Seoul Family Court

Judgement

Case [redacted] Request for return of children (Hague Convention)

Applicant [redacted]

[redacted] California, U.S.A.

Nationality: American

Representative: Attorney Min, Ji-won, Lee, Jeong-ha

Representative: Attorney Jeong, Jin-gyeong at law firm Dongjin

Respondent [redacted]

Address: [redacted] Yongin-si ([redacted]

[redacted]

[redacted]

Representative: Attorney Kim, Seong-woo, Choi, Jeong-ji at law firm Yulchon

Children [redacted]

Judgement

1. The Respondent shall return the Children to the Applicant.

2. The Respondent shall pay the trial cost.

Relief Sought

Same as written in the Judgement.

Reasoning

1. Acknowledgement

The following facts are acknowledged after examination of the records of this case and overall intent of the interviews:

a. The Applicant and Respondent married each other in California, US on August 19, 2013, and had the Children while staying in California, U.S.

b. The Child [redacted] was born in California, U.S. on [redacted], while the Child [redacted] was born in the Republic of Korea on [redacted] and went to the U.S. around January 21st, 2019 and remained in California, U.S. until returning to the Republic of Korea on November 15th, 2019.

c. The Applicant sent an e-mail to the Respondent around November 11th, 2019, stating that, 'the Respondent's plan to take the Children for a temporary visit with her older sister is acceptable, but an absence of the children from home in the U.S. after December 20th, 2019, is unacceptable and not agreed to.'

The Respondent replied asking why the Applicant set December 20th, 2019, as the date, and further added that she 'has yet to book a flight back to the U.S.,' and that she will purchase the tickets 'once there is a better plan and agreement regarding our family.'

The Applicant sent an e-mail to the Respondent around November 11th, 2019, saying "I agree on the need of discussion for a family plan, but do not agree to having the return schedule depend on it. The reason that I agreed

on the Children's visit to your older sister was because you said you needed some time to think and relax. Even now, I will not object the visit because I know that you will come home soon with the Children. I do not want to miss the Child[redacted] first birthday party and really hope you come back before December 10th. I want to make sure that you bring the Children home before Christmas."

d. The Respondent came to the Republic of Korea with the Children on November 15th, 2019, 2019.11.15 and sent an e-mail to the Applicant, expressing her thoughts about the 'current' situation and saying, "I want you to come to the Republic of Korea for the Child[redacted]'s first birthday party so we can celebrate it together."

The Applicant replied around November 16th, 2019, saying that he will be at the Child[redacted]'s first birthday party with his brother Steve, and that "if it is okay with everyone, we may be able to discuss our family plans while I am staying in the Republic of Korea, but I want to make it clear that your trip to the Republic of Korea was to provide some peace and quiet, and my wanting the Children home before December 20th has not changed. ."

e. The Applicant arrived in the Republic of Korea on December 10th, 2019, for the Child[redacted]'s first birthday party on December 11th, 2019, and returned to the U.S. on December 13th, 2019.

f. The Applicant sent an e-mail to the Respondent around December 25th, 2019, asking her to 'please book a flight and let me know by January 15th, 2020, then I can book a flight to the Republic of Korea before the Child[redacted]'s birthday and we can coordinate the schedules so that we come home together on the same flight. It will be preferable to return earlier than February, but end of February works, as long as we are back in the U.S. by February.'.

The Respondent booked a flight ticket around January 7th, 2020, for herself and the Children to return on March 2nd, 2020, and sent it to the Applicant via e-mail, saying "the flight ticket is for March 2nd, but it may be postponed depending on my health recovery".

g. The Applicant came to the Republic of Korea on January 28th, 2020, for the Child[redacted]'s birthday party with the Respondent on January 29th, 2020. The Respondent canceled the flight tickets, and the Applicant

left for the U.S. on March 2nd, 2020.

The Applicant sent an e-mail to the Respondent around March 5th, 2020, saying that 'he was very astounded and disappointed in learning that the Respondent cancelled the return tickets only just few days before he left for San Franciso,' and that 'he had never agreed on the Children being away from San Francisco for months, and that he had repeatedly expressed his disagreement in the Children staying in the Republic of Korea for the past few months, even before the Respondent's initial trip,' and that 'he wants the Respondent home back with the Children.'

h. The Applicant filed a claim for custody of the Children with the Superior Court of California, County of San Francisco on March 20th, 2020.

On August 4th, 2020, the above court issued an order on 2020.8.4, which stated that "the Respondent or mutually agreed upon third party shall return the Children to San Francisco by August 25th, 2020. If the Respondent or mutually agreed upon third party does not return the Children to San Francisco by the above date, then the Applicant shall be granted the sole legal and physical custody of the Children on August 26th 2020. The Applicant and Respondent shall contact the family court for adjustment of the custody and visitation rights immediately when the Children arrive in San Francisco. There will be a re-trial on October 1st 2020, for a tentative ruling."

When the Children were not returned to San Francisco by August 25th, 2020, the above court issued an order on October 2nd, 2020, stating "the court rejects to reconsider and maintain the order dated August 4th 2020. Since the Respondent did not return the Children to San Francisco, California, the Applicant is granted the sole legal and physical custody of the Children according to the order dated August 4th, 2020."

2. Judgement

a. Obligation to return the Children

1) According to Article 3 of the Convention on the Civil Aspects of International Child Abduction (hereinafter the "Convention of this Case"), "the removal or the retention of a child is to be considered wrongful where there

is a 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 where 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 term "habitually resident" under the Convention of this Case means a child's ordinary and continuous residence at normal times, not specific times. Whether it is ordinary and continuous must be determined by a comprehensive study of all circumstances and elements such as residence of child and parents, residence period, intent of permanent residence, residence qualifications, occupational activities of parents, ownership and management of main assets or daily supplies, child's age, family life, school life, social adaption, etc. However, the child's adaptation to the new environment after the kidnapping cannot be an element of determination, since it is the moment immediately before the removal that serves as the basis of determination for a child's habitual residence.

2) The above acknowledged facts, records of this case, and overall intent of the interviews demonstrate the following: the Applicant and Respondent had their marital life in California, U.S.; the Children had been raised in California, U.S. except for a temporary stay in the Republic of Korea until they were taken to the Republic of Korea on November 15th, 2019; while requesting their return by December 20th, 2019, the Applicant still agreed to the Respondent's visit to the Republic of Korea with the Children around November 11 th, 2019, asked once again on November 16th, 2019 to return by December 20th, 2019; the Respondent did not return to the U.S. with the Children by the requested date of December 20th, 2019 despite the several requests by the Applicant. In sum, the Respondent has an obligation to return the Children to the Applicant pursuant to Article 12(1) of Act on the Implementation of the Hague Child Abduction (hereinafter the "Hague Child Abduction Act") but violated the Applicant's custody by removing the Children who were had habitually residence in the U.S. to the Republic of Korea and retaining them from December 21 st, 2019 against the will of the Applicant, who has joint custody of the Children.

The Respondent argues that the Applicant agreed on the Respondent's termless stay in the Republic of Korea with the Children and that the Children's habitual residence should be in the Republic of Korea as they have been residing in the Republic of Korea since November 15th, 2019. However, the Respondent's submitted materials are not sufficient to show the Applicant's agreement regarding the Respondent's stay in the Republic of Korea with the Children, and there is no evidence to the contrary.

b. Whether to accept an exemption from return

1) The Respondent argues that even if the Children were illegally removed or retained in the Republic of Korea, the request for trial of this case was filed on November 26 th, which exceeds one year since the Childrens' arrival in the Republic of Korea on November 15h, 2019, during which period the Children have already adapted to a new environment, therefore a reason for exception to Article 12(4)2 of the Hague Child Abduction Act.

However, as stated earlier, the illegal retention of the Children initiated on December 2nd 2019, which indicates that the filing for this case was not done after one year has passed. Therefore, the above argument is groundless and there is no need of further examination.

2) The Respondent argues that the Applicant's agreeing to the Respondent staying indefinitely in the Republic of Korea with the Children is an equivalent of a consent and acquiescence to the Children's removal and retention (Article 12(4)2 of the Hague Child Abduction Act).

However, as stated earlier, the Respondent's submitted materials are not sufficient to show the Applicant's agreement on the Respondent's indefinite stay in the Republic of Korea with the Children or the Applicant's consent or acquiescence to the Children's retention, and there is no evidence to the contrary. Therefore, the Respondent's above argument is groundless.

3) The Respondent argues that there is a grave risk that the return of the Children to the Applicant who is addicted to alcohol would expose them to physical or psychological harm or otherwise place them in an intolerable situation, which is not allowed by the basic principle on human rights and fundamental freedoms of the Republic of Korea. (Article 12(4)3 and 5 of the Hague Child Abduction Act).

Upon scrutiny, the Respondent's submitted materials are not sufficient to show there is a grave risk that the return of the Children would expose them to physical or psychological harm or otherwise place them in an intolerable situation, and there is no evidence to the contrary. Therefore, the Respondent's above argument is groundless.

4) The Respondent argues that the Children object to being returned and have reached an age and a level of maturity whereit is appropriate to take into account their opinions (Article 12(4)4 of the Hague Child Abduction Act).

Upon scrutiny, Article 12(4)4 of the Hague Child Abduction Act states that the court may dismiss the petition seeking return of a child where the child objects to being returned and has reached an age and maturity at which it is appropriate to take account of his/her view. In this case, however, it is hard to say that the Children who are aged 4 and 2 respectively have reached such an age and a level of maturity that it would be appropriate to take into account their wishes. Therefore, the Respondent's above argument is groundless.

3. Conclusion

Consequently, the Applicant's request for trial of this case is grounded, and the court rules as written in the Judgement, in favor of the Applicant.

June 23rd 2021

Judge Shin, Yu-ri (seal affixed)

This is original.

June 23rd, 2021

Seoul Family Court

Clerk of Court Kang Tae-su (seal affixed)

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