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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
CHANCERY DIVISION, FAMILY PART
DOCKET NO. FD-13-0728-20

J.R.,

Plaintiff,

v.

A.R.,

Defendant.

APPROVED FOR PUBLICATION

February 15, 2022

COMMITTEE ON OPINIONS

Decided: July 1, 2020

Claire Scully, for plaintiff (Claire Scully, Esq., LLC, attorneys)

Amy B. Harris, for defendant (Keith, Winters, Wenning & Harris, LLC, attorneys)

ACQUAVIVA, J.S.C.

This case presents a question of first impression in New Jersey regarding a threshold inquiry to the application of the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670 ("Convention"). Specifically, this case requires the court to determine whether an accession to the Convention by the child's country of habitual residence—here, the Philippines—mandates application of the Convention where the

United States has not accepted that accession. For the reasons set forth herein, the court answers the question in the negative. Accordingly, because the United States has not accepted the Philippines' accession to the Convention, the alleged wrongful removal at issue is not subject to the Convention's prompt return protocols.

I.

The facts are not disputed. The parties were married in the United States in January 2016. They have a six-year-old child together, who was born in the United States in 2013. In 2016, the parties and child moved to the Philippines where they resided with J.R.'s[1] parents. While residing in the Philippines, both parties pursued further education. Although the marriage faltered in 2018, the parties continued to reside together in the paternal grandparents' home and remain married.

On January 8, 2020, however, A.R. left the residence with the child. Thereafter, on February 15, 2020, A.R. and the minor child left the Philippines for New Jersey without J.R.'s consent. Indeed, A.R. admitted that when she broached a return to the United States with J.R., his response was: "You can go home, but not [our child]." A.R. testified that she left the Philippines for

[1] The parties are identified by initials to protect confidentiality. R. 1:38-3(d). For purposes of publication, this opinion is an abridged version of the court's opinion and does not address other disputed issues.

"multiple reasons," including loneliness, financial strain, the deteriorating union with J.R., and "to give [our child] a better life in the U.S."

Upon locating A.R. in Monmouth County, J.R. filed an application seeking, among other relief, the return of the child to the Philippines pursuant to the Convention.

II.

The Convention is a multilateral treaty governing the wrongful removal of children from their country of habitual residence. Adopted in 1980, the Convention "address[es] the problem of international child abductions during domestic disputes." Monasky v. Taglieri, ___ U.S. ___, 140 S. Ct. 719, 723 (2020) (quoting Lozano v. Montoya Alvarez, 572 U.S. 1, 4 (2014)). Article 1 declares the Convention's twin "objects" are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Accordingly, the Convention's "central operating feature is the return remedy," which requires the return of a child forthwith to the child's country of habitual residence, absent narrow, enumerated defenses. Abbott v. Abbott, 560 U.S. 1, 9 (2010). More than one hundred countries are signatories, including the

United States and the Philippines. See Monasky, ___ U.S. at ___, 140 S. Ct. at 723.

There can be no dispute that when two countries are "Contracting States" to the Convention that its prompt return remedy applies to wrongfully removed children. See Abouzahr v. Matera-Abouzahr, 361 N.J. Super. 135, 152 (App. Div. 2003) ("[A] jurisdictional requisite is that the nations involved must be signatories to the Hague Convention.") (collecting cases); F.H.U. v. A.C.U., 427 N.J. Super. 354, 371 (App. Div. 2012) (noting, at inquiry's outset, that United States and Turkey were signatories).

Without delving further into the Convention's substantive mandates, the threshold inquiry here is the precise parameters of "Contracting State" and whether the Philippines-United States relationship vis-à-vis the Convention triggers its application.

The analysis begins with the Convention's plain language, as "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." Abbott, 560 U.S. at 10 (quoting Medellín v. Texas, 552 U.S. 491, 506 (2008)). Although the Convention does not define "Contracting State," the bounds of the term are illuminated by Articles 38 and 35.

For countries that were not original signatories, Article 38 provides:

> Any other State may accede to the Convention.
>
> . . . .
>
> The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession.
>
> [Emphases added].

Adding further context to Article 38, the Hague International Child Abduction Convention; Text and Legal Analysis states: "Significantly, under Article 38 the Convention is open to accession by non-member States, but enters into force only between those States and member Contracting States which specifically accept their accession to the Convention." 51 Fed. Reg. 10,494, 10,514 (March 26, 1986) (emphases added). Thus, the Convention's authoritative commentary undergirds its plain text, demonstrating that Article 38 is consequential, not ministerial.[2]

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[2] "As the Hague Conference's official reporter, Ms. [Elisa] Pérez-Vera's report 'is recognized by the Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention.'" F.H.U., 427 N.J. Super. at 371 n.7 (quoting Text and Legal Analysis, 51 Fed. Reg. at 10,503); accord Abbott, 560 U.S. at 15 (quoting Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 185 (1982)) (noting the Executive Branch's interpretation of treaties are "entitled to great weight").

Moreover, Article 35 provides that "[t]he Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." (Emphasis added). Read in conjunction with Article 38, acceptance of accession is a condition precedent to the Convention's applicability vis-à-vis two nations.

The United States' status as a Contracting State is patent. See Marks v. Hochhauser, 876 F.3d 416, 420 (2d Cir. 2017) (recounting timeline of United States' ratification). Conversely, the Philippines did not accede to the Convention until March 2016. And, dispositive here, the United States has not yet accepted that accession. See Acceptances of Accessions to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Hague Conf. on Priv. Int'l L., https://assets.hcch.net/docs/d796ab1c-7137-4376-8564-3dcd7d078e49.pdf (May 6, 2020).[3]

Accordingly, applying the plain language of Articles 35 and 38 to the undisputed facts here, because the United States has not accepted the Philippines' accession, the Convention does not yet "have effect" between the two nations. Thus, pursuant to its clear, express, unambiguous language, the Convention does not apply here.

[3] This linked PDF is periodically revised and replaced with an updated iteration.

In analogous circumstances, courts confronted with this issue have held similarly. In Marks, the United States Court of Appeals for the Second Circuit addressed an alleged wrongful removal of children from Thailand to New York. 876 F.3d at 417. There, following a trip to the United States in 2015, Ms. Hochhauser did not return with the children to Thailand. Ibid. Although the United States accepted Thailand's accession to the Convention in January 2016, that acceptance did not occur until after the purported wrongful removal in 2015. Id. at 420. Thus, at the time of the alleged wrongful removal in Marks—like the alleged wrongful removal here—Thailand's accession to the Convention had not yet been accepted by the United States.

On those facts, which align in material respects with the facts here, and premised on the Convention's plain language, the Second Circuit held that the Convention "does not 'enter into force' until a ratifying state accepts an acceding state's accession." Id. at 424. Accordingly, because the allegedly wrongful retention occurred prior to the United States' acceptance of Thailand's accession, Mr. Marks was without remedy under the Convention.

Other federal and state courts agree. For example, Taveras v. Taveras, 397 F. Supp. 2d 908 (S.D. Ohio 2005), involved a custody dispute involving the United States and the Dominican Republic. There, as here, although the Dominican Republic acceded to the Convention, it was "undisputed" that the

United States and the Dominican Republic had "not entered into the negotiations required by Article 38." Id. at 911. "Consequently, the Convention's administrative and judicial mechanisms [we]re not yet applicable with regard to relations between the two countries." Ibid. (citing Gonzalez v. Gutierrez, 311 F.3d 942, 945 (9th Cir. 2002) ("Accession . . . binds a country only with respect to other nations that accept its particular accession under Article 38.")); see also Viteri v. Pflucker, 550 F. Supp. 2d 829, 833 (N.D. Ill. 2008) ("[T]he Convention enters into force between an acceding State and a member Contracting State only when the Contracting State accepts the acceding State's accession to the Convention."); Safdar v. Aziz, 933 N.W.2d 708, 709 (Mich. Ct. App. 2019) (finding Convention's procedures not binding because United States had not accepted Pakistan's accession); cf. Souratgar v. Fair, 720 F.3d 96, 102 n.5 (2d Cir. 2013) (noting Convention applied where United States accepted Singapore's accession three weeks prior to alleged wrongful removal).

Scholarship too has coalesced around this interpretation. See, e.g., Olga Khazova, Russia's Accession to the Hague Convention on Civil Aspects of International Child Abduction 1980: New Challenges for Family Law and Practice, 48 Fam. L.Q. 253, 253 (2014) (citing Article 38 and noting "accession takes effect only in regards to the relations between the acceding

State and those Contracting States that have declared their acceptance to the accession"); Carol S. Bruch, The Central Authority's Role Under the Hague Child Abduction Convention: A Friend in Deed, 28 Family L.Q. 35, 36 n.2 (1994) (same); Lynda R. Herring, Taking Away the Pawns: International Parental Abduction & The Hague Convention, 20 N.C. J. Int'l L. & Com. Reg. 137, 138 n.8 (1994) (same).

Accordingly, in view of the Convention's plain language, not to mention analogous federal and state precedent, and scholarly consensus, the court concludes that because the United States has not accepted the Philippines accession to the Convention in accordance with Article 38, the court cannot grant J.R. his requested relief.