---

http://www.incadat.com/ ref.: HC/E/USf 481
[09/05/2002; United States District Court for the District of Minnesota; First Instance]
Silverman v. Silverman, 2002 U.S. Dist. LEXIS 8313

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

May 9, 2002

Before: Tunheim, D.J.

R. Silverman (Plaintiff) v. J. Silverman (Defendant)

Civil No. 00-2274 (JRT)

Counsel: Susan Anderson McKay, MCKAY LAW OFFICE, Eden Prairie, Minnesota, for plaintiff. Michael Baxter, LAW OFFICES OF MICHAEL BAXTER, Apple Valley, Minnesota, for defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING PLAINTIFF'S PETITION

Plaintiff R. H. S. brings this action against defendant J. H. S. (now J. H.) pursuant to the Hague Convention, 19 I.L.M. 1501 (1980), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. ss. 11601 et seq., alleging that she wrongfully removed their children to or retained them in the United States. Plaintiff contends that the children are habitual residents of Israel within the meaning of Article 3 of the Convention and accordingly seeks an order from the Court directing the prompt return of the children to that country. Plaintiff also seeks an order directing defendant to pay his attorney's fees pursuant to 42 U.S.C. s. 11607 (b)(3). The Court has jurisdiction to hear this matter under ICARA Section 4. 42 U.S.C. s. 11603 (a) (providing concurrent original jurisdiction over actions arising under the Convention in state and federal district courts).

This matter came on for an evidentiary hearing before the Court on March 18, 2002. The Court heard testimony from plaintiff's father, plaintiff and defendant, received affidavit testimony and obtained exhibits. Afterwards, the Court interviewed S.S., age ten, in chambers with counsel present. The Court then gave the parties an opportunity to submit closing arguments and amended findings of fact and conclusions of law to the Court. Based on the entire record and proceedings, the testimony at the hearing and arguments of counsel, the Court enters the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. All of the Findings of Fact set forth herein are undisputed or have been proved by a preponderance of the evidence.

2. To the extent that the Court's Conclusions of Law include what may be considered Findings of Fact, they are incorporated herein by reference.

3. R. was born in South Africa and holds dual citizenship in the United States and Israel.

4. J. is a dual citizen of the United States and Israel. She holds a degree in sociology from the University of Washington.

5. R. and J. met in 1988 while both were working at the Hyatt Hotel in Jerusalem--he as a cook and she as the Assistant Restaurant Manager.

6. In March 1989, R. and J. moved to the United States for R. to pursue his studies. They were married in Seattle, Washington on July 16, 1989. At the time, they resided in Poughkeepsie, New York.

7. R. and J. moved to San Francisco, California in 1991 where their oldest son, S., was born on March 2, 1992. S. is now ten years old.

8. The family lived in San Francisco until April 1993 when they moved to Los Angeles, California. In May 1995, the family moved from Los Angeles to Plymouth, Minnesota where they resided from May 1995 until the end of July 1999.

9. Their second son, J., was born on July 5, 1995 in Minneapolis, Minnesota. He is now 6 years old.

10. In the summer of 1997, R. and J. contacted a realtor in Israel to inquire about purchasing property with the intention of relocating to Israel but could not make any commitment until they sold their home in Minnesota.

11. In April 1998, the family began their efforts to sell their home. During this time, J. obtained estimates of the cost to have their property moved to Israel.

12. Their home was sold in January 1999 and the closing took place on March 26, 1999. In March 1999, R. began applying for Aliyah to Israel, which is the equivalent of immigration. J. had already made Aliyah in 1987 during her residence in Israel from 1987 to 1989.

13. J. does not dispute that she wanted to move to Israel and believed that Israel would be the right place to raise children. She also says that she and R. set the move up to be permanent, but as time drew nearer to the move, she was very torn because she did not think she wanted to stay in the marriage. R. and J. had problems in their marriage for a very long time and had sought marital counseling several times. [FN1]

14. In the months leading up to the move, R. was working in La Crosse, Wisconsin. According to J., she and R. were separated at the time, although R. denies this.

15. By July, J. says she did not want to go to Israel but R. convinced her to make the move. J. agreed, stating that she made the move only as a final effort to reconcile her marriage.

16. The family left the United States on July 26, 1999 and arrived in Tel Aviv on July 27, 1999. [FN2] The household goods had arrived in Israel three months prior to the family's arrival in Israel.

17. Upon their arrival, the family stayed with relatives. They first stayed with R.'s sister in Hod Hosharon, Israel for one month. In late August 1999, the family moved to Raanana, Israel and stayed with R.'s parents for another two months. Raanana is located about 20 kilometers from Tel Aviv. Almost immediately, as early as August 1999, J. says that she told R. she wanted to return to the United States.

18. R. and J. never purchased a home in Israel, but in October, they entered into a lease to rent an apartment and moved into the apartment in November.

19. In October 1999, J. flew back to the United States to file for bankruptcy in Minnesota after learning from her father that she and R. were nearly $ 100,000 in debt. According to J.'s testimony, she wanted to take the children with her to the United States, but R. refused to let the children go with her.

20. Upon her return, J. learned that R. had obtained a Tzav Ikuv (the equivalent of a restraining order) which prevented her from leaving Israel. [FN3] On that same day, R. informed J. that he knew about her affair and that he had been reading her emails for the last six months. R. canceled the restraining order on November 3, 1999 after the parties agreed to try again to reconcile their marriage. Nonetheless, R. testified at his deposition and acknowledged at the hearing that he would not have allowed J. to leave Israel with the children at any point between October 1999 and June

2000. J. also testified that for the last nine months of her stay in Israel, R. engaged in threats, force and coercion during this time which prevented her from leaving Israel.

21. As for the children, S. was enrolled in the H. Elementary School and J. was enrolled in preschool. They made friends, learned to speak Hebrew and did well in school. S. participated in extracurricular activities, including chess club, basketball and baseball.

22. In January 2000, J. and R. returned to Minnesota to complete the bankruptcy proceeding. [FN4] Both parties attended the bankruptcy discharge hearing and stated, under oath, that their permanent address was Plymouth Minnesota. [FN5]

23. In April 2000, the parties filed a joint United States income tax form for 1999 which listed their address as Plymouth, Minnesota. Both parties signed the tax return.

24. In June 2000, J. left Israel with the two children for a summer trip to the United States and Canada, obtaining R.'s written consent to make the trip. She purchased roundtrip tickets and was scheduled to return to Israel on August 30, 2000. At the airport before their departure, R. threatened J.. It was at that moment, J. says, that she made the decision not to return to Israel.

25. J. filed for legal separation from R. and custody of the two children in Hennepin County District Court on August 10, 2000. R. was served with the petition in Israel. R. then filed a motion to dismiss the action, contending that the court lacked jurisdiction to hear the custody issues. R. also filed a Hague Petition on October 10, 2000 in federal district court seeking return of the children to Israel. On that same day, the state court heard argument on R.'s motion to dismiss for lack of jurisdiction.

26. On October 17, 2000, the state court referee issued an order 1) granting J. temporary sole legal custody and temporary sole physical custody of the children, 2) granting R. the right to reasonable visitation, and 3) appointing a guardian ad litem for the children.

27. On May 4, 2001, the state court issued its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree. In its Findings of Fact, the court found that the parties' move to Israel in August 1999 was temporary and was made in an attempt to restore stability in their marriage. The court further found that J. and the children would have returned to Minnesota from Israel in October of 1999 but they were prevented from doing so by R.. The court also relied on the fact that in a bankruptcy petition filed in October 1999, both R. and J. signed the joint petition listing their permanent address as *, Plymouth, Minnesota.

28. While the state proceeding was still pending, J. moved in the federal court to dismiss the case on abstention grounds. On November 13, 2000, then-Chief Judge Paul A. Magnuson granted her motion, concluding that there is an ongoing state proceeding which implicates important state interests and that R. has an adequate opportunity to raise the Hague issues in state court. S. v. S., Civ. No. 00-2274 at 5-7 (PAM/JGL) (Nov. 13, 2000).

29. R. appealed that decision and on October 4, 2001, the Eighth Circuit concluded that abstention was improper and remanded the case for an evidentiary hearing. S. v. S., 267 F.3d 788, 792 (8th Cir. 2001), petition for reh'g en banc denied. The case was reassigned to this Court and defendant moved shortly thereafter for a jury trial based on the Eighth Circuit opinion. On February 21, 2002, the Court denied defendant's motion. S. v S., 2002 U.S. Dist. LEXIS 3000, No. 00-2274, 2002 WL 264932 at * 4 (D. Minn. Feb. 21, 2002).

30. While the state and federal cases were pending in the United States, a rabbinical court in Israel ruled on November 16, 2000 that Israel was the place of residence of S. and J. during the eleven-month period in question and that J.'s failure to return to Israel in August 2000 was prima facie evidence of wrongful retention of the children in violation of the Convention. The decision was upheld on October 30, 2001.

CONCLUSIONS OF LAW

The Hague Convention, to which the United States and Israel are signatories, is an international treaty adopted "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." Hague Convention, Preamble. Its primary purpose is "to restore the status quo ante and to deter parents from crossing international boundaries in search of a more sympathetic court." Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995) (citing Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993)). A decision under the Convention is not an adjudication of the merits of any underlying custody claim. Hague Convention, art. 19; 42 U.S.C. s. 11601 (b)(4).

In order to obtain relief under the Convention, plaintiff must prove by a preponderance of the evidence that his children were "wrongfully removed or retained within the meaning of the Convention. 42 U.S.C s. 11603 (e)(1)(A). [FN6] To demonstrate wrongfulness under Article 3 of the Convention, plaintiff must prove that: "1) defendant [retains] the children from their "habitual residence," and 2) plaintiff was exercising his parental custody rights over the child at the time of the [retention]." Freier v. Freier, 969 F. Supp. 436, 439 (E.D. Mich. 1996); Miller v. Miller, 240 F.3d 392, 398 (4th Cir. 2001).

If plaintiff satisfies his burden that the retention of S. and J. was wrongful, the Court must order the return of the children to their habitual residence unless defendant establishes one of the affirmative defenses set forth in Articles 12, 13 or 20 of the Convention. These exceptions are construed narrowly. Rydder v. Rydder, 49 F.3d 369, 372 (8th Cir. 1995).

In this case, defendant asserts there is a grave risk that returning S. and J. to Israel "would expose them to physical or psychological harm or otherwise place them in an intolerable situation." Hague Convention, art. 13(b). Defendant also contends that S., age 10, objects to being returned to Israel and that he "has attained an age and degree of maturity at which it is appropriate to take account of his views." Hague Convention, art. 13. [FN7]

I. Habitual Residence

As stated above, plaintiff carries the burden of proving by a preponderance of the evidence that J.'s refusal to return S. and J. to Israel constitutes a wrongful retention under the Convention. To satisfy this burden, plaintiff first must establish that the habitual residence of S. and J. at the time of the wrongful retention was Israel. Miller v. Miller, 240 F.3d 392, 398 (4th Cir. 2001); Cohen v. Cohen, 158 Misc. 2d 1018, 602 N.Y.S.2d 994, 998-99 (Sup. Ct. 1993). [FN8]

The Hague Convention does not specifically define the term "habitual residence." As one court observed, "this has been a matter of deliberate policy, the aim being to leave the notion free from technical rules, which can produce rigidity and inconsistencies as between legal systems." In re Bates, No. CA122.89 at 9-10, High Court of Justice, Fam. Div'n Ct. Royal Court of Justice, United Kingdom (1989). Consequently, the determination of one's habitual residence is a fact-based inquiry to be analyzed on a case-by-case basis.

While the intent of the framers of the Convention is for the concept of habitual residence "to remain fluid and fact based," Levesque v. Levesque, 816 F. Supp. 662, 665 (D. Kan. 1993) several district and circuit courts have given more precise descriptions of "habitual residence." The Eighth Circuit has characterized habitual residence as one's "ordinary residence." Rydder, 49 F.3d at 373. Many courts have cited with approval the view articulated by Lord Scarman in Shah v. Barnet London Borough Council and other appeals:

There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Shah, [1983] 1 A1 E.R. 226, 233 (Eng. H.L.) (discussed and adopted in In re Bates, at P 33).

In one of the most recent decisions on this issue, the Ninth Circuit concluded that "the first step toward acquiring a new habitual residence is forming a settled intention to leave the one left behind." Mozes v. Mozes, 239 F.3d 1067, 1075 (9th Cir. 2001). The court further held that, although it is the child's habitual residence that is being determined, "'the intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child's residence.'" Id. at 1076 (quoting E.M. Clive, The Concept of Habitual Residence, 1997 Jurid. Rev. 137, 144). The Third Circuit has similarly noted that the determination requires consideration of both the child's circumstances and the parents' shared intent. Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995) (explaining that "a determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there"). In Ponath v. Ponath, 829 F. Supp. 363 (D. Utah 1993), the district court echoed this view, observing that "although it is the habitual residence of the child that must be determined, the desires and actions of the parents cannot be ignored." Id. at 367. The court continued, "the concept of habitual residence must ... entail some element of voluntariness and purposeful design." Id. [FN9]

Evaluating the case at bar under the above standards, the Court determines that the habitual residence of S. and J. never changed from the United States to Israel and therefore, J.'s retention of the children in the United States since June 2000 was not wrongful. With the exception of the eleven months spent in Israel, S. and J. have spent their entire lives in the United States. The evidence also indicates that their time in Israel would have been much shorter had J. not been prevented from leaving Israel with the children from October 1999 until June of 2000. From October to November, she was prevented from leaving Israel by virtue of the Tzav Ikuv issued by an Israeli court on an ex parte basis. Although that order was lifted a month later, R. stated at his deposition and at trial that he would not have allowed his wife to leave Israel with the children in September, October, November or December 1999. He also agreed that he would not have allowed S. and J. to leave Israel in January, February, March, April, May and June of 2000 and that he would have prevented J. from leaving had he believed that she would return with the children to the United States permanently. J. also testified that in the last year they were together in Israel, R. was physically violent towards her and that he threatened to take her children away from him. [FN10] Although R. denies the abuse, the issue is one of witness credibility and, on this point, the Court finds J. more credible. Tsarbopoulos v. Tsarbopoulos, 176 F. Supp. 2d 1045, 1056 (E.D. Wash. 2001) (weighing the credibility of the witnesses in determining whether verbal and physical abuse did occur).

In two similar cases, courts have concluded that a coerced residence is not a settled intent to live there. Ponath, 829 F. Supp. At 368; Tsarbopoulos, 176 F. Supp. 2d 1045. In Ponath, petitioner, a citizen of Germany, and respondent, a citizen of the United States, lived in Utah with their two-year-old son. Id. 829 F. Supp. At 366. On November 6, 1991, the family traveled to Germany on roundtrip tickets to visit petitioner's family. Id. Although they were scheduled to return to the United States a month later, they remained in Germany much longer. Id. Two weeks after arriving there, petitioner found employment and by April 1992, he began construction of a house on property near that of his parents. Id. As early as February 1992, respondent expressed her desire to return to the United States with the minor child, but petitioner refused to permit her to leave and prevented them from leaving through verbal, emotional and physical abuse. Id. The court concluded that the habitual residence of the minor child was the United States. Id. 829 F. Supp. at 367. In reaching this conclusion, the court explained:

What began as a voluntary visit to petitioner's family in Germany, albeit an extended visit, might be viewed by the court as a change of habitual residence of the minor child but for respondent's intent and desire to return to the United States with the minor child and petitioner's willful obstruction of that purpose. Petitioner's coercion of respondent by means of verbal, emotional and physical abuse removed any element of choice and settled purpose which earlier may have been present in the family's decision to visit Germany.... For the court to grant petitioner's motion, and thereby sanction his behavior in forcing continued residence in Germany upon respondent, and through her, the minor child, would be to thwart a principle purpose of the Hague Convention. In the court's view, coerced residence is not habitual residence within the meaning of the Hague Convention.

Id. 829 F. Supp. at 367-68.

In Tsarbopoulos, the children were all born in the United States and lived in the United States their entire lives until their father, a Greek citizen and naturalized citizen of the United States, accepted a position with the Goulandris Museum in Athens, Greece. 176 F. Supp. 2d at 1051. At the time, Dr. T. worked at the * Research Institute in New Jersey. Although the family moved to Greece in October 1997 and Dr. T. signed a two-year contract [FN11] with the museum, Dr. T. did not resign from his position with * until January 1998. Id. at 1052-53. During that time, he maintained his insurance benefits and represented to the company that he still lived in New Jersey. Id. He also maintained various financial arrangements in the United States, including a U.S bank account and U.S. addresses in order to qualify for air mileage. Id. at 1052. The facts also revealed a history of verbal and physical abuse by Dr. T. towards his wife, K.T. Id. at 1050. Witnesses described Dr. T. as a very domineering husband who controlled the finances and decision-making process and kept his wife socially isolated. Id. This conduct continued in Greece and worsened to the point where, in December 1999, K.T. returned to the United States with the three children. Id. at 1054.

Petitioner filed a Hague petition, arguing that Greece was the habitual residence of his children because, among other things: 1) the family had lived there for 27 months; 2) the family took all of their clothes and belongings to Greece; 3) he sought and obtained repatriation benefits to aid with the move n12 and 4) his wife had once stated that she had a "dream of living in Greece." The court rejected the father's argument, concluding that Greece was not the habitual residence of the children and that the United States continued to be their habitual residence. Id. at 1057. In the court's view, the children did not sufficiently acclimatize to Greece to make it their habitual residence. Id. at 1055. The two youngest children had very little socialization outside the family. Id. Although H., the oldest, attended school and began to learn the Greek language, the court found this evidence insufficient to establish Greece as his habitual residence. Id. The court further determined that the T.'s did not have a shared intent to abandon the United States as their habitual residence. Id. The court based this decision, in part, on the verbal and physical abuse endured by Ms. T. Id. at 1056. According to the court, "the verbal and physical abuse of one spouse by the other is one of several factors in the Court's determination of the existence of 'shared intent' to make a place the family's 'habitual residence.'" Id. [FN13]

The Court is guided by these decisions and, for the reasons stated above, finds that J.'s residence in Israel from October to June was coerced and that she did not share a settled intent to make Israel the family's habitual residence. There is also evidence, as there was in Tsarbopoulos, which calls into question the permanency of the move to Israel. In the bankruptcy petition filed in October 1999 and when they appeared in court in January 2000, the parties swore under oath that their residence was * Plymouth Minnesota. Likewise, the couple's 1999 income tax forms, filed in April 2000 and signed by both parties, lists Plymouth, Minnesota as their residence.

Even though R. applied for and made Aliyah upon the family's move to Israel, that status does not suggest a conclusion that the family's move was intended to be permanent. The Aliyah process provides substantial financial benefits and given the financial difficulties faced by the parties at the time, it would not be unusual for them to seek help, regardless of whether the parties intended to remain in Israel.

There is evidence that J. sought employment while in Israel and enrolled the kids in school. R. also emphasizes statements J. made in emails to others which, he argues, contradict J.'s claim that she did not want to remain in Israel. In particular, plaintiff relies on the fact that, shortly after arriving in Israel, she told a friend, "I've waited 20 years to make this move." When read in context, however, the Court finds that J. made the statement in an effort to make the best of the situation before her. The statement, on its own, is thus entitled to little weight. As for the other evidence relied on by R., the Court acknowledges that the record is not completely devoid of evidence supporting his position. The same was true in Tsarbopoulos. However, it is plaintiff who carries the burden on this issue, and, for the reasons stated above, the Court finds that this burden has not been satisfied. Cohen, 602 N.Y.S.2d at 999 (petition must fail because petitioner did not satisfy one of the requirements for relief under the Convention). Accordingly, for all the foregoing reasons, the Court finds that the habitual residence of S. and J. is the United States and therefore, J.'s retention of the children in the United States is not wrongful.

II. Affirmative Defenses

A. Grave Risk of Harm

Even if the Court had determined that Israel was the habitual residence of S. and J., the Court finds, in the alternative, that their return to Israel would pose a grave risk of physical harm or otherwise place them in an intolerable situation. Article 13(b) of the Convention provides that:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that....

(b) 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.

Hague Convention, art. 13, 19 I.L.M. at 1502. As with the concept of habitual residence, many courts have interpreted the scope of this exception. In Thomson v. Thomson, the Supreme Court of Canada held that "the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation." 119 D.L.R.4th 253, 286 (Can. 1994). A British court has concluded that the harm required to trigger the grave risk defense is "something greater than would normally be expected on taking a child away from one parent and passing him to another." In re A., 1 F.L.R. 365, 372 (Eng. C.A. 1988). The Eighth Circuit has cited to these decisions with approval. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories."). The court in Nunez further emphasized that "the Article 13(b) inquiry does not include an adjudication of the underlying custody dispute." Id. According to the Eighth Circuit, "it is not relevant to this Convention exception who is the better parent in the long run, or whether [respondent] had good reason to leave her home in Mexico and terminate her marriage to [petitioner], or whether [respondent] will suffer if the child she abducted is returned to Mexico." Id. What is relevant are the circumstances and environment in which the child will reside upon his or her return. In other words, "the Article 13(b) inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence." [FN14] Id. at 378. Under the implementing legislation for the Convention, a party opposing return based on an Article 13(b) exception must establish the exception by clear and convincing evidence. 42 U.S.C. s. 11603 (e)(2)(A).

Upon review of the evidence presented in the case, the Court finds that returning S. and J. to Israel for determination of the custody issue would expose them to a grave risk of physical harm and place them in an intolerable situation. Israel is currently in a state of turmoil. Although, as plaintiff testified, Israel has always been a country at conflict to some extent, it is clear that the intifada has escalated dramatically in recent months. At the hearing, defendant presented evidence of the violence occurring in the region. It is undisputed that on March 16, 2002, a Palestinian gunman opened fire and killed two people, including a 17-year-old student, in the City of Kfar Saba. Each and every witness called to testify acknowledged that Kfar Saba is less than five miles from plaintiff's home in Raanana. Witnesses also acknowledged that another Palestinian bombing occurred in Netanya, a city only 15 miles from Raanana.

Since the hearing on March 18, the violence in the region has steadily worsened. On March 22, 2002, a Palestinian suicide bomber killed three Israelis and wounded 40 more in Jerusalem. See "Jerusalem Bomber Kills 3 and Shakes U.S. Peace Effort," N.Y. Times at A1, Mar. 22, 2002. On March 28, 2002, another Palestinian suicide bomber blew himself up in a crowded hotel dining room in Netanya as more than 200 people gathered for the Passover holiday meal. See "Bomb Kills At Least 19 in Israel as Arabs Open Beirut Meeting," N.Y. Times at A1, Mar. 28, 2002. The incident, "killed at least 19 and wounded more than a 100 others, many of them children." Id. On April 1, 2002, another suicide bomber detonated himself in a popular cafe in Haifa, a town in Northern Israel. See "Sharon Says Israel is in a War After Suicide Bombing Kills 14; More Tanks Move in West Bank," N.Y. Times at A1, Apr. 1, 2002. The blast killed 14, wounded 40 others and was described as "among the deadliest of the 18-month conflict." Id. On April 10, 2002, a bomb exploded on a commuter bus near Haifa, killing at least five people and injuring 20 others. See "Ambush Kills 13 Soldiers: More dead today as bus blast kills at least 5 near Haifa," Minneapolis Star Tribune at A1, Apr. 10, 2002. On April 12, 2002, a female suicide bomber blew herself up at a bus stop in Jerusalem's crowded outdoor market, killing six people and wounding many others. See "Bomb Rips at Peace Effort," Minneapolis Star Tribune at

A1, Apr. 13, 2002. The escalating violence prompted the State Department to issue travel warnings, telling Americans not to travel to Israel, the West Bank or Gaza and advising American residents in Jerusalem to leave the city. See "State Department issues new travel warning for Americans in Israel," 2002 WL 3319550, NBC News: Today, Apr. 3, 2002. Most recently, on May 7, 2002, 15 people were killed in a suicide bombing of a gambling club in Rishon le Zion, Israel, located 10 miles south of Tel Aviv. See "15 Killed by Suicide Bomber; Sharon Cuts Short U.S. Visit After a Meeting with Bush," N.Y. Times at A1, A14, May 8, 2002. The Court takes judicial notice of these events in consideration of this issue. [FN15]

There is evidence in the record, particularly from plaintiff's father, .M.S., who lives in Raanana and works in Tel Aviv, that, despite the events, schools and business have not closed. Plaintiff contends that the facts of this case are indistinguishable from those in Frier v. Frier, 969 F. Supp. 436 (E.D. Mich. 1996), in which the court held that unrest in Israel was insufficient to establish the grave risk defense. Id at 443. The Court does not agree. Significant differences exist between the violence occurring at the time Freir was decided and the violence occurring in Israel today. Unlike before, the violence has permeated areas that were previously unaffected by the conflict. Furthermore, the type of violence, through suicide bombings, has placed civilians, including children, at much greater risk. The level and intensity of violence occurring in Israel today thus goes well beyond "some unrest" described in Freier. In the Court's view, the current situation in Israel meets the "zone of war" standard contemplated by the Sixth Circuit in Friedrich.

The Court also takes account of the fact that S. and J. are settled in their new environment and that S. objects to returning to Israel. The Second Circuit has held that a court may consider the degree to which a child has settled in his or her new environment as well as that child's views in deciding whether the grave risk defense has been established under Article 13(b). Blondin v. Dubois, 238 F.3d 153, 163-68 (2d Cir. 2001). S. and J. have lived in the United States for nearly two years, a time period longer than that spent in Israel. In this time, S. and J. have adjusted extremely well to their environment, as evidenced by letters submitted by teachers of the Touchstone Community School in Worcester, Massachusetts, where they now live, and Rabbi Bernstein of the Temple Sinai.

Additionally, S. objects to returning to Israel, in part because of the violence in the region. Blondin, 238 F.3d at 166 (stating that "if a child's testimony is germane to the question of whether a grave risk of harm exists upon repatriation, a court may take it into account"). The Court finds that S. is mature enough and old enough to take consideration of his views, particularly where, as here, the Court is taking his views into account as a factor, and not a conclusive determination of whether to deny repatriation. Id. ("It stands to reason that the standard for considering a child's testimony as one part of a broader analysis under Article 13(b) would not be as strict as the standard for relying solely on a child's objection to deny repatriation under Article 13.") (emphasis in original).

The evidence presented at the hearing reveal that S. is a very bright and intelligent individual. He is a gifted child, which means he is in a class that is on par with his academics. He reads newspapers each day to follow events in Israel. The Court is particularly impressed by his behavior in learning of the upcoming legal proceedings and his desire to express his views in a letter and have them considered by the Court. The Court witnessed S.'s maturity firsthand in discussions with him in chambers after the hearing. In both the Court's private discussions with S. and in the presence of counsel, the Court was impressed by the level of maturity exhibited by S. It was evident that he understood the purpose and significance of these proceedings. Of course, while it is not possible to completely eliminate the possibility of influence by one parent, the Court saw no evidence of such influence in either the events leading up to S. writing the letter, the contents of the letter itself, or in discussions with S.. Finally, the Court finds that S., at age 10, is sufficiently old enough to have his views considered. Blondin, 238 F.3d at 167 (eight-year-old girl old enough to consider her views on returning to France).

Thus, for all the foregoing reasons, the Court makes the alternative holding that defendant has established the grave risk defense by clear and convincing evidence.

Both parties are fully capable of being excellent parents for S. and J. Regardless of whether there are additional legal proceedings in this case, the Court strongly encourages the parties to work out an arrangement which allows both R. and J. to be parents who are very much involved in their children's lives.

ORDER

Based upon the foregoing, the submissions of the parties, the arguments of counsel and the entire file and proceedings herein, IT IS HEREBY ORDERED that plaintiff's petition for return of the child to plaintiff [Docket No. 1] is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 9, 2002

at Minneapolis, Minnesota.

JOHN R. TUNHEIM

United States District Judge

---

[1] J. admits she had a relationship with another man. Although it is not clear when the relationship began, R. learned of the affair in April 1999 after searching temporary internet files and reading J.'s email messages.

[2] As part of the benefits R. received for making Aliyah, the family received vouchers to travel to Israel from the Aliyah Center. The voucher meant that their travel would only cost them $ 100.00 for the entire family.

[3] J. also learned that R. had put the children's passports and birth certificates in his father's safe deposit box in the bank.

[4] The children remained in Israel and stayed with their paternal grandparents, who live across the street from the elementary school.

[5] Both parties also admit they did not disclose a transfer of $ 9,000.00 to J.'s father from the sale of their home.

[6] Because R. expressly permitted J. to leave Israel in June 2000, but did not consent to her keeping the children in the United States permanently, the Court treats this case as one of an alleged "wrongful retention." Feder v. Evans-Feder, 63 F.3d 217, 220 n.4 (3d Cir. 1995).

[7] Defendant has also suggested that repatriation to Israel is inappropriate because S. and J. are settled in their new environment. Plaintiff correctly notes that the well-settled exception contained in Article 12 of the Convention is triggered only when a Hague proceeding is commenced after the expiration of one year. In this case, plaintiff filed his Hague petition well within the one year time period and therefore the Article 12 defense does not apply. Nonetheless, as discussed infra, the argument that the children are settled in their new environment, while not dispositive under Article 12, can be a relevant factor in the grave risk analysis.

[8] There is no dispute that R. was exercising his parental rights at the time of the alleged retention in the summer of 2000. R. has continued to exercise his custody rights by maintaining contact with his children by telephone.

[9] The Court notes that the Eighth Circuit has discussed caselaw from the Sixth Circuit which concludes that parental intent is not relevant to the habitual residence determination. Nunez-Escudero v. Tice-Menley, 58 F.3d at 379 (citing Fredrich v. Fredrich, 983 F.2d 1396, 1401-02 (6th Cir. 1993) (stating that "to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions"). In the Court's view, it is difficult, if not impossible, to consider the question of habitual residence without some consideration of the parents' intent. Accordingly, the Court agrees with the Ninth Circuit that parental intent is a relevant factor to be considered along with other factors in the determination of habitual residence. The Court also

notes that the Eighth Circuit did not have the benefit of the Mozes decision at the time it decided Nunez.

[10] R. admits that on one occasion he and J. got into a violent argument in the car and at one point he leaned over and opened the passenger side door where J. was seated. R. was driving about 40-55 miles an hour at the time. J. also testified that R. slammed J. up against stone walls in their apartment. J. also claims R. verbally threatened her by telling her that he would see her dead before he would see her divorced.

[11] The contract was renewed in January 1999 for another two-year period, but then was modified in September 1999, extending the contract for a term of indefinite duration. Id. at 1052.

[12] These benefits are available only to Greek citizens and enabled Dr. T. to bring goods to Greece without paying taxes. Id. at 1055.

[13] The court also relied on: 1) Dr. T.'s control and domination over decisions and finances of the family; 2) his continued ties with the United States; and 3) his misrepresentations to * concerning his residence and his status of employment. Id. 176 F. Supp. at 1056-57.

[14] The Sixth Circuit has interpreted these standards to mean that a grave risk of harm under the Convention can exist in only two situations:

First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute--e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

[15] According to Federal Rule of Evidence 201, "[a] court may take judicial notice, whether requested or not," and such notice "may be taken at any stage of the proceeding." Fed. R. Evid. 201 (c) & (f). The facts noted above are appropriate for judicial notice as they are facts not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]