THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)
A.D. 2014

CLAIM NO. SKBHCV2014/0106

In the Matter of the Inherent Jurisdiction of the Court

And in the Matter of Article 7 (8) of the Schedule of Child Abduction (International Civil Aspects) Act 12 of 2012

BETWEEN:

The Attorney General of
Saint Christopher & Nevis

Claimant

- and -

LISA SKERRITT

Defendant

Appearances:-

Mrs. Simone Bullen Thompson, Solicitor General, leading Ms. Alethea Gumbs for the Claimant.
Dr. Henry Browne, QC leading Ms. Marsha Henderson and Mr. John Cato for the Defendant.

2014: September 12

DECISION

[1] CARTER J. This matter involves an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention"). The applicant is the Attorney General of Saint Christopher & Nevis, acting as the Central Authority for the Convention in St Kitts and Nevis, pursuant to the Child Abduction Convention (International Civil Aspects), Act No. 12 of 2012.

[2] By fixed date claim form filed on the 4th day of June 2014 the applicant, pursuant to Article 7(f) of the Schedule to Act No. 12 of 2012 which authorizes the Central Authority to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of a child wrongfully removed from his or habitual place of residence, seeks the following relief:

> *"1. (i) A Declaration that the minor Ethan Eric Rein-Skerritt, D.O.B June 25th, 2002 and Emma Saba Rein-Skerritt, D.O.B May 25th, 2004 (the Minors) were unlawfully removed from their habitual place of residence by the Defendant;*
>
> *or in the alternative*
>
> *(ii) A Declaration that the minor children Ethan Eric Rein-Skerritt, D.O.B June 25th, 2002 and Emma Saba Rein-Skerritt, D.O.B May 25th, 2004 were unlawfully retained by the Defendant.*
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> *2. (i) An order that the minor children Ethan Eric Rein – Skerritt, D.O.B June 25th, 2002 and Emma Saba Rein-Skerritt, D.O.B May 25th, 2004 be returned to their place of habitual residence within 14 days of the order of the Court or such other date as specified by the order of the Court.*
>
> *3. An interim prohibitive injunction restraining the Defendant whether by herself o[r] by another acting on her behalf from removing the minor children Ethan Eric Rein –Skerritt, D.O.B May 25th, 2004 from the jurisdiction of the Court until the final hearing of the matter.*
>
> *4. ..."*

[3] During the course of the hearing, Counsel for the applicant indicated to this court that she would not be pursuing a declaration of an unlawful removal of the minor children, *Ethan Eric Rein-Skerritt, D.O.B June 25th, 2002 and Emma Saba Rein-Skerritt, D.O.B May 25th, 2004*(hereinafter referred to as "the children")by the defendant, but would seek the alternative declaration that the children had been unlawfully retained by the defendant. The Court granted leave to the applicant to amend its claim to reflect this.

[4] In support of the application, the applicant filed an affidavit of the same date.The applicant has acted in this matter pursuant to a request made by the Central Authority for British Columbia, Canada who in turn acted on an application made in that state by Dr. Amy Rein. The basis of the application by, Dr. Amy Rein, is that she and the defendant were involved in a relationship in British

Columbia and during the course of that relationship two children were born to the defendant. At their birth the parties were each endorsed as parents on the children's birth certificates.

[5] Subsequent to the children's birth, the parties married under the laws of British Columbia. The children lived together with Dr. Rein and the defendant in British Columbia, from their birth until Dr. Rein and the defendant separated in 2009. After the separation, Dr. Rein and the defendant continued to be both actively involved in the children's lives. In 2013 they moved to Florida with the children.

[6] There is some contention between Dr. Rein and the defendant as to who initiated the move to Florida and also as to whether the move was a conditional one, whether it was a "test case". However that issue is determined later in this judgment, factually, Dr. Rein and the Defendant moved with the children to Florida in March 2013. They remained there until the children came to St. Kitts on vacation on the 5th June 2013. The defendant has not returned the children to Florida despite a request from the Dr. Rein to do so. The parties agree that the alleged date of unlawful retention is mid-August 2013, when the children would have returned to Florida to resume their schooling. Dr. Rein now seeks to have the children returned to British Columbia; the place she alleges is the habitual residence of the children.

[7] The defendant filed a defence and a counterclaim in the matter. In her defence she denies that Dr. Rein was residing temporarily inFlorida, United States of America, and instead insists that she was there for a settled purpose. She further denies that the children were unlawfully removed and/or retained from their habitual place of residence in British Columbia. She asserts instead that the children were lawfully removed from Florida, the place of habitual residence of the children, immediately before the alleged unlawful retention. The two children are now aged 10 and 12.

[8] By counterclaim the defendant seeks a declaration pursuant to Article 16 of the Convention, that custody of the minor children be granted to her their natural mother.

[9] In submissions to the court, the defendant went further to state that whatever custody rights over the children Dr. Rein may have asserted in Canada, and she does not admit these, that she cannot

assert those rights for the purpose of the Convention as such rights as she might have acquired under the marriage in British Columbia are not recognized under the laws of St. Kitts and Nevis.

[10] The applicant filed a Reply and Defence to the counterclaim dated the 25th August 2014, reasserting that Dr. Rein and the Defendant are the parents of the minor children under the law of Canada. The applicant denied that the defendant was entitled to the Declaration sought under Article 16 of the Convention and further that the counterclaim had been brought in contravention of the Civil Procedure Rules 2000 ('CPR'), it having been instituted without the permission of the court or the consent of the Attorney General.

[11] The Court must determine whether there has been an unlawful, or to use the words of the Convention 'wrongful' retention under the Convention.

The Convention

[12] It is without a doubt unobjectionable to state that Hague Convention cases have always presented difficulties to the court because under the Convention it is not the court's function to determine where the children's best interests may lie. Their welfare is not the paramount consideration. The object of the Convention is to ensure that children are returned to the country of their habitual residence for their future to be decided by the appropriate authorities there.

[13] The Convention seeks"to protect children internationally 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, as well as to secure protection for rights of access,"[1]

[14] Article 1 of the Convention sets out its objects:

"The objects of the present Convention are -
a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

[1]The Preamble to the Hague Convention on the Civil Aspects of International Child Abduction (concluded on 25 October 1980)

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

[15] Article 3 of the Convention further states that:

"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 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 sub-paragraph 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."

[16] Article 4 sets out the definition of child to which the Convention applies:

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

[17] In order to determine whether there has been a wrongful retention, the court must first determine whether the child is a child for the purposes of the Convention as set out in Article 4.

[18] In the instant case both children are under the age of 16 years. The question of whether they were habitually resident in a Contracting State must be taken to mean the Contracting State to which this court is now being asked to order their return. In the instant case, that state is British Columbia, Canada.

[19] Were the children habitually resident in British Columbia, Canada immediately before any breach of custody or access rights? That this is the first question to be determined by this court in order to found its jurisdiction to order the return of the childrenthere finds authority in the case of Avesta v

Petroutasn[2]. In that case the mother travelled with the child from the United States to Greece and kept the child there. The father filed a petition in the Greek court under the Hague Convention seeking the return of the child to the United States. The Greek court denied the father's petition. The father then secreted the child back to the United States during a court-ordered supervised visit.

[20] The mother then filed a petition under the Convention in the District Court in the United States. That court granted the petition on the basis of comity to the Greek Court's denial of the father's Hague petition. The Appeals Court found that the Greek court had failed to determine the child's habitual residence, in its Hague Convention analysis, "even though the resolution of this issue is central to a court's Article 3 inquiry and is perhaps the most important inquiry under the Convention."[3]

[21] Further, the court in arriving at its conclusion that the Greek court's wrongful retention analysis was greatly undermined, by its failure to determine the child's habitual residence stated "In *Mozes* we emphasized that "[h]abitual residence is the central –often outcome-determinative- concept on which the entire system is founded." The identification of the child's habitual residence is crucial to a Hague inquiry because " [t]he relevant custody rights are those recognized in the State of habitual residence, and it is the State of habitual residence to which the child should be returned and where the ultimate merits of the custody fight are to be decided."[4]

[22] In The Attorney General of Antigua and Barbuda v Michael Gerard Moore,[5] Remy J. described the determination of the habitual residence of the child before his removal from Ecuador as a "threshold issue" and went on to state that: " As a threshold issue, the duty to return a child arises only if the removal or retention was "wrongful." In the instant case, the retention can only be wrongful if the children were habitually resident in Ecuador immediately before they were wrongfully retained in the USA. So the Applicant must first show that the Respondent removed the children from their habitual residence."[6]

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[2]United States Courts of Appeals, Ninth Circuit, No. 08-15365.
[3]Supra at page17
[4]Linda Silberman, Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis, 28 Fam. L.Q. 9 at 20 (1994).
[5] Claim no. ANUHCV 2012/0124
[6]Ibid, at page 11.

[23] The applicant in the instant case alleges that the children's habitual residence wasBritish Columbia, Canada. The defendant refutes this and states that they were habitually resident in Florida in the United States, immediately before the alleged wrongful retention. If this court finds that the children were habitually resident in Canada, then the court must act to order their return to that state. Conversely, if the court makes a finding that they were not habitually resident inBritish Columbia, Canada, as the defendant submits, the Convention would not compel the children's return to Canada because they would have been neither "removed" from the State of habitual residence nor "retained" in another state.

Habitual Residence

[24] Halsburys Laws of England 4th Edition 2008 states that the term "habitual residence" is not to be treated as a term of art with some special meaning, but should be understood according to the ordinary and natural meaning of the words; it is a question of fact to be decided by reference to all the circumstances of a particular case. An appreciable period of time and a settled intention are necessary for a person to become habitually resident in a country. Concurrent habitual residence in more than one place at the same time is incompatible with the Hague Convention; however, where a sufficient degree of continuity is established, it is possible for a person to be habitually resident in one country for part of the year and in another for the remainder of the year.., the habitual residence of the child falls to be considered immediately in relation to the period before the wrongful removal or retention"[7]

[25] Balcombe LJ in Re (Minors) Residence Order [1993] 1 FLR 495 at 499-500, found that there were four basic propositions deduced from the authorities:

"1) "Habitual" or ordinary residence" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being whether of short or of long duration...

2) Habitual residence is primarily a question of fact to be decided by reference to all the circumstances of any particular case...

[7] Reinforced in re H (Minors)(Abduction: Custody Rights) [1991] 2 A.C. 476 at page p. 578

3) There is a Significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be 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 have become habitually resident in country B...

4) Where the habitual residence of a young child is in question, the element of volition will usually be that of the person or persons who has or have the parental responsibility for that child:"

[26] More recently in the case of *Re LC (Children) (International Abduction: Child's Objections to Return)*[8]the UK Supreme Court reiterated that the test of whether a child was habitually resident in a place is whether there was some degree of integration by the child in a social and family environment there. Lord Wilson delivering the majority judgment stated: "Where a child of any age goes lawfully to reside with a parent in a state in which that parent is habitually resident, it will no doubt be highly unusual for that child not to acquire habitual residence there too."[9]That case resolved on the issue of the weight to be given to the objections of adolescent children on the issue of habitual residence and does not advance the position any further for the present purposes.

[27] The applicant on the matter of habitual residence referred the court to a number of cases. Arising from these cases, the applicant says that the test for the courts is to determine whether the child has become integrated in a social and family environment in the new location. That the courts must evaluate in particular the duration, regularity, conditions and reasons for the stay in the new location and the family's move to that state, the child's nationality, the place and conditions of attendance at school, and the family and social relationships of the child in that state.[10]

[8][2014] UKSC 1 [2014] 2 W.L.R. 124, affirming the case of A v A (Children: Habitual Residence) [2013] UKSC 60, [2013] 3 WLR 761on the test of habitual residence under the Convention

[9]Ibid, at paragraph 37

[10]A v A (Children: Habitual Residence) [2013] UKSC 60, [2013] 3 WLR 761; In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, [2013] 3 WLR 1597 and Re LC (Children) (International Abductions: Child's Objections to Return) [2014] UKSC 1, [2014] 2 WLR 124.

[28] The applicant submitted that the children had not been in Florida long enough to become settled there in any significant way.[11] The court considers that in order to determine the child's habitual residence that it must consider the settled intention of the parties, the children's carers and also the factual circumstances of the child's life.

[29] The applicant further submitted that there had been no shift of the children's habitual residence from British Columbia to Florida since the move to Florida had been conditioned on the fulfillment of a specific purpose and that purpose had not been fulfilled. The move had been a test case, conditioned on it working for all the parties and in particular on the defendant becoming a resident of Florida and finding work there. The applicant in this regard referred the court to Mota v Castillo[12] and Hofmann v Sender[13].

[30] In Mota, the child was habitually resident in Mexico with her mother. The father lived in New York. The parents agreed that the mother and child would move to New York in order to live with the father together as a family. The child went to live with the father as agreed but the mother was unable to do so due to circumstances beyond her control. The Court found that the child's habitual residence had not changed and remained in Mexico, the move to New York being conditioned on the mother being able to live with the child there.

[31] In Hofmann, the parties lived in Canada. The mother moved with the children to New York and the father was to join them in New York at a later date. When the father moved to New York the mother servedhim with divorce papers immediately upon his arrival. The court found that the move was conditioned on the parties raising the children together as a family. The defendant having unilaterally changed that condition, the children's habitual residence remained in Canada.

[32] On the issue of habitual residence the defendant agreed with the authorities that the alleged wrongful retention could only be established if the children were habitually resident in British Columbia, Canada. In skeleton arguments presented on behalf of the defendant, Learned Queen's Counsel, emphasized that the habitual residence of the child fails to be considered immediately, in

[11] *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562
[12] 692 F.3d 108, 117 (2d Cir. 2012)
[13] 716 F.3d 282 (2d Cir. 2013)

relation to the period before the alleged wrongful retention and in line with the authorities submitted that a determination of the issue of habitual residence was "fact sensitive."

[33] Learned Queens Counsel submitted, on the authority of Re B (Minors) (Abduction) No. 2,[14] that habitual residence requires that a person is in a place voluntarily and for a settled purpose and with a settled intention, that "Habitual residence" is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether of short or long duration."[15]

[34] The defendant's submission is that Dr. Rein had removed herself from the province of British Columbia, physically and mentally and that she had emigrated to Florida for the purpose of making the state her home and an intention of making Florida her place of habitual residence.

[35] Conversely, the applicant submits that there was no intention to establish a permanent residence in Florida. In submissions filed on behalf of the applicant, with regard to habitual residence, the matter was set out thus:

> *"The evidence will further establish that, in 2013 the parents decided to try life in Florida together; that they promised each other that they would each establish themselves in southeastern Florida; that they each promised that they would each live separately there and would share the parenting of their children there; that the Defendant assured Amy that she would retain legal counsel in Florida to secure an immigration visa for the United States and would take the necessary steps to secure employment licensing as an acupuncturist there; andthat they discussed the possibility that they would work together in a wellness center that Amy would establish in Florida"*

[36] The main evidence of the applicant on this matter comes from the evidence of Dr. Rein. In her affidavit evidence of June 26th 2014, she stated thus:

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[14] [1993] 1 F.L.R. 993
[15] Ibid at page 995

"6. In 2012 Lisa and I agreed that I would move with the children to Florida on a test basis. Lisa had wanted to move to St. Kitts but I did not want to move there and I absolutely refused to have the children live there. I could not work there because there would not be enough work and I was not familiar with the culture to do my job as a psychologist effectively and ethically. Instead we agreed that the children would stay with me in Florida and that Lisa would either move there also or would travel back and forth from St. Kitts with the children spending school vacation time in St. Kitts.

7. Accordingly, I rented a house in Florida, procured temporary visas for the children to stay there and, on February 28th, 2013 Lisa drove the children to Florida, where they arrived on mid-March 2013.

8. I arrived in Florida on March 5th 2013 and the children lived with me. I enrolled them in school there.

9. Lisa left Florida about a week after they arrived and flew to St. Kitts. She came back on about two other occasions to see the children for about two to three weeks each time, staying in a hotel or at a friend's place or in a car. On a couple of occasions she did stay at my house with the children when I stayed at a friend's. the children stayed with her for a few nights but usually spent their nights in my home during Lisa's visits.

10. Lisa never took any of the steps that she had said that she would take to try to settle in Florida, such as looking for employment or consulting with an immigration lawyer, or standing the process to be licensed as a Doctor of Chinese Medicine in Florida. She never secured a job and she never secured or applied for any kind of U.S. residency visa.

11. The children were not happy in Florida. They had not wanted to move there. They missed their friends. They wanted to move back to Vancouver from the time they arrived in Florida and continually said they thought it was a "bad idea" that we moved there. They were never settled in Florida. For them, their home throughout was in Vancouver.

12. On approximately June 5, 2013, Lisa and the children flew to St. Kitts for their summer holidays. They were scheduled to return to Florida in August to resume school there. They were each registered for school in Florida to resume in mid-August 2013. I never agreed that they could stay in St. Kitts for more than the summer vacation.

13. I travelled to St. Kitts in late June to see the children. Isa told me then that she was keeping the kids and that if I didn't like it, I could "move back to Canada and sue her."

14. Lisa has failed and refused to return the children to Florida or Canada, despite my constant efforts, requests and demands, she enrolled the children in school in St. Kitts without my consent. She has refused to allow the children to leave St. Kitts. "

[37] In her further affidavit of August 27th 2014 in response to the affidavit of the defendant, she also gave other evidence that this court finds relevant to the issue of the habitual residence of the children immediately before the wrongful retention.

[38] At Paragraph 10 "…it was never communicated to me that leaving the children in Florida were not in the children's best interest and that they would remain in St. Kitts with the defendant. The children were enrolled in school [in Florida] and both had testing scheduled, before school commenced to address academic issues."

[39] At paragraph 8: "the issue with Emma and the child….I dealt with the problem and Emma resolved the issue to the degree that she invited the girl to her birthday party. Emma did well at school. She never complained that she did not want to go to school. She made several friends and had a successful end of her year."

[40] At Paragraph 11: "The Defendant never discussed with me the fact that the Florida test was not working and she never communicated to me that she no longer intended to pursue working or living in Florida."

[41] At paragraph 15: "I am booked and ready to leave Florida. I have a moving truck and movers on hold. I have sold my boat and I am actively looking for a house in Vancouver. I have told my parents I am leaving. I have told my landlord and employer that I am leaving."

[42] The defendant's version of the move to Florida is somewhat different. As referred to earlier in this judgment, in her defence filed on the 22nd August 2014, the defendant denied that the move to Florida had been temporary and instead pleaded that Dr. Rein was in Florida for a settled purpose.

[43] In her affidavit of 22nd August 2014 in response to those filed by the applicant and Dr. Rein the defendant related that: "In March 2013 I decided to move to St. Kitts and drove the children to Florida where Dr. Rein was residing and working for a test and/or temporary period. It was clear to the both of us that this period was just a test period and that I would eventually move to Florida to live with my children."

[44] "…I had already looked into getting my medical license in the US as well as a work visa and had begun the process. There was no intention of moving back to Vancouver at the time as Amy was settled in Florida and I was making attempts to either settle there or in St. Kitts."

[45] "I admit that the children and I travelled to St. Kitts on 5th June, 2013, however I state that there was never any agreement made to return the children to Florida as is alleged. It was obvious that the children were not happy in Florida and leaving them there would not have been in their best interests. This was made clear to Amy."

[46] "We no longer have any ties to Vancouver. We have no family there. Amy hated it in British Columbia and wanted to leave very badly for about 10 years. Even if she moved back there it would be temporary until she could leave again. She was extremely unhappy there because of the constant rain. It was she who pushed to move to Florida."

Analysis

[47] The court has considered carefully the authorities cited as well as the evidence presented by the parties on the issue of habitual residence.

[48] The evidence before the court is that Dr. Rein and the defendant decided to move to Florida, for the children to live with Dr. Rein in Florida until the defendant either settled in Florida or in St. Kitts. The applicant's submission that a condition of the move was not fulfilled as in *Mota* or *Hoffman* thereby invalidating any change of habitual residence, does not take into account that there was agreement that the defendant might move to St. Kitts and commute to Florida to see the children, which she did between March and June 2013. Her being in St. Kitts while the children remained in Florida with Dr. Rein, was well within the contemplation of the parties and part of the agreement as to how they would order their lives with the children. This was the agreed family environment. The agreement between Dr. Rein and the defendant was not based solely on the condition that she move to Florida and make attempts to find work and regularize her immigration status there. In any event, the defendant states that she did embark on these matters between March and June 2013.

[49] There is evidence that Dr. Rein moved to Florida and had become settled there with the children. She had moved most of her practice to Florida, together with her belongings including her car and boat. The children were enrolled in school in Florida and the evidence of the applicant was that Dr. Rein intended that they be returned to Florida in order for them to recommence school in mid August 2013. Although Dr. Rein expressed that the children had some difficulties settling into school, these episodes are not unheard of when children move to a new locale. In this regard the court considered the evidence that Emma was at first bullied and unhappy at school. On Dr. Rein's own evidence these issues were resolved satisfactorily and Emma had a good year at school. These episodes are not determinative of the fact that the children were not settled.

[50] The applicant submitted that the move to Florida was a test case. However, despite the factors advanced by the applicant before this court, as to why the test was not working, it is instructive to note that there was no thought or move on the part of Dr. Rein to return to British Columbia, before the alleged wrongful retention. Although as outlined, Dr. Rein asserts that the children were not happy in Florida, these factors had not been sufficient before the alleged wrongful retention, to cause Dr. Rein to think that the children were so unsettled or the test case was not working to such extent as to cause her to make plans to move back to British Columbia. Instead, the evidence is that Dr. Rein contemplated a move to Delray Beach, Florida.

[51] The parties presented different versions of the children's ties to Vancouver. While Dr. Rein states that the children have indicated to her that they are excited to return to Vancouver, the Defendant asserts that they have no further ties to British Columbia. The Court notes again that although Dr. Rein outlined in her affidavit evidence all the activities and lifestyle that the children now want to go back to in Vancouver, she never asserts that these indicators had triggered in her mind that the children were so unsettled that she should return them to British Columbia, before the alleged wrongful retention. It is the defendant who raised the issue that in her opinion the move to Florida was not working out for the children. The Court notes in this regard, that when this issuewas raised by the Defendant, that she did soonly to bolster her reasons for keeping the children in St. Kitts.

[52] This court having considered the particular facts and circumstances of this case, is not satisfied that the applicant has proved that British Columbia, Canada was the habitual residence of the children immediately before their alleged wrongful retention by the defendant, the parties being in agreement that the alleged wrongful retention began at the date that the defendant failed to return the children to Florida as previously agreed, being mid-August 2013. Instead Dr. Rein and the children had become settled in Florida. There were no plans or thoughts by either Dr. Rein or the Defendant to return to British Columbia either because they or the children had not settled into their lives in Florida. The Court finds that Florida had become the children's place of habitual residence immediately before the alleged wrongful retention.

[53] In Re HB (Abduction: children's Objections to Return) [1997] 3 FCR 235, the court in dealing with the return of two children after finding that they had been wrongfully retained in Denmark, considered the weight to be given to a child's objections. In that case, although the court held that "there was no doubt that the children objected to being returned and they were of an age and degree of maturity in which their views should be taken into account." the court weighed these objections and the reasons for them against the whole policy of the convention: that children should be returned to have their future decided in the country of their habitual residence. In the instant case, although the defendant raised the issue of the children's objections to being returned in her affidavit filed in her Defence, she had not pursued this matter before the court, her Counsel instead, inviting the Court to make its own determination on the weight of these should the Court find it necessary. For the reasons outlined above the court does not make any determination on this matter in the instant case.

[54] Similarly the issue of rights of custody. In the Explanatory report on the Hague Convention by Professor Elisa Perez-Vera, Reporter to the First Commission of the Hague Convention:[16]it was noted by Professor Perez-Vera that:

> *"the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its habitual residence prior to its removal…"*

[16]The explanatory report of Eliza Perez-Vera is "recognized by the Conference as the official history and commentary on the Convention and is a source of background t the meaning of the provisions of the Convention available to all States becoming parties to it." Hague International Child Abduction Convention; Text and Analysis, 51 Fed. Reg. 10494, 10503 (Mar. 26, 1986).

[55] It is accepted by the authorities that the Convention is not concerned with the law applicable to the custody of children and reference is made to the law of the State of the Child's habitual residence "only so as to establish the wrongful nature of the removal."[17]While the Court notes these principles,for the reasons outlined above, the court does not make any finding in that regard in this case. Indeed the court cannot make an Order for custody on the instant application under the Convention. The defendant's application in this regard is misconceived and is dismissed.

[56] Given the determination of habitual residence, the court also does not consider that it is necessary to make a further determination as to whether the Constitution of St. Kitts and Nevis precludes this court from recognizing custodial rights in a requesting state where similar rights to custody may not obtain under the laws of St. Kitts and Nevis.

[57] The Court's order is as follows:

1. The applicant's claim is dismissed.
2. The defendant's counterclaim is dismissed.
3. The court makes no order as to costs.

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Marlene I. Carter
Resident Judge

[17] Paragraph 36 of the Report