FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLIVE EDWARD DAWSON,

Petitioner - Appellant,

v.

MARIAH DYLLA, f/k/a Mariah Dawson,

Respondent - Appellee.

No. 21-1225
(D.C. No. 1:21-CV-00283-RBJ)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **PHILLIPS**, Circuit Judges.

Petitioner Clive Edward Dawson appeals from the district court's order dismissing with prejudice his petition for relief under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 (Hague Convention or Convention), and the International Child Abduction Remedies Act, 22 U.S.C. § 9001 et seq. (ICARA). Exercising jurisdiction pursuant to 28

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

U.S.C. § 1291, we vacate the judgment of the district court and remand with directions to dismiss Dawson's petition without prejudice.

I

Dawson is a citizen of the United Kingdom. Respondent Dylla is a citizen of the United States. Dawson and Dylla met in the United States and were married in New Mexico on September 18, 2011. At the time of their marriage, Dawson was working as an information technology consultant and Dylla was an attorney. At some point after they were married, Dawson and Dylla moved to the United Kingdom. The couple's daughter, R., was born in the United Kingdom on April 12, 2013.

The couple separated on July 10, 2015. Following the separation, Dylla informed Dawson that she was interested in relocating to the United States with R. Dawson opposed the idea of R. living in the United States with Dylla.

On January 11, 2016, a family court in Manchester, England issued a custody order that determined, in pertinent part, that it was in R.'s best interests to live with Dylla in the United States. The custody order also, however, granted Dawson parenting time on at least three occasions per year, with two of those occasions to occur in the United States and one to occur in the United Kingdom. *Id*. The two annual periods of parenting time in the United States were to each be between three and four weeks in duration, and the single period of parenting time in the United Kingdom was to be for a minimum of two weeks. *Id*. In addition, the Manchester family court ordered that Dylla and Dawson would alternate having custody of R. at

Christmas time, and it directed Dylla to make R. available for "Google Hangouts" with Dawson for five to fifteen minutes every other day (and vice-versa during the periods when R. was in Dawson's custody). *Id*. Lastly, the Manchester family court directed Dylla to register the custody order in Colorado.

In early 2016, Dawson registered the Manchester family court's custody order in Elbert County, Colorado, by filing a petition in the District Court for Elbert County, Colorado (the state court) pursuant to Colo. Rev. Stat. § 14–13–305.[1]

After the Manchester family court's custody order was registered in Elbert County, Dylla filed a petition in the state court seeking to restrict Dawson's parenting time. Dylla raised concerns in her petition about Dawson's behavior and R.'s reactions to that behavior. On September 22, 2016, the state court denied Dylla's petition. In doing so, the state court (a) assumed that the Manchester family court considered the same information in reaching its custody decision, (b) noted that Dylla had not alleged that Dawson had engaged in physically or emotionally abusive behavior towards R. since the entry of the Manchester family court's orders, and (c) emphasized that it would not, in effect, act as a reviewing court for the Manchester family court's rulings.

[1] This statute permits "[a] child-custody determination issued by a court of another state [to] be registered in this state, with or without a simultaneous request for enforcement." Colo. Rev. Stat. § 14-13-305(1).

In February 2017, Dawson filed an emergency verified motion in the state court seeking to restrict Dylla's parenting time. The state court denied Dawson's motion on February 13, 2017, on the grounds that Dawson had not sufficiently alleged that R. was in imminent physical or emotional danger.

On February 22, 2017, the state court held a hearing regarding parenting time issues. On March 27, 2017, the state court issued a written order finding that Dylla had violated the existing parenting time order by denying Dawson parenting time in Colorado in the fall of 2016 and in February 2017. The state court attempted to rectify that violation by awarding Dawson "make-up" parenting time both in Colorado and the United Kingdom. The state court also set parameters on how and where Dawson would exercise his parenting time with R.

On January 17, 2019, the state court ordered Dawson to appear before it on February 11, 2019. According to Dylla, the subject matter of the scheduled hearing was to be child support and allocation of travel costs. Dawson failed to appear before the state court on February 11, 2019. The state court issued a bench warrant for Dawson's arrest and also issued a temporary custody order granting Dylla custody of R. and prohibiting R.'s school from releasing R. to Dawson's custody.

At some point in 2019, Dawson filed a motion with the state court seeking enforcement of the Manchester family court's custody order. The state court denied Dawson's motion on December 13, 2019. In doing so, the state court concluded that until the outstanding bench warrant for Dawson's arrest was "resolved, it [wa]s in the best interests of [R.] not to be with [Dawson] in unsupervised parenting time lest

he be arrested on the outstanding warrant." *Id*. at 143 (quotation marks omitted). The state court also noted that Dawson would be allowed parenting time if supervised by a professional supervisor in Elbert County, Colorado.

On December 16, 2019, the state court ordered the parties to contact the division clerk to set the matter for a status conference. Neither Dylla nor Dawson complied with the state court's order. As a result, on February 11, 2020, the state court denied all pending motions without prejudice and ordered the division clerk to close the case.

II

On January 28, 2021, Dawson initiated these federal proceedings by filing a pro se petition against Dylla seeking expedited enforcement of the Manchester family court's January 11, 2016 custody order pursuant to the Hague Convention and ICARA. Dawson alleged that Dylla "ha[d] largely failed to inform, let alone consult with, [him] concerning any aspect of significant decisions relating to R[.] – including several changes of school and change of physician – and ha[d] repeatedly ignored questions from [him] that she should do so." ROA at 18. Dawson further alleged that he "ha[d] no access to definitive evidence as to where" R. was residing. *Id*. at 19. Dawson also alleged that he last saw R. on video on July 25, 2019, and that Dylla had since cut off all video contact between him and R. Dawson sought "expedited injunctive relief" in the form of "a decree requiring [Dylla] to immediately act to ensure the execution of" the Manchester family court's January

11, 2016 custody order. *Id*. at 7. Dawson also asked for injunctive relief requiring Dylla

> to: (a) arrange and enact a two-week parenting visit for R[.] to [Dawson] in England at the earliest date that [Dawson's] work and study commitments w[ould] permit . . . ; (b) immediately restore . . . R[.'s] Ordered regular video call access to [Dawson] . . . ; [and] (c) conform with requirements and duties of a prime custodial parent to inform and consult with [Dawson] in such matters where information and consultation is required in law.

Id. at 20.

Dylla moved to dismiss Dawson's petition pursuant to Fed. R. Civ. P. 12(b)(1) and (6). The district court denied Dylla's motion to dismiss by docket entry on March 21, 2021. The docket entry noted as follows:

> You did not comply with the Court's practice standard regarding motions to dismiss. You either should comply with the English court's custody and visitation order or retain counsel. Petitioner should also retain counsel. Litigation under the International Child Abduction Remedies Act can be complicated, and the advice of a lawyer is very important. Please note, this Court will not sit as a domestic relations court and determine what visitation is in the best interest of the child. Those orders were issued by the English court and can be modified, if appropriate, by the English Court. This Court's role under the ICARA in general is simply to order that a child who has [been] taken to the U.S. by one parent and not returned for visitation as ordered by the foreign court must be returned to the foreign jurisdiction for such further orders as that court might enter. The best solution is to comply with the English court's orders until they are changed.

Id. at 136.

On March 23, 2021, the district court conducted a telephonic status conference and heard arguments from Dawson and Dylla.

On April 19, 2021, the district court issued an order dismissing Dawson's petition with prejudice. The order concluded that the Hague Convention and ICARA were inapplicable because "[t]he evidence establish[ed] that there ha[d] been no abduction or wrongful removal of the parties' child," and, instead, that "Dylla brought R[.] to the U.S. in 2016 with the express permission and order of the family court in Manchester, England," and "[t]he child's habitual residence has been in the U.S. and in particular in Colorado, since that time." *Id*. at 145. The order further stated:

> The problem here is that the parents have been unable or unwilling to comply with the parenting time orders that were originally issued by the Manchester court, and that have been registered in – and to some extent modified by – the District Court of Elbert County, Colorado. As a former Colorado state district judge who presided over literally thousands of parenting time disputes in that capacity, I am concerned that the best interests of the child are not being served, due largely to the behaviors of the two parents. Generally speaking, it is in the best interest of children to spend quality time with both parents. That plainly was the desire of both the Manchester court and the Elbert County District Court. However, this Court cannot sit as a court of appeal from either of those courts in the guise of exercising its authority under the International Child Abduction Remedies Act.
>
> It appears to this Court that Mr. Dawson has one, and possibly two, options. His best option appears to be to turn himself in on the outstanding warrant in Elbert County, Colorado. After addressing the warrant, he can presumably either move to reopen the Elbert County case or file a new action in Elbert or Douglas County, where I think the child now lives. The Elbert or Douglas County District Court would then address parenting time, decision-making and child support issues. Mr. Dawson is a student nurse, and there is some indication in the record that he might have pursued this new career in contemplation of relocation to the U.S. If he were to relocate to Colorado, then presumably the parenting time issues would be quite different. If he remains in the U.K., then the distance will continue to pose logistical

> and financial barriers. However, Colorado courts are well equipped to address those issues, as difficult as they might be.
>
> Possibly a second option would be to seek modification of the original parenting time order in the Manchester court. However, Ms. Dylla stated during the March 23, 2021 hearing that the Liverpool court has expressly ceded jurisdiction over all matters pertaining to the child to the Elbert County District Court. I have not seen documentation to that effect, and Mr. Dawson disputes this, but it would not surprise me. The U.S. has been the child's residence for the last five years, and both parties have actively litigated parenting issues in that court.
>
> The Court urges both parties to retain counsel to assist them in resolving these issues if they are able to do so. If the parties are financially unable to retain counsel, they might wish to contact Colorado Legal Services at 303-837-1313 to explore whether there is a legal aid organization that could help on a low-fee or no-fee basis. In any event, it is evident that a federal court in Denver, Colorado is not the place to be.

Id. at 145–47.

Final judgment was entered in the case on April 19, 2021. After filing an unsuccessful motion for new trial, Dawson appealed to this court.

III

Dawson argues in his appeal that the district court erred in dismissing his action. We review the district court's factual findings for clear error and its legal conclusions regarding the Hague Convention and ICARA de novo.[2] *See Watts v. Watts*, 935 F.3d 1138, 1143.

[2] Dawson's pleadings also make passing references to the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. That statute, however, has no applicability to this case.

The Hague Convention, of which both the United States and the United Kingdom are signatories, has two express objects: (1) "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"; and (2) "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Hague Convention, art. 1. ICARA, in turn, was enacted by Congress "to establish procedures for the implementation of the Convention in the United States." 22 U.S.C. § 9001(b)(1). Congress emphasized in doing so that "[t]he Convention and [ICARA] empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." *Id*. § 9001(b)(4).

Dawson does not claim that R. was internationally abducted or wrongfully retained by Dylla, nor does he claim that R. should be returned to the United Kingdom for custody proceedings. Indeed, it is undisputed that custody proceedings for R. occurred in the United Kingdom and culminated in the issuance of a January 11, 2016 custody order finding, in pertinent part, that it was in R.'s best interests to live with Dylla in the United States. In other words, it is undisputed that Dylla acted lawfully in moving R. to the United States and in doing so did not breach Dawson's custody rights under the Hague Convention.

Dawson instead seeks in this case to enforce the rights of custody and access that were granted to him by the Manchester family court's January 11, 2016 custody order. As Dawson correctly notes in his appellate brief, there is a circuit split regarding whether ICARA authorizes federal courts to entertain the type of access

claim that Dawson seeks to assert here, i.e., a claim seeking to secure the exercise of visitation rights that were previously afforded to him by the Manchester family court. *See Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013) (concluding that ICARA expressly authorizes federal courts to hear access claims); *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006) (concluding that federal courts are not authorized under ICARA to hear access claims). We have not, to date, weighed in on this issue.

It is unnecessary for us to definitively resolve that issue in this appeal because, we conclude, even assuming that ICARA authorizes federal courts to hear access claims, the district court in this case should have abstained from exercising jurisdiction over Dawson's access claims pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention applies when "(1) there is an ongoing criminal, civil, or administrative proceeding, (2) the state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) the state proceedings involve important state interests." *Weitzel v. Div. of Occupational & Prof'l Licensing of Dep't of Commerce*, 240 F.3d 871, 875 (10th Cir. 2001) (quotation marks omitted). If these three requirements are met and no exceptions apply, a federal court must abstain from hearing the case. *Id*.

The record on appeal in this case indicates that all three requirements are met. First, it is undisputed that the parties have, for the past five years, been litigating access issues in the state court civil proceeding and that Dawson attempted to assert in state court the same access issues that he now seeks to assert in this federal action, i.e., enforcement of certain provisions of the Manchester family court's January 11,

2016 custody order. To be sure, the state court most recently dismissed the action without prejudice. But it is undisputed that the state court did so, in pertinent part, because of Dawson's failure to comply with a court order, and that Dawson's failure to comply was undoubtedly due to the fact that the state court had previously issued a bench warrant for his arrest due to his failure to appear at a scheduled hearing on child support and allocation of travel costs. In other words, it is apparent from the record that Dawson chose to initiate these federal proceedings because his efforts at enforcing the Manchester family court's January 11, 2016 custody order in the state court were stymied by his own failure to comply with the state court's orders and the state court's resulting issuance of a bench warrant for his arrest. Second, the record makes clear that the state court provides an adequate forum to hear the access claims raised by Dawson in this federal action. And third, we conclude that the state court proceedings involve two important state interests: family relations and the interest in enforcing arrest warrants that have been issued by a state court. *See Kelly v. Robinson*, 479 U.S. 36, 49 (1986) (recognizing "that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief"); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *Lazaridis v. Wehmer*, 591 F.3d 666, 671 (3d Cir. 2010) (concluding that *Younger* abstention applied to plaintiff's constitutional challenges to state registration and enforcement of French custody orders).

IV

The judgment of the district court is VACATED and the matter REMANDED with directions to dismiss the petition without prejudice.

Entered for the Court

Mary Beck Briscoe
Circuit Judge