

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

JC [REDACTED] A,
Petitioner,

CASE NO.

vs.

JC [REDACTED],
Respondent.

**VERIFIED PETITION FOR RETURN OF MINOR CHILDREN TO PETITIONER
AND PETITION FOR IMMEDIATE ISSUANCE OF SHOW CAUSE ORDER TO
RESPONDENT**

The Convention of the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980; International Child Abduction Remedies Act, 42 U.S.C. 11601, et seq.

COUNT I – JURISDICTION

1. This Petition is brought pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980¹ (hereinafter the “Hague Convention” or “Convention”), and the International Child Abduction Remedies Act² (hereinafter “ICARA”). The Convention came into effect in the United States of America on July 1, 1988, and was also ratified between the United States of America and Spain.

2. The objects of the Convention are as follows: (1) to secure the immediate return of a child wrongfully removed or wrongfully retained in any Contracting State; and (2) to ensure that right of custody and of access under the law of one Contracting State are effectively respected in other Contracting States. Convention, Art. 1.³

¹ T.I.A.S. No. 11,670, at 1, 22514 U.N.T.S. at 98, *reprinted in* 51 Fed. Reg. 10493 (1986).

² 42 U.S.C. 11604 et seq. (1995). ICARA was created to deal with the sudden abduction of children and to allow a petitioner to assert his or her right in exigent circumstances. See Distler v. Distler, 26 F. Supp. 2d 723, 727 (D.N.J. 1998).

³ As has been stated by other courts addressing Hague cases, the Convention therefore authorizes a federal district court to determine the merits of the abduction claim but does not allow it to consider the merits of any underlying custody dispute. Morris v. Morris, 55 F. Supp. 2d 1136, 1160 (D. Colo. 1999)(recognizing the “[p]ursuant to Article 19 of the Convention, [this Court has] no power to pass on the merits of custody”); see also Currier v. Currier, 845 F. Supp. 916 (D. N.H. 1994) citing

3. This Court has jurisdiction pursuant to 42 U.S.C. §11603 – 11610 (1995), and because this case involves the wrongful retention of children under the age of sixteen (16) from their habitual residence of Spain in the United States of America.⁴ However, the Court only has jurisdiction to determine the rights under the Convention and not the merits of any underlying child custody claim. 42 U.S.C. §11601(b)(4).⁵

4. The United States of America has been a Contracting State under the Hague Convention since July 1, 1988. Spain is a Contracting State under the Convention.

COUNT II – PETITIONER’S RIGHT TO CUSTODY AND STATEMENT OF FACTS

5. Petitioner and Respondent were married September 11, 2003 in Venezuela, and moved to Spain in January 2013. A true and correct copy of the parties’ Marriage License is attached hereto as Exhibit A.

6. During the course of the marriage, two children (the children subject to this action) were born, to wit: P.J.D., born October 20, 2005, and R.N.D., born April 30, 2008. Copies of the children’s Birth Certificates are attached hereto as composite Exhibit B.

7. At the time of his application to the Central Authority of the United State of America, Petitioner was located in La Orotava, Tenerife on the Canary Islands (Spain).

8. Respondent holds Venezuelan citizenship. Petitioner and minor children hold dual citizenships in Spain and Venezuela.

Friedrich v. Friedrich, 983 F.2d 1396, 1399 (6th Cir. 1993); Meredith v. Meredith, 759 F. Supp. 4132, 1434 (D. Ariz. 1991). The court’s role is not to make traditional custody decisions, but to determine in what *jurisdiction* the child should be physically located so that the proper jurisdiction can make those custody decisions. Loos v. Manuel, 651 A.2d 1077 (N.J. Super. Ct. Ch. Div. 1994).

⁴ Toren v. Toren, 191 F.3d 23 (1st Cir. 1999).

⁵ A court considering an ICARA petition has jurisdiction to decide the merits of the wrongful removal claim only. It does not have jurisdiction to decide the merits of any underlying custody dispute. The Hague Convention is intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court. Lops v. Lops, 140 F.3d 927, 936 (11th Cir. 1998)(citations omitted).

9. In August, 2014, Petitioner accepted a teaching position at the University of Florida in Gainesville, FL (United States). Both parties and minor children moved to Gainesville, FL. Petitioner entered the United States with a J-1 Visa; Respondent and minor children entered the United States with J-2 Visas.

10. In May, 2015, Petitioner, Respondent, and minor children returned to Spain, as Petitioner was required to appear personally to satisfy the Spanish government's pension requirements.

11. Respondent threatened to leave with minor children; Respondent opposed. On July 17, 2015, Respondent and minor children, without consent, permission, or knowledge of Petitioner, traveled to the United States using the prior issued J-2 Visas. Respondent did not possess a DS-19 form.

12. Petitioner currently resides in . Respondent and minor children currently reside at 4122 NW 20th Terrace, Gainesville, FL (United States).

13. As evidenced by the minor children's birth certificates attached hereto and as referenced above, each child is under the age of 16 years at the time of the filing of this Petition. The Convention applies to cases where a child under the age of sixteen (16) years has been removed from his or her habitual residence⁶ in breach of the rights of custody of a petitioner,

⁶ Courts in both the United States and foreign jurisdictions have defined habitual residence as the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a degree of settled purpose for the child's perspective." Pesin v. Rodriguez, 77 F. Supp. 2d 1277, 1284 (S.D. FL. 1999)(citations omitted), aff'd, Pesin v. Rodriguez, 244 F.3d 1250 (11th Cir. 2001); 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999)("the law required [the Court] to focus on the child in determining habitual residence"); see also In re Robinson, 938 F. Supp. 1339, 1341-42 (D. Colo. 1997). In other words, it is a state of being or state of min. Habitual residence is the permanent physical residence of the child as distinguished from their legal residence or domicile. In Re Bates, No. CA 122-89, High Courts of Justice, Family Div., England, February 23, 1989; Brooks v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995); Loos v. Manuel, 651 A.2d 1077, 1080 (J.J. Super. Ct. Ch. Div. 1994)(stating that it is immaterial that the concept of habitual residence lack precision); see also T.B. v. J.B., 200 WL 1881251, at *1 (Supreme Court of Judicature, England, December 19, 2000)(stating that it is important to remember that the Convention is concerned with the return of the child to the country of their habitual residence and not their return to any particular person.

which the petitioner had been exercising at the time of the wrongful removal⁷ or wrongful retention of the child.

14. The children were habitually residing in Spain within the meaning of Article 3 of the Convention immediately before they were wrongfully removed by Respondent.

⁷ "Article 3 of the Hague Convention provides that the removal or retention of a child is wrongful where it violates the custody rights of another person that were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention." Lops v. Lops, 140 F.3d 927, 935 (11th Cir. 1998); "[t]he removal of a child from the country of his or her habitual residence is 'wrongful' under the Hague Convention if a person in that country is, or would otherwise be, exercising custody rights to the child under that country's law at the moment of removal." Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996); see Prevot v. Prevot, 59 F.3d 556 (6th Cir. 1995); Convention, art. 3.

COUNT III – RESPONDENT’S WRONGFUL REMOVAL OF CHILDREN

15. The children are presently in the State of Florida, in Gainesville, Alachua County, Florida in the United States of America and within the territorial jurisdiction of this Court.

16. Petitioner has requested the return of the children to Spain pursuant to his Request for Return.⁸ The Request for Return has been filed with the United States Department of State, the National Center for Missing and Exploited Children, and the Central Authority of the United States of America under the Convention.

17. At the time immediately before the wrongful removal of the children, the children habitually resided in Spain within the meaning of Article 3 of the Convention. The children lived with their Father and Mother, had family and friends around them and were completely settled and integrated in Spain’s life and culture. The children did not split their time evenly between the United States and Spain to effectively create two places of habitual residence; moreover, in removing the children, Respondent did not create a new place of habitual residence⁹.

18. At the time of Petitioner’s application to the Central Authority of the United States of America, the children are located in the Contracting State of Florida, in the United States of America.

19. Respondent’s wrongful removal of the children was done secretly and without the consent of Petitioner. Respondent hid her plans to remove the children from Petitioner.

20. Respondent has ignored Petitioner’s requests to resolve the wrongful removal of the children.

⁸ Given the urgency of this Hague Convention Petition, no authentication of any documents or information included with the Petition is required. 42 U.S.C. § 11605 (1995).

⁹ Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001).

21. In light of the aforementioned Code and the Hague Convention, the children are currently being illegally held in custody, confinement and/or restraint by Respondent. Unless this Court takes immediate action to bring Respondent before the Court, irreparable harm will occur to the well-being of the children in that they are denied all proper access to their father, family members, home, extended family, friends, culture, and support system. Unless an order to show cause is issued, Respondent will continue to wrongfully retain the children in Florida.

22. Petitioner never acquiesced or consented to the removal of the children outside of Spain.

23. At the time of the application by Petitioner for the Request for Return of the Child to the Central Authority of the United States of America, Respondent was a habitual resident of Spain as that term is defined by the Hague Convention.

COUNT IV – PROVISIONAL REMEDIES (42 U.S.C.A. §11604)¹⁰

24. Petitioner requests that the Court issue a show cause order and direct that the order be served immediately on Respondent and that she be brought before this Court with the children forthwith.¹¹ Section 5(b) (Provisional Remedies) of ICARA provides, *inter alia*, that, in a proceeding under Section 4(b) for the return of a child, “No court exercising jurisdiction...may...order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.” 42 U.S.C. §11604. In this case, the State law referred to in Section 5(b) is that of Florida. In Florida, the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) is the source for statutory law governing, *inter*

¹⁰ This Court “[i]n furtherance of the objectives of...the Convention...may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the further removal or concealment before the final disposition of the petition” 42 U.S.C. 16604(1995).

¹¹ Such an approach is consistent with the approach of other district courts faced with equivalent concerns regarding the flight of a respondent following service of a petition for return under the Convention. See Fawcett v. McRoberts, 168 F. Supp. 2d 595, 597 (W.D. Va. 2001).

alia, the resolution of both domestic and international child custody disputes. Sections 61.513(1)(e) and 61.523, Fla. Stat., address the appearance of the parties and the child in such cases. These sections authorize this Court to order the appearance of the child and custodian or custodians *together*. Id. This Court therefore has the authority to order the immediate appearance of Respondent and the children together.

25. Petitioner requests an order delivering the children to the custody of Petitioner.

26. Pending further hearing in this Court, it is requested that this Court issue an immediate order pursuant to 42 U.S.C.A. §11604 prohibiting the removal of the children from the jurisdiction of this Court, taking into safe-keeping all of the children's travel documents and setting an expedited hearing on the Petition for Return of Children to Petitioner.¹²

WHEREFORE, Petitioner respectfully requests the following relief:

A. An Order delivering the minor children to the custody of Petitioner, JOSE ANTONIO DIAZ-AVILA, or his agent;

B. An Order directing that the names of the children be entered into the national police computer system (N.C.I.C.) missing person section;

C. An Order directing a prompt return of the children to their habitual residence of Spain;

D. An Order directing that the children, together with Respondent, be brought into this Court by any United States Marshal, federal officer or police officer;

E. An immediate Order prohibiting the removal of the children from the jurisdiction of this Court;

¹² Such a petition may also be treated as an application for a Writ of Habeas Corpus itself. Zajackowski v. Zajackowski, 932 F. Supp. 128, 132 (D.Md. 1996) (“[T]he Court will treat the [Convention] petition as an application for a writ of habeas corpus...pursuant to 28 U.S.C.A. §2243”); see also In re McCullough, 4 F. Supp. 2d 411 (1998).

F. An Order commanding Respondent to appear in this Court with the children to show cause why the children have been kept from their father in contravention of Spanish law;

G. An Order directing Respondent to pay Petitioner's legal costs and fees;

H. An Order that Respondent comply with the above in all respects; and

I. Any such further relief as justice and its cause may require.

NOTICE OF HEARING

27. Pursuant to 42 U.S.C. §11603(c), Respondent will be given notice of any hearing in accordance with Section 61.518, Fla. Stat., of the UCCJEA.¹³

ATTORNEY'S FEES AND COSTS INCLUDING TRANSPORTATION EXPENSES PURSUANT TO CONVENTION ARTICLE 26 AND U.S.C. 11607

28. Petitioner has incurred substantial expenses as a result of the wrongful retention of her children by Respondent. Petitioner will submit a copy of all expenditures as soon as practicable and possible and will amend these costs, from time to time, according to proof and in light of further expenditures required because of Respondent's wrongful retention of the minor children.

WHEREFORE, Petitioner respectfully requests this Court award all legal costs and fees incurred to date as required by 42 U.S.C. 11607 and Article 26 of the Hague Convention, reserving jurisdiction over further expenses.

Dated May 26, 2016.

Respectfully submitted,
TASSONE & DREICER, LLC

¹³ The Convention itself does not specify any specific notice requirements. ICARA provides that notice be given in accordance with the applicable law governing notice in interstate child custody proceedings. 42 U.S.C. §11603(c). In the United States, the Parenting Kidnapping Prevention Act ("PKPA") and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") govern notice in interstate child custody proceedings. Klam v. Klam, 797 F. Supp. 202, 205 (E.D.N.Y. 1992). The UCCJEA and Part E of the PKPA provide that reasonable notice and opportunity to be heard must be given to all parties before a custody determination is made. The UCCJEA further provides that notice shall be given in a manner reasonably calculated to give actual notice. In Florida, the relevant statute is found in Sec. 61.518, Fla. Stat., and 61.532. Furthermore, in cases where flight of a respondent is at issue, federal courts have allowed substituted service in any manner reasonably effective to give the respondent notice of the suit. Ingram v. Ingram, 463 So.2d 932, 936 (La. App. 1985).