent evidence of potential continuing sexual abuse that has been considered both by this Court and the Juvenile Court. Petitioner does not deny that during her stay in Orange County immediately preceding the retention of the child, she took Shoshana to visit her sister, who was required to register with the Child Abuse Registry for allowing her own children to be sexually molested by a male boarder. And an examination of Shoshana by a nurse after her retention revealed two small anal tears, which, while possibly innocent, may be the result of some form of sexual abuse.

Accordingly, the Court finds that Shoshana should not be returned to her habitual residence, where petitioner has been awarded custody of her, because she would be placed in an "intolerable situation" there pursuant to Article 13(b) of the Hague Convention.

IV. CONCLUSION

For the foregoing reasons, the Court dismisses Shelley Stark Brown's Petition for Return of Child to Habitual Residence (Austria).

The Court's Findings of Fact and Conclusions of Law are separately filed this date. Copies thereof shall be served on all counsel of record.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order on all counsel of record.

Dated: 07 Jul 1994

/s/ Alicemarie H. Stotler

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE