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[18/12/1998; United States District Court for the District of Massachusetts; First Instance]
In re Walsh, 31 F. Supp. 2d 200 (D. Mass. 1998)

UNITED DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

December 18, 1998

Before: Young, D.J.

In re the Application of J.W.

This sad case is a gritty refutation of the folk wisdom that marriages are made in heaven and Pliny's observation that "children are conceived by moonbeams."

J. and JA. ("JA.") W. live in Ireland. J. physically abuses JA. She drinks to excess and eventually takes up with another man. Each exaggerates the conduct of the other. The children -- there are two, M., 9, and E., 4 -- suffer. Eventually, JA. flees from Ireland to the United States with her lover and her two children.

Her flight with the children gives rise to this litigation. The case arises under the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), as implemented in the International Child Abduction Remedies Act ("the Act"), 42 U.S.C. s.s. 11601-11610 (1998). Pursuant to the Convention, J. seeks the return of M. and E. to Ireland. Both the United States and Ireland are signatories to the Convention, which establishes procedures for the prompt return of minors wrongfully removed from their State of habitual residence. See Convention, Art. 1. Under the Convention and its implementing legislation, the burden rests on the petitioner to show by a preponderance of the evidence. that the removal was wrongful. See 42 U.S.C. s. 11603(e)(1)(A). If the petitioner meets this burden, the respondent may oppose the return of the children by establishing that any of a number of narrowly drawn exceptions applies.

In this case, JA. does not dispute that J. has met his prima facie burden, but relies exclusively on an exception providing that a child need not be returned when "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention, Art. 13(b). The burden now rests on JA. to establish the applicability of that exception by clear and convincing evidence. See 42 U.S.C. s. 11603(e)(2)(A).

FINDINGS OF FACT

These are the facts. JA. grew up in Malden, Massachusetts. She met J. in a pub in Ireland in 1988 and they lived together off and on, J. spending most of his time in Ireland and England and JA. spending most of her time in Malden. Their first child, M., was born in Boston on August 24, 1989. The couple married in May, 1992. It was his second marriage, her first.

Marital vows added no stability to this union. Incidents of physical abuse commenced within months. JA.'s aunt died on August 17, 1992. J. expected to be asked to be a pallbearer and, when not invited, he shouted and screamed at JA., struck her several times, and squeezed her hand so hard that her thumb was swollen.

The following New Years Eve, a drunken J. subjected JA. to severe verbal abuse. Ten months later, after imbibing a number of brandies, J. became obsessed with the idea that a young neighbor next door had dealt the drugs that caused the death of another Malden youth from an overdose. Raging "I'll kill you," J. began smashing on the neighbor's door until Malden police restrained and arrested him.

Facing a court appearance in the Malden District Court to answer charges of assault with intent to murder, J. fled to Ireland in January, 1994. He dare not return, as a default warrant for his arrest has issued. Pregnant with their second child, JA. followed. Despite her condition, J.'s physical abuse continued sporadically. In June, 1994, JA., then seven months pregnant, admitted to her gynecologist, Dr. Ann Marie

Burke, that certain bruises she bore were the result of spousal abuse. Dr. Burke recommended that she document the abuse and seek legal help. E. was born on August 25, 1994 in Waterford, Ireland.

As the victim of random beatings and the mother of two small children in a loveless marriage, JA. felt increasingly alone and isolated in Tramore, a small town outside Waterford. One activity she shared with her husband was visiting the local pub. Like him, she sometimes drank to excess, sometimes becoming falling-down drunk.

In October, 1996, JA. participated in a "pub quiz" concerning Irish sports. Afterwards, walking home, J. ridiculed her and fell to punching her, kicking her prostrate body when she fell. JA. went to a pharmacist, Ann Phelan, the following day and had herself photographed. The Court has reviewed the photos. They are inconclusive. They show cuts and short lacerations consistent with falling [FN01] or being knocked to the ground.

JA. returned to Malden without the children in December, 1996, to spend the Christmas holidays with her father, paying for the trip with money her father had sent her. The night before she left, J. pushed her so hard that she fell and hurt her coccyx, thus spending the entire trip in significant pain.

What of the children during these years? As is inevitable in these tragic cases, they were constantly exposed to their parents' acrimony and occasionally observed J.'s physical abuse of their mother as well. M. once fled the home when J. was beating JA. Though sometimes inattentive, JA. has never struck her children. J., however, is "strict" with the children, once spanked E. and sent him to his room after finding him in the cookie jar, occasionally slapped M. across the back of her legs for various infractions, and once called her "stupid" and spit on her for having mud on her shoes.

Whatever hope there may have been for saving this marriage collapsed in May, 1997, at the time of M.'s first communion. JA.'s sister MA. journeyed to Ireland for the event. Leaving the children with J., JA. met MA. at the Dublin airport on May 16th. MA. had never before visited Ireland and the two traveled leisurely south to Tramore, celebrating JA.'s birthday on the 16th and arriving home on May 17th. During this leg of the trip, JA. revealed J.'s physical abuse to MA., who strongly urged her to leave J., advising her that J. was a "bully" and would eventually hurt M. JA. and MA. then left together for a two or three day trip to Skibberene, spending a portion of the time with one M.I.M.

The communion service was scheduled for Sunday, May 24th. On Saturday evening, JA. stayed home to prepare her daughter's dress and MA., J., and MM. W. (J.'s eldest son by his first marriage -- apparently an older teen-ager) went out to the pubs, enjoying Ireland's summer twilight. MM. W. broke a beer bottle. Saying, "I raised no son of mine to behave like that!" J. attacked his son, fists flying. MM. stood up to his father briefly, but then fled. MA. and J. (now bloodied) returned to the marital home. When MM. W. wandered in sometime later the fight resumed. MA. testified she observed clots of blood from the fisticuffs on the fireplace hearth. JA. and M. came downstairs and eventually the fighters subsided, mutually battered. MM. W. was sobbing and M. made efforts to console him. J. said, "M., take a look at your brother and tell him to leave; that you don't want him here.". JA. then interposed herself and pleaded with him to leave M. alone. J. took JA. upstairs and they fell to arguing and shouting. JA. covered on the bed as J. circled it. He smacked her open-handed, and when MA. called out "Are you all right?", JA. replied "Yes."

Things, of course, were not "all right." Eventually, MA. slept in the bed with JA. and J. went elsewhere. The following day a battered J. closeted himself alone, MM. W. apparently having given as good as he got and the remainder of the family accompanied M. to her first communion.

This apparently was the last straw for JA. When next J. raised his hand to her, she fled to the home of P.W., J.'s brother. When MM. W. arrived, crying, P. called the police. Accompanied by the police, JA. returned to the marital home to find J. throwing her bags into the street. JA. declined to press charges against J. for assault, and the police recommended JA. seek legal aid.

Supported by her legal aid lawyer, Aidan Lynch, Esq., JA. obtained a Protective Order against J. and negotiations commenced concerning who was going to live where and with whom. By July 13, J. had agreed to vacate the marital home and JA. had moved back in to rejoin the children. JA. had also applied for a "barring order" -- a longer-term order that would establish and govern the rights of each spouse to be in the presence of the other and to have access to their children. In so doing, JA. submitted herself and the custody issues concerning the children to the courts of Ireland.

Driven out of the marital home by J., this period also saw JA. take up a more or less open liaison with M.I.M. [FN2] While M.I.M. did not live with JA., he was frequently at the home and their liaison was well known in the locality.

Not surprisingly, the absence of the constant tension and bickering between J. and JA. was beneficial to the children and they took readily to M.I.M. JA.'s new found companionship was not, however, an unmixed blessing. When she and M.I.M. would go pub crawling, they would take the kids, who would often find themselves at a late hour sleeping in an out of the way corner of a hotel lobby or pub. This matter was of sufficient seriousness to come to the attention of Irish social service agencies who warned JA. of her derelictions in this regard.

For her part, JA. denies any lack of attention to her children and complains that the Irish social service agencies, the police, and indeed her own Irish lawyer are unsympathetic to her situation. She asserts that the social service agency pays little attention to the needs of her children and rebuffs her with the comment, "This whole situation is between two adults; the children are not involved." The police, she says, treat her complaints of breaking and entering (see below) with indifference. Her own lawyer told her unequivocally that she would have to give up M.I.M. if she were to have a chance to obtain continued custody of the children.

Nor was the Protective order adequate to keep the parties apart. During one evening when JA. and the children were out with M.I.M., J. broke into the home and smashed furniture and fixtures. M.I.M. thrashed J., who preferred charges against him of assault and battery. As the date for hearing of the barring order (and the hearing on criminal charges against M.I.M. for assault and battery) drew closer, tensions rose. J. believed JA. and M.I.M. were attempting to suborn perjury by paying for evidence of J.'s spousal abuse. In early October, 1997, J. again broke into the home when JA. and the children were out for the evening. [FN3] He smashed everything breakable and threw turf around the floors before he left.

In November, 1997, JA. left Ireland for her father's home in Malden. She took M. and E. with her, having earlier taken the precaution of insuring that the children's passports were in order. While it plays no direct role in this Court's ultimate decision, the Court notes that among JA.'s incentives to leave Ireland is the well-founded belief that her chances of securing a divorce and custody of the children are greater in the United States than in Ireland. See Family (Divorce) Act, No. 32(e) (1996); Ir. Const. art. 41.3.2 (amended by Ir. Const amend. XV [1995]). Her flight was, in fact, an extreme form of forum shopping. M.I.M. went along. Already possessed of a long criminal record replete with crimes of violence, he was unwilling to stand trial for assault and battery on J. JA. and M.I.M. now live together with the children in Malden.

The children have adjusted well to their surroundings in the United States and to M.I.M. acting as a father figure. JA., however, has kept J. from communicating with the children, and M. suffers from an adjustment disorder that one professional has diagnosed as post-traumatic stress disorder. M. does not wish to return to Ireland or to have anything further to do with her father.

CONCLUSIONS OF LAW

The Court begins by noting that Art. 13(b) does not permit an ad hoc inquiry into the merits of the underlying custody dispute. See 42 U.S.C. s. 11601(b)(4) *Rydder v. Rydder*, 49 F.3d 369, 372 (8th Cir. 1995); *Blondin v. Dubois*, 19 F.Supp.2d 123, 126 (S.D.N.Y.1998). Those matters are reserved for the courts in the country of habitual residence, which are presumptively able to determine and protect the interests of the children. Accordingly, the grave risk of harm exception has been construed narrowly. "When we trust the court system in the abducted from country, the vast majority of claims of harm -- those that do not rise to the level of gravity required by the Convention -- evaporate." *Friedrich v. Friedrich*, 78 F.3d 1060, 1068, (6th Cir.1996). An analysis performed by the Department of State explains further:

A review of the deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child.

Public Notice 957, 51 Fed.Reg. 10,494, 10,510 (1986).

The decided cases provide a harrowing look at the kinds of deplorable circumstances that, nevertheless, fail to satisfy the Art. 13(b) exception. In *Steffen F. v. Severina P.*, 966 F.Supp. 922, 926 (D.Ariz. 1997), for example, the court rejected the argument that the petitioner father posed a grave threat to his young son,

despite the high probability that the boy's sister had been sexually molested, because it was not shown by clear and convincing evidence that the father committed the abuse. Similarly, in *Nunez-Escudero v. Tice-Menley*, 58 F.3d.374, 377 (8th Cir. 1995), the court reversed the denial of a petition in a case involving allegations of physical and sexual abuse of the mother by the father, and general allegations of abuse among various members of the husband's family. The court held that such allegations concerned only "the problems between Tice-Menley, her husband and father-in-law," *id.*, and were immaterial to the Art. 13(b) inquiry. See also *K v. K.*, 3 F.C.R. 207 (Eng.Fam. 1997) (granting petition even though child witnessed several incidents: of violence by petitioner father against mother); *N. v. N.* 1 F.L.R. 107 (Eng.Fam. 1994) (granting petitioner's request to return child to Australia despite sexual abuse of child petitioner); *Murray v. A.C.T.*, Appeal No. EA-51 (Austl. October 6, 1993) (affirming grant of petitioner despite evidence that petitioner father had inflicted numerous acts of violence upon children's mother in the presence of or in close proximity to children). [FN4]

It is thus apparent that the grave threat contemplated by the Convention, must be directed at, the children who are the subject of the petition, see, e.g., *Rechsteiner v. Kendell*, 80 A.C.W.S.3d 1195 (Ont.Fam. 1998), and that such threat must be established by clear and convincing evidence. See, e.g., *Blondin*, 19 F.Supp.2d at 126-29 (denying petition where petitioner, father routinely beat mother, hit child, twisted electrical cord around child's neck, and threatened to "kill every one"); *Turner v. Frowein* Docket No. FA-97-0084450 (Conn.Super.Ct. Jun. 25, 1998) (petition denied based on overwhelming evidence that petitioner father had sexually molested his son, the subject of the petition); *In re Ves*, 559SP (Ir.H.Ct. 1996) (petition denied based on evidence of sexual abuse to children by petitioner father). [FN5]

There are no allegations in this case, much less clear and convincing evidence, that the children are threatened with the degree of harm visited upon the children in *Steffen F.* and *Turner*. The evidence demonstrates that J. is intemperate and often unkind to his children and that he spans and slaps them for minor childish infractions, and of course, there is the constant exposure to verbal and physical conflict within the home. As regrettable, and indeed as reprehensible as this state of affairs may be, it does not furnish grounds to deny the petition. Cf. *Re HB*, 1 F.L.R. 392 (Eng.Fam. 1996) (granting petition because ill-treatment, insensitivity, and inappropriate chastisement of children by petitioner mother did not amount to grave risk of harm); *K v. K.*, *supra*. Whatever damage long term exposure to such a poisonous atmosphere may cause, the evidence does not reveal an immediate, serious threat to the children's physical safety that cannot be dealt with by the proper Irish authorities. See *In re BAD*, 113 M (Ir.H.Ct. 1997) (granting petition and deferring to English courts' ability to protect child); *Murray*, *supra* (deferring, to New Zealand courts to make appropriate orders to protect child).

The Art. 13(b) exception is similarly narrow with respect to a child's emotional well being. Some courts have recognized that separating a child from his or her primary caretaker may cause severe psychological harm, but have been reticent to apply the Art. 13(b) exception absent specific evidence that the child in question would suffer this type of harm. Compare *Ryder*, 49 F.3d at 373 (8th Cir. 1995) (no specific evidence of potential harm to child where both parties were "intelligent, mature, loving parents") with *Steffen F.* 966 F.Supp. at 927-28, 930 (psychological testimony established by clear and convincing evidence that child had bonded and attached to his mother, would not likely bond with his father, and therefore faced grave risk of harm in the event of removal).

Other courts have viewed evidence of this type of emotional harm with considerably more skepticism. The English Court of Appeals held in *In re A.*, 1 F.L.R. 3G5, 372 (Eng.C.A. 1988), that the harm required under Art. 13(b) is "something greater than would normally be expected on taking a child away from one parent and passing him to another" and concluded that evidence of parental bonding could not form the basis for a grave risk of harm. See also *Friedrich* 78 F.3d at 1067-68 (characterizing feelings of loss, abandonment, and anger as "nothing more than adjustment problem, that would attend the relocation of most children").

Moreover, it bears emphasis that the appropriate order under the Convention is for the return of the children to the jurisdiction from which they were abducted. This Court is not in a position to make a custody order, and the children are not by virtue of this order removed from the care of one parent, or remanded to the custody of the other. Allegations of physical and psychological harm should be considered in the children's home jurisdiction. See *LAING and the Central Authority*, 21 Fam.L.R. 24 (Austl. 1996) (holding that Georgia courts were appropriate forum to consider and determine allegations of physical, psychological, and sexual abuse). Even if the various anxiety and stress related conditions with which M. has been diagnosed approach the severe harm contemplated by Art. 13(b), to the extent that the children

may be spared both separation from their mother and exposure to their parents' fighting, concerns for their psychological well being are largely mitigated.

JA. raises several additional matters that she maintains are relevant to the Art. 13(b) consideration. She maintains that the difficulty she will have obtaining work in Ireland, a result of her lack of Irish citizenship, militates against granting the petition. She also suggests that the failure of Irish authorities to respond to her own, complaints of abuse reveal an inability or unwillingness to protect the interests of her children, a factor she insists. creates a grave risk to the children.

In support of the first point, JA. relies on *Panazatou v. Pantazatos*, 1997 WL 614519 (Conn.Super. Sept 24, 1997) (Interim Memorandum of Decision). That case, however, does not stand for the proposition that such practical concerns should prevent return of the children but that the concerns may be eliminated or mitigated by means of appropriate undertakings. The court in *Panazatou* secured the promise of the petitioner father that he would provide proper housing and financial support for the child and mother. The *Panazatou* court held that the mother could not take advantage of her lack of employment prospects to prevent the return of the child, so long as the representations' were honored. See *id.* at 2-4. In this case the Court has also secured appropriate undertakings from J., which are discussed below.

As for the second contention, that the Irish authorities will not protect M. and E., JA. relies on *Turner*, which, as discussed above, involved direct physical evidence of child molestation by the child's father. The Court in *Turner* did advert to the mother's allegations that Dutch authorities had not responded to or investigated her charges of child abuse. The court, however, made no specific findings on that point and rested its holding generally on all of the facts and circumstances of the case, the most compelling of which was the fact of the abuse itself. In any event, this Court has made no finding that the authorities in Ireland are unable or unwilling to intervene in cases of child physical or sexual abuse, or that they are not capable of protecting the best interests of M. and E. once they are returned to Ireland.

Despite the truly deplorable circumstances in which JA. now finds herself, and in the face of her laudable concerns for her children, she has not established by clear and convincing evidence that her children face a grave risk of exposure to serious physical or psychological harm, nor that their situation upon returning to Ireland will be intolerable. As a result she may not lawfully maintain her children here in the United States, and must return them to Ireland.

Having reached this conclusion, the Court faces numerous pragmatic issues that invite pragmatic solutions. Numerous courts granting petitions under the Convention have recognized the legitimacy of exacting appropriate undertakings from the parents designed to ensure that the children will be cared for properly during transit and that no harm will come to the children pending disposition in the country of habitual residence. See *Feder v Evans-Feder*, 63 F3d 217, 226 (3rd Cir. 1995); 63 Fed.3d at 226; *Thompson v Thompson*, 199r D.L.R.4th 253 (Can.Sup. 1994); *Re O*, 2 F.L.R. 349 (Eng.Fam. 1994); *C v C*, 1 F.L.R. 403 (Eng.C.A. 1989). With this end in mind, the court requested and received the following undertakings from J. and JA.W. at the hearing on this matter.

J. is to provide the transportation and escort of the children back to Ireland. Once the children reach Ireland, J. is to provide adequate housing, clothing, medical care and serve as a parental figure for the children. If J. cannot provide adequate housing and provisions then he must provide the Court with a detailed description of how the Social Services authorities in Ireland will make these provisions. In either event, the Court is to be informed specifically what provisions are in place before the, children will be ordered returned to Ireland.

If JA. determines to return to Ireland with the children, she must do so at her own expense. If she does return to Ireland, however, J. must have no contact with her nor come within 10 miles of her residence, wherever she chooses to take up residence. Moreover, if JA. returns to Ireland, J. will have no contact with the children unless ordered by the authorities in Ireland. Each of these undertakings are conditions of this Court's order, and if any is violated, the order will be of no force and effect. [FN6]

CONCLUSION

The determination that M. and E. do not face the kind of grave risk required by the Art. 13(b) exception does not in anyway diminish the deplorable conditions of domestic abuse that this Court has identified, nor should this decision be read to minimize the impact such violence has on the lives of children. This Court concurs in the recent conclusion of the Supreme Judicial Court of Massachusetts that a child who is forced

to witness abuse within the family suffers a distinctly grievous kind of harm." *Custody of Vaughn* 422 Mass. 590, 595 [664 N.E.2d 434] (1996).

Notwithstanding these reservations, this Court exercises a limited jurisdiction, and the applicable law is narrow in purpose and effect. The sole objective of the Convention, and therefore of this Court, is to return M. and E. to the country of their habitual residence, where the question of custody and well being properly may be adjudicated before a competent court. It is not the prerogative of this court to determine or protect the best interests of the children, save only that the Court may act to avert truly extraordinary threats to their health and safety. The conditions to which M. and E. are to be returned, while far from satisfactory, are not intolerable within the meaning of Art. 13(b). Further, the court has imposed and the parties have consented to, such safeguards as will hold in abeyance any potential threat to the well being of the children, at least until their fate can be decided by an Irish court. As soon as the necessary undertakings are completed the Court shall order the return of M. and E. W. to Ireland forthwith.

FOOTNOTES

1. J., not surprisingly, claims in his affidavit that JA. simply fell down while drunk. Although his affidavit is hearsay, Fed.R.Evid. 861(a), as it must under the Convention, the Court considers it and [he other materials attached to the petition as evidence in the case. See 42 U.S.C. s. 11605. In all other respects, the Court applies the Federal Rules of Evidence to the data proffered. Fed.R.Evid. 101.

2. J. suspects that his wife's infidelity pre-dates the final blow-up, that the relationship was under way as early as the trip with MA. to Skibberene, and that when JA. fled she actually abandoned J. for M.I.M. The actual date of the relationship's commencement is of no moment to this opinion. JA. admits to mid June, 1997. The Court's general view of what happened is set forth in the text.

3. No one saw J. break into the home on either occasion but circumstantial evidence points to him as the perpetrator. The Court reaches the conclusion about J.'s breaking and entering by employing the familiar fair preponderance of the evidence test to the record before it. It should be remembered that the Irish police need evidence that will potentially pass a beyond a reasonable doubt test before a prosecution can be brought. See *O'Leary v. Attorney Gen.*, 1 I.R. 102 (Ir.H.Ct. 1990). This Court's findings cannot -- and ought not -- be read as impugning the willingness of the Irish police to investigate the report of crimes within their jurisdiction.

4. Although decisions from foreign jurisdictions have no precedential weight, it is appropriate and desirable for the Court to consult these decisions along with those of courts in the United States in construing the terms and scope of an international convention. See *Air France v. Saks*, 470 U.S. 392, 404 [105 S.Ct. 133 8, 84 L.Ed.2d 289] (1985).

5. There are reports, however, of some cases wherein courts have denied petitions due to situations that, are much less threatening to the abducted child. For example, a French court. reportedly refused to return a child to Los Angeles under Art. 13(b) because of the polluted environment. See *Court Awards \$12.5 Million in Damages in International Child Abduction Case; Largest U.S. Verdict on Record*, Bus. Wire, July 6, 19983; see also *PF v. MF*, 1992 Ir.S.1C. 390 (Ir.1992) (denying petition based primarily on petitioner father's irresponsible management of money.) *MacMillan v. MacMillan*, 1989 S.L.T. 350 (Scot Ex.Div.1989) (denying petition based on evidence of petitioner father's alcoholism and depression). These cases go against the overwhelming weight of authority.

6. Of course, an order by the Irish authorities that permits J. to contact the children or JA. shall not act to negate this order.

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