

**MARTINEZ v. MOUMEN**

SUPREME COURT (Alcantara, A.J.): July 23rd, 1993

*Family Law—children—custody—applications by third parties—child’s welfare paramount consideration—if Moroccan and Gibraltarian applicants equally capable of caring for Moroccan child, parents’ wishes and desirability of adoption into same religious and cultural group may prevail over grant of custody to Gibraltarian*

The plaintiff applied for custody, care and control of a ward of court.

The defendant, a Moroccan guest-worker, gave birth to an illegitimate baby in Gibraltar, having kept the pregnancy a secret from her family, for fear of their disapproval. She originally rejected the child and expressed the desire that someone else should take care of him. The alleged father of the child visited the defendant after the birth at her request, but denied paternity and did not wish to have anything to do with the child. The baby was offered by the defendant to the plaintiff, a ward sister at the hospital, who agreed to take care of him.

The plaintiff commenced adoption proceedings and her solicitor obtained the defendant’s signature to a document purporting to give custody of the baby to the plaintiff. The mother consented to this arrangement on the conditions that he be raised a Muslim and be circumcised accordingly, and that she be allowed access to him. However, she later told the plaintiff that she wanted the child back and refused to give her consent to formal adoption. The plaintiff applied to the court for the child to be made a ward of court, fearing that harm might come to him if he were allowed to return to Morocco. A wardship order was made.

The defendant’s married sister later came forward as a potential adopter of the child in Morocco. The Social Services Department supported this course of action but psychologists for the plaintiff opined that the upheaval of a change of custody for the child, aged eight months at the date of the hearing, could cause irreparable emotional harm.

**Held**, ordering that custody be transferred to the defendant upon her leaving the jurisdiction:

(1) In wardship proceedings, the court was obliged to have regard to the welfare of the child as its paramount consideration. The wishes of its mother and the desirability of raising the child according to the religion of her family background were secondary considerations if they in fact ran contrary to the child’s best interests. The opinions of experts as to the effect of upheaval were to be taken into consideration, but the court must

ultimately make its own assessment of the proper course of action (page 100, line 13 – page 101, line 5; page 101, lines 25–27).

(2) The court was satisfied that the defendant had never intended that the plaintiff should adopt her baby, but had merely taken advantage of her good nature to have him cared for until she was able to make other arrangements. The defendant’s sister, who had children of her own, was a responsible and caring person who would provide the Islamic upbringing suited to a child born to a Moroccan Muslim, whilst enabling close contact with his natural mother, who wished to maintain a relationship with him. Although the plaintiff was in all other respects a suitable carer, these cultural influences were likely to be lost if custody were given to her, and the selection of Christian names for the child gave some indication of her intentions. On balance, it was in the child’s best interests, notwithstanding the risk of emotional upset resulting from a change of custody, that he return to Morocco with his mother. Custody would remain with the court until she was ready to leave the jurisdiction and temporary care and control would be given to the Social Services Department (page 94, lines 12–21; page 99, lines 1–14; page 101, lines 14–39).

#### Cases cited

- (1) *E (an infant), In re*, [1964] 1 W.L.R. 51; [1963] 3 All E.R. 874, applied.
- (2) *J. v. C.*, [1970] A.C. 668; [1969] 1 All E.R. 788, applied.

#### Legislation construed:

Adoption Ordinance (1984 Edition), s.5(5): The relevant terms of this sub-section are set out at page 97, lines 39–42.

s.6(4): The relevant terms of this sub-section are set out at page 95, lines 17–22.

*D.J.V. Dumas* for the plaintiff;

*S.P. Triay* for the defendant.

35           **ALCANTARA, A.J.:** These are wardship proceedings. Baby Moumen was made a ward of court by originating summons on March 4th, 1993. The summons was issued by Miss Gladys Martinez in whose care the baby was, and she sought the following order: “That custody, care and control of the said minor, which is at present in the hands of the plaintiff, may be committed to the plaintiff.”

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          “1. The said baby Moumen, known as Phillip James David Martinez, do cease to be a ward of court.

45           2. The custody care and control of the said baby Moumen be committed to the defendant.”

Directions were given and the case was heard on eight days in June and July 1993. On reaching a conclusion, I said:

“It is a fact of life that people suffer more through good deeds than through indifference. This is precisely what has happened to Miss Martinez. She wanted to help Fatima and has now fallen in love with the baby she took over.

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My decision will be very hard on her, but it is the right decision. She is a very nice lady but she fails in her bid to keep the baby. I will be giving reasons, in due course, for my decision. However, I think it is only proper to give my decision now. I make the following orders:

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1. The baby is to be handed over to Social Services within the next seven days so that they have the care and control of it. The Social Services are to have the discretion, if necessary, to allow access to the baby for both the mother and Miss Martinez, if the Social Services consider this to be in the interests of the child.

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2. Custody will remain with the court until such time as the mother is ready to take the child with her to Morocco. At that stage, custody, care and control shall revert to the mother. In other words, the custody of the court shall cease once the mother and the child leave the jurisdiction but not before.”

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I am now giving the reasons for my decision and stating the facts as I have found them to be.

Fatima Moumen is a Moroccan of the Muslim faith. She is a guest-worker in Gibraltar, where she has been working as a domestic cleaner for the last four years. She lives with her brother, who is also a guest-worker, at 23/2 Cumberland Rd. She is 33 years old, having been previously married and divorced.

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Gladys Martinez is a Gibraltarian of the Catholic persuasion. She is a State Registered Nurse and certified midwife. She lives with her family at 14 Hood House, Laguna Estate. She is 42 years old and single.

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Baby Moumen was born, illegitimate, on November 24th, 1992 at St. Bernard’s Hospital, Gibraltar. Fatima Moumen was taken by ambulance to St. Bernard’s Hospital as an emergency, suffering from severe stomach pains. In fact she was pregnant and had been hiding her pregnancy. She was delivered of her baby that same day. After the birth she rejected her baby. It was unwanted and undesired. She did not breast-feed or take an interest in him. The evidence is conclusive that she wanted someone to take care of him. She was prepared to give him away so that he would be taken care of. She offered him to Gladys Martinez, who was the ward sister.

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Gladys Martinez decided to take over the baby and try to adopt him. She sought legal advice and her solicitor, in the person of Mr. David Dumas (now counsel for the plaintiff), went to the maternity ward and obtained the following written consent:

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“To whom it may concern,

I, Fatima Moumen of 23/2 Cumberland Rd., Gibraltar, age 33 years, hereby authorize the prospective adopter, Sister Gladys Martinez, to take full responsibility and assume full parental rights over the male infant born to me on November 24th, 1992 and I hereby confirm that I freely and for no reward or payment, consent to the adoption of the said male infant by Sister Martinez.

Dated: November 30th, 1992.

Signed: Fatima Moumen

Witnessed by: David Dumas (Barrister)

David Dumas me ha leído en español y lo he comprendido.

Fatima Moumen.”

The solicitor must have known that this consent to adopt had no legal validity whatsoever, but it is said that Fatima was told that she would have to give her consent (in writing?) six weeks later, on or after January 6th, 1993. The proviso to s.6(4) of the Adoption Ordinance reads:

“Provided that the document signifying the consent of the mother of a minor shall not be so admissible unless—

(a) the minor is at least six weeks old on the date of the execution of the document; and

(b) the document is attested on that date by a justice of the peace or, as the case may be, by a person of a class prescribed as aforesaid.”

At the time when Fatima Moumen agreed that Gladys Martinez should take over and adopt Baby Moumen, she imposed three conditions: (a) that the child should be brought up in the Muslim faith; (b) that she be allowed access to him; and (c) that he be circumcised in the Muslim rite. These conditions were agreed to and confirmed by Gladys Martinez in the presence of the social workers. The social workers attended the hospital at the request of the solicitor for the plaintiff but after the consent had been signed. The conditions imposed by Fatima Moumen are of some significance and I will revert to them later.

One thing is clear: apart from the invalid consent dated November 30th, 1992, Fatima Moumen has at no time thereafter given her written consent to the adoption of baby Moumen by Gladys Martinez. If Gladys Martinez did not secure a valid written consent for the adoption, why did she persist in going ahead with the adoption? The answer lies in her perception that baby Moumen might come to some harm, real or imagined. There is evidence which justified her fears.

Just after baby Moumen was born, Fatima claimed that a Moroccan by the name of Mohamed Marzo was the father of the child. He visited the hospital at her request and denied paternity. There was a heated discussion between them and according to the affidavit of Gladys Martinez, dated March 3rd, 1993, this is what happened:

“At her request I telephoned the person whom she said was the father of the child, who came to visit her in hospital. After the visit

she was extremely agitated and nervous and she explained to members of my staff that the father of the child had said that he did not want anything to do with the child and that she should keep quiet, wait until she had left hospital then kill the baby and dispose of it. This she confirmed to me, saying that she wanted me to have the child and that the child should be mine.” 5

The use of words of harming or killing the child is denied by both Fatima Moumen and by Mohamed Marzo on oath. I have no reason to disbelieve Mohamed Marzo. I find that Fatima Moumen used words which led Gladys Martinez to believe that if she did not take care of the child some harm might come to him. I find as a fact that Fatima Moumen used Gladys Martinez to take care of her child until she was in a position to take care of him. This is what Fatima Moumen says in her affidavit: 10

“I obviously could not take the child home with me and, accordingly, I asked for help. I was under tremendous pressure to make suitable arrangements for the child whilst also ensuring that my family could not find out about my son. It was never my intention that the plaintiff, Gladys Martinez, should keep the child on a permanent basis. I needed time to consider the child’s future and when the plaintiff told me that she would take the child I consented because I could not take the child home and I knew of no one who would take the child whom I could trust not to tell my brother. It has always been my intention to take my child back to Morocco where he would be brought up in the Muslim faith. I have never told the plaintiff of my intention before, for fear that she would tell my brother of the baby. I have told the plaintiff that she could keep my child provided that she brought him up in the Muslim faith and that the child should be called Hamsa. I also wanted reasonable access to my baby.” 15 20 25

This evidence is consistent with the conditions that Fatima Moumen imposed on Gladys Martinez in relation to the upbringing of the child, baby Moumen, in the Muslim faith, and access before and after adoption. I have come to the conclusion that in the earlier stages Fatima Moumen was playing with the feelings and good nature of Gladys Martinez, being insincere and biding her time. Having someone to take care of her baby and providing for him was her aim, but her ultimate aim was never to lose him. Gladys Martinez took the child to her house and was enchanted with him. Baby Moumen has been in her care ever since, but for the major part of this time it cannot be said that it has been with the consent of the natural mother. 30 35 40

As early as January 14th, 1993 Fatima Moumen wanted her child back. This was communicated to Gladys Martinez’s solicitor by the Social Services. A meeting was arranged between Fatima Moumen and Gladys Martinez on January 19th, 1993 together with Mr. Dumas and Mrs. Marisa Fa of the Social Services. There the mother claimed the child back 45

and was told by the plaintiff, or on behalf of the plaintiff, that she could not have the child back, and that, if necessary, wardship proceedings would be instituted. At that meeting, for reasons I cannot fully understand, Fatima Moumen and Gladys Martinez were allowed to have a private meeting. According to Gladys Martinez's affidavit evidence, this is what happened:

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"I was happy to be able to talk to her at the office of Mrs. Fa at the said meeting and was able to have her confirmation that she did not want the child, that she wanted me to have the child and for the adoption to go through as she had originally wanted. Her only request was that the child be called Hamsa, a Moroccan name, and that the child should be brought up in the Islamic faith."

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The version of Fatima Moumen, as sworn in her affidavit dated June 21st, 1993, is the following:

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"I met the plaintiff at the offices of Marisa Fa and in the absence of Mrs. Fa the plaintiff tried to trick me into signing the consent form, explaining that my signature was required within three months of birth. I was not prepared to give such consent; however, I did tell the plaintiff in the presence of Mrs. Fa that the child should be brought up in the Muslim faith and that he was to be called Hamsa. The plaintiff agreed to this."

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I have had the opportunity of seeing and hearing both deponents (and others) in the witness-box. I find that Gladys Martinez is a witness of truth but that her judgement is sometimes clouded by her desire to keep the baby. Fatima Moumen is only a witness of truth when it suits her interests. Her interest was to go along with the question of adoption so that her child would be taken care of temporarily until she found means and ways of having him back. I find as a fact that at that meeting Fatima Moumen verbally agreed that baby Moumen should be adopted by Gladys Martinez, but that she refused to sign a written consent. This should have alerted the plaintiff and her legal adviser that this consent was neither genuine nor sincere.

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On February 23rd, 1993 Fatima Moumen told Gladys Martinez's solicitor that she wanted her baby back. This was again refused.

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A few days after the birth of the baby, on December 1st, 1992, the plaintiff gave notice to the magistrates' court that she would be applying for an adoption order. She also gave notice to the Family Care Unit (to which Mrs. Fa belongs) and sought the Governor's consent pursuant to s.5(5) of the Adoption Ordinance, which provides: "An adoption order shall not be made in favour of an applicant who is not resident and domiciled in Gibraltar or, save with the consent of the Governor, in respect of any minor who is not a British subject and so resident." Baby Moumen is not a British subject.

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The application for adoption came before the magistrates' court on February 23rd, 1993. With all due respect, I can only view that application

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as being half-baked. The proposed adopter did not have the written consent of the mother; nor had she secured, as yet, the Governor's consent. It was going to be an uphill task. After hearing counsel for both sides, the learned Stipendiary Magistrate was of the opinion that the application for the adoption should be heard by the Supreme Court. This was accepted and that was the end of proceedings before the magistrates' court. 5

The applicant, Gladys Martinez, instead of initiating proceedings for adoption before this court, on March 4th, 1993 by originating summons made baby Moumen a ward of court under the Minors Ordinance. Those are the proceedings now before me. It was set down for hearing on March 29th, 1993, when directions were given by the learned Chief Justice. Thereafter there was exchange of correspondence between the solicitors. There has been some delay in the hearing of the actual wardship proceedings, but I do not think that anyone can be faulted for this, not even the court. 10 15

Why did Gladys Martinez initiate wardship proceedings? Two reasons: She did not want to lose baby Moumen, and she was genuinely concerned about his welfare if she handed him over to his natural mother. At the back of her mind was the initial reaction of rejection by Fatima Moumen when the baby was born. Thereafter Fatima Moumen did not make it clear what was going to happen to the baby. Fatima did not want the male members of her family to know that she had "dishonoured" them by having an illegitimate child. Later on, on March 12th, 1993, this is what Fatima Moumen's solicitor wrote: 20

"The application for custody is made in order to enable our client (Fatima Moumen) to remove her child from this jurisdiction to Morocco with a view to freeing the child for adoption in Morocco. We are instructed that suitable prospective adopters have been found in Morocco." 25

Later, on April 14th, 1993, Fatima Moumen's solicitor wrote again to Gladys Martinez's solicitor to the following effect: 30

"Hafida Moumen is the sister and Mohamed Hamsa is the brother-in-law of Fatima Moumen. Both live in Morocco and are willing to come to Gibraltar to give evidence. At this stage it will not be possible to submit a written statement and it is unlikely that we will be able to provide you with the same in accordance with the order (directions) since they will only be coming for the hearing. The couple are willing to make themselves responsible for the welfare of the child." 35

On that evidence, it is understandable that Gladys Martinez was apprehensive about the future of the child and his welfare. Up to the date of the present hearing, Gladys Martinez did not really have a clear picture of what was going to happen to baby Moumen. The picture is now clear due to the evidence of Hafida Moumen. Let me say straight away that I accept her evidence *in toto*. I have observed her in the witness-box and 40 45

she is a witness of truth. The impression I have of her is that she is a responsible and sensible lady.

5 She knew nothing about baby Moumen until three months after he was born. She is willing take him into her house as her son on behalf of her sister Fatima. He will be raised as a member of the family in the Islamic faith. If her sister gets married and it is in the interest of the child she is willing to transfer it to her sister as the natural mother. As she states in her affidavit: "The child will legally belong to my husband and me, and we will have full parental rights but Fatima will always be the mother as this cannot be changed."

10 Hafida Moumen can be trusted to look after the welfare of the child and bring him up in the faith and tradition of Islam. The advantage of this arrangement is that Fatima will also be in Morocco and whether she marries or not, she will be in continual contact with her son.

15 Mrs. Marisa Fa of the Social Services went to the home of Mohamed Hamsa and Hafida Moumen in Tangier on May 22nd and 23rd, 1993, accompanied by Miss Carmen Xerri, a justice of the peace and a completely independent person. As a result of that visit, this is the recommendation of Mrs. Fa:

20 "The family were friendly and hospitable. Hafida and Mohamed are able to look after this child as they have done so successfully over the last eight years with their own daughter and their son. They have the added support of both their mothers, who are very active women. From what I have seen, I am confident that the child's needs would be appropriately met, not only in a practical and material way but also spiritually and morally.

25 Allowing a child to be reared by his own extended family is the next best thing to being with his own mother. I therefore strongly recommend that baby Moumen should be freed from the court's wardship and allowed to be taken out of the jurisdiction to his family in Morocco."

30 Mr. Dumas for the plaintiff has put forward two experts to assist the court, Miss Sheila Lee, M.Sc., B.A. Hons. D.C.E., educational psychologist, and Dr. Frank L. Stahl, a clinical psychologist with a doctorate from the Royal Academy of St. John, New York. Dr. Stahl's evidence is that a change of custody from Gladys Martinez to Fatima Moumen is not good for the child and he has emphasized how important it is for the child to be with the same family from the very first day. This is what he says in his report:

35 "After having seen the boy's home with Miss Martinez, I can assure, from a psychological point of view, that the house is very good, the atmosphere was very pleasant and friendly and the child was playing around in great harmony. When playing with the child, I could not find any fear or anxiety in it. The families seem to have great love and affection for the boy and his reactions show that those were not merely demonstrative. They were natural."

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Miss Lee’s recommendations as set out in the summary of her report dated July 6th, 1993, are as follows:

“In the coming infant years, Moumen needs not only nurture but love, stability and social acceptance. There are too many uncertainties for me to be satisfied that he would experience the latter two should his mother be successful in carrying out her present plans. Any move, now that he has formed bonds with the Martinez family, would entail distress on the part of the child. 5

Given the present set of circumstances, I can only recommend that he be allowed to remain with a family where evidence shows that all four of the above needs are likely to be met and where he is currently developing so well.” 10

The law to be applied in cases like this is clear to me. I take it first from the first sentence in the headnote in *The All England Law Reports* to the case of *In re E (An Infant) (1)* ([1963] 3 All E.R. at 874): 15

“**Held:** in wardship proceedings the paramount consideration was the welfare of the infant, and in considering this the element of religious upbringing was of great importance and the wishes of the mother of an illegitimate child must be seriously regarded by the court, but the court was not bound to give effect to them if satisfied that the infant required otherwise...” 20

The other leading case is *J. v. C. (2)* where Lord MacDermott in the House of Lords listed the considerations to be taken in account ([1969] 1 All E.R. at 824):

“1. Section 1 of the [Guardianship of Infants] Act of 1925 applies to disputes not only between parents, but between parents and strangers and strangers and strangers. 25

2. In applying s. 1, the rights and wishes of parents, whether unimpeachable or otherwise, must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relevant to that issue. 30

3. While there is now no rule of law that the rights of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purpose of the investigation... 35

4. Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be 45

resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."

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I would like to point out some of the salient facts in this case:

1. Fatima Moumen rejected the child when he was born.

2. Fatima Moumen gave her child away to Gladys Martinez for adoption very soon after birth, conditional on having access.

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3. When giving the child away, Fatima Moumen did not intend to lose the child permanently but did not so inform Gladys Martinez.

4. Fatima Moumen did not use the facilities of access fully, but it is fair to say that Gladys Martinez and her family did not make access easy.

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5. Fatima Moumen from the very beginning wanted the child to be brought up as a Muslim. Gladys Martinez agreed, but in her application for adoption the fact of selecting Christian names is suspect.

6. Fatima Moumen has at no time given a valid written consent to having the child adopted.

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7. Before the expiration of two months, Fatima Moumen asked for her child back.

8. Gladys Martinez is a person who can provide love and take care of the child.

9. Hafida Moumen is a person who can provide love and take care of the child.

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10. The recommendations of the child psychologists and the Social Services diverge. I very much take them into account and do not exclude them, but it falls on me to decide what is best for the child.

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Taking everything into account, including the possibility of a traumatic effect on a change of custody, I am of the opinion that the element of religious upbringing and roots, together with the definite wishes of the mother, not only now but as far back as March 23rd, 1993, weighs heavily. I have come to the conclusion that this child, who is not a British subject, should be brought up in his own country, in the town where he belongs and by his own family, and where the natural mother can have easy and natural access to him.

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It has not been an easy decision and I have taken as first consideration the paramount interest of the child. I have already made the order for the transfer of custody. I also made an interim order for care and control because it was obvious to me that it was right in the circumstances. I made no order as to costs because of what Mr. Dumas said in his address to me: "All the plaintiff has sought to do was to bring to court a problem she could not solve."

*Orders accordingly.*