---

http://www.incadat.com/ ref.: HC/E/CA 766
[07/12/1994; New Brunswick Court of Queen's Bench (Family Division)(Canada); First Instance]
Spini v. Spini, [1994] N.B.J. No. 567 (Q.L.)

S. APPLICANT and M.F.S. RESPONDENT

File No. FDM-509-94 Moncton

New Brunswick Court of Queen's Bench (Family Division)

December 8, 1994

SMITH J.:

[1] This is an application by M.F. for custody of her infant child, pursuant to subsection 129(2) of the Family Services Act of New Brunswick, and child support in the amount of $650.00 monthly pursuant to section 113 and subsection 115(1) of the Family Services Act . Before receiving notice of Ms. F.'s application, Mr. S., (her husband), requested the return of their child to Switzerland pursuant to the International Child Abduction Act , Chapter 1-12.1 of the 1982 Statutes of New Brunswick. Pursuant to the International Child Abduction Act , the Attorney General of New Brunswick is the Central Authority for the province and acts on behalf of Mr. S. in its application.

[2] Article 16 of the Convention on the Civil Aspects of International Child Abduction which is annexed to the International Child Abduction Act as Schedule A states:

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to he returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

[3] The Court therefore gave a preliminary ruling that it is prevented from considering the custody application of Ms. F. unless a negative decision is rendered on the Convention Application.

[4] In April of 1992 Ms. F., who was then 30 years of age, met Mr. S. who was also 30 years of age while they were both vacationing in the Dominican Republic. Mr. S. returned to his home in Switzerland and Ms. F. to her home in St. Louis-de-Kent, New Brunswick, Canada.

[5] In June of 1992, Ms. F. contacted Mr. S. to advise him that she was pregnant with their child. In January of 1993 Mr. S. travelled to Canada to be present at the birth of his daughter. Shortly after the child's birth, Ms. F. advised Mr. S. that she suffers from cyclothymia which is a manic-depressive psychosis.

[6] Five days after the birth of the child, Mr. S. and Ms. F. entered into an agreement in which the parties agreed: (1) to live separate and apart; (2) that Mr. S. is the father of the child and that he accepts financial responsibility; (3) that Ms. F. would have custody of the child and Mr. S. would have liberal access; (4) to the terms of the support by Mr. S. for the child, and (5) that the laws of New Brunswick shall apply to the agreement and shall prevail over the laws of any other jurisdiction.

[7] Mr. S. returned to Switzerland shortly after the agreement was signed, in the latter part of January 1993. In March of 1993, Ms. F. and the child went to Switzerland for a six-week visit, after which they returned to Canada for a short period of time. Ms. F. again went to Switzerland in June of 1993.

[8] Mr. S. and Ms. F. resided in Switzerland in a common-law relationship from June of 1993 until they married on October 8, 1993 in Switzerland. They resided as husband and wife with the child in Switzerland until early July 1994.

[9] In early July, Ms. F., Mr. S. and their infant daughter travelled to Canada to vacation and visit with Ms. F.'s parents. Mr. S. returned to Switzerland on July 15, 1994 and plans had been made for Ms. F. and their child to return to Switzerland on July 27, 1994. On or about July 27, Mr. S. requested Ms. F. to return with their child to the matrimonial home in Switzerland, to which she refused.

[10] On July 29, 1994 Mr. S. instructed his lawyer in Switzerland to write a letter to Ms. F. requesting her immediate return with their child to Switzerland. When the request by Mr. S.'s lawyer did not result in the return of his wife and child, Mr. S. initiated proceedings under the Hague Convention on the Civil Aspects of International Child Abduction which resulted in the application before the Court.

ISSUES

[11] The issues to be determined by this Court are:

[12] 1. Does the custody and child support agreement, dated January 21, 1993, give custody of the child to Ms. F. and if so, does the fact that Ms. F. has custody prevent the child from being returned under the Application of the Convention?

[13] 2. Are the necessary facts present to apply the Convention and return the child to Switzerland?

ISSUE #1

Does the custody and child support agreement, dated January 21, 1993, give custody of the child to Ms. F. and if so, does the fact that Ms. F. has custody prevent the child from being returned under the Application of the Convention?

[14] The agreement of January 21, 1993 was entered into by the parties in order to provide child support. It also recognized that Ms. F. would have custody of the infant. It was entered into before the parties lived together and before marriage was contemplated. New rights were created for the parties under the Swiss Civil Code upon their subsequent marriage in Switzerland on October 8, 1993. Some of the rights acquired under the Code are:

Article 270:

"Where the parents are a married couple, the child assumes the surname of the family."

Article 271:

"Where the parents are a married couple the child acquires the father's citizenship."

Article 297:

"During the marriage the parents exercise the parental power jointly".

[15] The individual rights given by the Swiss Civil Code clearly supersede those given in the January 1993 agreement, and therefore the subsequent marriage in Switzerland on October 8, 1993 rendered the January 1993 agreement a nullity, that is of no legal force.

ISSUE #2

Are the necessary facts present to apply the Convention and return the child to Switzerland?

[16] Thomson v. Thomson , a Supreme Court decision recently rendered on October 20, 1994, is the first Supreme Court decision dealing with the Hague Convention. It is not yet published, but can be found in Quick Law as Supreme Court Judgment #6 and provides an excellent overview of the application of the Hague Convention on the Civil Aspects of International Child Abduction. The headnote of the Supreme Court Report summarizes the majority decision of the Court:

The underlying purpose of the Convention is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence. Its primary object is the protection of custody rights, i.e., "rights relating to the care ... of the child and, in particular, the right to determine the child's place of residence" (Article 5). Under the Convention the removal of a child is wrongful if it is in breach of "custody [rights] attributed to a person, an institution or any other body ... under the law of the State in which the child was habitually resident

immediately before the removal or retention" (Article 3(a)). Such custody rights may arise by operation of law, as well as by judicial or administrative decision, or agreement.

[17] Re N (Child Abduction: Habitual Residence) 1993, F.L.R. 124, a decision of the Court of Appeal of England, approved by Thomson v. Thomson, found, in allowing an appeal of a Hague Convention application that on such an applications the Court is under a statutory duty to apply the Convention if the necessary facts were present, and bound by Article 12 to order the return of a child who had been wrongfully removed or retained within the terms of Article 3 unless one of the exceptions in Article 13 is established.

[18] Article 3 of the Hague Convention on the Aspects of International Child Abduction which is annexed as Schedule A to the International Child Abduction Act, Statues of New Brunswick, states:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under of the law of the State in which the child was habitually resident immediately before the removal or retention;

and

(b) 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.

The rights of custody mentioned in subparagraph (a) above, may arise in particular 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.

[19] Article 5 reads:

For the purpose of this Convention:

(a) "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;

[20] The Court must establish the habitual residence of the infant child, S., in order to determine if the Convention shall apply. Lord Justice Balcombe, in Re N supra, when determining habitual residency stated at page 129:

"I now refer to the decision of the House of Lords in the well-known case of Re J [1990], 2 AC 562, sub nom C v. S (A Minor) (Abduction) [1990] 2 FLR 442 and in particular to the speech of Lord Brandon of Oakbrook at pages 578F and 454B respectively. He says:

"The first point is that the expression "habitually resident" as used in Article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to he understood according to the ordinary and natural meaning of the two words it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to he habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to he habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, this situation with regard to habitual resident will necessarily be the same as hers."

J in that case was a very young child.

[21] The facts of this case are that the child, S., lived with her parents in Switzerland, first in a common-law relationship from June 1993 until October 8, 1993 and then as a child of the marriage from October 1993 until July 1994. In July of 1994 the mother, Ms. F., and the child vacationed in Canada with the intention of

returning to Switzerland. Ms. F. decided for some reason unknown to the Court, not to return to Switzerland, but to remain in Canada with the child.

[22] It is clear from the facts that the child, S., was a habitual resident of Switzerland immediately prior to vacationing in Canada with her mother.

[23] The question that now must be answered is, was there a breach of rights of custody attributed to Mr. S. under the law of Switzerland? Article 297 of the Swiss Civil Code, to which I have already referred, gives joint custody of the child to the parents. At the time the child was retained in Canada, Mr. S. was exercising his custodial rights until he returned to Switzerland with the expectation of seeing his daughter in Switzerland shortly thereafter. Based on the facts, I find that the retention of S. in Canada is wrongful within the terms of Article 3 of the Convention,

[24] Article 13 of the Convention, lists the exceptions to applying the Convention if a determination, as in this case, that a child has been wrongfully retained pursuant to Article 3.

[25] Article 13 of the Convention States:

"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."

[26] I do not find that any of the exceptions listed in Article 13 have been established from the facts. This Court is therefore bound by Article 12 which states:

"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 or the child forthwith."

[27] I therefore order the return of the child, S.S.-F., to Switzerland forthwith. Since Mr. S.'s application is successful, the application for custody and support by Ms. F. will not be heard.

[28] Mr. S. has stated that he would pay for the return fare of Ms. F. and S. He has also stated that he would care for them in Switzerland. Ms. F. must now decide if she wishes to accept her husband's offer to return to Switzerland.

COUNSEL: Catherine Berryman, per the Attorney General of New Brunswick being the Central Authority for the Province; Harold R. Grew, for the respondent

---

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law