

Juzgado de Primera Instancia (Court of First Instance) no. 9 of Valencia
Proceedings for return of a child no. 799/05

[Stamp: NOTIFIED TO THE COURT ATTORNEY - 11 JULY 2005]

ORDER

At Valencia, this 6th day of July, 2005

FACTUAL GROUNDS

FIRST.- *Procurador* (Court Attorney) Mr. Cerrillo Ruesta, on behalf of Mr. Peter William Innes, lodged a motion for voluntary proceedings containing an application for the return of the child Victoria Solenne Innes, against Mrs. Maria José Carrascosa Peñalver.

SECOND.- Upon notification of such application to Mrs. Carrascosa pursuant to the provisions of Article 1,904 of the *Ley de Enjuiciamiento Civil* (Civil Procedure Act) of 1881, she opposed such return.

THIRD - The parties and the Public Prosecutors were convened to a hearing, in the course of which they made their allegations as they thought fit and the court admitted the evidence proposed (namely cross-examination of the parties, documents and an expert opinion), and such evidence was heard within the six following days.

LEGAL GROUNDS

FIRST.- The objects of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 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 other Contracting States (Article 1). The removal or the retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person, by operation of law, or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; or where at the time of removal or retention those rights were

actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention (Article 3). For the purposes of such Convention the rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence (Article 4). Article 12 thereof provides, as a general rule, that where a period of less than one year has elapsed from the date of the wrongful removal or retention until the date of the commencement of the proceedings before the judicial authority of the Contracting State where the child is, the authority concerned shall order the return of the child forthwith. In the case under review, such removal into Spain, notwithstanding whether such removal was wrongful or not, took place on January 2005 (cross-examination of Mrs. Carrascosa), and therefore the period of one year had not elapsed yet. By way of exception, the judicial authority is not bound to order the return of the child if the person which opposes its return establishes that 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, or if it is found that that the child objects to being returned, where he or she has attained an age and degree of maturity at which it is appropriate to take account of its views (Article 13(b)).

SECOND.- As provided under the Constitutional Court judgment of 20 May 2002, the resolution to be issued within the framework of the Hague Convention of 25 October 1980, requires the judicial authority to take two decisions: firstly, a declarative decision, stating whether the removal of the child into Spain from the country of origin is to be considered wrongful or not and, secondly, a return order, after such declaration that the removal of the child was wrongful, pursuant to the provisions of Article 3 of the aforementioned Convention, whereby the judicial authority shall order the return of the child to the country of origin, provided that there are no reasons to exclude such obligation to return as provided under Article 13 of the Convention.

THIRD.- The first question to determine is which was the child's habitual residence immediately before she was taken to Spain on January 2005. As regards the habitual residence of the litigants, Mrs. Carrascosa's allegation that she has never lived in the United States is contradicted by a certificate of registration of her marriage stating as the address of the spouses their respective addresses in such country, and also by the fact that the child was born in New Jersey and that while she was pregnant she stayed in such country (Exhibit no. 4 to the Application and cross-examination of Mrs. Carrascosa). As regards the period of time after the removal, the spouses stopped living

together in New Jersey (Exhibit no. 5 to the Application and cross-examination of Mrs. Carrascosa), and at that time the mother purchased a house by herself or through a family trust (Exhibit no. 6 to the Application and cross-examination of Mrs. Carrascosa). At the time the child was taken to Spain she was attending the *Escuela Interparroquial de Cristo el Maestro*, whereas she was enrolled and started to attend the *Colegio Sagrada Familia* of Valencia only since January 2005 (Exhibit no. 6 to the Application and certification issued by *Escuelas Pías*). Therefore, there is enough evidence that the child's habitual residence was in the United States when she was taken to Valencia.

FOURTH.- Pursuant to the foregoing, one must determine whether the removal of the child into Spain from her country or origin was wrongful or not, as the return of the child to her former residence shall only be ordered in those cases where the removal was wrongful. There is no doubt according to the exhibits attached to the Application and to Mrs. Carrascosa's acknowledgment in the course of the cross-examination, that both parents signed an agreement dated October 8, 2004, providing that the custody would be held by the mother, that the father would have a right to visit the child, and that both parents would not travel out of the United States with the child without the written consent of the other party. Maria José Carrascosa Peñalver moved on January 2005 with the child to Spain, and such country became the child's place of residence since then. On 4 February 2005, the High Court of New Jersey ordered the return of the child forthwith from Spain and the further enforcement of the agreement dated 8 October 2004. On 22 March 2005 such Court awarded temporary custody to the father.

FIFTH.- The judgment dated 24 June 1997 of Section 22 of the *Audiencia Provincial* (Provincial Court) of Madrid provides that the court must refuse to order the return of the child if at the time of the removal the custody rights had not been awarded to the father, given that he was not exercising and was not entitled to exercise such custody at the time of the removal because he was not covered by any judicial resolution for such effect. The decision dated 12 September 2001 of Section 22 of the *Audiencia Provincial* of Madrid provides that where the rights of custody of the child have not been conferred to any of her progenitors none of them has a legitimate right to recover the child from the other progenitor and, in addition, such return is not to be ordered where such progenitor was in fact not exercising the custody. Further, decision dated 28 March 1994 of the *Audiencia Provincial* of Zaragoza provided that the removal of a child by his mother from the United States was not wrongful since such

removal had taken place before the relevant order was issued in such country. Therefore, in accordance with this doctrine, when the child was taken to Spain the US judicial order awarding temporary custody to the father had not been issued yet; the father was not effectively exercising any custody because three months before, the parties had agreed that the custody as from the separation of the spouses would be conferred to the mother, as it was finally the case; in addition, the father would not have the right of custody if such removal had not taken place, as evidenced by the agreement between the parties and the resolution dated 4 February 2005. Therefore, the removal was not wrongful merely because of a breach - as evidenced by the fact that the written consent of the progenitor has not been father - of a private undertaking to not travel abroad with the child, since there has been no infringement of any custody rights conferred to the father, any custody rights effectively exercised nor any custody rights that would not exist without such removal.

SIXTH.- Pursuant to the provisions of Article 1,909 of the *Ley de Enjuiciamiento Civil* (Civil Procedure Act) of 1881, the costs of the proceedings are not awarded to any of the parties.

Pursuant to the foregoing, the Court's decision is as follows,

DECISION: the application to return VICTORIA SOLENNE INNES to the United States and to deliver her to her father PETER WILLIAM INNES is refused. The costs of the proceedings are not awarded to any of the parties.

This Decision may be appealed with by means of an Appeal for Revocation, to be filed within five days as of its notification. Such Appeal will not suspend the proceedings.

In witness whereof, the Magistrate-Judge of Court of First Instance no. 9, Mr. César Zenón Calvé Corbalán, has hereunto set his hand and seal.