2017 IL App (1st) 162995-U

FIRST DIVISION
October 30, 2017

No. 1-16-2995

In re the Marriage of:	)	Appeal from the
	)	Circuit Court of
	)	Cook County
BRYAN K. ROBY,	)	
	)	
Petitioner-Appellant	)	No. 16 D 6259
v.	)	
	)	
MIRI VAN WAGENINGEN,	)	Honorable
	)	Karen J. Bowes,
Respondent-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding the child's habitual residence to be Netherlands (Holland). The court did not err in determining that Illinois had no jurisdiction to make and enter custody determinations.

¶ 2 Petitioner Bryan Roby appeals from an order of the circuit court granting respondent Miri Van Wageningen's petition to return their daughter Rachel under the Hague Convention (22 U.S.C. §9001) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (750 ILCS 36/201 (West 2014)). Bryan argues that the circuit court erred when it found the

Netherlands (Holland) to be the place of Rachel's habitual residence under the Hague Convention and erred in finding that Illinois courts lack jurisdiction to make and enter custody determinations with regards to Rachel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Many of the facts involving the intent of the parties in this case are disputed. Bryan, an American citizen, and Miri, a Dutch citizen, met in Israel in May 2013. They were engaged to be married in July 2013. In July 2013, Bryan moved to New York to take a job with New York University and Miri remained in Israel. Miri visited Bryan in New York at the end of August 2013. They were married in a civil ceremony in New York on September 4, 2013. At the end of the month, Miri returned to Israel. Bryan went to Israel in October 2013 where he and Miri were married in a religious ceremony on November 5, 2013. A Ketubah, a Jewish marriage contract that outlined the marital obligations between Bryan and Miri, was tendered during the ceremony. The Ketubah stated that at the time the Ketubah was entered, Bryan would provide Miri "food and all of her needs" in the United States. A footnote to that provision indicates that "during the time of the signing of the Ketubah, this refers to the residence at 1506 W. Terrace Circle, New Jersey USA."

¶ 5 Miri and Bryan lived together in Israel until they moved in with Miri's mother in Holland in December 2013. Bryan moved back to New York in January 2014, but returned to Holland for the birth of their daughter Rachel on August 19, 2014. Bryan moved to his mother's home in Chicago on January 19, 2015, and Miri and Rachel remained in Holland.

¶ 6 Miri and Rachel traveled to Chicago in April 2015, September 2015, April 2016 and June 19, 2016. According to Miri, these trips, except for the June 19, 2016 trip, were for Rachel to

spend time with her father and to celebrate Jewish holidays. Bryan testified that the purpose of these trips was in preparation of Miri's and Rachel's permanent relocation to Illinois.

¶ 7 When Miri visited in June 2016, the parties discussed the status of their marriage. Miri gave up on the marriage on July 1, 2016, and she and Rachel moved out of Bryan's Chicago apartment and into the Rohr Chabad House. Miri and Rachel returned to Bryan's apartment on July 5, 2016. The following day, Miri and Bryan again discussed the status of their marriage. Miri and Rachel returned to the Rohr Chabad House that night.

¶ 8 Bryan filed his petition for dissolution of marriage on July 6, 2016. On July 7, 2016, he filed an *ex parte* emergency petition for an order of protection requesting that Rachel be declared a protected person because of Miri's unsafe behavior when caring for Rachel including Miri leaving with Rachel without notice to Bryan for four days. Bryan's petition was granted.

¶ 9 On July 27, 2016, Miri filed a verified petition for return of the minor child under the Hague Convention and the UCCJEA, and argued that all custody matters should be heard in Holland. Zachary Williams was appointed as Rachel's Guardian Ad Litem on July 28, 2016 "for the sole purpose of determining habitual residence of the child." Bryan filed his response to Miri's verified petition on August 18, 2016, and argued that the petition should be denied because there was no wrongful retention of Rachel and the parties' habitual residence has been the United States.

¶ 10 Miri filed a motion for summary judgment arguing that Rachel's habitual residence is in Holland based on the length of time she was physically present in Holland. Bryan filed a motion in opposition arguing that a motion for summary judgment was inappropriate when there is no genuine issue of material fact at issue, and all material facts regarding Miri's pleading were at

issue.

¶ 11 On September 16, 2016, the court denied Miri's motion for summary judgment. On November 4, 2016, after a hearing on her verified petition to return Rachel under the Hague Convention and UCCJEA, the court issued a written order granting Miri's petition. The court found Netherlands (Holland) to be Rachel's habitual residence. The court further found that under the Hague Convention and the UCCJEA, Illinois was not the appropriate jurisdiction for custody matters to be litigated. It is from this order that Bryan now appeals.

¶ 12 ANALYSIS

¶ 13 Bryan argues that the trial court erred when it found, under the Hague Convention, that Rachel's habitual residence was Holland. Bryan also argues that the trial court erred in finding that Illinois courts lack jurisdiction to make and enter a custody determination with regards to Rachel under the UCCJEA.

¶ 14 The Hague Convention was adopted in 1980 and seeks to secure the prompt return of children wrongfully removed to or retained in any signatory state. Convention, supra, ch. 1, art. 1. It is meant "to deter parents from absconding with their children and crossing international borders in the hopes of obtaining a favorable custody determination in a friendlier jurisdiction." *Walker v. Walker*, 701 F.3d 1110, 1116 (7th Cir.2012). Under the law of the Hague Convention, "a person whose child has wrongfully been [retained in] the United States in violation of the Convention [may] petition for return of the child to the child's country of 'habitual residence.' " *Norinder v. Fuentes*, 657 F.3d 526, 529 (7th Cir.2011). A removal or retention is wrongful under the Convention where "it is in breach of rights of custody attributed to a person *** under the law of the State in which the child was habitually resident immediately before the removal or

retention," and those rights were "actually exercised *** or would have been so exercised but for the removal or retention" at the time of the removal or retention. Hague Convention art. 3, T.I.A.S. No. 11670.

¶ 15 The Hague Convention is not intended to settle custody disputes. *Ortiz v. Martinez*, 789 F. 3d 722, 728 (7th Cir.2015). Rather, a child's country of habitual residence is "best placed to decide upon questions of custody and access." *Whallon v. Lynn*, 230 F. 3d 450, 456 (1st Cir.2000). Habitual residence is not defined by the Hague Convention. *Koch v. Koch*, 450 F. 3d 703, 712 (7th Cir. 2006). Courts are instructed to "interpret the expression 'habitual residence' according to 'the ordinary and natural meaning of the two words it contains [, as] a question of fact to be decided by reference to all the circumstances of any particular case.' " *Redmond v. Redmond*, 724 F. 3d 729, 732 (7th Cir. 2013) (quoting *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir. 2001)). In determining the parents' intent, the court should look at actions as well as declarations and must be determined after an assessment of observable facts. *Redmond*, 724 F. 3d at 742. Two most important facts to consider are parental intent and the child's acclamization to the proposed home jurisdiction. *Martinez v. Cahue*, 826 F. 3d 983 (7th Cir. 2016).

¶ 16 Determinations of intent involve questions of fact and we defer to the circuit court's finding on intent unless those findings are clearly erroneous. *Koch v. Koch*, 450 F. 3d 703, 710 (2006). The ultimate determination of habitual residence is a mixed question of law and fact to which we apply *de novo* review. *Id.* ("Whether there is a settled intention to abandon a prior habitual residence is a question of fact as to which we defer to the district court."); *Gitter v. Gitter*, 396 F.3d 124, 133 (2nd Cir.2005) (the intention of the parents is a question of fact in

which the findings of the district court are entitled to deference).

¶ 17 After hearing all of the evidence in this case, the circuit court concluded that Holland was Rachel's habitual residence by a preponderance of the evidence. The circuit court found "Miri credible in that Bryan led Miri to believe that he intended to work on saving their marriage, when in fact, within no more that 17 days after he alleged 'permanent arrival', he filed for divorce demonstrating his true intentions." The court made certain additional findings of fact (including the facts we have recited above) and a finding that at one time Miri may have had the intent to move to Chicago, but when she arrived here in June 2016, it was on the condition that Bryan work on saving their marriage, a finding that is contrary to Bryan's statement that Miri intended to permanently relocate to the United States when she came to Chicago in June 2016. Further, the circuit court concluded that Miri's social media posts, wherein she stated that she was wrapping up her affairs in Holland with the intent to move to the United States, were made for public consumption and the circuit court "did not give great weight to the public portrayal to Miri's life." Rather, the circuit court found that her private email to Bryan wherein she stated that she was coming to Chicago hoping that they could save their marriage was more persuasive of her intent.

¶ 18 The circuit court also found Bryan's actions to be persuasive in determining whether Miri intended to remain in the United States in June 2016. The court stated that although Bryan claimed that Miri's arrival in the United States in June 2016 was permanent, Bryan filed for divorce 17 days later and filed for an order of protection one day after that. In addition, although Bryan's petition for dissolution indicated that Miri had been a resident of the State of Illinois for more than 90 days preceding the filing, nothing in the testimony or other evidence supports that

statement. Furthermore, although Bryan indicated in the petition for dissolution that he was Rachel's primary caretaker, both parties testified that Miri was Rachel's primary caretaker.

¶ 19 Further, the circuit court found that Bryan had accepted a position in January 2016 at the University of Michigan in Ann Arbor which would require him to be on campus during the week with Miri and Rachel remaining in Chicago. Bryan kept this important information from Miri until after she came to Chicago in June 2016. The circuit court found that, because Bryan chose to conceal his employment at the University of Michigan from Miri and he knew when he accepted the employment that he would be spending a significant amount of time away from Miri and Rachel if they did come to Chicago, Bryan had no intention of working on saving the marriage and that Miri's intent was to come to Chicago for him to do so.

¶ 20 The court further found that Miri was actively involved and seriously committed to playing her viola and violin. She taught both instruments in Holland. The court considered the fact that Miri never brought those instruments with her to the United States, including the last trip characterized by Bryan as her "permanent relocation" to the United States.

¶ 21 The court also found that in Rachel's 26-months of life, she spent most of that time in Holland. Excluding the last trip which ended in the question presented here, Rachel spent a total of nine weeks in Chicago. In addition, Rachel's primary medical care took place in Holland. Furthermore, and without question, Miri was Rachel's primary caregiver and that care took place in Holland.

¶ 22 Based on the record presented, we cannot find the trial court's factual findings to be clearly erroneous. "Questions of witness credibility and conflicting evidence are matters for the trial judge to resolve as the trier of fact." *In re Marriage of Sturm*, 2012 IL App (4th) 110559,

¶ 6. Here, the court had an opportunity to see and hear the witnesses, and is therefore in a position superior to a reviewing court for assessing witness demeanor, judging their credibility weighing conflicting evidence and drawing reasonable inferences. *Id*. We agree with the circuit court's factual determination here, that based on all of the evidence, Miri did not have the intent to remain in Chicago with Rachel when she visited in June 2016 and, therefore, Rachel's habitual residence is Holland. We therefore will not disturb this finding.

¶ 23 Based on the factual findings in this case, both the parental intent and the Rachel's acclimazation lead us to conclude that Rachel's habitual residence is in Holland. *Martinez v. Cahue*, 826 F. 3d 983 (7th Cir. 2016). The evidence showed that at some time in the past, Miri may have had the intent to permanently reside in Chicago. However, when she came to Chicago in June 2016, her intention was to work on her marriage with Bryan. Miri did not travel to Chicago with the intent to stay. Moreover, Bryan did not intend to work on his marriage. He was less than forthcoming with Miri about his job in Ann Arbor, which would require him to be away from Chicago during the week. He also filed for divorce 17 days after Miri arrived in Chicago. It was not Bryan's intent for Miri to permanently relocate to Chicago with him as his wife. In addition, Rachel spent most of her short life in Holland, under the care of Miri. Considering both parental intent and the child's acclamization to the proposed home jurisdiction, we affirm the court's determination that Rachel's habitual residence is Holland.

¶ 24 Bryan next argues that the trial court erred in finding that Illinois courts lack jurisdiction to make and enter custody determinations regarding Rachel.

¶ 25 Parental intent is also considered pursuant to the UCCJEA, with respect to determining whether time away from the country where the child was residing was a temporary absence.

Sections 201(a) of the UCCJEA provides in pertinent part:

> "(a) Except as otherwise provided in Section 204 [i.e., temporary emergency jurisdiction], a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State. 750 ILCS 36/201 (West 2014).

The definition of "home state" is provided in section 102(7) of the UCCJEA:

> " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child *lived from birth* with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period." (Emphasis added.) 750 ILCS 36/102(7) (West 2014).

This provision's reference to "lived from birth" has been construed to mean the place where the child occupies a home. *In re D.S.*, 217 Ill.2d 306, 317 (2005).

¶ 26 Pursuant to section 201 of the UCCJEA, Holland is Rachel's habitual residence and Illinois has no jurisdiction to determine custody issues. Rachel had not spent six consecutive months in Illinois prior to the commencement of this proceeding. Rachel's presence in Illinois in June 2016 was a temporary absence from Holland. When Miri filed her Hague petition, she and Rachel had only been in Illinois for a total of 38 days. *In re the Marriage of Schoffel*, 268 Ill.

App. 3d 839 (1994).

¶ 27 Finally, we deny appellant's request to strike Miri's brief because of various violations of Supreme Court Rule 341.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.