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[01/09/1989; Superior Court of the State of California, Placer County (United States); First Instance] Navarro v. Bullock, 15 Fam. L. Rep. (B.N.A.) 1576 (Cal. Super. Ct.)

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## **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF PLACER**

**September 1, 1989**

**Before: Garbolino, S.C.J.**

**M. Navarro (Petitioner) vs. B. Bullock (Respondent)**

This is an action for the return of children who have been abducted by their mother from Spain to the United States. The petition is brought by the children's natural father under the provisions of the Hague Convention on the Civil Aspects of Child Abduction, and its implementing legislation in the United States, 42 U.S.C. 11601 et seq. Pursuant to the Hague Convention, Father applied to the United States Department of State for assistance in locating his children. The children's whereabouts were determined, and the District Attorney for the County of Placer located the children and detained them. This court being apprised of the detention of the children, ordered them to be detained in the Placer County children's shelter, and ordered that a petition be filed in this court on August 24, 1989, and that a hearing on the further detention of the children would be held on that date.

On August 24, 1989, the petition was duly filed pursuant to the terms of the Hague Convention, Petitioner M.N. appeared with his attorney Robert Davis, Respondent appeared with her attorney Grant Macomber (special appearance), and the children appeared through their attorney Stanley Fortner. The District Attorney for Placer County also appeared. The Court ordered the children detained in the custody of David Brose, inspector for the District Attorney of Placer County, and further ordered an psychological evaluation of the children by Dr. Eugene Roeder. The court granted provisional visitation to father (Petitioner), and ordered the deposit of his passport, and the children's passports as security for the performance of the court's orders. The court granted mother supervised visitation with the children.

Hearing on the petition was set for August 31, 1989. At the hearing Petitioner was represented by his attorneys William Hilton and Robert Davis. Respondent was represented by Gregory Emery. The minor children were represented by Stanley Fortner.

For the reasons stated herein, the court will order that the children be returned in the custody of their father to the country of Spain, where they shall report to the appropriate Central Authority according to the provisions of the Hague Convention.

### **FACTS**

Husband and Wife were married in Madrid, Spain on August 5, 1972. Thereafter, the parties moved to Riverside, California, where husband attended the University of California, Riverside. M.N.B. was born October 17, 1977 in the United States. The parties moved to Spain in 1979, and the second child of this union, P.N.B., was born in Spain on October 4, 1979. From October 1979 to January, 1984, husband and wife lived in La Laguna, Canary Islands, Spain.

All previous proceedings dealing with the dissolution of the parties marriage and the custody of their children have been conducted in the Court of First Instance, of the City and District of La Laguna, Spain. There has never been an attempt by either party, prior to the instant action, to seek intervention of the Courts of this State or the United States.

The parties separated in 1984, and father was granted provisional custody of the children in the family home, with the mother being granted visitation on all summer and other holidays, and other liberal visitation with the children.

On April 15, 1985, the court revoked wife's visitation with the children because she had wrongfully retained and concealed the children after the expiration of her Easter holiday visitation with them. It was subsequently learned that she had removed the children to the United States. The children remained in the United States with their mother until September, 1986, when all three returned to Spain pursuant to an agreement which was reached regarding visitation and custody. The crux of that agreement was that husband and wife would reverse their respective positions regarding the custody and visitation of the children, and that the wife would have the children during the school year, and the husband would have the children on the holidays, summer, and alternate weekends. The parties also agreed to share joint legal Custody. This agreement was approved by the court in Spain. Mother was to live in Santa Cruz de Tenerife with the children, and Father was to live in La Laguna. Mother was Granted permission to take the children to California for one month during the summer of 1988, and one month in the summer every other year thereafter. The children were to attend school in Spain.

A final divorce decree was entered in December, 1987. In April 1987, mother attempted to abduct the children a second time. She was assisted by her church minister, who drove her to the airport. Father, who had learned of the attempted abduction, obtained a court order restraining the mother from leaving Spain with the children, and police at the airport on the island of Tenerife prevented the mother's attempt at wrongful removal of the children.

On August 1, 1988, Mother took the children to California pursuant to the terms of the Spanish court order allowing her to do so. The Spanish court issued its order allowing the children to obtain passports, and allowing the mother free exit from the country. The children were to be returned to Spain by September 1, 1988. Instead, mother retained the children in violation of the Spanish court order, concealed the children in California, and allowed the father no contact with his children whatsoever. Father learned of the abduction when he attempted to exercise his normal visitation with the children which would have occurred had they been properly returned. The mother's wrongful retention of the children commenced on September 1, 1988 and continued until August 24, 1989.

Mother located herself in Applegate, California with the children. The children had virtually no contact with their father. The father did not know where the children had been taken, except that he found that they had been taken to the United States. His contacts with his former mother-in-law established that the children were fine, but their location was not disclosed. Father sent letters and small presents to the children in care of the mother-in-law. Father received no response from the mother or the children.

Mother left the country of Spain according to the advice of her attorney, one Carmen Sevilla Gonzalez. Both mother and an independent witness testified that the attorney told the mother that she was crazy to have returned to Spain with the children, and that she should leave. Mother testified that she was living on the equivalent of \$600.00 per month [FN1] (72,000 pesetas), 35,000 pesetas in child support, 37,000 for her employment as a "kind of teacher." Mother contended that she was unable to obtain more suitable employment even though she has a Master's Degree.

Father is employed as an associate professor at the University of La Laguna. He testified that he gave his wife not only the support which was ordered, but that he gave her additional support as was necessary and assisted her in finding employment, and in finding a residence in Spain after her return in 1986. Neither party has apparently remarried.

Dr. Eugene Roeder was appointed by the court for the purpose of examining the children to determine the relationship which the children had with the father and the mother. Dr. Roeder testified that M., psychologically frail, would be damaged by a removal from her mother, and that significant bonding with mother was present. M. was not seemingly bonded with her father, although insufficient time for a complete evaluation by Dr. Roeder left the reasons for such lack of bonding a matter of speculation. Dr. Roeder was of the opinion that removal of M. to the custody of her father to return to Spain would be harmful, to the point risking permanent psychological damage.

Dr. Roeder was of the opinion that P. would be less effected by such a move back to Spain, although there would probably be some psychological damage. Dr. Roeder made it clear that separation of the children would probably be damaging to both children, since they were greatly bonded to each other, and obtained support and sustenance from each other. Dr. Roeder stated that in the event that the mother was to move back to Spain with the children, that the effects of any such change would be far less damaging to the children. Mother testified that in the event the court ordered the children to return to Spain, that she would return with the children to Spain to live.

The children were not able to articulate reasons why they did not want to return to their father, but rather articulated some reasons why they did not want to return to Spain. An important reason for not wanting to be returned to the father was that such a move necessarily meant that the children would have to remain in Spain. Dr. Roeder opined that it is possible that M. had undergone a grieving process over being separated from her father, and had adjusted her life without him. M.'s (and to some extent P.'s) idea of fantasy cure for the situation was for her father to just "go away". The children's drawings of the family excluded the father.

M. clearly expressed to Dr. Roeder the fact that she did not want to go back to Spain. P. expressed the same desire. Neither were able to articulate any concrete reasons for not wanting to go with their father, except that such meant that they would be required to return to Spain.

## DISCUSSION

Article 12 of the Convention provides, in part, as follows:

"Where a child has been wrongfully removed or retained in terms of Article 3 and at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

Article 13 of the Convention provides as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(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 or 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The burden of proving the wrongful retention is upon the Petitioner, who must prove this element by a preponderance of the evidence. 42 U.S.C. 11603(e)(1)(A). The person opposing the petition has the burden to prove by clear and convincing evidence the exception in Article 13b, *supra*, applies. 42 U.S.C. 11603 (e)(2)(A). Exceptions in Articles 12 and 13 other than 13b may be proven by a preponderance of the evidence. 42 U.S.C. 1603(e)(2)(B).

This court is vested with original jurisdiction to hear this matter. 42 U.S.C. 11603(a). The substantive law to be applied is the law established by the Convention. 42 U.S.C. 11603(d). The Convention is a treaty among nations, and as such is the supreme law of the land. United States Constitution Article VI, clause 2.

### 1. Wrongful Retention.

In the instant case, father has overwhelmingly demonstrated that the children were wrongfully retained in violation of an existing order granting joint legal custody (*patria potestas*) over the children. The father was entitled to specified visitation rights which were deliberately violated by the mother. In fact, credible evidence shows that she was actually encouraged by her lawyer to disobey a known order of the Court of First Instance in La Laguna. [FN2] Mother further compounded her wrong by retaining the children incommunicado, and testified that she did not know whether she was going to conceal the children from their father for an indefinite period of time. Mother admitted that she made no efforts to inform the father where the children were, whether they were sick or well, and made no attempts to allow the children to communicate with their father.

Clearly, the above facts demonstrate a retention of the two children in violation of an existing custody order. Retention of a child is wrongful when "it is in breach of rights of custody attributed to a person...either jointly or alone under the law of the State in which the child was habitually resident immediately before the removal or retention." Hague Convention, Article 3a. Additionally, the party deprived of their custody rights must have been actually exercising those rights, or would have exercised those rights but for the wrongful retention. Hague Convention, Article 3b. Here, the father testified that he exercised every scheduled visitation, and only found out that the children were not in Spain when he went to their home and found them gone. If there is any doubt that the mother's conduct was wrongful, the provisions of California Penal Code section 278.5 declaring such conduct to be a felony offense in this state should put to rest any such reservations. [FN 3]

### 2. Risk of Being Exposed to Psychological Harm.

The more difficult issue to resolve is that of the potential psychological harm which would come to both children by returning them to Spain. It is clear that the children were not vehemently opposing return to their father, rather their concerns were of returning to Spain. It is also clear that the children have been already damaged by the conduct of their mother in stealing them away from their father. The history of this family shows that the family remained intact from 1977, through the birth of the children, until January, 1984 when the parties separated. At this time M. was 6 years, three months old, and P. was 4 years 2 months old.

Thereafter, the children were in the exclusive custody of the father, as the mother had left the family home. Her visitation with the children during this period of over a year, was sporadic. Thereafter, during a period of visitation, the mother stole the children away to the United States for the first time. They remained in the U.S. with their mother, until the father negotiated their return in September, 1986, a period of one year four months. During this first abduction, mother permitted some telephone contact between the father and the children, but did not allow disclosure of their location until an agreement satisfactory to wife was negotiated and made a court order in Spain.

Under this negotiated agreement, the parties remained in Spain for almost two years, with father exercising his regular (and liberal by California standards) visitation with the children. This period was not without difficulties, as mother attempted to abscond again to the United States for a second time, only to be foiled in the attempt. Finally, on August 1, 1988, mother and children left Spain legally, pursuant to the court decree, but wrongfully remained away until found in the United States on August 23, 1989.

In sum, during the five year and eight month period since the parties separation, mother has concealed the children from the father for a total period of time of two years four months. Under the circumstances, is there any wonder why the children might have difficulty "bonding" with their father?

Father presents himself as a credible, concerned, law-abiding man. He has availed himself of the courts to settle disputes that obviously require judicial intervention. He has continually displayed restraint and compliance with the rule of law. There is no doubt that upon return to Spain, father will seek the court's intervention to establish whatever is in the best interest of these children.

By contrast, the mother has placed these children in an absolutely untenable position. They have been wrongfully deprived of the love and companionship of their father, they have been led to believe that their exit from Spain was absolutely legal (a fact which this court finds that mother knew not to be the case) and they have been now allowed to make a comparison between countries as to their relative desirability for living. Naturally, the children have made friends here, naturally they are attached to their pets, naturally they enjoy all the benefits of this country and the material things which they can have. But what they are too young to appreciate is that the love of both parents is vital to emotional growth and security. There are advantages of living in Spain which cannot be appreciated in the United States. It is for these reasons that mother has fostered and endorsed an unfair comparison between the countries which has little to do with a child's psychological and emotional growth and stability.

The opinion of Dr. Roeder as an expert, is not binding upon this court. *People v. Wilcox* (1986) 177 C.A.3d 715. While this court may reject the conclusion of the expert, even when the testimony is uncontradicted, this court may not do so arbitrarily. *Krause v. Apodaca* (1960) 186 C.A.2d 413. Dr. Roeder conditioned all of his testimony regarding the children upon a single afternoon's visit at the request of this court. He admittedly would have liked to have more time to make his assessment of the children. Dr. Roeder did not have the benefit of knowing all of the facts which were known to the court. Additionally, the reasons for the children's apprehension to return to Spain were vague at best. The problem with the basic tenor of Dr. Roeder's opinion was that in this situation, the facts simply did not bear out the conclusion posed that the children would be subject to a "grave risk that [their] return would expose the child[ren] to psychological harm."

The first reason for rejecting Dr. Roeder's opinion is the "brainwashing" effect the children experienced at repetitive removals. The off-again, on-again presence of father in their lives is damaging. Leaving the case "status quo" and allowing the children to remain in the U.S. virtually guarantees further harm and maladjustment.

The fact is, that the children have already been exposed to, and have suffered psychological harm due to their wrongful retention. Additionally, the lack of bonding of these children to their father is doubtlessly due to their being spirited away from him twice. The confusion in these children's minds as to what is their proper home, who is entitled to care for them, whether their father cares for them, whether he has seemingly opposed their "lawful" exit from Spain, and a host of other confusing and opposing facts erases any doubt that mothers actions have psychologically injured these children.

The Convention exception in this area speaks of "exposing" the child to psychological harm by return to the country of habitual residence. In this sense, this court firmly believes that neither child will be "exposed" to harm by returning the children to Spain. Certainly one must be a realist and understand that any abducted child will suffer trauma to some extent when moved about the world by a ill-advised parent. But returning the children to Spain will serve, in this court's opinion, to allow the Spanish courts to determine what is in the best interest of the children, and to rule accordingly. Clearly, the father has demonstrated to this court that he is the more stable and law abiding parent, and the parent who is clearly inclined to honor the terms of any judgment awarding visitation.

Thus, this court believes that there truly is no grave risk of exposing the children to psychological harm by returning them to Spain. Father has showed caring for them, and a commitment to abide by the orders of the court. This stability is necessary for the children to allow them to nurture. To retain the children in the United States guarantees that mother will continue to frustrate the custodial and visitation rights of the father, and to undermine his relationship with his children. This would undoubtedly expose the children to a greater risk of psychological harm than returning them to Spain. To allow this to happen would be to allow mother to profit by her own wrong, and to continue to damage the children psychologically by her unwillingness to allow the father access to his children. Thus, mother has failed to convince this court by clear and convincing evidence that there is a grave risk that the children will be exposed to psychological harm by their return to Spain.

### 3. Children's Maturity to Express a Choice.

By a preponderance of evidence, this court finds that both children are of insufficient age and degree of maturity to express a view to this court which would be meaningful. This is evident from the testimony of Dr. Roeder. Finally, the purposes of the Hague Convention are clearly borne out in this case. The abject immorality of mothers decisions to take the law into her own hands, when other clear alternatives existed for her to seek assistance, and to avoid the grief and suffering to the father and the children, is appalling. This court suggests that in the likely event that mother returns to Spain to be near her children, or even have custody of them in that country, that she be required to surrender her passport to the United States Embassy in Spain in order to vouchsafe her intentions to comply with future orders which will doubtlessly prohibit her from wrongfully removing the children again.

### 4. Attorneys Fees and Costs.

Pursuant to the convention it is required that attorneys fees and costs of transportation be paid by the party guilty of wrongful conduct, absent reasons which would justify not making an award. In the instant case husband is thus entitled to an award of \$5,000 as and for attorneys fees and costs of travel to effectuate the order of return.

## CONCLUSION

For the foregoing reasons, the petition is hereby granted, and the children shall be allowed to return to Spain with their father forthwith.

Dated: September 1 , 1989.

James D. Garbolino

Judge of the Superior Court

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## FOOTNOTES

1. According to the Foreign Exchange Market, one U.S. Dollar is the approximate equivalent of 121 Pesedas as of August 31, 1989.

2. If true, this type of conduct by an attorney practicing in this State, would subject the attorney to disciplinary proceedings from the California State Bar, and would subject the attorney to potential contempt of court proceedings. This grave allegation of misconduct by an officer of the court should be inquired into by the appropriate Spanish authorities.

3. "(a) Every person who is in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars (\$10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand (\$1,000.00) dollars, or both."

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