

SUPERIOR COURT OF NEW JERSEY

EDWARD V. TORACK
JUDGE



BERGEN COUNTY JUSTICE
HACKENSACK, NJ 07601
(201) 527-2395

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December 22, 2006

Attn. Jeffrey A. Newman
Appellate Division, Clerk's Office
Hughes Justice Complex
25 W. Market Street
P.O. Box 006
Trenton, New Jersey 08625-0006

Re.: Peter Innes v. Maria Jose Carrascosa
FM-02-1247-05

Dear Mr. Newman:

This letter is written pursuant to R. 2:5-1(b) to supplement the record of the trial court's November 3, 2006 decision on mother's motion for reconsideration and motion to vacate the 2nd Amended Judgment of Divorce dated August 24, 2006 in the above captioned matter

The Order now under appeal was entered November 3, 2006, the same day oral argument was heard on the matter. That Order denied the motion for reconsideration and the motion to vacate the 2nd Amended Judgment of Divorce declining to grant comity or deference to the Hague Convention proceeding in Spain.

When the Judgment of Divorce was entered on August 22, 2006, I detailed my factual findings and conclusion on the record. Similarly, details were given when I rendered my decision on the motion for reconsideration on November 3. The transcripts of both proceedings significantly contain my factual findings and conclusions.

My decision on the motion for reconsideration is supplemented as follows:

Procedural History

The parties were married in a religious ceremony in Spain on March 20, 1999. One child was born of the marriage, namely Victoria, born in Secaucus, New Jersey on April 17, 2000. The family lived in West New York, New Jersey until they separated in May of 2004, father moving to Saddle Brook and mother moving to Fort Lee. Victoria attended Fort Lee Parochial School until taken to Spain in January of 2005.

On October 8, 2004, the parties entered into an agreement formalized by a consent order. This agreement addressed the issue of parenting time, that father would have parenting time with Victoria every other weekend from Friday at 6p.m. through 8p.m. Both parties agreed that neither would travel more than 90 miles from New Jersey with Victoria. Custody issues were not addressed in the agreement.

On November 22, 2004, there was a domestic violence complaint filed in Bergen County, mother against father, voluntarily dismissed. On December 10, 2004, father filed a complaint for divorce in New Jersey. Mother retained counsel who entered a special appearance. On December 15 or 17, mother filed for a civil annulment in the Spaniard court.

Somewhere in or around the end of January 2005, Victoria was removed to Spain at the instance of the mother, without either a court order or consent of the father. On February 4, 2005, Judge Parsons entered an order directing father to undergo a TASC evaluation. It was ordered that the child immediately be returned from Spain, and upon the return, the parties were directed to abide by the parenting agreement of October 8, 2004. That order also directed that the child's passport was to be turned into the court upon her return to New Jersey.

On February 22, 2005, mother sought leave to appeal Judge Parsons' order to the Appellate Division. That was denied by the Appellate Division. On March 22, the court received the TASC report, indicating that father's tests were negative for drugs and alcohol. Mother failed to comply with the terms of the order, neither returning the child nor the passport to New Jersey. Efforts to communicate with the Spaniard court were unsuccessful, after Judge Parsons made every effort to obtain communication.

On March 22, 2005 Judge Parsons entered another order denying mother's application for a stay of the New Jersey proceedings and granted temporary custody of Victoria to the father and directed again that Victoria be returned to the United States. The order provided that if the child was not returned in three weeks, a warrant for the arrest of the mother would issue. That, in fact, was done. Judge Parsons also ordered that the child's passport be immediately surrendered to the New Jersey court upon the return of the child to the U.S. and that mother could then apply for a change in temporary custody upon her return with the child.

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On July 6, 2005, there was a decision by the Spaniard Court of First Instance, which was later affirmed by the Provincial Court at the Level of Appeal on January 18, 2006, on the father's application in the Hague convention proceedings conducted in Spain. The court made the determination that the habitual residence of the child at the time of removal was New Jersey and the United States. The court also made the determination that mother did not unlawfully remove the child when she took Victoria from New Jersey to Spain. The court based its decision upon the fact that when Victoria was removed from New Jersey there was no existing judicial ruling giving the father temporary custody.

First, both the United States and Spain are signatories to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). Both countries ratified the Convention, the purpose of which is to provide for prompt return of children who have been wrongfully taken or retained in another country. The language of the Convention, specifically Article 19, goes out of its way to make clear that a decision under the Convention does not determine custody on the merits but rather seeks to return the child to the state of habitual residence where that determination can best be made. The only allowance for not returning the child is where one of the convention's defenses is met.

The purposes of the Convention include ensuring that rights of custody under the law of one signatory are effectively respected in the other. *Caro v. Sher*, 296 N.J. Super. 594 (1996) and the Convention, Article 1(b). The wrongful removal analysis requires an inquiry into the legal custody rights of the left behind parent under the law of the state of habitual residence. (The Convention, Article 3.) The Spaniard Court was faced with having to determine whether the plaintiff/father had legal custody rights in New Jersey at the time Victoria was removed by mother.

The creators of the Convention's articles were well aware that in most cases, abductions occur prior to any judicial ruling. Thus, Article 3 of the Convention explicitly identifies three non-exclusive sources from which custody stems, specifically, that rights of custody may arise by operation of law, by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

In reviewing case law, I found that cases under the Convention involving wrongful removal follow Article 3's mandate, expressing over and over again that rights of custody are to be viewed vis-a-vis the state of habitual residence in order for custody rights to be determined. (See *Feder v. Evans-Feder*, 63 F.3d 17 (3rd Cir. 1995), *Baxter v. Baxter*, 423 F.3d 363 (3rd Cir. 2005), *Caro v. Sher*, 296 N.J. Super. 594, *Bader v. Kramer*, 445 F.3d 346 (2006), *Armiliato v. Zaric-Armiliato*, 169 F.Supp. 2d 230 (2001), *In re: Application of Ariel Adan, Elena Esther Evans*, 437 F.3d 381, *Whallon v. Lynn*, 230 F.3d 450 (2000), *Katona v. Kovacs* (2005, CA 4 NC) 148 Fed. Apprx. 158.) The Convention unequivocally aims to protect the legal custody rights of the parent who is left behind after the abducting parent has unilaterally altered the status quo. *Feder* at 221.

I found that at the time Victoria was removed that plaintiff/father did, in fact, have legal custody rights to Victoria under New Jersey law. I found the following statutes apply:

N.J.S.A. §9:2-2 states in relevant part:

When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State...they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order.

Thus, the statute expressly prohibits unilateral removal by a parent having custody without consent or court order.

N.J.S.A. §9:2-3 states in relevant part:

No child shall be taken forcibly or against the will of the parent having custody by the other parent without a court order.

New Jersey's focus is on the preservation of the child's relationship with the non-custodial parent. *Holder v. Polanski*, 111 N.J. 344 (1988) and N.J.S.A. §9:2-2.

Under N.J.S.A. §9:2-4, the legislature finds and declares that it is the public policy of this State to assure minor children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

The above statutes apply given the child resided in New Jersey and New Jersey was the State of habitual residence at the time of the removal. *Morton v. Morton*, 982 F. Supp. 675 (1997). Therefore, by operation of New Jersey law, under these statutes, father held rights of custody at the time of removal.

I found further evidence of the father's custody rights within the meaning of Article 3 of the Convention in the agreement entered into by the plaintiff/father and defendant/mother on October 8, 2004. In addition to setting up parenting time for father, the agreement evidenced control by both parents over where the child would live in that each promised the other that the child would not be moved within 90 miles of New Jersey without the consent of the other. This agreement had legal effect in the State of habitual residence and thus established father's rights of custody within the meaning of the

Convention.¹ I found rights of custody and the exercise thereof were clearly evidenced by the parties' agreement.

Recognition of the Spaniard Court Decision:

To ascertain whether to recognize the decision of the Spaniard court's Convention proceeding, I looked to the International Child Abduction Remedies Act ("ICARA"), the purpose of which is to establish procedures for the implementation of the Convention in the United States. Section 11603(g) of ICARA implies a legislative preference not to extend formal full faith and credit to foreign judgments in that it limits the scope of full faith and credit to courts within the United States.² I took this as an implication that full faith and credit is not the standard when the court is asked to recognize a foreign country's judgment. I also relied on the Restatement (Second) of Conflict of Laws Section 98 cmt. B (1971) cited by *Mezitis Diurino v. Mezitis*, 237 F.3d 133 (2nd Cir. 2001) that states as a general rule "judgments rendered in a foreign nation are not entitled to the protection of full faith and credit." *Mezitis* held that the standard for recognizing a foreign judgment is one of comity.

Mezitis goes on to guide when comity should be extended. The doctrine of international comity prevails if the foreign judgment "does not prejudice the rights of United States citizens or violate domestic public policy." *Mezitis* at 143 quoting *Victrix Steamship Co. v. Salen Dry Cargo A.B.*, 825 F.2d 702 (2nd Circuit 1987). United States tribunals defer to judgments of foreign tribunals where the foreign forum afforded the litigant an opportunity for a full and fair adjudication and where there is no evidence of prejudice. 27 Federal Communications Commission (FCC) Red 10794, 10803 (2002). A particular case may disclose such defects as to make the particular judgment not entitled to recognition. *Mezitis* at 143 citing Restatement Third of Foreign Relations, §481 & 482 (1987). I found that this was the case here.

The Spaniard Court determined that father had no rights of custody because at the time of removal there had been no judicial ruling. Yet father's rights of custody were in full effect by virtue of operation of law and as evidenced by the parties' agreement. Therefore, after careful consideration of the determinations of the Spaniard Court in a complicated sequence of litigation, I found I could not recognize the Spaniard Court's determination. I could not recognize a decision that offends New Jersey law and public policy and prejudices its citizens.

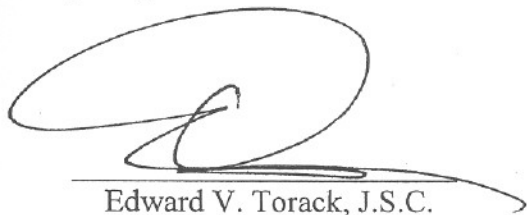
The Spaniard Appeals court applied the Article 20 defense as additional support for not ordering the return of Victoria. The constitution of Spain gives their citizens a right to live wherever they want. The Appellate Court reasoned that by insisting on the

¹ Article 5 states that for purposes 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.

² Section 11603(g) states that full faith and credit is to be accorded by the courts of the States to the judgment of any other such court ordering or denying the return of a child. Section 11602(8) defines "State" to mean any of the several States, D.C., and any commonwealth, territory or possession of U.S.

return of Victoria, that this was in violation of defendant/mother's rights under Spanish law as it would be dictating where the defendant lived. I didn't agree with this reasoning as this was mother's choice to take Victoria and thereby violate of father's rights of custody.

The foreign judgment prejudiced the rights of Mr. Innes and in so doing offended New Jersey's policy and laws of both parents enjoying joint custody until a decree says otherwise. Were I to recognize this decision, I would be failing to recognize New Jersey law as well as contravening the purposes of the Convention. ICARA provides in its declarations that it recognizes the international character of the convention and that there is a need for a uniform interpretation among the courts. Section 11601(b)(3)(A) and (B). Additionally, ICARA advises in Section 11601(a)(2) that persons should not be permitted to obtain custody of children by virtue of their wrongdoing.



Edward V. Torack, J.S.C.

cc: ✓ Peter Van Aulen, Esq.
Tomas Espinosa, Esq.

Ariel A. Rodriguez, Presiding Judge, Appellate Division-Part G