

**Squicciarini v Oreiro**

2012 NY Slip Op 33755(U)

March 14, 2012

Supreme Court, New York County

Docket Number: 114338/11

Judge: Ellen Gesmer

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 24**

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**RICCARDO SQUICCIARINI,**

Plaintiff,

-against-

**DIANA OREIRO,**

Defendant.  
-----X

**Index No. 114338/11**

**DECISION AND ORDER  
Motion Sequence 1**

**Hon. Ellen Gesmer, JSC**

Petitioner Riccardo Squicciarini (Father) seeks an order: (1) pursuant to Article 3 of the Hague Convention and the International Child Abduction Remedies Act (ICARA) directing the return to him in Italy of the parties' children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08); (2) awarding the Father custody of the children; (3) granting his Writ of Habeas Corpus requiring respondent Diana Oreiro (Mother) to produce the children in court; and (4) restraining the Mother from leaving this jurisdiction. The Mother opposes the motion, and cross-moves for an order dismissing the Father's petition.

On December 22, 2011, this court granted the Husband's request for a Writ of Habeas Corpus, and the Mother produced the children in court on the return date of the motion, January 4, 2012. For the reasons discussed below, the court grants the balance of the Father's motion, and denies the Mother's motion.

**FACTS**

The parties were never married. The Father is an Italian citizen, and the Mother is a citizen of the United States. They met in Rome, Italy in or about 2003. The Father is a medical doctor and dentist, licensed to practice in Italy. He resides and works in Rome. The parties' first child was born in New York on July 18, 2006, while the Mother was visiting her family here. Both children are Italian citizens. Shortly after Diego was born, the Father joined the Mother and Diego, and they returned to Italy, where they resided together. Their second child, Eve, was born on July 26, 2008 in Rome, Italy. Both children attended preschool, and have friends, extended family, and their primary care physician in Rome. Although the parties and their children sometimes visited New York, frequently staying with friends in New York City, they resided in Italy from and after the children were born.

In or about 2010, the parties' relationship deteriorated, and the Father moved out of their home in Rome and into an apartment nearby. He later moved to a home on the same property as the Mother and children. After the parties separated, they shared time equally with the children.

In winter 2011, the parties became involved in custody litigation in Italy, and attended mediation. On or about November 14, 2011, however, the Mother took the children to New York. The parties had discussed the Mother taking the children to Florida for the upcoming Christmas holiday with the children, and returning to Italy by December 26 to spend time with their Father and his family. However, they had not agreed on a departure date, and the Father was alarmed when he found the children had disappeared without a word from the Mother.

**FILED**  
**MAR 16 2012**

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The Mother claims that the Father hit her on one occasion, but does not specify the date, time, location, or any other details about this allegation. She also alleges that the Father does not put the children in car seats when he drives with them, and that he uses cocaine. The Husband denies these claims, noting that he is subject to periodic drug testing for compliance with various licenses and permits. He attaches copies of two drug tests taken on May 10, 2010 and January 25, 2012. Although the tests are not translated into English, they appear to be hair follicle test results showing a negative result for cocaine.

On November 15, 2011, the Mother obtained an *ex parte* temporary order of protection from the Suffolk County Family Court, which directs the Father to stay away from her and from the children.<sup>1</sup> On November 16, 2011, the Mother filed custody petitions in Suffolk County Family Court, in which she alleged that her and the children's address was 33 Hedgerow Lane in Commack, New York. Her petitions further allege that each of the children resided at both that address with her and at the Father's address in Italy from birth.

By order dated November 16, 2011 (the November Family Court Order), the Mother's custody petitions were dismissed based on a lack of "home state" jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), and a finding that the Mother and children had resided in Italy since October 2006, and had been in New York for only a matter of days at the time the petitions were filed.

On November 16, 2011, the Father received a telephone message from the Mother's mother advising him that the children were in New York with their Mother, that they were well, and that the Father's car was parked in the Fiumicino airport parking lot outside Rome. The Father filed a missing persons report with the Italian police. On November 19, 2011, he filed a report with the Italian police that the Mother had abducted the children. The Father also filed a petition in the Rome Family Court in which he seeks an order directing the return of the children to his care and custody in Italy.

On or about December 8, 2011, the Father received an email from the Mother's attorney advising him that the children were fine, and that all contact with them must go through him. The Husband had his attorney contact the Mother's attorney.

On December 22, 2011, the Father filed his Petition and the instant Motion. Because he did not know where the children were staying, he filed in New York County, since the parties had stayed in Manhattan when they had visited New York together, and because he understood from a mutual friend, whose affidavit was attached to the Father's reply papers, that the Mother had been seen in Manhattan. Furthermore, the Father had sought assistance from the Deputy Counsel to the Consulate General in Italy, Lucia Pasqualini, whose affirmation is attached to the Father's reply papers. Ms. Pasqualini contacted the maternal grandmother, who would not provide any information about the Mother's or the children's whereabouts. The Father was not permitted by the Mother to see or speak to the children between November 13, 2011 and January 4, 2012, the return date of this motion, when this court

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<sup>1</sup> On the return date of the Father's motion, January 4, 2012, the Mother admitted that the temporary order of protection had not been served on the Father.

directed that he be permitted to spend time with them in the courthouse in the presence of their maternal grandparents.

On February 21, 2012, this court received a letter from Marco P. Tedesco, Division Chief of Outreach, Prevention and Training, Office of Children's Issues, United States Central Authority Hague Convention on the Civil Aspects of International Child Abduction (Central Authority), which is an office within the United States Department of State. The letter, dated February 16, 2012, states that the Father's Petition was initiated as a result of a request to the U.S. Central Authority by its counterpart in Italy for the return of Diego and Eve Squicciarini. It further notes that the US Central Authority believes that the Hague Convention on the Civil Aspects of International Child Abduction applies to this case, and provides a summary of the Convention.

### ANALYSIS

Both the United States and Italy are signatories to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention). The United States implemented the provisions of the Convention by passing the International Child Abduction Remedies Act (ICARA) (42 U.S.C. § 11601–11610). Pursuant to Article 42, section 11603(a) of the United States Code, this court has original and concurrent jurisdiction with the Federal courts to enforce the Hague Convention (*see also People ex rel. Geiser v Valentine*, 17 Misc3d 1117A [Sup Ct Richmond Co 2007]). Article 11 of the Convention requires judicial authorities in the contracting states to act expeditiously in proceedings for the return of children to their home country. Articles 12 and 13 state that a court has a mandatory obligation to return children to their country of habitual residence, provided that a petition has been filed within one year after their wrongful removal, except where: (1) petitioner was not actually exercising custodial rights at the time of removal and/or consented to the removal; or (2) return of the child would pose a grave risk of physical harm to the child or otherwise place the child in an "intolerable situation," such as exposure to a risk of being sexual abused (*see also Seikh v Cahill*, 145 Misc2d 171, 172 [Sup Ct Kings Co 1989]). Article 3 of the Convention provides that removal or retention of children is 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 a legal effect under the law of that State.

(Convention, Art. 3; *see also Seikh, supra* at 175-176).

An affirmation submitted by the Husband's Italian counsel states that under Italian law, both parents jointly exercise parental authority by operation of law, absent an agreement or order to the contrary.

The finding in the November Family Court Order that Italy is the children's home country is now *res judicata*. It is undisputed that the children have resided in Italy their entire lives, that the Father exercised his joint parental rights with the Mother on a regular basis prior to the children's removal, and that the Mother removed the children from Italy with the intention to remain in New York with them, and without the Father's consent, on or about November 13, 2011. Therefore, the children were wrongfully removed from their home country, and the first exception to mandatory return of the children to Italy does not apply. The Mother has also failed to make a *prima facie* case, much less meet her burden to prove by clear and convincing evidence, that returning the children to Italy would pose a grave risk to them of physical harm or otherwise place them in an intolerable situation (*see Geiser, supra*).

Indeed, the Mother does not base her request that this court decline jurisdiction to hear the Father's Petition on any exception to the Convention and ICARA's requirement that children be returned to Italy. Rather, the Mother lists three bases for her request for dismissal. First, she claims that "the children were not residing in New York County when the Petition was filed." However, the children's only residence, as a matter of law pursuant to the November Family Court Order, and as is undisputed by the Mother in the instant motion, is Rome, Italy. It is not clear where the Mother's residence is. In order for a particular venue "to qualify as a residence a party 'must stay there for some length of time and have the bona fide intent to retain the place as a residence with at least some degree of permanency'" (*Bennet v Bennet*, 49 AD3d 949, 949-950 [3d Dept 2008][quoting *Hammerman v Louis Watch Co.*, 7 AD2d 817, 818 [3d Dept 1958]]; *see also Neu v St. John's Episcopal Hospital*, 27 AD3d 538 [2d Dept 2006]). Here, the Mother does not clearly state where she has lived since she left Italy, and she does not state an intent to remain in any particular place. Accordingly, she has not established that her residence is Suffolk County either.

Second, the Mother argues that this court should decline jurisdiction based on improper venue. Section 503 of the Civil Practice Law and Rules states that, where neither party is a resident of the State of New York, as is the case here, venue shall be "in any county designated by the plaintiff." Furthermore, where a party wishes to move venue to a more convenient location, she must serve a written demand prior to seeking a change of venue by motion (CPLR §511[b]). The Mother has never done so, and has failed to state any reason why Suffolk County would be a more convenient venue.

Finally, the Mother argues that the Father's Petition should be brought in Suffolk County because she filed petitions in Suffolk County Family Court for custody, paternity, and an order of protection. However, the most relevant of these petitions to this Petition is the custody proceeding, and that proceeding was dismissed for lack of jurisdiction. Furthermore, the Temporary Order of Protection was issued without the Father's presence in court and without any findings being made. Accordingly, that is not a basis for the Father's Petition to be transferred to Suffolk County.

In addition, dismissal of the Father's Petition, or transfer of it to Suffolk County, would only serve to frustrate the purposes of the Convention and ICARA, which require courts to act quickly to return children to their place of habitual residence, where custody disputes may be determined by a court that has jurisdiction to decide such matters. Indeed, the Father could have brought, and still could bring, his Petition in Federal Court, in which case the Mother might have had to travel to New York City to litigate in any event, since the federal courthouse for the Eastern District of New York is

located in Brooklyn. Thus, for all of the above reasons, the Mother's cross-motion to dismiss the Father's Petition is denied.

Accordingly, pursuant to the provisions of the Convention, and the ICARA (42 U.S.C. §11601 et seq.), the Mother shall produce the children in Part 24, Room 210 of the Supreme Court at 71 Thomas Street, New York, New York on Monday, March 19, 2012 at 9:30, to be returned in the company of their Father to Italy. The Father shall have the exclusive right to the physical and legal custody of the children during the period of time required to return the children to Italy. Subject to further order of a court of competent jurisdiction, the Father shall keep the Mother apprised of the children's whereabouts, including their residence address and a telephone number, and, if possible a Skype or other computer video address, so that she may communicate with the children at reasonable times for the children and for reasonable periods of time. This Order is not a determination of the merits of any custody issues within the meaning of Article 19 of the Convention. The Father is directed to report the delivery of the children to the appropriate Central Authority.

In accordance with the above decision, it is

ORDERED that respondent-Mother Diana Oreiro shall produce the parties' minor children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08), in Part 24, Room 210 of the Supreme Court at 71 Thomas Street, New York, New York on Monday, March 19, 2012 at 9:30, to be returned in the company of petitioner-Father Riccardo Squicciarini to Italy; and it is further

ORDERED that, pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct 1980 (Convention) and the International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq., the minor children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08), be returned in the company of their Father, Riccardo Squicciarini (Father), to the sovereign nation of Italy, and shall report the delivery of the children to the appropriate Central Authority; and it is further

ORDERED that the Father has the exclusive right to the physical and legal custody of the children during the period of time required to return the above-named minors to Italy, the country of the children's habitual residence; and it is further

ORDERED that the Father shall keep the Mother apprised of the children's whereabouts in Italy, including their residence address and a telephone number, and, if possible a Skype or other computer video address, so that she may communicate with the children at reasonable times for the children and for reasonable periods of time, subject to further order of a court of competent jurisdiction; and it is further

ORDERED that this Order is not a determination of the merits of any custody issues within the meaning of Article 19 of the Convention; and it is further

ORDERED that this Order is made under the authority of U.S.C. §11603(a), conferring upon this court original and concurrent jurisdiction with federal district courts of the United States; and it is further

ORDERED that all relief requested but not granted above is denied.

NOW THEREFORE, TO ANY PEACE OFFICER IN THE STATE OF NEW YORK AND TO ANY FEDERAL OFFICER:

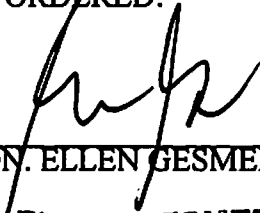
YOU ARE HEREBY COMMANDED TO enforce the instant Order allowing Riccardo Squicciarini, the Father of the above-named minor children, Diego Riccardo Squicciarini (DOB: 7/18/06) and Eve Lourdes Squicciarini (DOB: 7/26/08), to remove the above-named minor children from the United States of America, and to allow Riccardo Squicciarini to accompany them to the country of Italy, giving Riccardo Squicciarini the right, without interference, to have the children in his lawful custody for the purposes described herein.

This order is effective the date below written, and shall continue in force and effect until modified or cancelled by a court of competent jurisdiction in Italy.

This constitutes the decision and order of the court.

Dated: March 14, 2012

SO ORDERED:

  
HON. ELLEN GESMER, JSC  
ELLEN GESMER  
J.S.C.

**FILED**  
MAR 16 2012  
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NEW YORK