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[29/03/2000; Cour d'appel de Grenoble (France); Appellate Court]  
M. v. F., 29 March 2000, Cour d'appel de Grenoble

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**Unofficial Translation**

**IN THE NAME OF THE OF PEOPLE OF FRANCE**

**CASE No 00/00797**

**Stamped date 30 March 2000**

**No of minute 372**

**APPELLATE COURT OF GRENOBLE**

**CHAMBER FOR EMERGENCY**

**ORDER DATED Wednesday 29 MARCH 2000**

**APPEAL of an order made by the High Court of GRENOBLE**

**(Case No 200000773)**

**Dated 17 February 2000, on a declaration of appeal dated 17 February 2000 and a request for emergency hearing dated 29 February 2000**

**APPEALING PARTY**

**Mrs. M.**

**Born 29 July 1969 in France, French citizen**

**Represented by the SCP GRIMAUD Solicitors to the Appellate Court and assisted by Isabelle STAUFFERT GIROUD Lawyer to the Bar of Grenoble**

**DEFENDANT TO THE APPEAL**

**Mr. F.**

**Born 9 June 1965 in Italy, Italian Citizen.**

**Represented by the SELARD DAUPHIN NEYRET Solicitors to the appellate Court and assisted by Me Veronique CHAUVEAU Lawyer to the Paris Bar**

**IN THE PRESENCE OF:**

**Me Françoise LAUDET, lawyer for the interest of the child S. born the 1st of June 1993 in ROME.**

**The original has been delivered on the 30 March 2000 to SCP CALAS, SCP GRIMAUD, Me RAMILLON, SCP PERRET et Pougnaud, SELARD DAUPHIN NEYRET**

**Composition of the court**

**During the debates and at the hearing when the order was made:**

**Mrs. Marthie COMBE, Appellate Court magistrate, acting as President**

**Mrs. Laurence HUSQUIN, Appellate Court magistrate**

**Mr. Michel REBUFFET Appellate Court magistrate**

**Mrs. PAVAN DUBOIS Public Prosecutor**

**Assisted by Mrs. Helene PAGANON Clerk during the debates**

**DEBATES**

**AT THE HEARING IN CHAMBERS DATED 22 MARCH 2000**

**AFTER THE FILE HAVING BEEN COMMUNICATED TO THE PUBLIC PROSECUTOR**

**THE SOLICITORS AND LAWYERS HAVING BEEN HEARD IN THEIR BRIEF AND PLEADING ARGUMENTS,**

**AND MRS. PAVAN DUBOIS PUBLIC PROSECUTOR IN HER REQUISITIONS BY WRITING AND SPEECH**

**F. and M. lived as co-habitees.**

**They had a baby girl S., born 1 June 1993 in Rome**

**They parted during the year 1995.**

**By an order made in San Diego, State of California (USA) on the 20th of September 1996, F. has obtained legal and physical custody of his daughter, whereas, by a previous order dated 14 December 1995, the child had been in the care of her mother.**

**As the child had been taken to France by her mother on the 4th of June 1996, F. filed in the Family Court of Grenoble a request to obtain immediate return of the child to the USA, in due application of the Hague Convention.**

**By an order dated 17 February 2000, he was granted his request, and the immediate return of the child S. to her father, in any place chosen by the latter, with immediate enforcement and on minute if needed.**

**M. was sentenced to pay to F. the amount of 25.000 FF and the costs were to be paid by her. On the 17 February 2000, M. regularly appealed this order.**

**She had been given leave for emergency appeal by an order dated 18 February 2000 for a fixed hearing dated 22 March 2000.**

**In order to give grounds to her appeal, as well as in her request for emergency hearing, M. stated that the order made by the Superior Court of California on the 14th of September 1996 is in violation of the dispositions of Article 14 of the French Civil Procedure Code, as it has been made in her absence; that this order had not been served to her, therefore that she could not appeal it; that this order has been obtained in fraud of her rights as, at this time, she was in France with her daughter, and that F. knew it as he came to join her.**

**Therefore that she has been denied an equitable trial.**

**She underlines that this order dated 20 September 1996 had not been translated by an expert translator; that the fact that F.'s lawyer explained this order is not acceptable in France; that the order, made out of her presence, is contrary to French Public Order; therefore that these documents are to be set aside.**

**She then adds that French Judicial authority of the requested state is not bound to order the return of the child if the person who opposes the return establishes that there is a grave risk that the child's return exposes the child to a physical or psychological danger or in any other way places the child in an intolerable situation; that F. pretends that it is due to her behaviour that his order was made (as he states that she abducted her child S. in 1995 for one month to Italy, then in 1996, in order to come to France; that all this is untrue; that at this time she had physical custody of the child; that even if it is true that this order stated that no one of the parents could leave the County of San Diego without the consent of the other, or an order, F. had left to Cuba with the child without any problem whereas she had not agreed; that in 1996 when she came to Paris to see her father, F. knew it; that it is under these circumstances that he has obtained the order dated 20 September 1996; that she had many times requested from the American Justice to change the physical custody of her daughter, or to allow her to come to France with her; that this has always been denied to her, whereas she is French and so is her daughter; that she entertains with the child privileged links; that the separation would be intolerable for them both; that she cannot come back to the USA as there is a warrant against her and this could lead to her arrest; that F. lives with a Brazilian woman and has a child with her and may go to Brazil, a country not a signatory of the Hague; that he does not justify having a residence and a job in San Diego; that the child has no family in the USA; that F. is unstable, having spent 6 months in South America without being satisfied; that he even has asked leave to take the child to Brazil or the Ivory Coast, and that this has been denied by the American Judges.**

**She requests for the application of Article 13(2) of the Hague Convention, the child having reached an age and maturity that would allow account to be taken of her opinion and estimates that a social welfare inquiry should be ordered to hear the child and obtain information on her situation.**

**She considers that the order from San Diego is contrary to French Public Order; that the sole access obtained was a reasonable one; that the UN Convention on the Rights of the Child states the right of the child to maintain relationship with both parents; that if she had had an access right allowing her to come on a regular basis to France with her child, F. would not have been compelled to ask for return of the child.**

**She states that in the first time, she had been deprived of any rights of access to her daughter S. due to the violence and alcoholism of F.**

**She states that if the return of the child was ordered, she would not see her again, as the father has leave to take the child to any place he chooses.**

**In application of Article 16 of the Convention she contends that the child has been living for nine months in France with her, that she is in primary school and that F. forbid her to go to a French School, depriving her of her roots; that she is remarried, has another child, a baby boy, and that S. lives in a protected environment with her sister and brother; that she benefits from medical insurance whereas there is nothing as such in the USA; that also she is free to take care of S. and that is not the case of F.; finally she states that she had to come to France as F. never satisfied his undertaking that he would pay for her rent and alimony.**

**F. answered that the appealing act is void and that therefore the appeal is not receivable; that M. did not state her DOB and her address, this meaning her actual and real residence; that this omission is hurting his case as, when the order was made, she had disappeared from her domicile taking the children with her and she could not be found whereas the Public Prosecutor and a private detective he took never made research; that she concealed her residence from him and the court, and that will make the enforcement of the new order difficult and shows the persistence of the violations of the law by M. He also adds that pursuant to Article 961 of the New French Civil Procedure Code, her brief is not receivable as all the notes compulsory under Article 960(2) of the New Civil Procedure Code, amongst which include the address, are not given, therefore her brief is to be put aside.**

**In addition, he states that he is an Italian Citizen, and that he resides in San Diego, that he has obtained legal and physical custody, pursuant to illegal displacements of the child from the USA to France by M.; that this decision has been made within the framework of a long and painful procedure, during which he had to come back to the Family Court many times; that, during one access, M. has unlawfully displaced the child from the USA to France, without leaving any address, and that he only found his daughter after nine months, with the help of Interpol.**

**He precises that, at the first hearing in front of the Judge, M. had acknowledged that she took the child during her access rights; that, nevertheless, neither of the parents was allowed to take the child out of California without the other's consent; that, during the hearing, an agreement was found between the parties, pending the order, according to which he was to take the child in front of the Church of Bourg d'Oisan and bring her back the next day; that, as soon as he heard the content of the order, F. asked the head of the school where his child was not to give the child to the mother; that nevertheless the child left with her mother and sister and was not found; that on the instructions of the Public Prosecutor, the police forcibly entered M.'s apartment and found traces of a quick departure; that this case comes to the Appellate Court in this state, the child not being in school since February.**

**He asks for personal appearance of the parties, if the Court decides that it is lawfully seized.**

**On the merits, he states that the mechanism of the Hague Convention is simple; that when a child is displaced from his usual place of residence to be taken to another country, called country of refuge, the judge of the said country must, without any delay, send the child back to the jurisdiction of origin; that the displacement is illicit with the meaning of the Convention when all the bearers of custody within the meaning of the Convention have not given their agreement for such a displacement; that the order for return is in no way an order on the merits of physical custody nor legal one; that the best interest of the child has no influence in such a framework.**

**He considers that the requested conditions for the enforcement of the Convention are found; that he has custody; that the displacement is illicit as M. had asked to take her daughter to**

**St Barthelemy, that this had been denied to her; that none of the parents could take the child out of California without the other's consent; that the habitual residence of the child is without any contestation,**

**in San Diego.**

**He estimates that the return of the child should be ordered, none of the exceptions stated in the legal text may be granted; that he never acquiesced to the displacement; that the return of the child to the USA will not incur for her any grave risk, physical or psychological; that prior to leaving the USA, the child was in school; that the mother had an access right; that he took good care of the child; whereas M. sometimes forgot her own child in school; that also, two times, prior to the displacement dated 1999, M. displaced her residence, depriving him of all contact with her, and he never did such an act; that S. does not oppose to her return and that also she is too young to make such a decision.**

**He underlines that the order dated 20 September 1996 has been produced in original and translated as well as all the other documents, by a certified translator; that if this order had been made out of M.'s presence, she had knowledge of it and had the possibilities to ask for modifications and that she has always been denied; that the affidavit from Mrs. Maria Hart from the US State Department, Central Authority, establishes that the displacement was illicit.**

**He precises that the Assistant of the Public Prosecutor of San Diego had established a report showing that M. had already abducted the child; that therefore it was not abnormal that the San Diego Judge forbid the outgoing of the child from the jurisdiction to prevent any new abduction; that he has never forbid mother and child to have contact; that if the child was returned to the USA, this would stop any proceeding against M. in the USA; that she has the right to defend herself; that also he has undertaken and again undertakes that M. will have access, of which the US judge will organize the organization; that also he offers that M. sees the child whenever he comes to Italy to see his parents; that also M. may pursuant to Article 21 request the Ministry of Justice to transfer to the US Central Authority a request for access; that also the risk for abduction to Brazil as evoked by M. is not serious, whereas he has always abided by the orders made; that this accusation shows clearly the own behaviour of M.**

**He opposes to the hearing of the child, which had not been asked to the first judge, as it is not the desire of the child that should be taken into account but the opposition to return; that S. is too young to be heard and has been pressured in an important way from mid February and has always been happy to see him.**

**He states that the Convention on the Rights of the Child is without any consequence on this case, as he never was opposed to the relationship between mother and child, but that it is different with M.**

**He states that the Article 16 of the Convention allows, when the parent responsible for abduction has filed a request with the Family Court, to withhold the procedure until the decision on return is made.**

**He asks for confirmation of the previous order, and also the sentence of the defendant to 50000 FF for damages, including costs, lawyer's fees, solicitor in the Appellate Court, usher, private eye as well as hotels and restaurants. He also asks for the sentence of 20000 Frs for abusive appeal.**

**The Public Prosecutor to the appellate court requires that the first order be confirmed, this only being possible to restore a state of law deliberately violated by M.**

**As an answer to the briefs of F., served on the 17th of March, M. has answered on the 21<sup>st</sup> of March. She produces many affidavits and completes her motivations. F. considers this evidence unacceptable, as violating the rule for contradiction, the briefs and evidence not being an answer to his own arguments.**

**The hearing of S. was ordered the 22nd of March and has been done immediately in due presence of the lawyer she had asked for. The parties took knowledge of what she said on the 22nd of March and were able to give their point of view.**

#### **MOTIVATION OF THE ORDER**

##### **1) On the procedure**

**It is showed by the documents given to the case that M. had indicated in her declaration of appeal, her request for emergency bearing and her brief attached the place of her domicile, whose existence is proven by a lease contract, dated 17 September 1999 and the fact that her husband still resided at this place in the beginning of March 2000. While M. has acknowledged having left this place with the children and being hosted by friends in order to avoid the enforcement of the order, this does not mean she had changed her domicile. Therefore her request and brief will be said acceptable. Whereas, it must be said that F. has served his brief in answer on the 13th of March 2000 on Monday.**

**Therefore, and whereas the hearing was set on the 22nd of March 2000, the service of evidence done on the 16th of March 2000 by F., as well as the brief served on the 21st of March 2000 will be set aside, as violating the principle of contradiction.**

##### **2) On the merits**

**It is not useless - in order to decide on the appeal filed by M., to recall the judicial history of the parties from 17 March 1995, as it is showed by the numerous orders produced in the debates and from Mrs. Partida's report (Mrs. Partida is the Officer from the Office of The Public Prosecutor from San Diego county dated 6 November 1990) and Marc Gotbaum, Counselor to the Family Services of the Family Court of Superior Court of San Diego, all these documents being lawfully translated.**

**The history goes as follows:**

**17 April 1995: Order from the Court to grant joint legal custody of S. to both parents;**

**Departure of M. to Italy with her daughter whereas the orders had forbidden her;**

**28 April 1995: Legal custody of the child granted to both parents but physical custody to F.;**

**14 December 1995: the Superior Court of California County Of San Diego undertakes the fact that F. and M. have decided not to take the child out of the County of San Diego without either the other's consent or an order from the Court; the Court decides to adopt the recommendations of the Mediation applicable during six months and subject to modification at one parent's request, stating that both parents should have legal joint custody, the main residence of the child being at the mother's, and the child being with her father every Sunday from 11 to Tuesday 18h, and with the mother the remainder of the time. Each parent being granted two holidays a year for 10 days;**

**17 July 1996: Order for localization of the child S., due to her departure with mother without the father's agreement;**

**20 September 1996: Order made by the Superior Court of San Diego, after the hearing dated 4 September, at the request of F. dated 8 July 1996, modifying the custody order in order to grant the father with legal and physical custody of the child S., the mother being entitled to reasonable access;**

**17 November 1997: Order for temporary restriction at the request of M. in order for F. not to be able to leave California with the child;**

**18 November 1997: Order granting F. the right to take his daughter to Italy from 19 to 29 November;**

**24 December 1997 order for the mother to have the child from every Friday afternoon until school on the next Monday (the mother bringing the child to school);**

**6 March 1998: Order of the Superior Court of California County of San Diego, at the request of M.: custody to the father and sharing plan of the child on two weeks, from Thursday to Saturday morning to the mother on the 1st week, and from Thursday to Saturday of the next week, on the report of mediation, recalling that the father has legal and physical custody of the child after two abductions of the child from the USA. The accusations of alcoholism and drug abuse made by the mother did not appear acceptable and the mother being quite unstable, her dream to move to the Antilles do not show of a nature sufficient to protect F.'s rights;**

**15 October 1998: The request filed by M. to obtain a variation of the order on custody and access is denied;**

**11 March 1999: Order denying the request for variation of the order on custody and access filed by M., forbidding F. to take his daughter for holidays out of the USA or in Mexico without the mother's consent;**

**19 May 1999: The Superior Court of California County of San Diego, seized by M., denies to her the right to travel to France with the child and orders mediation;**

**Friday 4th of June 1999: M. abducts the daughter to France without F.'s agreement;**

**It results from these facts, whereas all the orders have not been filed, that:**

**The initial order dated 20 September 1996 has not been varied in its principle, whereas numerous requests for variation have been filed by M. from then to May 1999, and that therefore she cannot pretend that she has not been present at the hearing after which this order had been made, whereas also at this time she was in France where she took her daughter unlawfully;**

**F. had custody of the child, M. was not granted with leave to take the child to France and therefore such an abduction is illicit, with the meaning of Article 3, M. having taken the child during her access rights;**

**There is no immediate grave risk that the return of the child would expose her to a physical or psychological danger or place her in an intolerable situation, within the meaning of Article 13(1)(b) of the Convention. As a matter of fact the child lived as a principal residence with her father since September 1996 and all the elements contained in the judicial file have**

never shown against F., whereas, on the 3rd of March 1999, the Headmistress of S.'s school in San Diego underlined that when the child was with her mother, she frequently missed school or arrived late, or that the mother picked her up late from school, or even once, had not shown up, whereas F. was unrepachable. M.'s instability has been underlined many times and she does not guarantee the relationship of the daughter and father, as shown with the same act done three times.

There is nothing such as an opposition of the child to her return, the child being heard and having only showed a preference to live in France but never opposed to her return.

Also, there are no other elements allowing to say that the order of the American authorities could be contradictory to French Public Policy, nor that the return of the child would be an attempt to limit the human rights or fundamental freedom, whereas the mother had a normal access right on the child and has been able to exercise it. It should be underlined on this point that M. has not told the US judges that she was willing to live in France and that therefore her access should take this into account, but simply had asked leave to take her daughter to France to see her grandparents.

Also Article 16 forbid in fact the French authorities to make an order on custody unless it is shown that conditions for return are not fulfilled.

This is why the first order can only be confirmed being only premised that the child should return with her father to the USA and not in any place chosen by the father.

This being said, it is undertaken by F. that he promises to take the child to France four times a year for at least one week without undertaking that he will leave the child to sleep at her mother's, and he undertakes also that the mother will be able to see S. under the same conditions when he comes to Italy.

Therefore, and as F. has also undertaken the fact that he will let the USA judge be informed of such undertakings, it belongs to M. to ask for access on her daughter, being stated that the Court has heard the parties and the child and estimates that this right is needed by the child, truly attached to both parents, and that the periods for the child to be with her mother should be at least 15 days, serene and profitable relationships being difficult to establish for a lesser period.

In due application of Article 26 of the Convention, M. shall be sentenced to pay to F. the amount of 35000 FF, she will also stand for the costs of appeal.

**THIS IS WHY**

**THE APPELLATE COURT**

**In a public and contradictory hearing**

**After deliberation**

**Declares the appeal receivable**

**Sets aside as violating the contradiction of the debates, the evidence filed on the 16th of March by F., the brief filed by M. on the 21 March 2000 and the one filed by F.**

**Says acceptable and regular the petition and briefs filed by M.**



**Confirms in all its dispositions the order deferred to the court with the exceptions of the amount of the sentence pronounced in application of Article 26 of the Hague Convention.**

**Precise that the child should return to the USA with her father and not in any place chosen by him**

**By a new order**

**Sentences M. to pay to F. the amount of 35.000 Frs**

**And adding to it:**

**Undertakes that F. has promised to take his daughter to France four times a year for one week at least, without undertaking that he will allow her to sleep at her mother's, and to let S. see her mother under the same conditions whenever he comes to Italy.**

**Precise whereas that the Court, which has heard the parties and the child, estimates that this right is necessary for the child who is obviously attached to her mother and father and that the stays with the mother should be at least of 2 weeks each time, the relationship being difficult to establish in a serene and profitable way if inferior in length.**

**Sentence M. to the expenses and costs of the appeal.**

**Order made in the hearing of this day, signed by Mrs. COMTE, Counselor, acting as President, and Mrs. PARAGNON Clerk.**

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