

Benjamin v NYC Dept. of Health & Mental Servs.

2009 NY Slip Op 31580(U)

July 13, 2009

Supreme Court, New York County

Docket Number: 402774/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

Index Number : 402774/2008

BENJAMIN, JOEL BARRY

VS.

NYC DEPT OF HEALTH & MENTAL SERVICES

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 402774-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ vere read on this motion to/for _____

PAPERS NUMBERED

[Handwritten signature]

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/13/09

[Handwritten signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

----- X
BENJAMIN, JOEL BARRY AND
EKATERINA YURIEVNA BENJAMIN,
Petitioners,

-against-

Index Number 402774/2008
Submission Date Apr. 15, 2009
Mot. Seq. No. 001

**DECISION, ORDER &
JUDGMENT**

NYC DEPARTMENT OF HEALTH & MENTAL
SERVICES, DIVISION OF VITAL RECORDS AND
MENTAL HYGIENE COMMISSIONER DR. THOMAS
R. FRIEDEN,

Respondents.

-----X

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Papers considered in review of this motion to compel:

Papers

- Notice of Petition and Affidavits Annexed
- Affid. of Service
- Affid. in Resp. to Pet. to Amend Birth Cert.
- Suppl. Affid. in Resp. to Pet. to Amend Birth Cert.
- Affid. of Joel Barry Benjamin
- Exhibit "I" to Supplemental Affid.

UNFILED JUDGMENT
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PAUL G. FEINMAN, J.¹:

Petitioners Joel Barry Benjamin and Ekaterina Yurievna Benjamin (Екатерина Юрьевна Комова) filed the present petition pursuant to Public Health Law § 4138[1][c],² for the issuance of an amended birth certificate to an infant child, which would change the child's patronymic and

¹The court acknowledges the research and assistance of Assistant Law Clerk Mikhail Sheynker, Esq. in the preparation of this decision.

²While petitioners rely also on Public Health Law § 4138[1][d], the Court finds only Public Health Law § 4138[1][c] applicable, because the name change arises out of the adoption proceedings.

last names and would fill in the adopting father's name in the space designated for the birth father, which was left blank at the time of the issuance of the birth certificate. Respondents take no position on this petition.

On May 6, 2005, the City of New York Department of Health and Mental Hygiene issued a certificate of birth No. 156-05-033512 for Daria Igorievna Roussina-Komova, who was born on April 8, 2005, at 11:43 p.m., in Elmhurst Hospital, Queens, New York (Pet. Ex. B). The certificate states the mother's maiden name to be "Yekaterina Yurievna Komova." The certificate leaves the birth father's name blank. The mother's residence address is stated to be "100 Hoyt Street, Apt 4G, Stamford, Connecticut 06905." The mother's place of birth is noted to be "Kazakhstan."

On June 30, 2007, Yekaterina Yurievna Komova married Joel Barry Benjamin, a United States Citizen, in the City of Almaty, the Republic of Kazakhstan (Pet. Ex. A). Benjamin is a partner at the international law firm Denton Wilde Sapte Kazakhstan Ltd., and has been a resident of the City of Almaty since 1993 (Pet. ¶ 3). The couple currently resides in Almaty. (Pet. ¶ 15).

On December 12, 2007, the Medeus County Court of the City of Almaty, Kazakhstan issued an order granting a petition of adoption initiated by Joel Barry Benjamin and ordered that Daria Igorievna Roussina-Komova's full name be changed to "Дария Джоэловна Бенджамин" (Daria Joelovna Benjamin) (Pet. Ex. C). An amended birth certificate was subsequently issued by the Kazakh court (Pet. Ex. D).

On March 10, 2008, Yekaterina Benjamin requested in writing from the New York City Department of Mental Health and Hygiene an amended certificate of birth reflecting the changes

made by the court in Kazakhstan. The request was rejected because it was not made within a year of the child's birth (Pet. Ex. F, G).

The present petition was filed in Supreme Court on November 18, 2008. The requested relief entails (1) changing the name of the Benjamins' infant daughter from "Daria Igorievna Roussina-Komova" to "Daria Joelovna Benjamin," (2) changing the birth certificate of Daria Joelovna Benjamin to reflect that "Joel Barry Benjamin" is the father of record, and (3) changing the birth certificate of Daria Joelovna Benjamin to reflect the correct name of her mother "Ekaterina Yurievna Benjamin," dropping the first letter "Y" in her first name.

New York Public Health Law § 4138[1][c] states that "a new certificate of birth shall be made whenever:...(c) notification is received by, or proper proof is submitted to, the commissioner from or by the clerk as aforesaid of a judgment, order or decree relating to the adoption of such person. Such judgment, order or decree shall also be sufficient authority to make a new birth certificate with conforming change in the name of such person on the birth certificate of any of such person's children under the age of eighteen years whose record of birth is on file in the state health department..." To establish entitlement to the new birth certificate, petitioners offer a certified record of the Kazakh court judgment signed by Judge Kalekeeva K.F. on December 21, 2007 (Pct. C).

New York courts are required to recognize and give full legal force to judgments from foreign countries in certain circumstances. Article 53 of CPLR mandates recognition of a foreign final monetary judgment, excluding family and child support matters (CPLR 5301[b]). Because the present case involves the judgment of adoption, a non-monetary family matter, Article 53 does not apply.

Domestic Relations Law § 111-c imbues the foreign country judgment of adoption with the same force and effect as a New York judgment if at least one adopting parent is a resident of New York and the validity of the foreign adoption has been verified by the granting of an appropriate visa for the child by the United States Citizenship and Immigration Services (“USCIS”). In the present case, none of the elements is satisfied. First, neither Joel Barry Benjamin nor Ekaterina Benjamin, nee Komova, is a resident of New York. Second, this law is intended to address the adoption of foreign children by New York residents (*See Barry E. v Hollis Ingraham*, 43 NY2d 87, 93 [1977]). Here, both the adoptive parent and child are United States citizens by birth, who may freely enter the United States without the need for a visa, so the USCIS has no occasion to verify the validity of the Kazakh adoption. For the same reason, Domestic Relations Law § 115-a[8], which provides for re-adoption proceedings, is of no avail, because petitioner Joel Barry Benjamin may not re-adopt Daria, whom he originally adopted outside of the United States, until he becomes a resident of New York.

Another option is the Uniform Child Custody Jurisdiction and Enforcement Act, which provides for the enforcement of child custody determinations issued by courts in foreign countries if the foreign court had jurisdiction, and the child custody law of a foreign country as written or as applied is consistent with the fundamental principles of human rights (Domestic Relations Law § 75-d). However, this law is inapplicable to judgments of adoption, because adoption is an establishment of a legal relationship between a child and an adoptive parent, while a custody dispute involves the custody and visitation rights as between the parents. Therefore, Joel Barry Benjamin’s adoption of Daria in Kazakhstan is not amenable to enforcement under the Uniform Child Custody Jurisdiction and Enforcement Act.

However, the Kazakh court judgment may be accorded recognition on the basis of judicial comity, which is the equivalent of full faith and credit given by the courts to judgments of our sister States. The doctrine of comity has long been established to be not a rule of law, but one of practice, convenience and expediency (*Mast, Foos & Co. v Stover Mfg. Co.*, 177 U.S. 485, 488 [1900]). It does not of its own force compel a particular course of action. Rather, it is an expression of one state's entirely voluntary decision to defer, or not, to the policy and decision making of a foreign court (*Zeevi & Sons v Grindlays Bank [Uganda]*, 37 NY2d 220, 227 [1975], *cert den* 423 U.S. 866 [denying enforcement of forfeiture of contractual rights caused by Uganda's anti-Israeli policies]).

The Court of Appeals decision in *Barry E. v Hollis Ingraham* (43 NY2d 87 [1977]) provides the guidelines for extending comity to foreign adoptions. In *Barry*, the Court of Appeals rejected the Mexican adoption of a New York child by New York residents, because the transcript of the foreign judgment was not clear that the adoptive parents appeared physically before the Mexican court, and the Mexican court performed only a cursory investigation into the advisability of the adoption (*Id.* at 97). The Court of Appeals decried the Mexican court's attempted arrogation of jurisdiction over the adoption of a child who was a resident of New York and who was brought to Mexico only for the purpose of adoption (*Id.*). In addition, the Court of Appeals admonished the lower courts to carefully review the background of the adopted child and the circumstances surrounding the foreign adoption (*Id.* at 95).

An additional requirement for recognition of foreign adoptions is sufficient notice of the adoption proceedings. Without evidence that proper notice of the adoption proceedings was given to everyone with parental rights, a New York court cannot extend comity to a foreign

adoption (*See L.M.B. v E.R.J.*, 58 AD3d 186, 190-97 [1st Dept 2008] [affirming vacatur of a re-adoption judgment issued by the New York Surrogate Court, because the adoptive parent, who adopted the child in Cambodia, did not inform the court that there was another person with rights to the child and no proper notice was given to that person of either the Cambodian adoption proceedings or the re-adoption application in New York]).

Here, the Kazakh court granted an adoption of Daria after taking into account Daria's and the Benjamins' residence in Kazakhstan, the interests of the child, and the circumstances of Joel Barry Benjamin's marriage to Ekaterina Benjamin, nee Komova, Daria's mother. The Kazakh court, however, made no mention as to whether any notice of the pending adoption proceedings was required to be given, or was actually given, to Daria's biological father and what rights the biological father had asserted with respect to Daria, if any.

While the entry for the father's name in Daria's birth certificate is empty, the father's first and last names appear featured, following Russian custom, in Daria's full name on the certificate as the patronymic and the first part of the family surname. From this, the Court understood the father's name to be Igor Roussin. At oral argument in March 2009, the Court requested that petitioners provide an explanation as to the parental status of the biological father. Petitioner Benjamin provided a copy of the notarized relinquishment by Igor Roussin of parental claims to Daria, dated July 3, 2007 (Benjamin Affid. Ex. H). In his affidavit, Benjamin explains that the original document was filed with the Kazakh court, which returned it on the grounds that it was unnecessary, as the birth certificate did not provide for the father's name (Benjamin Affid. ¶ 8). Benjamin also submitted to this Court e-mail communications between himself and Igor Roussin, in which Igor Roussin apparently agrees to Daria's adoption (Ex. I). Given the entirety of the

documentation submitted, the Court finds the proof and explanation of circumstances to be satisfactory. Therefore, the Court accords judicial comity to the Kazakh court judgment and directs respondents to issue an amended birth certificate with requested name changes and additions. This decision is conditioned upon the filing with the Court, within 45 days of this Decision and Order, of an affidavit of service of this decision and order on Igor Roussin. The service of the Court's decision may be effected pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters if Igor Roussin currently resides in a signatory nation. Otherwise, the service must be by personal delivery. It is therefore,

ORDERED and ADJUDGED that the present petition to direct the New York City Department of Health and Mental Services to amend the birth certificate originally issued to Daria Igorievna Roussina-Komova on May 6, 2006 is granted without opposition; and it is further

ORDERED and ADJUDGED that the New York City Department of Health and Mental Services issue petitioners a new birth certificate in the name of "Daria Joclovna Benjamin," designating the father's name as "Joel Barry Benjamin" and the mother's name as "Ekaterina Yurievna Benjamin"; and it is further

ORDERED that this decision and judgment will come into force only upon the filing with the Court, within 45 days of the date of this Decision and Order, of an affidavit of service of this Decision and Order on Igor Roussin, as specified in the foregoing Decision.

This constitutes the Decision, Order and Judgment of this court.

Dated: July 13, 2009

New York, New York

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).