



treatment for heroin addiction. They were married on March 18, 1995, in Florida. Their son, Simon, was born on June 20, 1995 in Philadelphia. According to respondent's counsel (not specifically refuted by petitioner's counsel), Simon was addicted to heroin at birth, as a result of his mother's addiction, which allegedly continued until at least 1996. Respondent, not to be outdone, has an extensive history of alcohol abuse and cocaine addiction. He has undergone, and is still involved in, treatment for these problems, and claims to have been "clean" for at least the past year.

Petitioner and respondent resided together in Philadelphia from December 1994 until August 16, 1997, when petitioner, with respondent's consent, took their child on a trip to Europe, to visit her parents in Spain, and other relatives and friends in Switzerland. Shortly after arriving in Europe, the petitioner informed respondent by letter that she did not intend to return to the United States, having instituted a divorce action in a Swiss court.

Respondent then filed an application for the return of the child, in the Tutelary Court in Switzerland, invoking the Convention. The trial court refused to order the child's return to the United States, and that ruling was upheld in an intermediate court of appeal. Petitioner appealed to the highest court in Switzerland but, through a subterfuge, managed to spirit

the child out of the country and back to Philadelphia. Upon learning that the child was no longer in Switzerland, the Swiss appellate court declined to entertain the appeal, and dismissed the action.

Meanwhile, back in Pennsylvania, respondent had been busy litigating for custody of the child. Immediately upon learning that his wife intended to remain in Europe, respondent filed an emergency application for temporary custody of the child, in the Court of Common Pleas of Philadelphia County. On October 8, 1997, that court, per the Honorable Edward E. Russell, granted temporary custody to respondent, ex parte, and scheduled a hearing for permanent custody for October 17, 1997. That hearing was postponed, because respondent had not been able to make service of process upon petitioner. Service was achieved on or about November 7, 1997, and the hearing was scheduled for November 13, 1997. On November 13th, an attorney representing petitioner appeared and obtained a postponement until November 20, 1997, so that petitioner could appear.

Petitioner did not appear on November 20th either. On that date, the Honorable Nicholas Kozay entered an order awarding permanent custody of Simon to the respondent, and also imposing a \$1,500 fine on petitioner for her non-appearance.

On or about December 4, 1997, petitioner appealed from Judge Kozay's order. Unfortunately, the appeal has not yet been

docketed in the Superior Court of Pennsylvania, because Judge Kozay completely retired from the bench shortly after entering the custody order, and Superior Court rules require an opinion from the lower court before an appeal will be docketed.

Petitioner's counsel have made repeated efforts to resolve this procedural impasse - including an application to the Supreme Court of Pennsylvania. On March 30, 1998, the Supreme Court of Pennsylvania granted petitioner's application for a stay of Judge Kozay's custody order. On May 28, 1998, respondent returned to Philadelphia with Simon. Respondent then applied to the Supreme Court of Pennsylvania for an injunction to preclude petitioner from removing the child from Pennsylvania. On June 16, 1998, by an order without opinion, the Pennsylvania Supreme Court (1) dismissed respondent's application for an injunction, without prejudice; and (2) dissolved the stay of Judge Kozay's custody order.

Additional events in the Swiss courts should also be mentioned. Petitioner's application for a divorce included an application for custody of Simon. The trial court entered an order of dismissal for lack of jurisdiction. Petitioner appealed that decision to the Court of Justice of Geneva. On or about July 9, 1998, that court ruled that the Swiss courts do have jurisdiction to resolve the custody dispute, and entered an order granting temporary custody of Simon to petitioner. Under Swiss

law, however, that order is not yet enforceable, since the appeal period will not expire until September 14, 1998. If respondent appeals, the order would remain unenforceable during the pendency of the appeal. If respondent does not appeal, the Swiss court proposes to hold a hearing on September 14, 1998, but counsel have not yet obtained clarification as to the scope of any such hearing.

## II. Legal Issues

The Convention mandates that, when a child is wrongfully removed from his country of "habitual residence" the courts of the receiving state "shall" order the return of the child to his place of habitual residence unless the person opposing return proves that "(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." And, under the ICARA the burden of proof is on the objector to prove that exception by clear and convincing evidence. Respondent argues that the Tutelary Court's decision denying his application to have Simon returned under the Convention should not be granted full faith and credit, because, although the Tutelary Court correctly found that Simon's habitual residence was in the United States, and that his removal to Switzerland was wrongful, it committed manifest error in refusing to return Simon to the United States, as mandated by the Convention. Respondent

points out that the court made no specific finding of fact with regard to any supposed "grave danger"; that there was no evidence to support any finding of grave danger to Simon if he were to be returned to the United States; and that a mere conclusory statement does not satisfy the strict requirements of the Article 13(b) exception. Respondent finds much support for this argument in the reported decisions of the courts of the United States on this subject. As noted in the case of Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), the "grave danger" exception in Article 13(b) is intended to apply only where the country of habitual residence is a war zone, or suffering famine or pestilence or other chaotic conditions. Under the Convention, a court is not permitted to frustrate the scheme of the Convention by relying merely on factors which would be appropriate if custody issues were being addressed.

It is therefore at least arguable that the Tutelary Court's decision would not be entitled to full faith and credit because that court plainly did not have jurisdiction to resolve custody issues, yet that is precisely what it actually did, under the guise of Article 13(b).

I need not resolve that issue, however, in view of the recent action of the Swiss Federal Court, which concluded that, since Simon was no longer in Switzerland and had been returned to the United States, respondent's application to the Swiss courts

to order his return had become moot ("the appeal is without object and the case is dismissed"). It should be noted that Article 12 of the Convention provides:

"Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another state, it may stay the proceedings or dismiss the application for the return of the child." (emphasis supplied)

To extend full faith and credit to the judgments of other courts means simply that such judgments must be given the same effect they would have in the jurisdiction where rendered. The federal court (the highest appellate court in this instance) did not affirm the decisions of the lower courts; it dismissed the entire action - presumably in accordance with Article 12 of the Convention. Moreover, even if it were otherwise, and the judgment of the lower courts had been affirmed, that judgment merely establishes that the respondent was not entitled, under the Convention, to have the Swiss courts order Simon's return to the United States. This Court is not being asked to order Simon's return to the United States.

Under the terms of the Convention, it is wrong to remove a child from his place of habitual residence. It is by no means clear, however, that it is wrong for a parent to use self-help in returning the child to his place of usual residence. Thus, an essential predicate for the present application seems to be lacking. Moreover, the "clean hands" doctrine militates

against granting the present application.

### III. The Remedy

This Court does not have jurisdiction to resolve custody disputes. But the Convention and the implementing statute do, in my view, confer upon this Court an obligation to see to it that custody disputes are resolved by the appropriate court, on their merits, and on a level playing field. Neither party has thus far shown an inclination to face the custody issue realistically or fairly. A father should not be denied custody of his three year old son merely because, two years ago, he had a drinking problem and was involved in an alcohol-related automobile accident (not involving the child). A mother should not be deprived of custody of her three year old son because she refused to travel to Philadelphia from Switzerland. Child-custody should not be resolved by default judgments.

I therefore propose to stay this action for a period of 90 days. If, within that period (which may be extended by this Court for cause shown), petitioner shall have caused the permanent custody order entered by Judge Kozay to be vacated, and shall have arranged to have all custody issues concerning Simon resolved at a full and fair hearing in the Court of Common Pleas of Philadelphia County, with the benefit of appropriate evaluations of both parents with regard to their fitness for obtaining custody, and a full and fair consideration of the best

interests of the child; and if respondent shall grant reasonable visitation rights to petitioner in the interim, this Court will, absent additional evidentiary developments pertinent to this case, then dismiss the present petition.

An Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY ALEXANDER VON WUSSOW-ROWAN	:	CIVIL ACTION
	:	
v.	:	
	:	
DAVID A. ROWAN	:	NO. 98-3641

ORDER

AND NOW, this            day of August, 1998, IT IS ORDERED:

That all further proceedings in this case are STAYED, for a period of 90 days, on the terms and conditions set forth in the accompanying memorandum.

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John P. Fullam, Sr. J.