

Children's Law Center of Indiana



Custody and Parenting Time

10/25/17

In ***Coulibaly v. Stevance***, 85 N.E.3d 911 (Ind. Ct. App. 2017), the Indiana Court of Appeals (Court) affirmed the determination of the Marion Superior Court (trial court) that it lacked jurisdiction to modify custody of the children and was required to enforce the Malian court's custody order under the Uniform Child Custody Jurisdiction Act (UCCJEA) as codified in Indiana. *Id.* at 920. Mother and Father are both dual citizens of France and Mali. They were married in Mali in 2001 and had two children, who are also dual citizens of Mali and France, a daughter born in 2002 and a son born in 2004. Father is a computer science engineer and operates a company that provides internet service in Mali. Mother is a physician, and she and the children lived in France with Father's consent from 2005 until 2007 while Mother was pursuing her Master's degree in epidemiology. Father remained in Mali during this time but visited Mother and the children regularly. Mother returned to Mali in 2007, where she practiced as an obstetrician/gynecologist. Father petitioned for divorce in Mali on March 14, 2008. Both parties appeared with counsel at the final divorce hearing and presented evidence. At the hearing, Mother indicated that she wished to live outside Mali and also alleged that Father had been physically abusive to her. Father denied Mother's abuse allegation, asserted that Mother wanted to move to Canada or Europe, and said he feared Mother would kidnap the children and cease contact with him. Both parties requested custody of the children. Following the hearing, but before the Malian divorce court issued its custody order, Mother took the children and moved to France. On October 6, 2008, the Malian court issued its decree awarding custody to Father. Despite this order, Mother did not return the children to Father, and unsuccessfully sought relief from the order in Mali and France. Then, Mother moved to the United States and sought relief in Indiana. Mother argued that the Malian custody order was unenforceable under the UCCJEA because Mali's child custody laws violate fundamental human rights.

The trial court conducted a five-day evidentiary hearing, at which Mother presented evidence on Mali's laws, culture, and customs. Mother presented testimony concerning widespread judicial corruption in Mali, difficulties Malian mothers face in securing visitation with their children, the prevalence of female genital mutilation (FGM) in Mali and the absence of a specific law prohibiting FGM, and the wide acceptance and rare prosecution of spousal abuse and child abuse. The trial court rejected Mother's arguments. The trial court found: (1) there was no evidence of bribery, corruption, or influence in the parties' divorce proceeding; (2) Father described FGM as "horrible", and there was no evidence that the parties' daughter was in danger of being subjected to FGM if she returned to Mali; (3) there were Malian laws prohibiting spousal and child abuse and agencies charged with investigating allegations of abuse. The trial court rejected Mother's claim that the Malian court had applied a presumption that Father should have custody of the children. The trial court found that the Malian court's order reflected its

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consideration of several factors relating to the children's best interests. The trial court found that there was no violation of fundamental human rights, and concluded that the Malian court's order was entitled to enforcement. The trial court found it lacked jurisdiction to modify the custody and ordered the children immediately returned to Father. The trial court subsequently approved the parties' agreement to stay the enforcement of its order pending appeal.

As a matter of apparent first impression, the Court found that because a foreign jurisdiction's law differs from Indiana's law or seems outdated to Indiana courts is insufficient to establish violation of fundamental principles of human rights. *Id.* at 917. The Court explained that the Uniform Child Custody Law, which was the predecessor to the UCCJEA, was enacted in 1977 to: (1) avoid competition among jurisdictions and conflicts with courts of other states in child custody matters; (2) promote interstate cooperation so that custody decrees will be rendered in the state best able to decide the case in the interests of the child; and (3) deter abductions and other unilateral removals of children to obtain custody awards. *Id.* at 916. Citing *Horlander v. Horlander*, 579 N.E.2d 91, 95 (Ind. Ct. App. 1991), *trans. denied*, the Court noted: (1) under the UCCJL, an Indiana court has an affirmative duty to question its jurisdiction when it becomes aware of an interstate dimension in a child custody dispute; (2) the trial court must first determine whether it has jurisdiction, and, if it does, whether to exercise that jurisdiction; and (3) the UCCJL has international application. *Coulibaly* at 916. Mother conceded that Mali was the children's home state at the time the custody order was issued and that she had notice and an opportunity to be heard consistent with UCCJEA standards, so the issue of whether the Malian custody order met the fundamental jurisdictional standards of the UCCJEA was not in dispute.

The Court looked to IC 31-21-1-3, which provides: (a) An Indiana court shall treat a foreign county as if the foreign county were a state of the United States for purposes of applying [the UCCJEA]. (b) Except as otherwise provided in subsection (c), a child custody determination made in a foreign country with the jurisdictional standard of this article must be recognized and enforced under IC 31-21-6. (c) *An Indiana court need not apply this article if the child custody law of a foreign country violates the fundamental principles of human rights.* (Emphasis in opinion). *Coulibaly* at 916. The Court explained that subsection (c), which has been referred to as the UCCJEA's "escape clause," acknowledges that there are circumstances in which foreign decrees might not be entitled to recognition and enforcement in the United States. *Id.* The Court noted the UCCJEA official comment: (1) does not define the phrase "fundamental human rights"; (2) "takes no position on what laws relating to child custody would violate fundamental freedoms"; (3) the term "violation of human rights" "is a traditional one in international agreements [but] is invoked only in the most egregious cases"; (4) narrows the reviewing court's focus by providing that "the court's scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system." (Multiple citations omitted). *Id.* at 917.

Mother argued that Mali's child custody law violates fundamental human rights because it favors men over women. She noted that Mali's divorce law is fault-based and provides that the children will be in the custody of the spouse who obtained the divorce unless the court orders, for the best

interests of the children, that all or some of them will be cared for by the other spouse or a third person. Mother argued that Mali's divorce laws evince a preference for men such that women will more often be found to be at fault for a divorce, resulting in a de facto paternal preference. In response to Mother's argument, the Court observed that custodial preferences are not foreign to American jurisprudence and were the norm in the United States in the not-so-distant past. *Id.* at 919. The Court looked to *Hosain v. Malik*, 108 Md. App. 284, 671 A.2d 988 (Md. Ct. Spec. App. 1996), where the Maryland Appellate Court affirmed the trial court's decision to enforce a Pakistani custody decree based in part on the Islamic doctrine of Hazanit. *Coulibaly* at 920. Hazanit embodies "complex Islamic rules of maternal and paternal deference, depending on the age and sex of the child." *Hosain* at 1004. *Coulibaly* at 920. The *Hosain* Court noted that Hazanit was merely one factor considered by the Pakistani court in determining the child's best interest. *Hosain* at 1004. *Coulibaly* at 920. The *Hosain* Court found that Hazanit is similar to traditional maternal preferences in custody cases and observed that Maryland courts will not refuse to enforce custody awards of those states which still recognize the maternal preference as a factor. *Hosain* at 1004-05. *Coulibaly* at 920. The *Coulibaly* Court opined that Malian law does not permit courts to blindly apply a parental presumption and ignore the children's best interests. *Id.* at 921.

As a matter of apparent first impression, the Court opined that the UCCJEA does not require an Indiana court to reevaluate the merits of every foreign custody decree that comes before it. *Id.* at 919. The Court noted that, in reviewing the Malian court's order, the trial court found that Mali's child custody law as applied in this case did not violate fundamental principles of human rights and was in substantial conformity with Indiana's child custody law. *Id.* at 918-19. The Court quoted *Matter of Yaman*, 167 N.H. 82, 105 A.3d 600, 611 (2014), in which the New Hampshire Supreme Court reasoned that "[t]he comments to the UCCJEA... clarify that the analysis is meant to focus on the foreign jurisdiction's substantive law, and not its legal system *or how that law is implemented.*" (Emphasis in opinion). *Coulibaly* at 919. The Court opined the meaning of the *Yaman* Court's statement was that claims of mere legal error are insufficient to establish violation of fundamental human rights. *Coulibaly* at 919. The Court agreed with this proposition. *Id.*

As a matter of apparent first impression, the Court opined that Mali's child custody law, as written, did not violate fundamental human rights. *Id.* at 919. The Court was not persuaded by Mother's argument that a presumption of custody is a violation of the parent's fundamental right to care, custody, and control of the child. *Id.* The Court opined that the Malian court's order made it clear that its decision was based solely on the children's best interests, and the Malian court conducted an analysis of best interests of the children "not at all unlike the one applied by the courts of this state." *Id.*

As a matter of apparent first impression, the Court opined that the trial court's scrutiny was limited to Mali's child custody law and not to other aspects of its legal system. *Id.* at 921. Mother argued that Mali's failure to outlaw Female Genital Mutilation (FGM) is, as a general matter, likely to affect children. The Court had little difficulty concluding that FGM is itself a human rights violation, but was not as certain that a country's failure to pass a law

specifically prohibiting the practice constituted a violation of fundamental principles of human rights. Id. The Court noted that, although FGM has been prohibited in the United States by federal law (18 U.S.C. § 116), many states, including Indiana, have not passed laws against FGM. Id. at 921 n.7. The Court opined that considering the effect of every law likely to affect children would “throw the doors wide open” to include laws on civil rights, education, health care, housing, and inheritance in evaluating a foreign custody decree. Id. at 921. The Court explained that this approach would put Indiana courts “in the untenable position of passing judgment on the entire legal system of a foreign country, a result plainly at odds with the clearly stated intent of the drafters of the UCCJEA.” Id.

The Court explained that the best interests of the children is inapplicable to its jurisdiction analysis under the ICCJEA. Id. at 921 n.8.