

**CITATION:** Kirn v. Kirn, 2020 ONSC 2159  
**COURT FILE NO.:** 758/19  
**DATE:** 2020-03-31

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Meghan Marie Kirn (Applicant)  
Andrew George Kirn (Respondent)

**BEFORE:** Justice W.L. MacPherson

**COUNSEL:** Joan M. Irwin, for the Applicant mother

**HEARD:** In Chambers

**ENDORSEMENT -- COVID 19 PROTOCOL**

[1] **AS A RESULT OF COVID-19**, this determination of urgency is made pursuant to the Notice to the Profession of the Chief Justice of Ontario, available at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/> [“the Chief’s Notice”]. Under that Notice, the regular operations of the Ontario Superior Court of Justice have been suspended since March 15, 2020, until further notice.

[2] This is a matter in which the mother sought the return of the children (Scarlette Kirn and Arielle Kirn) to Florida under the *Hague Convention*. They were brought to Ontario by the father in November 2019. The mother did consent to the children coming to Ontario for a visit. However, the children were not returned to Florida as had been agreed. The mother has used both the Florida and Ontario courts to try to have the children returned to her in Florida.

[3] The matter came before me on one prior occasion before the suspension of court operations. On February 28, 2020 the matter had been set to be heard as a long motion. The father, through his counsel, Paul MacLeod, requested an adjournment which was granted to permit the father to file responding material. The matter was to return to court on March 26, 2020 at 10:00 a.m. to be argued as a long motion before me.

[4] By operation of the Chief’s Notice, this matter has been adjourned until further notice. By operation of a Notice to the Profession in Central South Region, dated March 24, 2020 [the “Regional Notice”], this matter was adjourned to be spoken to on June 2, 2020 at 10:00 a.m.

[5] By email to the St. Catharines court on March 31, 2020, mother's counsel requested that this matter go forward at this time rather than await the return to operations of the Court in June 2020.

[6] The following subsequent events have taken place:

- a) The mother had a visit with the children in Ontario during the first week of March 2020.
- b) The respondent did not serve any responding material. Instead, he filed a Notice of Withdrawal of his Answer and he also filed a Notice of Change of Representation confirming that he is acting in person.
- c) The father returned the children to Florida on March 15, 2020 and they have been residing with the mother since that time.
- d) The father continues to reside in Florida.
- e) The father has returned the children's USA passports to the mother. He continues to retain possession of the children's Canadian passports.

[7] At first blush, this case would not appear to be urgent. The children's safety and well-being are protected as they are now residing with the mother in Clearwater, Florida. Many countries including Canada and the United States, have imposed travel and border restrictions. Unnecessary travel is to be avoided. During this global pandemic it is extremely unlikely that the father would have any success in removing the children from Florida at this time.

[8] In late 2019 the mother commenced a proceeding in the Circuit Court for Pinellas County Florida. The documents in that proceeding were served on the father at the same time that he was served with the documents in the Ontario proceeding. The first appearance in the Florida proceeding was on January 14, 2020. When the Florida court was advised that the mother had brought a *Hague Convention* application in Ontario, that court suspended its proceeding until the Ontario court had determined which court had jurisdiction to deal with custody of the children.

[9] According to Mr. Michael Berry (one of the mother's lawyers in the Florida proceeding) the Florida court requires an order from the Ontario court requiring the return of the children to Florida, before it can proceed to deal with custody matters in Florida.

[10] Having knowledge of the file from the previous appearance and based on the father's withdrawal of his Answer, such that the mother's Ontario application would be able to proceed on an unopposed basis, it is abundantly clear that under the *Hague Convention* the children's habitual residence is in Florida, USA. It is also apparent from the material filed by the mother, that the father had wrongfully removed the children from Florida and wrongfully retained them in the Province of Ontario. The father's subsequent actions in returning the children to Florida support that finding as well.

[11] Certainly, as set out in the Chief's Notice this matter could be deemed to be an "urgent matters" as it relates "to the wrongful removal or retention of a child". However, the question remains is it urgent enough that it must be dealt with during the suspension of regular court operation. In my view, in the current circumstances and circumstances in the foreseeable future, I believe that it does.

[12] No one knows how long the COVID-19 pandemic will last nor how long the travel restrictions will continue in place. Once the health crisis is over, it is expected that travel restrictions will be eased. Undoubtedly there will be much backlog in the Ontario court system and great uncertainty as to when and how matters will proceed.

[13] In a case such as this, where the proper court to hear a custody matter is Florida and not Ontario, the sooner that is determined, the better it will be for the children to have the court with jurisdiction to be able to make the appropriate custody order.

[14] For those reasons, I find that this matter is urgent. I am also satisfied that I am able to deal with the motion in writing, based on the material filed by the applicant mother.

[15] Based on the foregoing, the following final order shall issue:

1. There shall be a finding that the habitual residence of Scarlett Lynn Marie Kirn, born [date omitted] and Arielle Juliette Lily Kirn, born [date omitted] ("the children") is Florida, USA.
2. There shall be a finding that the children were wrongfully removed from Florida by the respondent, Andrew George Kirn, and were wrongfully retained by him in Ontario within the meaning of Article 3 of the *Convention of Civil Aspect of International Child Abduction*.
3. The children shall be returned to their habitual residence, namely Florida, U.S.A. by the respondent.
4. The applicant shall proceed expeditiously with the court proceeding in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County Florida, Case No. 19-0010674-FD dealing with custody of the children.
5. The respondent shall forthwith deliver to the applicant the children's Canadian passports. These passports and the children's USA passports shall be retained by the applicant,
6. The return to operations date of June 2, 2020 at 10:00 a.m. is vacated.
7. The issue of costs in this proceeding and any other matters arising from the February 28, 2020 interim order are adjourned to the Trial Scheduling Court on July 9,

2020 at 2:30 p.m. to arrange a date before Justice MacPherson. Counsel for the applicant may arrange the date in advance through the Trial Coordinator's office.

MacPherson J.

**DATE:** March 31, 2020

## Official Global Travel Advisory

### **Avoid non-essential travel outside of Canada until further notice.**

To limit the spread of COVID-19, many countries have put in place travel or border restrictions and other measures such as movement restrictions and quarantines. Many airlines are suspending flights. Many airports are closing, preventing flights from leaving. Exit bans are becoming more frequent. New restrictions may be imposed with little warning. Your travel plans may be severely disrupted and you may be forced to remain outside of Canada longer than expected. Canadian travellers should return to Canada as soon as possible.

Contact your airline or tour operator to determine options for cancelling or postponing your trip.

### **If you are still considering travelling or are already outside of Canada:**

- Check your destination's Safety and security, Entry/exit requirements and Health sections.
- Get the [Government of Canada's latest updates on COVID-19](#).
- Check the [Pandemic COVID-19 travel health notice](#).
- Ensure that you have sufficient finances and necessities, including medication, in case your travels are disrupted.
- Check with your travel insurance provider to know more about their policies related to COVID-19. Find out if you are covered for medical treatment if you become infected with COVID-19 as well as for extended stays outside of Canada. [More about travel insurance](#)

This advisory overrides other risk levels on our Travel Advice and Advisories pages, with the exception of any risk levels where the advice is already for you to avoid all travel.

### **Financial help for Canadians affected by COVID-19 outside Canada**

Canada has announced the creation of the COVID-19 Emergency Loan Program for Canadians Abroad to help Canadians return home. For more information on this program, visit [COVID-19: Financial help for Canadians outside Canada](#).

Avoid all cruise ship travel due to COVID-19.