

FAX - ELENA [illegible name]
CERRILLO
19/01/06

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Case number: 955-05

Section 10

NOTIFIED TO THE
COURT LIAISON
19 JAN 2006



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JUDGEMENT NUMBER: 14-06

SECTION TEN
PROVINCIAL COURT
OF VALENCIA
18 JAN 2006
DISPATCHED

SECTION TEN:

The Honourable:

President,

Mr. José Enrique de Motta García-España

Senior Judges:

Ms. M^a Pilar Manzana Laguarda

Mr. Carlos Esparza Oleina

In Valencia, on the seventeenth day of
January in the year two thousand and six.

A hearing is held by Section Ten of the Honourable Provincial Court, at the level of an appeal, of case number 759/05 regarding return of a minor, brought before the Court of Valencia 9, between the parties, PETER WILLIAM INNES, as plaintiff, represented by the Court Liaison Mr. Cerrillo Ruesta, and M^a JOSE CARRASCOSA PEÑALVER, as the defendant, represented by the Court Liaison, Mr. Frexes Castrillo.

The Honourable Senior Judge, Ms. M^a Pilar Manzana Laguarda, acts as the ruling judge hereby,

BACKGROUND FACTS

ONE. In this case, on 6-7-05, the Honourable Judge of the Court in Valencia number 9 ruled the following judgement: "I HEREBY RULE that the child VICTORIA SOLENNE INNES shall not be returned to the United States to her father Peter William Innes. The legal costs of the proceedings shall be paid by legal aid.

GENERALITAT
VALENCIANA

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JUDICIAL
AUTHORITIES

TWO. An appeal was brought against such judgement by the legal counsel of Peter William Innes and, after having made the relevant notifications to the other party so that the appeal or challenge may be opposed, the case was submitted to the Clerk of this Court who recorded it in the relevant case, setting today's date to hold the hearing, which shall be recorded and the previous procedures shall be carried out by the Court Clerk.

THREE. All the formalities and statutes of limitations have been duly fulfilled.

LEGAL GROUNDS

ONE. Under the supervision of the appellant's legal counsel, a challenge has been brought against the appealed judgement, which states that the child Victoria Selene, born on 17 April 2000, should not be returned to her residence in the United States, because her transfer to Spain may not be deemed as illegal under the terms stipulated in the Hague Convention on the civil aspects of international child abduction dated 25 October 1980, ratified by Spain on 28 May 1987 (Published in the Official Gazette on 202/87 on 24 August 1987). The following is claimed as grounds for the aforementioned challenge: a) Infringement of Article 5 referring to Article of the Convention, and b) Infringement of the principle of "favor filii".

TWO. In fact, Article 1 of the aforementioned Convention determines that the purpose thereof is to secure the prompt return of children under 16 years of age 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. An unavoidable case for its application is that the removal, in this case, of the minor, is considered illegal, and, for such purpose, Article 3 of the Convention presumes any removal as illegal when it is in breach of the rights of custody attributed, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

 GENERALITAT
VALENCIANA



JUDICIAL
AUTHORITIES

that these rights of custody would have been so exercised but for the removal or retention. Therefore, a twofold element is required, a legal element, consisting of the previous existence of rights of custody attributed by the State where the minor was habitually resident, and the existence of which is based on the need for legal appearance of title, and a factual element consisting of effectively exercising the rights of custody before the removal, with grounds based both on the minor's right not to have her social and affective conditions altered as well as the probability that there is, within this scope and in practice, different contradictory decisions taken in this respect.

The rights of custody may be attributed either by virtue of a judicial ruling or an administrative decision or else due to an agreement reached between the parties, the child's parents in this case, and such right may be attributed to one of the parents or may be shared between both of them or in favour of a person or institution or official body. According to Article 5 of the Convention, 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. In the case in question hereby, the rights of custody stem from the assignment of such duty in the document that both parties signed on 10 October 2004, which is a mutual agreement between the parents.

According to Article 14 of the Convention, in ascertaining whether there has been a wrongful removal or retention, the judicial or administrative authorities of the requested State may take notice directly of the law and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of the decision which would otherwise be applicable, according to the following Article the same authorities may require the plaintiff to ensure that the authorities in the State of residence of the child certify the wrongful removal, within the meaning of Article 3.

Finally, in the case referred to above of wrongful removal, the return of the child may not be ordered if the circumstances arise stated in paragraph two of Article 12, when the proceedings have been commenced after the expiration of the period of one year and it is demonstrated that the child is now settled in his/her new environment, and in the two cases stated in Article 13 of the Convention: a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or b) 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. Neither will the return be agreed if the

GENERALITAT
VALENCIANA



JUDICIAL
AUTHORITIES

child objects to being returned, when he/she has attained an age and degree of maturity at which it is appropriate to take account of his/her views. Paragraph two of Article 13. Finally, Article 20 states that the return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms

THREE.- The agreement signed between the parties dated 8 October 2004, in which some personal affairs were determined regarding their separation, a translation of such document being attached as Exhibits 48 and 49 to the case, in which the legal counsel of both parties were involved and the parties ratified such document by duly signing it, does not expressly specify that the guardianship and custody of the minor is attributed to the mother, however this assignment of custody is indeed implicitly stated in this document and the periods allowed for the plaintiff to spend time with the minor, which is alternate weekends. It is also considered, as the Judge of this court will take into account, that this assignment of maternal custody is a fact that is not even disputed by the parties and this consideration was also clarified by the plaintiff's legal counsel in the recording of the hearing in the Court of First Instance, which referred to the agreement signed between the parties in these terms in minute 3 of the initial allegations and in the question raised in this respect in the interrogation recorded in minute 40 of the hearing. Moreover, this is corroborated by the mother, who, in the replies she made at the hearing, when asked by her legal counsel, confirmed this by acknowledging that the person who had been at the child's side from the time she was born was her mother and the child had only been alone with her father when he exercised his visiting rights with the child on alternate weekends.

According to Article 5 of the 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. The care of the child was exercised by her mother and the right to decide on her residence was shared between both parents in the aforementioned document. In fact, even though the custody was attributed to the child's mother, in the document they signed when regulating the personal issues of their marital separation, as referred to above, the parents determined a clause by virtue of which the consent would be required of both spouses

GENERALITAT
VALENCIANA



JUDICIAL
AUTHORITIES

in order to take the child further than 90 miles from her state of residence. Therefore, when, on about 12 January 2005, the mother brought her daughter to Spain, she breached this agreement. However, in Spain such agreement could only be considered as a letter of intent therefore no sanction whatsoever could be imposed for such breach of contract, as it was an agreement limiting the fundamental rights contained in Article 19 of the Constitution that guarantees all Spanish citizens the right to freely choose their place of residence and the use of such expression in the agreement can not be deemed valid. The incompatibility of this restrictive clause with Spanish law regarding fundamental rights, under the autonomous system of the Civil Procedures Act, implies grounds for a public litigation order and from the standpoint of Article 20 of the Convention, is justification for a refusal to return the child, as has been requested.

FOUR.- Notwithstanding the dismissal of the appeal, the costs should not be imposed for this appeal because of the nature and dispute of the question involved in the appeal.

RULING

The Court AGREES:

One. To dismiss the appeal brought by the legal counsel of Peter William Innes.

Two. To fully confirm the appealed judgement.

Three. Not to impose the costs for this appeal.

This is our ruling, for which a certificate will be issued to be included in the case, which we state, order and sign.

GENERALITAT
VALENCIANA

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JUDICIAL
AUTHORITIES

PUBLICATION. I hereby attest that the previous judgement has been read and published by the Honourable Senior Judge, ruled at the Public Hearing of Section Ten of the Provincial Court on today's date.

GENERALITAT
VALENCIANA