



Sylvester v

By Jan Rewers McMillan

A Michigan auto executive is sent to Austria to open a joint venture. While there, he falls in love with an Austrian woman. Following his reassignment to Michigan, he marries the woman who later gives birth here to a daughter. One day, after just 18 months of marriage, the auto executive returns from work to find his wife and baby gone. He later learns his wife has returned "home" to Graz, Austria with baby Carina whom, she threatens, he will never see again.

Monika Sylvester had abducted her daughter to Austria. The litigation that ensued in Austria under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention)¹ resulted in an order that Carina be immediately returned to Michigan. The order was affirmed on appeal. When Monika Sylvester stubbornly refused to comply with its terms however, the Austrian legal system proved wholly ineffectual to compel her to do so. While the system at first merely enabled her non-compliance, it ultimately provided a mantle of legitimacy both to her defiance of the return order and to the abduction itself. The result demonstrated Austria's willful disregard not only of its treaty obligations but

American father and daughter given voice in European Court of Human Rights



Austria

also of the underlying rule of law upon which those treaty obligations are based.

Little Carina has thus been at the vortex of Austrian-American relations² for more than seven years. As time has passed and her fate has unfolded, Carina is poised to become an unwitting bellwether in the reformation of the laws regarding the enforcement of return orders entered by the courts of Austria and other Council of Europe³ nations under the Hague Convention.

Thomas R. and Carina M. Sylvester v The Republic of Austria

*Sylvester v Austria*⁴ is currently pending before the European Court of Human Rights (ECHR) in Strasbourg, France. The complaints of Thomas and Carina Sylvester were

filed in 1997 and 1998 and admitted by the court for adjudication in 2002. They allege a violation by Austria of their fundamental human right to be free from unwarranted interference with their family life as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights) under Article 8. The complaints are based on the aftermath of Austria's failure to enforce the order entered by its own courts in 1995 requiring that Carina be immediately returned to Michigan under the terms of the Hague Convention, to which both Austria and the United States are party. Had the return order, affirmed by the Austrian Supreme Court, been timely enforced, Carina would have been back in Michigan six months after

her abduction. The pre-abduction status quo would have been restored and the custody determination would then have been made here, her adjudicated "habitual residence" at the time of her abduction, as required under the Hague Convention.

Instead, Austria's civil law system provided no effective means of enforcing the valid and final return order. Thus, despite Austria's duties and obligations under the Hague Convention to assure the prompt return of parentally abducted children to their countries of habitual residence at the time of the abduction,⁵ neither Austrian law nor procedure provided any mechanism to compel the mother's compliance with the return order. This ultimately permitted the Austrian courts to engage in the circular reasoning that due to the passage of time resulting from their own failure to enforce the order, Carina had become well-settled in Austria and it would therefore no longer be in her best interests to pursue enforcement. In other words, Carina had not been returned because the return order was not enforced; now the return order would not be enforced because Carina had not been returned.

With that determination, the Austrian court proceeded to award the mother custody of Carina in Austria in contravention of Article 16 of the Hague Convention, which divests a court of custody jurisdiction once it has entered a return order. It then ordered the father to pay child support retroactive to the date of the abduction. To date, Carina, a native-born American, has never been back to the United States and is unconscionably forbidden by the same Austrian court from traveling here under any circumstances. She is now eight years old and speaks only German. Thomas may see her only in Austria and only under the supervision of the mother at such times as the mother directs. Carina knows her father as a foreigner who speaks inadequate German and who comes to her home three times a year with armloads of presents. She has been given no opportunity whatsoever by the Austrian courts over these many years to experience the bonds of a family tie with her father and extended American family, and likely never will.



Fast Facts

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The European Court of Human Rights

It is against this backdrop that the complaints of this father and daughter have been admitted for consideration by the ECHR, the enforcement arm within the Council of Europe for the European Convention of Human Rights. The Republic of Austria, a Council of Europe nation, is a party to both the Hague Convention and the European Convention of Human Rights. As such, it is subject to defending the actions of the agents of its government before the ECHR for violations of the European Convention of Human Rights and now, in this context, the Hague Convention as well.

The ECHR was established mid-twentieth century to provide a forum to protect the fundamental rights and freedoms guaranteed by the European Convention of Human Rights. Its purpose is to ensure that relevant structures and procedures are in place in the courts of Council of Europe nations to allow for the vindication of violations of those fundamental rights and freedoms in accordance with the rule of law. Since the European Convention of Human Rights entered into force in 1953, it has been amended by 11 protocols. Protocol 9 allowed individual applicants to bring their cases to the court and protocol 11 restructured the convention's enforcement machinery. The result is the current incarnation of the ECHR, which came into operation on November 1, 1998, replacing the former two-tiered commission/commissioner system.⁶

There are currently 43 judges who sit on the ECHR. Judges are elected by the Parlia-

mentary Assembly of the Council of Europe for a six-year term. There is no restriction on the number of judges of the same nationality and each sits in his/her individual capacity, and not as a representative of any state.⁷

The ECHR is divided into four sections the composition of which are "geographically and gender balanced and take account of the different legal systems of the contracting states."⁸ Chambers of seven members are established within each section on a rotating basis. The Grand Chamber consists of 17 judges. The procedure is adversarial and hearings are open to the public. Individuals may submit their own applications, but legal representation by an attorney licensed to practice and resident in one of the Council of Europe nations is required after the individual's case is accepted for admission, unless representation by another person is permitted by the President of the Chamber. The official languages of the ECHR are English and French.⁹

The court's business is generally conducted in two phases: admissibility of a complaint and adjudication of a complaint on the merits. The admissibility consideration acts as a sua sponte summary judgment in the event it is not well-grounded in the law or is otherwise "manifestly ill-founded."¹⁰ Only complaints that survive the admissibility phase proceed to final adjudication on the merits. An admitted complaint is brought first to a decision by the assigned section and, should a review of the decision be requested, the case is then sent to the grand chamber for a final, binding decision from which there is no further appeal.¹¹

The relief provided by adjudication in the ECHR is "just satisfaction," primarily in the form of money damages including pecuniary, non-pecuniary, and attorney fees and costs.¹² In addition, a violating nation must take remedial measures to conform its law and procedures to align with the terms and policies of the European Convention of Human Rights. For example, in *Sylvester v Austria*, should father and daughter prevail, they will be awarded money damages and Austria will be obliged to put into place structures and systems to ensure that Article 8 right to family life guarantees are met by the prompt enforcement of adjudicated orders for the return of abducted children entered by their courts under the Hague Convention.

A committee of ministers of the Council of Europe supervises the enforcement of a judgment against a contracting state and determines whether adequate remedial measures have been taken to come into conformity with the court's judgment.¹³

The caseload of the ECHR is onerous and is the cause of considerable delay. Hence, the *Sylvester* complaints took nearly four years to be admitted and six years to be adjudicated. The number of complaints lodged with the court has increased from just 404 in 1981, to 4,750 in 1997, and to 13,858 in 2001. Reforms are under consideration to more effectively process the expanding number of complaints.¹⁴ In addition to the right to family life and fair trial asserted in *Sylvester*, the court addresses complaints alleging violations of freedom of religion, thought, and conscience, freedom of expression, assembly, and association, the prohibition of discrimination, the prohibition of torture, the right to life, and the right to liberty and security, among others.

American Litigants in the ECHR

Thomas Sylvester is just the second parent, and the first American, to have a complaint admitted for consideration by the ECHR concerning the failure by a Council of Europe nation to enforce a Hague Convention return order. As a minor, Carina lacks capacity to raise a claim against Austria herself and thus her American father has brought the action both in his own name

and on her behalf. Leave to Intervene was granted jointly to the National Center for Missing and Exploited Children and the International Centre for Missing and Exploited Children, and also to this author as an individual American attorney who has represented Thomas Sylvester since the date of Carina's abduction in October 1995.

The All Reasonable Measures Standard

At the time the *Sylvester* complaints were filed, the ECHR had never adjudicated the issue of the failure by a contracting state to enforce a return order entered under the Hague Convention as a violation of Article 8 of the European Convention of Human Rights. In essence, the analysis requires linking a nation's obligations under one convention to the obligations of another. However, in early 2000, a landmark decision was published determining Romania in violation of Article 8 of the European Convention of Human Rights for its failure to enforce an order entered under the Hague Convention that an abducted child be returned to France. In *Ignaccolo-Zenide v Romania*,¹⁵ the ECHR found an obvious nexus between a contracting state's obligations under the Hague Convention and its obligations under Article 8 of the European Convention of Human Rights to protect the right to family life.

This decision created a variant on the traditional legal standard for examining a violation of Article 8, which had evolved over the decades of ECHR caselaw. Under the new "all reasonable measures" standard articulated in *Ignaccolo-Zenide*, the ECHR should now determine Austria's liability in light of whether it took all reasonable measures required of it pursuant to its obligations under the Hague Convention to enforce the *Sylvester* return order. The inquiry should focus on whether sufficient procedural mechanisms were in place in the Austrian legal system to empower the court to timely enforce the return order when voluntary compliance was not had.

This new all reasonable measures standard fits the facts and circumstances of *Sylvester v Austria* precisely and acts as clear precedent for the ultimate issue to be decided in the case.

McMillan Gains Prominence

By Naseem Stecker

April was an exceptional month for Southfield attorney Jan Rewers McMillan. Years of hard work on the *Sylvester* case—trips to Austria, discussion and consultation with the U.S. State Department, Senate and House Committees, and the National Center for Missing and Exploited Children in Alexandria, Virginia, finally crystallized when on April 24, 2003, the European Court of Human Rights (ECHR) unanimously found that Austria had violated McMillan's client's fundamental human rights and awarded Thomas Sylvester money damages. He's the first American parent to have a complaint concerning the Hague Convention on the Civil Aspects of International Child Abduction admitted for consideration by the court.

"*Sylvester v Austria* now takes its place alongside *Ignaccolo-Zenide v Rumania* in a line of human rights cases that will eventually lead to greater diligence in the enforcement of Hague Convention return orders throughout Europe. For now, the decision means that all Council of Europe nations signatory to the Hague Convention will risk human rights violations should they fail to promptly enforce a return order entered by their own courts under the Hague Convention," McMillan said.

Both parties in the *Sylvester* case have until late July to request a review of the decision. McMillan says her client is considering the possibility of requesting review of the matter of damages awarded in light of the 4/3 split on that issue. Also, since the decision has no direct effect on the status quo of her client's ability to see his daughter, they will continue with efforts in Congress and the State Department to improve the situation. McMillan added that the U.S. Assistant Secretary of State Maura Harty is scheduling a trip to Vienna in the near future to apply pressure on her Austrian counterparts to assist in a negotiated settlement on access.

As one of a dozen prominent American attorneys specializing in the field of international child abductions, McMillan continues to meet and work with a growing network of left-behind parents, mostly fathers, who struggle every day to gain access to their abducted children in Europe, Asia, the Middle East, and the United States. The National Center for Missing and Exploited Children estimates that there are about 350,000 parental child abductions in the United States each year. Of this number 70,000 are international.

McMillan has been practicing family law in Michigan for more than 15 years. She is the incoming chair of the State Bar of Michigan's International Law Section, chairperson of the International Family Law Committee, and a member of the Family Law Section. Her articles on international parental child abduction have been published by the *Journal of the American Academy of Matrimonial Lawyers*, the *Michigan Bar Journal*, and the *Michigan International Lawyer*. She contributed a chapter on *Parental Kidnapping: Federal and International Law and Practice* to the West Group publication *Michigan Practitioner Series: Family Law and Practice*. She has also lectured on various topics relating to domestic and international family law for ICLE and others, including a presentation on the enforcement of foreign orders to the Michigan Judicial Institute at its Annual Judicial Conference in October 2000.

In 1998, McMillan participated in one of two international forums hosted by the National Center for Missing and Exploited Children to examine the practical problems of the Hague Convention and explore the means by which its operations could be improved. These forums led to the creation of a "Good Practice Report" published in 2002 designed for use by Central Authorities, legal professionals, judges, legislators, and parents. She is currently working in conjunction with the State Department on a symposium marking the fifteenth anniversary of ICARA, the implementing legislation for the Hague Convention in the U.S., to be conducted later this year.

The Remedy

It is expected that by application of the all reasonable measures standard, father and daughter should prevail. The damages, fees, and costs requested, even if awarded in toto, could never compensate for the priceless parent-child relationship lost. However, should father and daughter prevail, Carina Sylvester will stand as the dual-nationality girl, carried away from Michigan as a baby and raised as an Austrian, who forced a change in the Austrian legal system. A favorable result could mean new mechanisms in Austria empowering its courts to compel compliance with its Hague Convention return orders by means similar to what we know as contempt of court. This victory could itself lead to subsequent decisions in the ECHR regarding other Council of Europe nations such as Germany and Sweden whose systems at present are in large part identical to those of Austria.

A decision in *Sylvester v Austria* is expected by September 2003. Should she pre-

vail in the ECHR, Carina will likely not know of her victory for many years to come. The loss of her life with her father, and the loss of her American heritage, extended family, and culture will have been the price she paid for bringing on the legal reform that will ensure that what happened to her won't happen to any other child abducted by a parent to Austria. ♦



Jan Rewers McMillan has practiced both domestic and international family law for more than 15 years. She is incoming chair of the International Law Section of the State Bar of Michigan and chair of its International Family Law Committee.

Ms. McMillan has written and lectured extensively on topics relating to international family law.

Footnotes

1. October 25, 1980, TIAS No. 11, 670, 1343 Units 89.
2. 2003 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, pages 4-6, found at www.travel.state.gov/2003haguereport.html.
3. The Council of Europe is a multi-national organization aimed to protect human rights and the rule of law among its members. The Council of Europe is different from the European Union, although all 15 member states of the European Union are also members of the Council of Europe.
4. ECHR Application Nos. 36812/97 and 40104/98. The Admissibility Decision in *Sylvester v Austria* is available from HUDOC, the Human Rights Documents data base at www.echr.coe.int.
5. See, e.g., Preamble, the Hague Convention.
6. The ECHR website contains a wealth of information on both the Council of Europe and the court itself. It can be found at www.echr.coe.int.
7. European Convention of Human Rights, Articles 20-22.
8. See note 6, supra.
9. European Convention of Human Rights, Articles 27, 34, and Rule 34 § 1, ECHR Rules of Court.
10. European Convention of Human Rights, Article 35.
11. European Convention of Human Rights, Article 44.
12. European Convention of Human Rights, Article 41.
13. European Convention of Human Rights, Article 46, Section 1.
14. See Solemn Hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, Thursday, 23 January 2003, Speech by Mr. Luzius Wildhaber, President of the European Court of Human Rights at www.echr.coe.int.
15. ECHR Application No. 31679/96 (25 January 2000).

Since this article went to publication, a favorable decision in Sylvester v Austria came down from the ECHR, months earlier than expected. On April 24, 2003, a seven-judge panel by unanimous decision found the Republic of Austria in violation of Article 8 of the European Convention of Human Rights, awarding Tom Sylvester EUR 42,682 in money damages, fees, and costs payable to him by the Republic of Austria. No damages were awarded to Carina Sylvester.

In reaching its decision, the ECHR applied the all reasonable measures standard, concluding at paragraph 72 of the opinion "that the Austrian authorities failed to take, without delay, all measures that could reasonably be expected to enforce the return order, and thereby breached the applicant's right to respect for their family life as, guaranteed by Article 8."

Although the decision itself was unanimous, the award of damages was the result of a 4-3 split, with two spirited dissents as to damages. The first was a joint dissent as to damages amount, generally declaiming the amount awarded "reparation at its most frugal." The opinion further objected that no award was made to Carina, whom they claimed, should have received "compensation reflecting the level of damage she sustained." The second dissent as to damages was written separately by Judge Bonello to voice his "radical disagreement" with the damages award, which he called "mean and beggarly," "paltry and uncaring," and "an offensive trifle." He concluded "if neutralizing the convention comes so cheap, states may well find it foolish not to brave a try."

The victory nonetheless is a moral one and a vindication for father and daughter in an independent international forum of the complete destruction of their relationship. Now Austria must take remedial measures to come into compliance with the court's ruling. The decision may well pave the way for similar decisions against recalcitrant countries such as Germany and Sweden whose systems, like Austria's, provide no means for effective enforcement of the child-related orders entered by their own courts.

A copy of the full text of the decision in Word format is available at the court's website found at www.echr.coe.int.