Tkel v. Leirvik, 14 ROP 155 (2007)
DARLENE JANE TKEL,
Appellant,

v.

ALF BJORGE LEIRVIK and
ERIK ARILD WARLAND,
Appellees.

CIVIL APPEAL NO. 06-040
Civil Action No. 06-001

Supreme Court, Appellate Division
Republic of Palau

Decided: September 4, 2007[1]

Counsel for Appellant: Johnson Toribiong

Counsel for Appellees: Richard Brungard

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

MILLER, Justice:

Appellant Darlene Jane Tkel appeals the judgment of the Trial Division recognizing the custody judgments of Norwegian courts that awarded custody of two of her children to their fathers, Appellees Alf Bjorge Leirvik and Erik Arild Warland. Having considered the arguments of the parties, we affirm the judgment of the Trial Division.
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BACKGROUND

In 1990, Warland and Tkel met in the United States when they were both students. They have two children together: Lindsay was born on February 18, 1992, and Andre was born on May 17, 1994. Warland and Tkel were married in Norway in 1992, but the marriage ended in divorce in 1999. Shortly thereafter, Tkel started a relationship with Plaintiff Alf Bjorge Leirvik. They have one child, Marlene, who was born on June 15, 2003.

[1]Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral arguments pursuant to ROP R. App. P. 34(a).

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In 2004, Warland and Leirvik sought custody of their children by filing actions in the Jæren District Court in Norway. At the time, all of the parties resided in Norway. On March 18, 2005, Judge Drangsholt issued a Judgment and Interim Decision finding that Leirvik should have permanent custody of Marlene but that the girl would continue to live with Tkel until the appellate process had been concluded. On May 12, 2005, Judge Solvik made a similar custody finding with respect to Lindsay and Andre, except that Warland would have "interim" custody during the appeal process.

Tkel appealed both decisions but left Norway and traveled to Palau with Andre and Marlene on June 12, 2005, before either appeal was heard. In connection with the custody dispute over Lindsay and Andre, the Norwegian Court of Appeals twice attempted to contact Tkel to interview Andre. The appellate court ultimately concluded that Tkel would not make Andre available and, after considering the evidence available to it, affirmed the District Court's custody determinations in October 2005. Tkel appeared through counsel and made a statement over the phone during the appellate hearing regarding custody of Marlene. The Court of Appeals found that the evidence presented during the appeal, including Tkel's telephone statement, gave no grounds for deviating from the District Court's determination that Leirvik should have permanent custody of Marlene.

Tkel brought Andre and Marlene to live with her in Peleliu. In January 2006, Warland and Leirvik filed suit in the Trial Division to secure the return of their respective children. On November 14, 2006, the Trial Division recognized the judgments of the Norwegian courts and entered a custody order for Warland and Leirvik pursuant to the Norwegian court orders. On November 17, 2006, the Trial Division ordered that custody of the children be transferred to their respective fathers. Tkel sought a stay of execution pending this appeal that was denied by this Court on December 1, 2006. Tkel surrendered Andre and Marlene to their respective fathers on December 1, 2006, who took the children with them back to Norway. Tkel now appeals, claiming the Trial Division incorrectly applied the law when deciding to recognize the judgments of the Norwegian courts.

STANDARD OF REVIEW

This Court employs the *de novo* standard in evaluating the lower court's conclusions of law. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 46 (2006). Factual findings are reviewed using the clearly erroneous standard. *Id.*

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ANALYSIS

Palau has not enacted a law to address the recognition and enforcement of foreign judgments. Under 1 PNC § 303, the authority for the recognition and enforcement of foreign judgments is the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481, 482, and 485 and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 79, 98 and 117. Taken together, the two Restatements stand for the proposition that valid judgments from foreign jurisdictions should generally be recognized and enforced as long as due process was afforded in the foreign jurisdiction. *See* FOREIGN RELATIONS LAW §§ 481, 482(1)(a) and CONFLICTS OF

LAW § 98. The Trial Division found that Tkel was afforded a full and fair opportunity to litigate her claims for custody before the Norwegian courts and that the Norwegian system as a whole and as applied in these particular cases adequately protected Tkel's due process rights.

Tkel now claims that the Trial Division overlooked applicable Palauan law that should take priority over the Restatements. She cites to the International Convention on the Rights of the Child ("ICRC") adopted by the General Assembly of the United Nations in 1989. In 1995, the President of the Republic of Palau approved the ICRC in Executive Order No. 142 and the Fourth Olbiil Era Kelulau ratified the Convention. *See* House Joint Resolution No. 4-81-11. Specifically, she argues that the Trial Division should have applied ICRC Article 3(1): "In all actions concerning children . . . undertaken by . . . courts of law . . . the best interests of the child shall be a primary consideration."

A. Self-Execution

The Appellees argue that the ICRC is not self-executing and should not apply in this case. Ratified treaties have the same force and effect as the laws of the Republic. Just as a constitutional provision, the presumption is that treaty provisions are self-executing except in situations:

> 1) Where we cannot determine the scope or nature of the right from the language of the provision even with full recourse to the full panoply of interpretive devices which courts normally use to divine the meaning of constitutional language; or 2) where the provision reflects an intention of the framers that it not be implemented until legislative or other action is taken.

Gibbons v. Etpison, 4 ROP Intrm. 1, 4 (1993). While Article 3(1) is general, that does not mean this Court cannot determine its scope or nature from the language. "The first guideline quoted above recognizes that constitutional language is often imprecise, and makes clear that such imprecision is *not* a basis for finding that a provision is not self-executing, so long as courts can give meaning to it in the way courts usually do." *Eberdong v. Borja*, 10 ROP 227, 229 (Tr. Div. 2003). Article 3(1) is clear that the best interests of the child should be a primary consideration of a court. While Article 3(1) does not detail what are the best interests of children, more specifics are not necessary because the best interests of children are unique as the children themselves ⊥158 and should be determined on a case by case basis. A court can giving meaning to the language of Article 3(1) and it does not fall into the first exception to the presumption of self-execution.

As to the second exception, Article 3(1) does not include any language about later implementation by a legislature, nor does it envision the legislature defining any terms. There appears to be no intention by the drafters that further legislation is required. Article 3(1) does not fall into the second exception to the presumption of self-execution. Accordingly, ICRC Article 3(1) is self-executing and applicable law.

B. Best Interests of the Children

Tkel claims that the Trial Division overlooked the ICRC and did not take into consideration the best interests of the children in making its decision. As the Appellees point out, the ICRC was presented by them to the Trial Division not Tkel. While the Trial Division did not mention the ICRC, it considered the interests of the children a "great concern to a court" and found the children's interests to have been properly litigated and considered by the Norwegian courts:

> With respect to Tkel's argument that this court should make an independent determination regarding the best interests of the children, the governing law suggests that the court may, but need not, address this issue. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 485 n.4. There is no doubt that a child's interest should be of great concern to a court involved in a child custody dispute, but, having found that the Norwegian courts afforded Tkel a full and fair trial on exactly that issue, the Court is persuaded that concerns regarding judicial comity, deterrence of child-snatching, and the avoidance of protracted custody litigation and inconsistent judgments require the recognition and enforcement of the Norwegian judgments without additional proceedings on the merits.

Trial Division Opinion at 8. Tkel's argument is premised on the idea that the ICRC required the Trial Division to make a *de novo* assessment of the children's best interests. However, ICRC Article 3(1) does not mandate that a court make its own determination of the best interests of the child, nor does it, when appropriate, prevent a court from recognizing and enforcing foreign judgments that address such issues. To hold otherwise, especially in a case where the children were brought to Palau in violation of court orders, would be to turn back the clock[2] ⊥159 and undermine ICRC's equally important mandate that countries should take measures to combat the illicit transfer of children abroad. ICRC Article 11 § 1.[3] The Trial Division did not err when it deferred to the Norwegian courts' determinations of the best interests of the children.[4]

CONCLUSION

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[2] Prior to the mid-1970s, American courts often refused to recognize foreign judgments in child custody cases in favor of a *de novo* determination of the best interests of the child. *See* FOREIGN RELATIONS LAW § 485 n.1. Unfortunately, this procedure often encouraged parents against whom a custody decree was rendered to take the child to another state or country in the hopes of obtaining a more favorable judgment in the second jurisdiction. *Id.* The recent trend is towards a more deferential policy favoring enforcement of foreign child custody determinations in order to prevent child-snatching and prolonged litigation. *See* FOREIGN RELATIONS LAW § 485 cmt. a and CONFLICTS OF LAW § 79 cmt. b.

[3] The Hague Convention on the Civil Aspects of International Child Abduction provides for the recognition of foreign child custody decrees. *See* Articles 3, 14, and 17. Palau is not a signatory to the Convention, but many countries are a signatory to both the Hague Convention and the ICRC. It is inappropriate to read into the ICRC a requirement that would conflict with the Hague Convention.

[4] Although the Trial Division did not cite to it, the Trial Division's actions satisfied the requirements of ICRC Article 12, which provides that a child who is capable of forming his own views has the right to express those views. The Trial Division spoke to Andre and specifically recommended that the judges in Norway consider his wishes before entering final judgment.

The Trial Division did not err when considering the best interests of the children and properly relied on the Restatements to address the recognition and enforcement of foreign judgments. For these reasons, the Trial Division's judgment is affirmed.