The Family Court in Tel Aviv - Yaffo

FC 52595-02-20 The Father vs. the Mother

Before the Honorable Judge Tamar Snunit Forrer

The Plaintiff:	**The Father** **By representing counsels Attorney Moran and Attorney Dror**
	- Versus -
The Defendant:	**The Mother** **By representing counsels Attorney Shai and Attorney Finkelshtein-Lahav**

Cited legislation:

The Hague Convention Law (Return of Abducted Children), 5751-1991

The Courts and Execution Offices Regulations (Legal Procedures in a Special Emergency), 5751-1991: Section 3(4)

The Civil Procedures Regulations, 5744 - 1984: Section 295xvii

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Ratio decidendi:

*The court had accepted the claim of a Father pursuant to the Hague Convention and instructed of returning a 16 months old Minor to the United States. Inter alia, the claim of existence of the grave concern exemption in returning the Minor to the United States due to the emergency situation formed by the corona virus had been rejected, and this as the corona virus crisis exists in both countries and it had been proven that the Minor's health insurance coverage is better in the United States.

* Family - custody of Minors - return of abducted children

* Public international law - conventions - the Hague Convention

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A claim filed by the Father pursuant to the Hague Convention Law (Return of Abducted Children), for ordering the return of his Minor Daughter (16 months old) to the United States. There is no dispute that the Parties had relocated to the United States during the pregnancy carrying the Minor in light of the Father's place of employment. The Minor holds an American citizenship only. According to the Father, the Minor's habitual residence is in the United States and the Parties' arrival in Israel had been for a limited period and temporary for arranging their residency and work visas in the United States.

It should be noted that during the stay in Israel the Mother had initiated divorce proceedings at the rabbinical court as part of which she had issued a stay of exit order against the Father and against the Minor, as she herself had failed to appear for an interview at the embassy intended for arranging her residency visa in the United States.

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The Family Court had accepted the claim for the following reasons:

Regarding the habitual residence of the Minor, the court rejects the Mother's argument that in light of the Minor's age the issues are to be examined in a limited manner and determine that the Minor's habitual residence is with her Mother or in Israel; the Convention does not differentiate between Minors' ages for examining habitual residence. The Mother's claim that "the Minor's habitual residence, most of her life, had been by the Defendant" is on the custody and visitation rights level and should not be included under the Convention.

The Supreme Court had ruled that examination of "habitual residence" requires a pure factual objective examination as part of which weight will also be be given (however not only) to the parents' intentions and decisions they had made, however the emphasis is on the child's point of view, "the Minor's world map"; for implementation of so in the matter at hand it had been ruled that the Minor's habitual residence is in the United States. (In this context evidence had been presented that the Parties had acted intentionally and explicitly for renouncing their residence in Israel. Following, they had explicitly, in agreement and intentionally acted for establishing permanent residency in the United States for them and for the Minor. Evidence had also been presented that the Parties' arrival in Israel had been for an agreed upon, limited and temporary period only for obtaining a visa to the United States and the fact that the Parties had not acted for obtaining a green card does not modify the overall evidence that had been proven in court).

Had unlawful estrangement been conducted by the Mother? In this context the Mother argues that since she does not have any possibility to return to the United States in lack of an appropriate visa, she should not be deemed failing to return the Minor. The court rejects this claim. The Mother by her actions is preventing or at least not acting for examining and obtaining a residence visa in the United States as required under law. Such conduct is in bad faith and meets the criteria for non-return of the Minor to her habitual residence. Moreover, case law that had interpreted the Convention had also addressed situations in which the alienating parent is under criminal charges in the country of origin, or may be deported from it, and the matter had not prevented returning the Minor to his habitual residence; (it had been ruled that the date of failure to return commences the date on which the Defendant had failed to appear for the interview at the embassy on 18.2.2020).

Regarding the threshold conditions concerning the question of had the Father's custody rights had been violated? The court rules that also disregarding the expert's opinion for foreign law on behalf of the Father, according to the wording of the law applicable in ... (in the United States) as well as that according to previous case law in Israel as of now, in legal terms both parents have equal rights to custody of the child. In this situation, the Mother's unilateral determination on the Minor's stay in Israel and her explicit refusal to return to the United States, she should be deemed violating the Father's custody rights under the Convention.

Subsequently, the Mother's arguments had been rejected as to the existence of any of the exceptions under the Convention for returning the Minor to the United States - the exception of consent (particularly in light of abandoning the claim) and the grave concern in two issues: Irreversible psychological damage by detaching the Minor from her Mother since the Mother has no possibility to return to the United States; true health danger posed to the Minor due to the emergency situation caused by corona virus.

Regarding the first concern it had been noted, inter alia, that such is concern of returning the Minor to the country he had been abducted from rather concern of his estrangement from the alienating parent. In any event, the Mother had failed to prove that the prevention of traveling to the United States is related to the United States government or the Father. The deliberation is not upon cases that had been discussed in case law, which had also been given a solution, where the alienating parent is facing criminal proceedings due to the abduction and his concern of the return is justified. Moreover, in a document recently published by the Hague Council regarding conflict of laws "Guide to Good Practice" in respect of interpretation and application of the Hague Convention particularly regarding analysis of the concern of grave concern exception, it had been ruled that enabling a situation where a parent determines that he will not return to the country of origin and then claims of inflicting damage due to the grave concern established following his refusal to return cannot be allowed. Therefore, as the claim that damage may be incurred by the Minor due to her estrangement from her Mother is entirely dependent on the Mother's will, the grave concern exception does not hold true.

Regarding the concern of the corona virus and the Mother's request that the court shall instruct of delaying the ruling on the case and instruct of prohibiting taking the Minor outside Israel until the restrictions on behalf of the Ministry of Health and the World Health Organization in light of the corona pandemic - the Mother's claims had been rejected both on the procedural aspect as well as the substantive aspect. The corona epidemic exists in both countries. Additionally, in questioning the Parties it had been proven that it is precisely the Minor's stay in Israel with no health insurance and no HMO which is riskier for Minor than return to her country of origin where she is a citizen and has appropriate health insurance. Thus, and since the corona epidemic crisis exists in both countries and is not related to the Minor's health condition, the exception of grave concern in this regard does not hold true.

Subsequently, the court sets forth the conditions for returning the Minor to the United States while ensuring for the Mother the possibility of residence and visa in the United States and in light of the corona epidemic.

Judgment

1. Before me is presented the Plaintiff' claim (hereinafter: also the "**Father**") pursuant to The Hague Convention Law (Return of Abducted Children), 5751-1991 (hereinafter: the "**Convention**") for instructing of returning his Minor Daughter to her habitual residence, which according to the Father is California in.... The Defendant (hereinafter also: the "**Mother**") is petitioning for various reasons for rejecting the claim and argues that the conditions for returning the Minor to California pursuant to the provisions under the Convention are not met.

I. The Factual Background and the Legal Proceedings

2. The Plaintiff and the Defendant (hereinafter: the "**Spouses**" and/or "**Parties**") were married on 9.9.2015.

3. Prior to their marriage, on 19.8.2015, the Parties had signed a prenuptial agreement and such had been confirmed by a notary (hereinafter: the "**Parties' Prenuptial Agreement**").

4. **On 1.7.2018** the Spouses had moved to reside in .... due to a business opportunity related to the Father's place of work. The Parties had renounced their Israeli residency and signed the documents for this purpose.

5. **On .... 2018 the Daughter ---- was born in the United States** (hereinafter: the "**Minor**" and/or "**Daughter**"). The Minor holds an American citizenship only.

6. Both Parties had obtained residence and work visas in the United States.

7. After giving birth to the Minor the Mother had stayed with her several months on maternity leave. Later, the Mother too had started working at a company in the United States.

8. Commencing **1.9.2019** the Minor started attending kindergarten in .....

9. Between the Minor's birth and up to 11/2019 the Minor had been in Israel for three limited visits.

10. **On 21.11.2019** the Parties and the Minor had arrived in Israel in order to arrange their residence and work visas in the United States. The plane tickets the Parties purchased had been "round trip" tickets. The ticket's planned date of return had been 3.1.2020. Later, due to delays in conducting the interview at the United States embassy the Parties' date of return according to the ticket had been postponed (however not canceled).

11. The Parties had rented an apartment in Israel (through AirBnb) for a short period. The Parties continue paying the rental fees in the United States, for their leased car in the United States. The Parties had not packed their apartment and it has remained as it was at the time they left for Israel. The Parties are still paying for the Minor's kindergarten in the United States.

12. The interview at the United States embassy scheduled for December had been postponed to 18.2.2019.

13. **On 29.1.2020** the Parties had signed an agreement with "----" kindergarten for the Minor's stay there for two months (attached as Appendix XVII to the statement of claim). In the agreement vis-a-vis the kindergarten it had been stated: "--- will attend the kindergarten for approximately two months and therefore the parents are not required to provide advanced notice". **On 30.1.2020**, the Minor started attending the kindergarten in Israel.

14. **On 29.1.2020** the Mother had initiated settlement of dispute proceedings at the Rabbinical Court. As part of the settlement of dispute proceedings the Mother had requested and obtained a stay of exit order against the Father and a stay of exit order against the Minor.

15. **On 13.2.2020** the Mother had delivered through her counsel a letter to the United States embassy (added by the Plaintiff to the court file on 27.2.2020 and presented at the hearing that day), in which she had notified that she does not intend to appear at the interview that had been scheduled and she does not intend to return to the United States. Additionally she had explained to the embassy that she had initiated legal proceedings and that she had issued a stay of exit order against the Father, as well as according to her the proceedings in Israel are expected to be complex and difficult:

Dear Sir or Madam,

Re: _____ Israeli passport no. _____
Interview on 18.2.20

Our firm represents the lady involved. On her behalf I am referring to you on the matter, as follows:

1. My client his invited for an interview at the embassy intended to be held on 18.2.2020.

2. The person who is currently my client's husband, Mr. _____ passport number _____ has also been invited to the interview.

3. The interview has been designed for renewing the residence visa in the United States for my client and her husband, as well as renewal of a work visa.

4. Legal proceedings are held by the parties at the Rabbinical Court, and the parties intend to divorce.

5. Unfortunately for my client it appears that the legal road is still long and the nature of the proceedings is complex and difficult.

6. My client has clarified that she does not intend to return to the United States, and she is continuing her life in Israel. For doing so and in order to protect her rights, my client has submitted as part of the legal proceedings, an application for stay of exit order against Mr. ____. The Rabbinical Court has accepted my client's application and had issued a stay of exit order for 30 days against Mr. _____ and a stay of exit order for one year against the minor.

7. Since as aforementioned the parties are headed towards divorce and my client is staying in Israel with the minor, she will not be flying to the United States, under any circumstances, with Mr. _____.

8. In light of the aforementioned it is clear that there is no need for the interview scheduled for my client on 18.2.2020, and it is hereby requested to consider this letter of mine as notification by my client on her non-arrival to the interview.

9. For the avoidance of doubt it should be clarified that this letter is solely in name of my client, and does not affect Mr. ____ position for all intents and purposes, particularly in all related to the disputes between the parties, including the legal disputes.

16. **On 18.2.2020** the Father had been interviewed at the United States embassy and following he had been granted the visa. The Mother had failed to appear for the interview.

17. On **20.2.2020** the Father had filed this claim.

18. On **24.2.2020** the Mother had filed an application to instruct the Father to provide translations of the statement of claim appendices (application no. 1). After receiving the Father's response, on **25.2.2020** I have instructed of rejecting the application:

> **"After reviewing the application and the response to it, and in light of the applicable law when conducting hearings concerning the Hague Convention (as part of which it is required to conduct a focused, rapid and straight to the point hearing), and since the documents in question are in English, and there is no dispute that both Parties (and the court) understand, and since the applicant herself is familiar with the documents and had signed some of them and such are known to her, the application is rejected.**
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> **I hereby exempt the respondent from translating the documents from English. Moreover, some of the documents are not required even for ruling purposes, so that the applicant's claim that she needs to "examine in-depth" the validity of the documents while the respondent seeks to prove by them the residence matter only, has also been considered by me, in order to ensure that both Parties' rights shall be duly maintained.**
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> **Should there be an application for an additional translation of a specific document I shall reconsider".**

19. **On 24.2.2020** the Mother had submitted an additional application (application no. 2) for issuing an order instructing the Father to provide the following documents: The agreement with the American venture capital fund translated into Hebrew, the agreement of waiver of shares due to violation of an undertaking translated into Hebrew and the employment agreement with the company as such is signed and translated into Hebrew. On **26.2.2020**, after receiving the Father's response and his attachment of documents I have instructed:

> **"After reviewing the application and after documents had been added to the application - the subject regarding of the application had been exhausted.**
>
> **The respondent has attached documents even without issuance of a ruling on so. The documents shall be added to the file.**
>
> **In light of my ruling on application no. 1, there is no reason to instruct of translating the documents as part of the proceedings.**
>
> **The applicant is of course entitled to translate the documents at her expense".**

20. **On 24.2.2020** the Mother had filed a third application (application no. 3) for dismissing the claim outright. As part of the pre-trial hearing that had been held on 27.2.2020, counsel for the Mother had agreed to the court's recommendation that her claims as part of this application will be deliberated upon as part of the judgment.

21. **On 26.2.2020** the Mother had filed a statement of defense for the proceedings.

22. **On 27.2.2020** a first hearing on the claim had been held, at the end of which the file had been scheduled for an early evidentiary hearing. As part of the hearing the Defendant had waived as aforementioned her arguments for dismissing the claim outright and her entire arguments will be examined in the judgment on their merits.

23. Following the hearing a number of several additional applications had been submitted by the Mother.

24. **On 3.3.2020** the Mother had filed an additional application (application no. 6) within which she had petitioned for the court to appoint an expert - a child psychiatrist with expertise in infancy in respect of the following issues: The damages expected to be inflicted on the Minor a result of detachment from her Mother; the damages that will be inflicted on the Minor due to the instability caused by moving from one country to another within short periods of time. After receiving the Father's response the Mother's response had been requested as well, and in her response the Mother further seeked to request that the court will instruct of appointing an expert also in respect of the damage the Minor had incurred, if any, merely by taking her out of the United States and her stay in Israel. The Father had objected to the application and it had been discussed at the end of the evidentiary hearing in presence of the Parties.

25. **On 4.3.2020** the Father had filed an application as part of which he had requested that the court will instruct the Mother to attach a photocopy of all of her entry visas to the United States (application no. 7). On 8.3.2020 the Mother had submitted a response to the application as part of which she had added photos of the visas she had been granted and had requested the appointment of an additional expert who will submit an expert opinion regarding her possibility to permanently reside in the United States, including her ability to work, also in the situation where the Parties are separated or are conducting divorce proceedings at the Rabbinical Court in Israel.

26. **On 4.3.2020** a hearing had been held at the Rabbinical Court on the Father's request for revoking the stay of exit order issued against him by the Mother. Upon conclusion of the hearing, the stay of exit order that had been issued against the Father had been revoked subject to depositing securities that had been determined by the court.

27. **On 5.3.2020** the Mother had filed an application (application no. 8) in which she had once again requested that the claim will be dismissed outright in lack of proof of the Californian law by the Plaintiff; alternatively she had requested that the court will issue instructions for proving the Californian law and that up to that date the proceedings will be suspended and the evidentiary hearing will be postponed.

28. **On 9.3.2020** the Father had submitted (in response to application no. 8) the expert opinion of Prof. Primer dated 8.3.2020 in respect of the foreign law in California (hereinafter: the "**Foreign Law Opinion on behalf of the Plaintiff**"). Additionally, the Father had submitted an opinion on behalf of the Parties' American attorney Michael S. Rosenthal dated 8.3.2020, who had handled for the Parties the process of obtaining the visas, for clarifying the Defendant's options to stay in the United States also given the Parties' separation (hereinafter: the "**American Attorney's Opinion in Respect of the Visas**").

29. **On 10.3.2020** the Mother had submitted an expert opinion on foreign law on her behalf by an attorney who is an expert on family law at... Jane Aceituno (hereinafter: the "**Foreign Law Opinion on behalf of the Defendant**").

30. **On 10.3.2020** an evidentiary hearing of the file had been held. Upon conclusion of the hearing the claims argued by counsels for the Parties had been heard in respect of pending applications requiring a ruling.

31. **On 10.3.2020** after the hearing in presence of the Parties I have issued my ruling regarding the following applications that had been submitted by the Mother: The Mother's application for appointing an expert regarding claims of damages the Minor will incur; the Mother's application for appointing an expert for examining her possibility to obtain a visa to the United States and its type; and the Mother's application for appointing an additional expert on the foreign law (in addition to the opinions on foreign law that had been presented by both Parties) by the court:

> "3. **The Mother's application for appointing an expert on the question of several damages she claims that the Minor will incur** - the Mother is requesting the appointment of a child psychiatrist with expertise in infancy who will submit an opinion on three issues:
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> The damages expected to be incurred by the Minor who is only one year and four months old as a result of detachment from her Mother should the court order of returning the Minor to the United States;
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> The damages that will be inflicted on the Minor due to the instability caused by moving from one country to another within short periods of time;
>
> The damages the Minor had incurred, if any, merely by taking her out of the United States and her stay in Israel
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> [...]
>
> 6. **After reviewing the application and after extensively hearing the Parties' arguments during the hearing before me, the application is to be denied.**
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> 9. Case law has been consistent over the years that it should be ensured that as part of proceedings pursuant to the Hague Convention, the court shall not deliberate on claims related to custody of the Minor, visitation rights, the parents' parental competence and the Minor's relationship with each parent. Also the matter of the alleged damage has been interpreted in a limited manner and main case law has been intended that claims of damages will be heard in the primary proceedings to be filed following the conclusion of the ruling om the Convention proceedings. The place to hear these claims, as such are raised, depends on the Hague Convention proceedings - or at the court of the Minor's habitual residence should it be ruled that illegal

estrangement had been conducted or at the court in the country he is staying at that time and it had been learned that illegal estrangement had not been conducted.

[...]

11. I have not been convinced that the damages claimed by the Mother in aspects regarding which the appointment of an expert had been requested are related to the direct aspects for proving damage pursuant to the Convention. Such are directly related to the Parties' conduct in these proceedings and the circumstances of the dispute between the Parties, of whether or not illegal estrangement of the Minor had been conducted. An appointment of an expert on these issues is not required and it will be possible to rule on such according to the Parties' evidence and their testimonies.

[...]

13. The Mother's claims in respect of damages are directly related to the ruling required on whether the Mother had conducted illegal estrangement. Moreover, I am also willing to assume as a starting point that the current situation is harmful for the Minor. However, the Mother's claim that should the court instruct of returning the Minor to the United States she will incur damage following the Mother's refusal to return to the United States is not a damage included under the Convention. It should be noted that the Parties have elaborated in detail, which I shall also address as part of the judgment, regarding the meaning of granting/not granting the Mother a visa to the United States.

[...]

17. I have not found within the broad factual foundation that had been presented to me so far that the Mother has established a sufficient evidentiary foundation in the aspects regarding which appointment of an expert had been requested. The meaning of appointing an expert as part of Hague Convention proceedings means delaying the proceedings and ruling on such for an additional and unknown period and diverting the hearing from matters pursuant to the Convention to issues of examining damages, which according to case law it is doubtful whether such are included within the definition of the damage exception

(as opposed to other damages that had been specified by the Mother, which have greater weight). These are not the main proceedings under the Convention and the proceedings before me are not to be turned into such.

See also: AFLA 6039/12 **John Doe vs. Jane Doe** [published in Nevo] (13.8.2012), Sections 3-4 of the honorable judge Danziger's judgment.

18. It should further be emphasized that these matters are even more true, as already at this stage it is clear that the Father has not attempted at any stage to separate or prevent contact between the Mother and their Daughter and it appears that he will be pleased if the Parties will jointly return to the United States.

20. It also appears that both counsels for the Parties according to their claims during the hearing before me regarding this application, each believes per his position that it is possible to obtain a ruling on the case without an expert's opinion, since their arguments had already addressed the Parties' questionings, and as part of such claims had been argued, which are more appropriate for the case's summations rather than for an interim application.

[...]

22. **In all concerning the Mother's request that an expert be appointed to examine the Mother's possibility to obtain a visa in the United States and the type of visa she may be granted** - this issue too is beyond the scope of the Convention. Moreover, the foundation in this matter had been extensively laid also through documents the Parties themselves had presented, including the document issued by the attorney who handled the visas of both of them in the United States. It should be noted that the Minor is a United States citizen and there is no prevention, and no one had argued that she is prevented to return to the United States.

23. Also according to the Mother she is eligible at least to a tourist visa at the first stage, which will enable her entry into the United States. Also he issue of the Mother's employment in the United States exceeds the Convention's boundaries, which focuses on the damage incurred by the Minor (rather than the parents) due

to her illegal uprooting from her habitual residence. In any event, this issue may be given various solutions and in various manners and does not require delaying the proceedings before me at this point.

24. **Thus, this application is denied as well.**

25. **Regarding the Mother's request that the opinions that had been submitted by both Parties concerning the foreign law are not sufficient and therefore an additional expert on the foreign law should by appointed on behalf of the court** - I shall address the issue of weight, admissibility, and relevance of the expert opinions on foreign law that had been submitted by each of the Parties as part of the judgment.

26. Proving the foreign law in the specific aspects of the Convention and as part of its limited procedural framework is factually proving imposed on the person claiming illegal uprooting. In our matter the Mother had provided on her own initiative an expert opinion of a foreign expert on her behalf, which had been added to the expert opinion the Father had submitted. So that the court also has a full picture in this regard that may be required as part of the judgment."

32. **On 15.3.2020** (after obtaining the hearing's transcribed protocol) an order for summations had been issued. As I have additionally noted in my ruling that: "**As a side note in the ruling, however not at its fringes - I believe that the Parties will be better off should the Parties promote at this specific time a comprehensive and meaningful agreement".** Such agreement had not been promoted.

33. I had hoped that during this period of "**overall chaos**" the parents will be wise enough to reach an agreement for their own good and for their Daughter's good, however since there is no consensus, it is required to rule on the disputes between the Parties.

34. **On 17.3.2020** the Father had submitted his summations.

35. **On 20.3.2020** the Mother had submitted an application for postponing the date of submitting her summations and extending their scope. The application had been forwarded for providing a response. On 24.3.2020 my ruling in respect of postponing the date for obtaining the Defendant's summations (that does not exceed the dates I have determined in practice in the ruling dated 15.3.2020). I

have denied the request for increasing the scope of summations in light of the fact that the Father's summations had already been submitted.

36. **On 29.3.2020** the Father had submitted (as part of application no. 9) confirmation of filing custody proceeding on his behalf to the court in ....

37. **On 30.3.2020** the Mother had submitted her summations. It should be noted that additional evidence had been attached as appendices to the Mother's summations without permission and upon conclusion of the evidentiary procedure. However, I believe that such submission should be permitted in light of the urgency and due to the nature of the claim and the certain relief granted in Hague Convention proceedings for proving certain issues. This evidence will be addressed further down the judgment.

38. Now, and after all of the aforesaid, a judgment is issued.

II. The Parties' Claims

The Father's Claims

39. The Father argues that all of the elements required in order to rule that illegal estrangement of the Minor are met, and her return to the United States, to ... should be ordered pursuant to the Hague Convention.

40. The Father claims that the Parties' habitual residence and the Daughter's habitual residence is in the United States. Therefore, the competent court in California, in .... is the place where all of the disputes in the Parties' issues are to be heard.

41. The Father argues that the Parties' visit in Israel had been for a limited and temporary period for arranging the visa in the United States, and therefore the Parties' status in the United States remained as it had been (continued payment of rental fees for the Parties' home and leaving all of their belongings there, continued leasing the car, continued payment for the Minor's kindergarten , payment for medical insurance, etc.

42. The Father argues that under the law in California and pursuant to the expert opinion on the foreign law that been submitted on his behalf he had been given the custodial rights applied in practice, and failure to return the Minor to the United States by the Mother constitutes a violation of these rights.

43. The Father emphasizes that the defenses under the Hague Convention do not hold true - neither the defense of consent nor the defense of grave concern.

44. The Father claims that the provision in respect of consent under the Convention does not hold true as he had never agreed to not returning the Minor to the United States and had not made peace with the Mother's actions, and immediately upon becoming aware of the Mother's actions he had filed the claim.

45. Regarding the claim of damage due to being separated from the Mother - the Father argues that the separation is under the Mother's control and stems from her conduct. The Father emphasizes that also according to the American attorney's opinion concerning the visas there is no prevention of the Mother's return to the United States. The Father emphasizes that the Mother is the one who chose by her actions denial of obtaining a visa to the United States by her failure to appear at the interview in the embassy.

46. In respect of the Mother's claim in the aspect of the emergency situation due to the corona virus, the Father argues that the Minor is an American citizen and has extensive and comprehensive health insurance in the United States, while in Israel she has no insurance at all. The Father had referred to data, which according to him, indicates that the percentage of contraction in California is lower than the percentage of contraction in Israel.

The Mother's Claims

47. The Mother claims that the fundamental elements required pursuant to the Convention had not been met and therefore the claim including all of its components should be rejected. The Mother argues that this is a futile claim as the Parties hold Israeli citizenship only, they do not hold American citizenship and do not have a US green card. The Mother argues that the Minor had not been abducted but is rather staying with both parents in Israel.

48. The Mother claims that both Parties chose to arrive in Israel in agreement, had enrolled the Minor in kindergarten, rented an apartment in Israel, are employed in Israel and have been continuously staying in Israel since 11/2019.

49. The Mother claims that the Minor's habitual residence is in Israel. The Mother claims in Section 52 of the statement of defense that: **"The Minor's residence, most of her life, had been next to the Defendant, so such is not a question of which country but rather should be viewed in a narrower manner and rule that the Minor's place is with her Mother".** The Mother claims that the stay in the United States had been for a limited period and dependent on ongoing consent of both Parties, and dependent on their continued living together. The Mother claims that the Minor had stayed in Israel during her brief life, long periods (the Mother had claimed in Section 38 of the statement of defense that such period had been 6 months out of the Minor's brief life of 16 months, in her summations she

had claimed that the 17 month old Minor had stayed in the United States 13 months (gross) (Section 2 of the summations)), and the arrival in Israel had been in agreement among the Parties. The Mother argues that the Minor did not blend in the United States and that "**her habitual residence is with her Mother**" (Section 71(6) of the statement of defense). In her summations she had claimed that the Parties consider Israel to be their habitual residence, and that the move to the United States had been temporary only due to the request of the investors in the Plaintiff's company, rather than for settlement purposes.

50. The Mother argues that the Minor does not have any affinity to the United States. The Minor is enrolled in a kindergarten in Israel. The Minor lives near her extended family, is learning to speak Hebrew and has no affinity, even if she once had such, to the United States.

51. In the statement of defense the Mother had elaborated extensively on the Parties' relationship and claimed that the Plaintiff had treated her with emotional and financial violence.

52. The Mother argues that no illegal move of the Minor took place since the Parties had arrived in Israel in order to examine the option of returning to the United States by obtaining residence and work visas. However in light of the Parties' agreement to divorce her possibility to return to the United States had ended, and therefore the Parties' agreement to return to the United States may no longer be considered joint agreement among the Parties. She additionally argues that since she does not have the possibility to be granted a visa to the United States, in fact there is no date of return to the United States and her stay in Israel is part of the Parties' agreement and she may not be considered as illegally detaching the Minor.

53. The Mother has claimed in her summations that pursuant to the provision setting forth that the jurisdiction in the Parties' Prenuptial Agreement is solely of the courts in Israel authorized to hear the Minor's issue and per the Israeli law only. The Mother argues that under the relevant foreign law custody proceeding in the Minor's matter cannot be held at .... Additionally the Mother claims that the opinion on the foreign law on behalf of the Plaintiff is to be rejected as Prof. Primer is not an expert on California law. The Mother repeatedly argues in the summaries the court had been required to refer to the court in ... and together with it examine whether the court is authorized to hear this case.

54. The Mother claims that since she has expressed her wish to divorce the Father and he agreed, she may not stay in the United States and such should be deemed as his coming to terms with and agreement to the Minor's stay in Israel with her. The Mother furthers specifies in Section 11 of her summations that her stay with the

Plaintiff endangers her emotional health and since she has no affinity to the United States, other than her marriage to the Plaintiff, and once this marriage had been terminated, she can no longer reside in the United States.

55. The Mother argues that the grave concern exception is met in two issues: Irreversible psychological damage by detaching the Minor from her Mother since the Mother has no possibility to return to the United States; true health danger posed to the Minor due to the emergency situation caused by corona virus.

56. The Mother claims that accepting the claim means ruling of an intolerable situation in two cases (Section 96 of the statement of defense): The first case - even if a solution is found that enables the Defendant to stay in the United States means that the Defendant's continuing life will be under ongoing emotional, financial, intolerable, and inhumane distress that will also affect the best interests of the Minor. The second case - should the claim be accepted, the Defendant will stay in Israel while the Minor will be separated from her and an "**intolerable, illogical and unreasonable situation will be formed, constituting grave and irreversible damage incurred by the Minor due to separation from her Mother.**"

III. Discussion and Ruling

III(1) The Minor's Habitual Residence

57. Section 4 of the Convention prescribes as follows:

> **"The Convention shall apply to any child whose habitual residence had been in an engaging country prior to any violation of custody or visitation rights; the Convention shall cease to apply upon the child's reaching the age of 16".**

58. There is a dispute among the Parties as to the Minor's habitual residence. The Father claims that the Minor's habitual residence is in California. The Mother claims that the Minor's habitual residence is with her: **"The Minor's residence, most of her life, had been next to the Defendant, so such is not a question of which country but rather should be viewed in a narrower manner and rule that the Minor's place is with her Mother or in Israel** (Section 52 of the statement of defense).

59. Concerning the Mother's claim that in light of the Minor's age, the issues should be examined in a limited manner and it should be ruled that the Minor's habitual residence is with her Mother or in Israel - I cannot accept this claim. The Convention had not distinguished between Minors' ages for examining habitual residence. Accepting the Mother's claim means that any young child will not be included within the boundaries of the Convention, and thus there is no basis under the Convention and case law that had interpreted it. Moreover, accepting this interpretation encourages abduction in practice should the examination be of which parent took more care of the Minor. Additionally, the Mother's claim that "the Minor's habitual residence, most of her life, had been by with the Defendant" is on the custody and visitation rights level and should not be included under the Convention.

60. **The Supreme Court had ruled that examination of "habitual residence" requires a pure factual objective examination as part of which weight will also be be given (however not only) to the parents' intentions and decisions they had made, however the emphasis is on the child's point of view, "the Minor's world map":**

> **"The position, according to which habitual residence is an issue of "pure fact", means that the examination should be comprehensive and thorough. The result of the pure factual examination is that at times a certain fact will be granted greater weight in the final weighting of all the data and at times another fact will prevail.**
>
> **A purely factual examination must be broad and inclusive. The overall facts shall certainly include the parents' intentions and the decisions they made, however no independent outside weight should be given to their intentions for examining the facts. The intention is also part of the factual picture. Naturally, the intention datum refers the examination to the parents. Here too the true weight should be given to the precise term Habitual Residence of the Child - which places the child in the limelight. In this sense it is required to listen to the child. This is not in the sense where the Israeli court will ask him of his habitual residence as we are not discussing a subjective issue, but rather in the somewhat abstract objective sense. According to this perspective it is important to examine the child's current life; however the conclusion may include the parents' intention, which is also relevant as a fact. Of course, there are other important considerations such**

> **as the purpose of the move to another country, limitation of the period of the move and the child's age as well. However note, the child's habitual residence is not the issue required to be examined, but rather his habitual residence with all that entails.**
>
> **Focusing on the facts, as opposed to combining an examination of the facts and examination of the intentions, will lead to different results that are not based on the existence of competing legal theories, but rather on the basis of the unique overall facts of each case. It should also be emphasized that examination of the facts too is not conducted from the parents' perspective but rather from the child's perspective, by an objective examination of this point of view. That is, as the court is required to place its finger on the world map, point at one of the countries and rule that "this is the Minor's habitual residence" it is required to see before it the Minor's world map, based on the mosaic facts comprising it".**
>
> **A purely factual examination while focusing on the child that includes his parents' intentions also complies with the judgment on the Matter of Gabay as well as recent case law issued at this court according to which no barrier is to be established between the facts and the intentions. The examination is also compatible with case law in foreign countries, which are committed too, like Israel, to the Convention's wording and purposes."**

See: AFLA 7784/12 Jane Doe vs. John Doe [published in Nevo], Section 9 under the honorable judge Hendel's judgment (28.7.2013).

See additional reference repeating this examination as part of AFLA 5041/19 **Jane Doe vs. John Doe** [published in Nevo] (8.8.2019), Sections 4-6 of the honorable judge Hendel's judgment.

61. **In our case the evidence and questioning of the Parties lead to the conclusion that the Minor's habitual residence had been in California, in .....United States.**

62. A pure factual examination incorporating the the parents' intentions **from the Minor's perspective** testifies that the Minor's habitual residence is in the United

States. I have examined the evidence as a weave of three parts including the Minor's point of view and the parent's intention:

Evidence had been presented that the Parties had acted intentionally and explicitly for renouncing their residence in Israel.

Evidence that following, the parents had explicitly, in agreement and intentionally acted for establishing permanent residency in the United States for them and for the Minor.

And finally - evidence that the Parties' visit to Israel had been for an agreed upon, limited and temporary period only, both for them as well as for the Minor.

63. **Evidence of the Parties' renouncement of Israeli residence -**

- Both Parties had signed renouncement of Israeli residence at the National Insurance Institute (attached as Appendix II to the statement of claim). In these documents both Parties had noted that they are moving to the United States for an "**unknown**" period. The Defendant had stated in the document she had signed for the NII that: **"Both myself and my husband had obtained a work visa... and therefore we wish to renounce residence in order to avoid paying taxes both here as well as in the United States. The date of return is unknown".** In questioning the Defendant she had confirmed that she had signed the document for the NII (however had raised reasons - which had not been proven - as this document has no meaning) (see: protocol dated 10.3.2020 pp. 64, lines 34-36, pp. 65, lines 1-6).

- The Plaintiff had rented out the apartment he owns in Israel on 4.8.18 (attached as Appendix III to the statement of claim, and see also: Protocol of cross examination of the Plaintiff dated 10.3.2020 pp. 18, lines 30-34). This apartment served for the Parties' residence until moving to the United States.

- The Parties had not taken with them any significant furniture from Israel to the United States (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 19 (lines 1-14).

- The Defendant had left her place of work in light of the move and had duly obtained her rights (confirmation of employee's retirement had been attached as appendix IV to the statement of claim).

- The Plaintiff had signed an employment agreement with an American company under which it had been stated in Section 1.2 of Appendix I to the agreement that the company shall pay for all of the expenses of the move as well as

provisions for financing visits to Israel only (had been attached as Appendix VI to the statement of claim).

- The Parties had sold the cars they had in Israel (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 19, line 25).

- In the summary of the Defendant's therapy (attached as Appendix II to the statement of defense by the Defendant's therapist, that the Defendant had left Israel with the Plaintiff: "... **and then left Israel for relocation of her husband for a certain period, as she is pregnant and gave birth to her Daughter in the United States".**

- The Plaintiff had noted in his cross examination that the Parties' move from Israel had been a joint decision and also seeing the best interest of the Minor who will be born in the United States: "**We thought that this is a good opportunity for the family to move there, we have talked about her having American citizenship, which will be good for her life**" (see: Protocol dated 10.3.2020 pp. 17, lines 26-29), and that the Parties had not determined that the period will be limited to (pp. 17, lines 35-36, pp. 18, lines 1-6).

- The Defendant had confirmed in her cross examination that: **It was clear that we are not going there for a month**" (see: Protocol dated 10.3.2020 pp. 65 (line 16).

- The Parties had held a "farewell party" for their friends due to the move (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 20 (lines 18-19).

- The Parties had terminated standing orders they had in Israel (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 21 (lines 26-35).

64. **<u>Evidence of the Parties' and the Minor's Habitual Residence in the United States -</u>**

- The Minor was born in the United States on 15.10.2018 (birth certificate had been attached as Appendix V to the statement of claim).

- the Minor holds American citizenship only (the Minor's passport had been attached as Appendix V to the statement of claim).

- Both Parties had obtained a residence and work visa in the United States for two years (a copy of the Plaintiff's visa had been attached as Appendix XIII to the statement of claim; copies of the Defendant's visas had been attached by her on 9.3.2020 as part of application no. 7).

- As part of the American attorney's opinion in respect of the visas he had noted that he has been handling for the Parties the visa issues since 2018. Additionally the American attorney had noted that the Defendant holds a B-1/B-2 visa, which is in force until 23.2.2025.

- The Plaintiff has an employment agreement with an American company (attached as Appendix VI to the statement of claim, as he had also attached additional documents regarding his employment and its terms as part of application no. 2 dated 26.2.2020). During the cross examination of the Plaintiff he had noted that on the company's part he is required to stay within the ... coastal area in the United States, and in the event where his leaving the company is unjustified he may pay a substantial fine due to so (see: Protocol dated 10.3.2020 pp. 12, lines 29-36, pp. 13, lines 1-5, and further down on pp. 15-16).

- The Parties had rented a house for their residence (the rental agreement is attached as Appendix VIII to the statement of claim). Later on they had extended the rent. The Parties had also searched for an additional permanent residence (correspondences between the Defendant and real estate agents had been attached as Appendix IX to the statement of claim) (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 24 (lines 8-24).

- The Parties had purchased full furniture for them and for the Minor in the United States (rather than moving furniture from Israel). The Plaintiff had estimated that they had spent for so approximately $25,000 (see: Protocol dated 10.3.2020, cross-examination of the Plaintiff pp. 19, lines 1-14, pp. 48, lines 13-19).

- The Parties held a permanent car for their use as part of car-leasing (confirmation of the car's insurance had been attached as Appendix X to the statement of claim. The Parties' address had been noted in the insurance documents as being in ...

- All family members, including the Minor have health insurance in the United States (confirmation had been attached as Appendix XI to the statement of claim). Appendix XI to the statement of claim had included correspondence between the Defendant herself with the insurance company within which she is seeking to add the Minor to the health insurance. The Defendant had confirmed during her cross examination that the Minor has health insurance in the United States and does not have insurance in Israel (see: Protocol dated 10.3.2020 pp. 67 (lines 32-35).

- During 6/2019 the Defendant started working in the United States (the Defendant's employment agreement had been attached as Appendix VII to the

statement of claim). The Defendant had confirmed this fact in her cross examination (see: Protocol dated 10.3.2020 pp. 68 (lines 21-26).

- The Parties had opened a joint bank account in the United States (the Defendant had confirmed in her cross examination the continued activity of the account, see: Protocol dated 10.3.2020 pp. 82 (lines 9-17).

- During 9/2019 the Minor started attending kindergarten in .....

- The Minor since her birth had been in Israel several short times for visits only (see cross examination of the Defendant, Protocol dated 10.3.2020 pp. 45 (lines 16-18).

- Also as part of the settlement of dispute proceedings the Defendant had initiated in Israel during 1/2020 the Minor's information had been noted according to her United States' passport only. As part of the applications for stay of exit orders the Defendant had submitted to the Rabbinical Court (attached as an Appendix XIX to the statement of claim) the Defendant had confirmed that the Parties had moved to reside in...: "**The Parties left Israel and moved to** ..." (However later she had noted that such had been, according to her, a move for a limited period) (see for example: Section 5 of the application for a stay of exit order against the Minor). Additionally the Defendant had confirmed that the Minor holds American citizenship only, and dose not hold Israeli citizenship (Section 13 of the application for a stay of exit order against the Minor).

65. **<u>Evidence that the Parties came to Israel for an Agreed Upon, Limited and Temporary Period, them and the Minor -</u>**

- The Parties had purchased a "round trip"family airline ticket to the United States (attached as Appendix XV to the statement of claim as well as an updated postponed airline ticket had been submitted on 12.3.2020 as part of application no. 10 by the Plaintiff).

- The purpose for the Parties arrival in Israel had been for conducting an interview at the embassy for the visas purposes only, rather than for re-settlement (correspondence with the attorney who had represented the Parties regarding the visas recommending arrival in Israel for arranging the visas had been attached as Appendix XIV to the statement of claim).

- Also as part of the settlement of dispute proceedings the Defendant had initiated in Israel during 1/2020 (attached as Appendix XIX to the statement of claim) the Defendant had confirmed that the Parties came to Israel for a limited period and for renewing the visa: "**Three months ago the Parties had arrived in Israel,**

rented an apartment for their residence and even enrolled the Minor in kindergarten in Israel, <u>in order to renew their residence and work visas</u>" (Section 8 of the application for a stay of exit order against the Minor) (underlined emphasis - added).

- During the hearing at the Rabbinical Court on 4.3.2020 the Defendant had explicitly confirmed that the Parties came to Israel only for extending the visa" **In November 2019 we arrived in Israel, <u>in order to extend the visa</u>, however our relationship had deteriorated** (Protocol of the hearing at the Rabbinical court dated 4.3.2020 had been attached by the Plaintiff on 10.3.2020 as part of an application no. 6 (underlined emphasis - added).

- The Parties still continue to pay rental fees for their home in ... All of their belongings had been left at home as they were. The Plaintiff had confirmed in his cross examination that the rental fees stand at $5,000 per month and the Parties continue to pay the rental fees in the United States also during their stay in Israel (see: Protocol dated 10.3.2020 pp. 25 (lines 6-22). The Defendant confirmed the continued payment off rental fees (pp. 69, lines 15-17), as well as confirmed that the contents of their home stayed in .... (pp. 69, Lines 27-32).

- The Parties still continue to pay for the Minor's kindergarten in ... (Correspondence with the kindergarten teacher regarding the payment had been attached as Appendix XII to the statement of claim). The Plaintiff had confirmed in his cross examination that the kindergartens' fees stand at $2,700 per month and the Parties continue to pay the payment also during their stay in Israel (see: Protocol dated 10.3.2020 pp. 25 (lines 6-22). the Defendant had confirmed in her cross examination that she was the one who took care of continued payment for the kindergarten (see: protocol dated 10.3.2020 pp. 60, lines 30-35, pp. 61, lines 1-10).

- The Parties continued to maintain regular contact with the Minor's kindergarten teacher the United States in respect of the date of the Minor's return to ... (The name of the WhatsApp group with the kindergarten teacher is: ("---- **back**") (attached as Appendix XII to the statement of claim). The Defendant herself had responded to the kindergarten teacher on 31.1.2020 that the delay of the return is related to the date that had been scheduled for the interview at the United States embassy.

- The Parties' car had been left in .... at their parking space. The Plaintiff had confirmed in his questioning that he is continuing to pay for the car as well as for the parking space at his place of work (see: Protocol dated 10.3.2020 pp. 27 (lines 1-8).

- The Parties had rented a temporary apartment for their residence (had been attached as Appendix XVI to the statement of claim). Within the rental agreement it had been stated that the rental period is between 18.11.2019 through 3.1.2020. The agreement's heading had been: "**Short-term rental contract**". The contracts had been extended in light of the postponement of the interview at the United States embassy until 25.2.2020.

- On 29.1.2020 the Parties had signed an agreement with "----" kindergarten for the Minor's stay there for two months only (attached as Appendix XVII to the statement of claim). In the agreement vis-a-vis the kindergarten it had been stated: **"--- will attend the kindergarten for approximately two months and therefore the parents are not required to provide advanced notice".** On 30.1.2020, the Minor started attending the kindergarten in Israel in accordance with these agreements. The Defendant had confirmed in her questioning that enrollment of the Minor in kindergarten had been for a temporary period (see: pp. 73, Lines 27-35).

- The Minor does not have health insurance in Israel and she is not registered at any HMO. When the Minor required medical care the Parties had contacted a private physician (the tax invoice provided by the private physician noting that the Minor resides in ... had been attached as Appendix XVIII to the statement of claim.

- The Parties' health insurances in the United States are continued to be paid for (see: Cross-examination of the Plaintiff, protocol dated 10.3.2020 pp. 25, lines; cross examination of the Defendant pp. 70, lines 16-17).

- Both Parties continue to be employed in Israel by the same companies at which they which they were employed in the United States (see: Cross examination of the Plaintiff, protocol dated 10.3.2020, pp. 52 (lines 35-36). The Defendant had confirmed that: "**I work from the offices here in Israel at the same workplace however at the Israeli branch**" (see: pp. 61, Lines 25-26).

- Within the letter delivered by counsel for the Defendant to the United States embassy on 13.2.2020 she had noted that the Parties had arrived in Israel for renewing the residence and work visas in the United States (had been attached to the court file by the Plaintiff on 27.2.2020 and had presented at the hearing that day).

- In cross examination of the Plaintiff he had noted that: "**We had not discussed at any point that we are returning to Israel and intend to divorce**" (see: Protocol dated 10.3.2020 pp. 6, lines 26-27, as well as pp. 7 lines 26-27).

- The Plaintiff had elaborated in his cross examination on how all of the Minor's belongings had remained in the United States and the terms of her present residence: "**The child has lived her entire life there, where she has friends, her toys there, her room there, her bed there, all she knows, her books. All she knows here, by the way, it should be understand that the child currently resides in a rented apartment, she kind of sleeps on a balcony as there is no other place and at deteriorated conditions, and she has a kindergarten there with children she is attached to including the kindergarten teacher who is loving, and assistants who know her, today I had held a conversation with the kindergarten teacher in the United States and she is expecting her return telling us how much she is waiting for the arrival. The mere fact that she is prevented from returning there, in my opinion, does not do her any good". (See:** Protocol dated 10.3.2020 pp. 31 (lines 15-22).

- The Parties, during their stay in Israel, had continued using the joint bank account in the United States. The Defendant had confirmed in her cross examination the continued activity of the account and use thereof (see: Protocol dated 10.3.2020 pp. 82 (lines 9-17).

66. The Mother had not claimed and had not presented any evidence that the Parties' intention had been to return and settle permanently in Israel. She had confirmed in a number of manners and on various dates that the Parties had arrived in Israel for a short period to renew the visa only. Later she had confirmed that she was the one who had changed her mind regarding her and the Minor's return to the United States (as shall be specified below also in the Chapter " Date of (Non) Return").

67. **In the Defendant's summations she had raised additional arguments, some new and had submitted evidence that had not been submitted previously regarding a number of issues which I will address below.**

68. **No-action by the Parties to obtain a green card** - in Section 8 of her summations the Defendant claims that the Parties had not acted for obtaining a resident permit/green card, by so the Defendant claims that it had been proven that the Parties' intention had not been to settle in the United States. The Defendant had attached as Appendix 2 to her summations an e-mail message from attorney Jason Susser dated 20.3.2020, addressed to her. The email message included only one line:

"**A person on a L-1 can start the green card process at any time. They do not have to wait one year once they've arrived**".

It is not clear from the aforementioned e-mail what the attorney had been asked and what are the facts that had been presented to him.

As has been emphasized above, the test that had been set in case law has changed and currently the required examination does not focus on the parents' intention, but rather on the Minor's point of view: **"A purely factual examination must be broad and inclusive. The overall facts shall certainly include the parents' intentions and the decisions they made, however no independent outside weight should be given to their intentions for examining the facts". (See:** AFLA 7784/12 Jane Doe vs. John Doe [published in Nevo], Section 9 under the honorable judge Hendel's judgment (28.7.2013))(underlined emphasis - added).

It should be added that the Parties had not stayed illegally in the United States, and had arranged their status in the United States in a careful manner, end even prior to the move. They had been taken care of by an American attorney who had taken care of their mattes since 2018, they both had a residence and work visa (see: The opinion of the American Attorney's Opinion in Respect of the Visas). Attorney Rosenthal, the American attorney who had handled their issues had explicitly stated in his opinion that the Defendant also currently holds a B1-B2 visa, which permits her to stay in the United States, and is in effect until 23.2.2025. All this indicates that the fact that the Parties had not acted for obtaining a green card does not change the overall evidence, which had been proven in court.

69. **The Plaintiff's Driver's License** - the Defendant claims in her summations that the Plaintiff had not acted for obtaining an American driver's license, which testifies in an additional manner that he had not intended to settle in the United States. To her summations the Defendant had attached to Appendix I a copy of the Plaintiff's Israeli driver's license in effect until 9.11.2029, which had been renewed on 26.11.2019 (after the Parties' arrival in Israel) as she had also attached in Appendix III information taken from an unofficial website ("israelisabroad.com" - on the manner of obtaining an American driver's license.

The Plaintiff had been asked in his cross examination as to the matter of not obtaining an American driver's license (see: Protocol dated 10.3.2020 pp. 23 (lines 13-35). He had confirmed that he had not obtained an American driver's license. However, he had explained that the Israeli license serves as an international license as well. This fact had not been contradicted by the Defendant and she had not raised any claim that the Plaintiff drove illegally or without a license in the United States. I do not believe that this fact combined with all the other evidence, constitutes a change of the overall evidence that had been proven in court. The evidence indicates of settling in the United States carried much greater weight than not obtaining an American driver's license.

70. **Termination of the Parties' car Lease Agreement** - the Defendant had attached to her summation in Appendix IV the Parties' car leas agreement as well a a letter dated 31.1.2020, this letter states that the contract had ended at the beginning of the year and had not been renewed. Such evidence could have been attached by the Defendant for evidence. However, actually attaching such proves that both Parties had signed the lease agreement for an ongoing period rather than for a single month, for example, their address in the agreement is their home in ... as they also continued paying for the leasing also during their stay in Israel, meaning that they had expected quick return to the United States rather settling in Israel,

71. **Failure to obtain an American credit card** - the Defendant had attached in Appendix V to her summations a copy of both Parties' credit cards issued by CITIBANK, and claims that the Parties had not acted for establishing credit rating in the United States as proof of non-settling. This matter had not been raised previously and the Plaintiff had not been asked on this matter during his cross examination. Examination of the cards that had been attached indicates that they are in effect until 2024 for both Parties (rather than for a short period). Moreover, actually the Defendant's answer during the cross examination, that also during the Parties' stay in Israel she is continuing to make use of the joint bank account in the United States rather than an Israeli account, testifies to settling in the United States and that the Parties' ongoing financial conduct also while their stay in Israel is conducted through the American bank account:

> "**Q: Do you have a bank account in the United States?**
> **A: Jointly with the Father.**
> **[...]**
> **Q: Have you closed it? Have you requested to leave it? Anything?**
> **A: No.**
> **Q: Do you also withdraw money from it now and then?**
> **A: Yes, I live here; I am completely financially dependent on my husband [...]"**

(See: Protocol dated 10.3.2020 cross-examination of the Defendant pp. 82, lines 9-16).

72. **The Minor's Language -** under Section 8(VII) of her summations the Defendant notes that the Parties continued speaking Hebrew at home and with the Minor and claims that that they had not acted for ensuring that the Minor will learn English. I am willing to accept as a premise that the Minor's primary language is Hebrew, despite her very young age and as she does not yet talk fully. However, there is no

dispute that the Minor had been enrolled in kindergarten in the United States, at which English is spoken (and it had not been argued otherwise), so the claim that the Parties "had not acted to ensure that the Minor will learn English" cannot be accepted. The Plaintiff had confirmed that the Minor speaks a few words in Hebrew (adapted to her age) as well as that she is exposed to videos in English and Hebrew, as the Parties talk to her in Hebrew (see: Protocol dated 10.3.2020 pp. 53, lines 26-36, pp. 54 (lines 1-4). The Minor's language is one component of evidence within the overall evidence that had been proven in respect of the Minor's map of life.

73. **Continued Accumulation of Social Rights in Israel** - the Defendant claims in Section 8(VIII) of her summations that the Parties' continued accumulation of social rights in Israel is a most significant issue and indicates that the Parties viewed their lives and future in Israel. The Defendant had attached in Appendix VI to her summations a report on the rights in her name dated 12.3.2020 from ... stating that the policy is active. The report does not state the ongoing deposit. Moreover, the confirmation indicates that such is a policy dated 22.3.2010, meaning prior to the Parties' marriage. The Defendant had not elaborated on the matter any further: Do the Parties have provisions at their current places of employment in the United States, at what rate, what is the rate of current provisions in Israel, does it only maintain the policy or is more significant. Additionally, the Defendant had not addressed Appendix IV, which had been attached by the Plaintiff to the statement of claim, confirming that the Defendant had left her place of work in light of the move to the United States and had duly received her rights. It should be noted that when the Plaintiff had been asked in his cross examination in respect of his continuation of payment for life insurance in Israel, he had explained that this is required under the Parties' Prenuptial Agreement (which as aforementioned had been signed in 2015, shortly prior to the date of their marriage) (see: Protocol dated 10.3.2020 pp. 22 (lines 20-24).

74. **The Situation of the Plaintiff's Company** - under Section 9(b) of her summations, the Defendant claims that the Parties' stay in the United States had not been for establishing their life there, but rather for expanding the Plaintiff's company by constructing an extension in the United States, which will later continue to operate also without the Plaintiff (as she says). The Plaintiff had been questioned about the company's situation and the request that he will reside in the United States (as opposed to, for example, that he will work in Israel and travel frequently to the United States) and he replied: **"The agreement had been in mid 2018. As part of this agreement, they insisted that I will move to the united States.** They thought that this is the right thing for the company in order to promote it. **Within this framework, it had been very important for them to include a provision in the agreement stating that I have to move to the United**

United States" (see: protocol dated 10.3.2020 pp. 12, lines 34-36, pp. 13, line 1). Later the Plaintiff had been asked whether in light of the global economic crisis due to the corona virus there is a chance he will lose his job and answered: **"I do not know how to answer you on theoretical questions. I know that currently there is a very clear agreement. By the way, the company as you understand, is successful and has evolved since then, it has a brighter future. By the way, in light of everything that is happening, it is not relevant, however I will just note this by word, that in light of all that is happening currently concerning people who are unable to fly freely, this greatly serves our business since we are a platform for doing business remotely, and therefore the future is very bright for the company.** The Defendant argues that the court had not allowed her to study in depth the issue of the company's financial situation and therefor the Defendant's claims in her testimony should be accepted. I cannot accept this argument - the cross examination of the Plaintiff lasted for about two hours with endless patience of this panel, while focusing on the issue of the Hague Convention rather than on other issues. The cross examination of the Plaintiff had been recorded on over 53 pages of a transcribed protocol on a wide range of various issues that speak for themselves.

75. Moreover, the success or failure of the company is only one uncritical parameter among the great variety of the evidence that had been presented. The Defendant had not contradicted the Plaintiff's arguments that lately funds had been raised and the type of the company is actually appropriate for the current time of financial crisis as specified by the Plaintiff. Furthermore, these claims raised by the Defendant do not include reference to the comparison between the financial crisis in Israel and the financial crisis in the United States. Additionally, these arguments are forward-looking, while the Convention examines the situation in the past and the present situation. It should be further noted that the financial crisis the Defendant referred to may times in her summations is not included among the exceptions related to damage pursuant to the Convention, as the damage that should be examined according to it (and as shall be specified below) is not the damage that had been or will be incurred by the parent, but rather physical or psychological harm to a Minor or placing the Minor otherwise in an intolerable situation.

76. **Thus, and after examining the evidence and testimonies, it is indicated that examination of the Minor's world map leads to the conclusion that the Minor's habitual residence is in the United States, in California, in the city of ...**

III(2). Had Unlawful Estrangement been Conducted by the Mother?

77. Section 3 under the Convention sets forth when non-return of a Minor will be deemed an action unclouded within the Convention:

> "**3. Estrangement or non-return of a child shall be deemed illegal where -**
>
> **(a) Such violates custodial rights granted to a person, institution or any other party, either jointly or separately, under the laws of the country that had been the Minor's habitual residence shortly before his estrangement or non-returned, well as**
>
> **(b) During his estrangement or non-return the same rights had been exercised in practice, whether jointly or separately, or would have been exercised had it not been for the estrangement or non-return.**
>
> **The custody rights stated in Subsection (a) may arise particularly by virtue of law, a judicial or administrative ruling or an agreement of legal validity pursuant to the laws of that country".**
>
> "**5. For the purposes of this Convention -**
>
> **(a) "Custody Rights" - including rights referring to the child's body and in particular the right to determine the child's place of residence;**
>
> **(b) "Visitation Rights" - including the right to take a child for a limited period to a place other than his habitual residence".**

78. As aforementioned, it had been ruled as part of the Chapter "The Minor's Habitual Residence" that the Parties' arrival in Israel had been for renewing the visa only and for a limited period. Now it is required to examine the date that may bee deemed the date of (non) return of the Minor to the United States. Additionally, and as a prerequisite it is required to examine whether the Father's custody rights had been violated.

I. The Date of (Non) Return

79. The **Father** argues that the date of non-return had commenced upon the Mother's notification in a number of manners and on dates closely around his filing the claim, that she does not intend to return to the United States with the Minor.

80. The **Mother** argues that since she does not have any possibility to return to the United States in lack of an appropriate visa, she should not be deemed failing to return the Minor. The Mother further claims that the Father's behavior towards her prevents her from returning to the United States. Additionally the Mother claims that the agreement to live in the United States had been valid so long as the Parties were living together as a family, and now as they are going to divorce, there is no reason for continue living together in the United States.

81. In order to examine whether there is a date that may be deemed the date of non-return of the Minor it is required to once again examine the factual chain of events since the Parties' arrival in Israel. As aforementioned, it has been ruled that the arrival in Israel had been for a limited time only and had not been for re-settling in Israel.

82. **On 21.11.2019** the Parties and the Minor had arrived in Israel in order to arrange their residence and work visas in the United States. The plane tickets the Parties purchased had been "round trip" tickets. The ticket's planned date of return had been 3.1.2020. Later, due to delays in conducting the interview at the United States embassy the Parties' date of return according to the ticket had been postponed (however not canceled).

83. The interview at the United States embassy scheduled for December had been postponed to 18.2.2019. The interview had been intended for both Parties. The Minor, as aforementioned, has US citizenship, and she does need any visa for entering the United States again.

84. The Mother had attached in Appendix 3 a transcription of a conversation between the Parties dated 12.12.2019. According to the Defendant the transcription of the conversation had been designed for proving the Plaintiff's grave and hurtful behavior towards her. Merely by recording a conversation in early 12/2019 may testify of the Mother's plan on her future conduct also regarding the Minor.

85. **On 29.1.2020** the Mother had initiated settlement of dispute proceedings at the Rabbinical Court. As part of the settlement of dispute proceedings the Mother had

requested and obtained a stay of exit order against the Father and a stay of exit order against the Minor.

86. Examination of the application for settlement of dispute and the applications that had been filed as part of such (attached as appendix XIX to the statement of claim) indicates that already on the date of filing the application for settling the dispute, the Mother's representation to the Rabbinical Court had not been accurate and could have predicted the Mother's refusal to return to the United States.

87. As part of the settlement of dispute proceedings, the Mother had indicated that the Parties' addresses are in Israel, on ... St., in ..... As part of the application for issuance of a stay of exit order the Mother noted that the Father had notified her that he intends to take the child to the United States, also without her, and this within a few days. By doing so, the Mother had presented a representation in which she had failed to specify the true facts as to the Parties' residence in the United States, their arrival for a limited time (but rather only further towards the end of the application). Moreover, the Mother had stated that: "[..] **The respondent had decided to move to ... for a limited period of several years".** The impression arising from this Section is that only the Plaintiff had moved to the United States. Only in the following Section the Defendant notes that the Parties had left Israel and moved to ... Furthermore, the Defendant had presented at the Rabbinical Court a representation of permanent return to Israel and had noted that the Parties had rented an apartment for their residence (and had failed to note that such had been a short-time lease), stated that the Parties had enrolled the Minor in kindergarten (as the enrollment took place on the same day she had filed the application for settlement of dispute proceedings and the Minor started attending kindergarten on the following day).

88. The Defendant had claimed at the Rabbinical Court that the respondent's behavior put an end to the possibility of family life and the Defendant's return to the United States with him. Later the Defendant had specified in length that the Plaintiff does not intend to enable the continuation of the Minor's residence in Israel, and she wishes to prevent the possibility that the Father will take the Minor to the United States, and therefore is petitioning for her stay of exit order at once. In doing so the Defendant had expressed her explicit desire to prevent the return of the Minor to the United States. The manner of presentation of the issues may establish a representation where the Minor's habitual residence is in Israel, and that the Father seeks to change the permanent situation and take the Minor to the United States.

89. In her cross examination the Defendant had justified the presentation of the situation at the Rabbinical Court (see: Protocol dated 10.3.2020, pp. 74-76).

90. Additionally, in the cross examination of the Mother she had confirmed that at the time of enrolling the Minor in kindergarten on 29.1.2020 she had already made her decision not to return to the United States with the Minor, and she chose consciously not to tell the Father of so:

> "**Q: [...] <u>On January 28, while you are enrolling her in kindergarten, did you know that you are not going back?</u>**
>
> **A: At that point, <u>yes. I made a decision that I want to divorce him.</u>**
>
> **Q: <u>So you are hiding this fact from him.</u> You are not telling him, 'what are you senselessly talking about for a month or two?' you are not telling "I am not going back"?**
>
> **A: <u>I chose not to confront him, I confronted him two or three days after I have opened the file, and it is my right to choose when I confront him and expose the issues to him.</u> As if we have not held 20 thousand conversations on our discontinuing the relationship".** (Underlined emphasis - added).

(See**:** Protocol dated 10.3.2020 pp. 77 (lines 3-11).

91. Additionally the Mother had confirmed in her cross examination that she had decided not to go for the interview at the embassy yet at the time she had initiated the settlement of dispute proceedings:

> **"Attorney Moran: [...] When did you decide not to go to the interview?**
>
> **The witness, Ms. ---: <u>I decided around the time of opening the case and told him so in an open manner that there is not any reason to go, that I will not obtain the visa, and if on our part we are conducting divorce proceeding, there is no reason for me to go, I will simply not obtain such.</u> It is not as if I arrive and I will obtain a different visa, and I had <u>notified them that I do not intend to arrive</u>, and that I am talking about myself only, as well as shared,**
>
> **Q: Why have you not really notified only that you do not intend to arrive?**
>
> **[...]**

A: **Because at that moment, was it a mistake or not? I did not try to sabotage his visa at any point. All that had been sent, it had been said that it is relevant only with respect to me, and at that moment, yes, there had been a ruling of the Rabbinical Court that he is detained and that it concerns our matter and I shared. Was it a mistake or not? I don't know, it could be, and maybe I really should have appeared for the interview and tell them there the same thing. I would have said exactly the same things, and it would have resulted in nothing".** (Underlined emphasis - added).

(See**:** Protocol dated 10.3.2020 pp. 79, lines 23-35, pp. 80 (lines 1-2).

92. **On 13.2.2020** the Mother had delivered through her counsel a letter to the United States embassy (added by the Plaintiff to the court file on 27.2.2020 after being presented at the hearing that day), in which she had notified that she does not intend to appear at the interview that had been scheduled and she does not intend to return to the United States. Additionally she had explained to the embassy that she had initiated legal proceedings and that she had issued a stay of exit order against the Father and against the Minor, as well as according to her the proceedings in Israel are expected to be complex and difficult. In this letter (its contents had been presented as part of the factual background), the Mother had noted explicitly that: **"My client had made it clear that she does not intend to return to the United States, and she is continuing her life in Israel. In order to do so and in order to preserve her rights, my client had submitted as part of the legal proceedings, [...] Stay of exit of the Parties' shared Daughter from Israel. [...] Since as aforesaid the Parties are headed towards divorce, and my client is staying in Israel with the Minor, she will not fly, whatsoever, with Mr. --- to the United States"** (Underlined emphasis - added).

93. **On 18.2.2020** the Father had been interviewed at the United States embassy and following he had been granted the visa. The Mother had failed to appear for the interview.

94. On **20.2.2020** the Father had filed this claim.

95. During the cross examination of the Mother she had replied that she would not return to the United States even should the court instruct of returning the Minor to the United States, and in her clear words: "**I am staying in Israel**" (see: Protocol dated 10.3.2020 pp. 63, lines 4-12, as well as further: pp. 64 Lines 6-12). The Mother claims that she is prevented from traveling due to the lack of a visa, however she had not addressed the fact that by her own actions she had prevented obtaining the visa, and had not acted in any manner of her own initiative to examine an alternative option for obtaining the visa.

96. As part of Section 11 of her summations the Mother had specified her position regarding the Plaintiff's claim that her lack of cooperation regarding obtaining the visa is what establishes her being prevented from returning to the United States rather than real prevention: **"Accepting the Plaintiff's claim as if the Defendant's refusal to return to the United States is her fault establishes a situation where the sinner is awarded. The Plaintiff had abused the Defendant and now she must return to live with him under the same roof, as staying with him endangers her emotional wellbeing.. It is clear that the Defendant does not have any affinity to the United States, other than her marriage to the Plaintiff, and once this marriage has ended, the Defendant cannot reside in the United States, and therefore had failed to show up for the interview at the embassy".**

97. As part of the ruling I have issued on 10.3.2020 after the evidentiary hearing I have addressed the Mother's request that an expert be appointed for examining the Mother's possibility to obtain a visa in the United States:

> **"22. <u>In all concerning the Mother's request that an expert be appointed to examine the Mother's possibility to obtain a visa in the United States and the type of visa she may be granted</u> - this issue too is beyond the scope of the Convention. Moreover, the foundation in this matter had been extensively laid also through documents the Parties themselves had presented, including the document issued by the attorney who handled the visas of both of them in the United States. It should be noted that the Minor is a United States citizen and there is no prevention, and no one had argued that she is prevented to return to the United States.**
>
> **23. Also according to the Mother she is eligible <u>at least</u> to a tourist visa at the first stage, which will enable her entry into the United States. Also the issue of the Mother's employment in the United States exceeds the Convention's boundaries, which focuses on the damage incurred <u>by the Minor</u> (rather than the parent) due to her illegal uprooting from her habitual residence. In any event, this issue may be given various solutions and in various manners and does not require delaying the proceedings before me at this point.**
>
> **24. Thus, this application is denied as well."**

98. **It should be noted that in the US Attorney's opinion regarding the visas, who had handled the visas of <u>both</u> Parties from 2018, the <u>various</u> possibilities available to the Mother to obtain a residence visa also given the Parties' separation had been set out.**

99. It should be noted that pursuant to the Convention it is also not required to provide an expert opinion on this matter and such had also been proven beyond what is necessary. Both Parties had legally resided in the United States, had legally been employed in the United States, their Daughter is an American citizen and that they had arrived for obtaining an up-to-date visa. **The Defendant chose not to appear for the interview at the embassy and chose not to examine the possibilities for her legal return to the United States.**

100. In practice, no real action, or any honest attempt on behalf of the Defendant had been made to examine whether or not she is entitled to return to the United States and at what terms. Vis-a-vis her claim that has been argued since the onset of the proceedings that she is prevented from returning to the United States, there is the opinion of the attorney who had handled both Parties, specifying more than one manner to her permanent stay in the United States, after the Parties' separation. The Defendant had not presented any opinion to the contrary.

101. The Defendant's request that the court appoint an expert on visa law in respect of her (as the Minor is not related to this matter at all), had been denied as aforementioned, providing the reasons for my ruling dated 103.2020. Also now, as I have examined the issues as part of the overall picture, and in light of the Defendant's assertive claims that she does not wish to return to the United States in any event, I have not been convinced that this application of the Defendant had been submitted in good faith, with an honest and real wish to resolve the issue of her return to the United States.

102. Moreover, no one is requiring the Defendant to return to family life with the Plaintiff or live with him under the same roof. The goal is to return the Minor to her habitual residence.

103. It should be further noted that it is clear from the cross examination of the Plaintiff that he wishes that the Defendant will return with him and the Minor to the United States and does not seek in any manner whatsoever to prevent the Defendant's return or G-D forbid alienate her from the Daughter (see, for example: Cross examination of the Plaintiff, protocol dated 10.3.2020, pp. 11 lines 14-18).

104. The Defendant's claim of lack of affinity to the United States is puzzling in light of the above concerning the Minor's habitual residence, the Minor's citizenship

and the Defendant's place of employment (see more details under the Evidence Chapter as to the Parties' and the Minor's habitual residence in the United States).

105. In practice the Defendant seeks to add an exception that is not included under the Convention regarding her stay at the Minor's habitual residence after being illegally removed by her. The Mother by her actions is preventing or at least not acting for examining and obtaining a residence visa in the United States as required under law.

106. Moreover, case law that had interpreted the Convention had also addressed situations in which the alienating parent is under criminal charges in the country of origin, or may be deported from it, and the matter had not prevented returning the Minor to his habitual residence. For example, it has been explicitly stated that even if the alienating parent is expected to be deported as a result from his return to the country of origin, such shall not prevent returning the child to his habitual residence (see: AFLA 741/11 Jane Doe vs. John Doe [published in Nevo], Section 25 under the honorable judge Arbel's judgment (17.5.11).

107. A document that had been published recently by the Hague Convention regarding private international law "**Guide to Good Practice**" concerning the interpretation and implementation of the Hague Convention particularly with regard to analysis of the grave concern (hereinafter: the "**HCCH Guide to Good Practice Document**"), reference had been made also to the issue of raising claims of lack of visas of the alienating parent. It has been explicitly stated there that lack of action by the alienating parent or his avoidance from taking the measures required for the visa's purposes, cannot establish a situation where later that parent will claim that damage had been incurred by the Minor or that he is prevented from returning to his country of origin and therefore the grave concern exception holds true pursuant to the Convention:

> **"It needs to be emphasized that, as a rule, the parent should not – through their inaction or delay in applying for the necessary immigration approvals – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish grave risk"** (Underlined emphasis - added).

See:

Guide to Good Practice, Part VI – Article 13(1)(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Pp. 45, Section 68 ii.

https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

108. The Mother has not acted in any real and reliable manner to examine whether she is entitled to duly obtain a residence and work visa in the United States. She had posed a fait accompli before the Father on of her non-return resulting not due to real prevention of her return but rather due to her explicit wish not to return. Such conduct is in bad faith and meets the criteria for non-return of the Minor to her habitual residence.

109. Under these circumstances and in view of the above, the date of non-return may be deemed commencing the Defendant's failure to appear for the interview at the embassy on 18.2.2020, although even prior to so she had announced explicitly that she has no intention to return to the United States. By the Defendant's failure to appear for the interview she had prevented by her actions her possibility to obtain a residence visa in the United States and her agreed upon return and had announced explicitly that she objects also to the Minor's exit from Israel and her return to the United States.

110. **Under these circumstances, following 18.2.2020, the date on which the Mother had not appeared for the interview at the embassy, the Mother explicitly refuses returning the Minor to the United States, and this date may deemed the date of non-return.**

II. Had the Father's Custody Rights Been Violated?

111. Section 14 of the Conventions provides that regarding proof of the foreign law under Hague Convention proceedings that: "When ascertaining whether a estrangement or non-return had taken place illegally, as their meaning under Section 3, the judicial or administrative authorities of the required country **are entitled to refer directly to the laws of the country** in which the habitual residence of the child is located, as well as judicial or administrative rulings of that country, whether or not such had been formally acknowledged in that country, **this without requiring special proceedings to prove that law or acknowledged foreign rulings, which would have been required if not for this provision."** (Emphasis added).

112. **In our case, the foreign law to be proven is the law in the state of California.**

113. Both Parties have submitted opinions on the foreign law. **On 9.3.2020** the Father had submitted (in response to application no. 8) the expert opinion of Prof. Primer dated 8.3.2020 in respect of the foreign law in California (hereinafter: the "**Foreign Law Opinion on behalf of the Plaintiff**"). **On 10.3.2020** the Mother had submitted an opinion on foreign law on her behalf by an attorney who is an

expert on family law at... Jane Aceituno (hereinafter: the "**Foreign Law Opinion on behalf of the Defendant**").

114. **The Father** argues that according to the opinion on foreign law, per the simple wording of the law applicable in California as well as in accordance with previous case law in Israel, his custody rights have been violated.

115. **The Mother** has raised 3 main claims regarding the foreign law:

1. The Mother claims that the opinion on the foreign law on behalf of the Plaintiff is to be rejected as Prof. Primer is not an expert on California law.

2. The Mother claims that the Minor is subjected to the jurisdiction clause in Section 11.4 of the prenuptial agreement between the Parties and therefore only Israeli law applies, and the courts within the Tel Aviv District are those authorized to hear the agreement between the Parties and in matters regarding the Minor.

3. The Mother argues that under the foreign law custody proceeding in the Minor's matter cannot be held at .... The Mother repeatedly argues in the summaries the court had been required to refer to the court in ... and together with it examine whether the court is authorized to hear this case.

116. The Convention had recognized the immediate need for obtaining a judicial ruling for returning Minors to their countries of origin. For doing so, several mitigating provisions had been set forth for simplifying the process, optimize it and promote it quickly. The same was done regarding the proof of foreign law. For this matter the Convention explicitly states that the court **may <u>directly</u> refer to the foreign law even without requiring special proceedings to prove the foreign law.**

117. The Father has quoted in his summations the applicable law in California, the **California Family Code,** under which it has been stated in Section 3010(a) that both parents are entitled to custody of the child:

> "**The Mother of an unemancipated Minor child and the Father, if presumed to be the Father under Section 7611, are equally entitled to the custody of the child**."

118. Examining the wording of the law in California indicates that at this time legally speaking **both** parents have an equal right to custody of the child.

119. Also previous case law in Israel has ruled that pursuant to the law in California both parents have an equal right to custody:

> **<u>"The California Family Code, Section 3010(a) sets forth that the Mother and Father of a child</u> (if it is proven that he is the**

> **Father, and this is not in dispute in our case) <u>are equally entitled to custody of the child</u>. <u>This indicates that prior to the estrangement</u> (and disregarding the agreements at this stage) <u>the Plaintiff had the rights custody</u> of the children by virtue of law."** (Underlined emphasis - added).

See**:** FC 103880/99 John Doe vs. Jane Doe [published in Nevo] (24.4.2001), pp. 12 of the honorable judge Shohat's judgment. This judgment had been cited in FA 2070-07-19 A v. G [published in Nevo] (17.7.2019) Paragraph 30 of the judgment, and its rulings had been identical regarding the applicable law.

120. Also in a judgment recently issued by the Supreme Court (which rejected LTO on FA 2070-07-19 mentioned above) it had been explicitly stated regarding California law, that should it be found that non-return had taken place, this constitutes a violation of custody rights under California law:

> **"There is no dispute as to the provisions set forth under the section regarding "violation of custody rights under the relevant country's law", meaning, <u>there is no dispute that should California be the habitual residence of the Minors - failure to return them by the applicant violates the respondent's custody rights, and therefore is illegal."</u>**

See: FA 5041/19 Jane Doe vs. Jane Roe [published in Nevo] (8.8.2019), Section 4 of the honorable judge Hendel's judgment.

121. **Within the opinion on foreign law on behalf of the Plaintiff** that had been submitted by Prof. Primer it had been determined regarding California law the following issues that are consistent with the case law cited above:

> 1. **Pursuant to United States law, custody laws are determined according to the laws of that state, which is the child's habitual residence. In California, the relevant law is the California Code 2011 Family Code, Division 8, Custody of Children.**
>
> 2. **<u>The legal term "Custody" in California refers to the cluster of rights and duties of parents towards their children</u>, which includes the physical aspect ("Physical Custody") - which is similar to "Accommodation" under Israeli law - as well as the legal aspect ("Legal Custody") - which is similar to "Guardianship" under Israeli law.**
>
> [...]

3. **Pursuant to Section 3010(a) of the aforementioned law, so long as there is no judgment ruling otherwise, both parents of a Minor have custody rights towards him. This Section had been implemented a number of times by the family courts in Israel.**

[...]

4. **Consequently, pursuant to California law, each parent has the right to determine the habitual residence of the child, and no one of the parents may change it without the consent of the other or given court consent.**

5. **These rights also grant to each of the parents "Custody Rights" pursuant to Section 5 under the Convention regarding the civil aspects of international child abduction - which had been signed in Hague on October 25, 1980 [...]".** (Underlined emphasis - added).

122. **The Defendant's Claim that Prof. Primer's Opinion Should be Rejected Since He is not an Expert on California Law** - in Section 13 of her summations the Defendant specifies her reasons as to why the Plaintiff's opinion on foreign law should be rejected: According to her, Prof. Primer is not an expert on California law, the Defendant had not been given the possibility to address the opinion, and the court had been required to examine in depth the foreign law rather than based on an attorney's opinion "whose main writings regards Halakha issues" (in her words). The comment regarding Prof. Primer'e expertise is out of place. Furthermore, the opinion had been available to the Defendant promptly upon submission thereof. In response, the Defendant had submitted an opinion on foreign law on her behalf. The Defendant emphasized also during the evidentiary hearing that the opinion on foreign law on her behalf is preferable due to the expertise of the attorney in California who wrote it. The date of the evidentiary hearing had been known, and the Defendant opted to submit an application for appointing an expert on behalf of the court who will determine the foreign law rather than the two opinions that were submitted. So that all of her arguments in respect of this matter had been discussed and she has been given her day in court.

123. I have noted in my ruling dated 10.3.2020 (the main points of which had been presented in the factual background and the legal proceedings) that proof of the foreign law in the specific aspects of the Convention and as part of its limited procedural framework is factually proving imposed on the person claiming illegal uprooting. In our matter the Mother had provided on her own initiative an expert opinion of a foreign expert on her behalf, which had been added to the expert

opinion the Father had submitted. Thus there is no reason for appointing an expert on behalf of the court for this matter. Both Parties had provided an opinion on the foreign law, and therefore it is not clear what is the purpose of the third opinion the Defendant is requesting. Not only that such is not required under the Convention, it would have prolonged the proceedings and unnecessarily complicate them. If the purpose is that an additional opinion will state otherwise than the two others, it is certainly not a reason to appoint an expert on behalf of the court.

124. I believe that the Plaintiff's opinion on the foreign law has met the rules required for proving the foreign law. However, I am willing for the purposes of the judgment and in light of that stated in the opening part of this part to assume that the Plaintiff's opinion on the foreign law should be disregarded (without casting any aspersions on the expert's expertise).

125. Also disregarding Prof. Primer's opinion, the clear and explicit words of the California law placed before me- which pursuant to the Convention the court may refer to it directly even without holding special proceedings for proving it. **The Defendant does not dispute the wording of the law, has not refuted it and did not claim that it is incorrect.**

126. **The opinion on the foreign law on behalf of the Defendant** that had been submitted by an attorney specializing in family law in ... Jane Aceituno , had not discussed directly what is the California law regarding violation of custody rights, but rather the question of jurisdiction and the question of whether the court in California has jurisdiction to hear the Parties' issues. It should be emphasized that the expert on behalf of the Defendant had emphasized in the closing clause of the opinion that should there not be another court that may hear the Parties' issues, including if another court will rule that it does not have jurisdiction to hear such - the court in California will have jurisdiction to hear the Parties' issues:

> **"Also, a California court can exercise custody jurisdiction if <u>all the other courts that may have jurisdiction have declined to exercise it</u>.**
>
> **[…]**
>
> **And finally, <u>if no court of any other state would have jurisdiction under these criteria, California may exercise jurisdiction</u>".** (Underlined emphasis - added)

127. Even according to the Defendant in her summations under Section 13 with respect to the time required for a child's residence in the United States prior to submitting a custody claim there (as she refers to Section 10 of the opinion on foreign law on behalf of the Plaintiff), under circumstances where a child is out of the country due to the unlawful estrangement, the absence is deemed temporary absence and does not change the jurisdiction to hear his matter.

128. It should be emphasized that both opinions of the Plaintiff and the Defendant have exceeded the necessary and both had "proposed" the case law that the experts believe should be given in this case in accordance with the data each party had presented them with. I have not given any weight to these positions, as the opinion is required for proving a factual issue, it being the foreign law, and does not require an alternate or proposed legal analysis for the proceedings.

129. **The Mother's claim that the Minor is subjected to the jurisdiction clause in Section 11.4 of the prenuptial agreement between the Parties and therefore only Israeli law applies and the courts within the Tel Aviv District are those authorized to hear the agreement between the Parties and in matters regarding the Minor** - the Mother claims that in light of the Parties' Prenuptial Agreement the proceedings held between the Parties should be heard in Israel only. Section11.4 of the prenuptial agreement prescribes as follows: **"Israeli law only shall apply to this agreement, and the courts with the ... District shall be the only ones authorized to interpret and rule on it".** The Mother had not addressed in her summations the fact that she had initiated proceedings at the Rabbinical Court and had noted that she intends to submit there a claim for divorce with inclusions. Meaning, the Mother too is not acting pursuant to the Parties' Prenuptial Agreement regarding property matters.

130. Additionally, I have examined the wording of the Parties' Prenuptial Agreement. This agreement does not include explicit reference to the application of the Hague Convention, and in particular the prenuptial agreement does not set any exception regarding this Minor providing that the Father is not entitled to initiate proceedings in accordance with the Hague Convention or that the Minor's habitual residence is Israel or that there is no right to hold legal proceedings on the Minor's issues at another habitual residence of the Parties.

131. The agreement is a "classic" prenuptial agreement and I have not found there the far-reaching interpretation **denying** the Father's right of access to the courts or preventing him from arguing a claim of illegal estrangement.

132. It should be further noted that the Plaintiff had not been asked on this issue specifically during his cross examination.

133. Moreover, I have not found where the Minor's claimed right pursuant to the prenuptial agreement precedes her other rights under the Convention. This matter has not been addressed by the Mother.

134. **The Mother's Claim that Under the Foreign Law Custody Proceeding Cannot be Held in the Minor's Matter in ... and Therefore Her Refusal to Return Cannot be Deemed Illegal Estrangement** - the Mother repeatedly argues in the summations that the court had been required to refer to the court in ... and examine whether the court is authorized to hear this case. As aforementioned, I believe that the opinion on foreign law on behalf of the Defendant as specified above eliminates this claim argued by the Defendant and explicitly specifies that indeed the court in ... has jurisdiction.

135. To this it should be added that the Father has already filed a custody claim there on 27.3.2020 (confirmation of initiating the proceeding had been attached on 29.3.2020 as part of application no. 15).

136. The Mother had not referred to case law ruling that as part of Hague Convention proceedings it is required to examine the possible jurisdiction to hear custody issues. Thus the emphasis is placed on examining whether or not the custody rights had been violated pursuant to the foreign law. Had it been learned that under the foreign law the Mother had not violated the custody rights, indeed the claim would have been denied.

137. **Therefore I rule that in light of proving the foreign law applicable in California the Father has custody rights in the same manner as the Mother does. In this situation, the Mother's unilateral determination on the Minor's stay in Israel and her explicit refusal to return to the United States, she should be deemed violating the father's custody rights under the Convention.**

III(3). Do Any of the Convention's Exceptions for Returning the Minor to ... Hold True?

I. The Exception of Consent - Section 13(a) of the Convention Schedule

138. As part of the statement of defense the Defendant had briefly stated in Section 91 that she believes that the Plaintiff's consent in advance or in retrospect may be viewed in two aspects: I. When the Defendant had notified the Plaintiff that she wishes to divorce, according to her the Parties could not have been in the United States, and therefore the Plaintiff made peace with the Minor's stay in Israel, and

that all he had done was attempt to renew the visa only for himself. Additionally, the Plaintiff's consent to divorce the Defendant had formed a situation where the Defendant cannot be in the United States and the Plaintiff had been aware of so, and thus his consent to divorce constitutes making peace with the Defendant's stay in Israel and thus it should be concluded that he agrees to the minor's stay with the Mother in Israel.

139. Case law has ruled in respect of the exception of consent, that explicit consent or an initiated action is not required and consent may be concluded also by implied behavior. See: FA 741/11 Jane Doe vs. John Doe, Section 21 under the honorable judge Arbel's judgment (17.5.11).

140. In her summation the Defendant had not specified the existence of the aforementioned exception, and she should be deemed abandoning this argument.

141. Beyond the necessary it should be noted that the Plaintiff's behavior throughout the period in Israel cannot be construed neither as consent nor as making peace. See specification in the previous part concerning the Parties' arrival for a limited and temporary period (under the chapter discussing the habitual residence of the Minor) as well as in respect of the date of (non) return of the Minor. An examination of these dates indicates that not only had the Plaintiff not agreed to the Minor's stay in Israel, he had also vigorously acted since the moment he understood that the Defendant does not intend to return to the United States with the Minor. It should be noted that after the Defendant had failed to appear for the interview at the embassy on 18.2.2020 the claim had been filed just two days later on 20.2.2020.

142. Therefore I rule that the consent exception had not been met.

II. The Exception of Grave Concern - Section 13(b) of the Convention Schedule

143. Section 13(b) of the Convention Schedule states that even where it had been proven that there had been illegal estrangement, it is not required to instruct of returning the minor to his habitual residence if it is proven that: **"There is grave concern that returning the child will expose him to physical or psychological harm or otherwise place the child in an intolerable situation".** This exception is referred to in case law as the "**grave concern exception**".

144. **The Defendant** claims that the grave concern exception is met in two separate matters:

    a. Damage that may be incurred by the Minor due to separation from her Mother.

b. The health risk posed to the Minor due to the corona virus.

145. The burden of proof of this component is imposed on the one claiming it. Case law has ruled that this is a very heavy burden of proof.

See: AFLA 1855/08 Jane Doe vs. John Doe [published in Nevo], Section 33 under the honorable judge Procacia's judgment (8.4.08).

146. The Convention' foundation is that the best interest of the child requires his immediate return to the country from which he had been abducted. Non-return of the child due to one of the exceptions is reserved for rare and extreme situations only.

See: AFLA 1855/08 Jane Doe v. John Doe [published in Nevo], Section 23, Section 29 under the honorable judge Procacia's judgment (8.4.08).

147. Case law has interpreted the exception of grave concern the minor will incur otherwise in a manner compatible with Hague Convention proceedings and in a narrower manner that examination of the child's best interests, which is customary and required as part of ordinary custody cases:

> **"The Convention embodies agreement to international order, vital in the global world in order to prevent "one may do as he pleases" (Book of Judges, XVII, VI). This principle temporarily prevails over the basic principle of the "ordinary" best interests of the child, meaning, it is required first and foremost (other than exceptions) to comply with the duties of international order; and as stated by the president Barak "these are special and narrow "best interests of the child". It is not the ordinary framework of the 'best interests of the child' deliberated upon in ruling on permanent custody rights. These are "the best interests of the child" examined as part of first aid of restitution" (the Matter of Gabay, pp. 251-252; compare CA Stagman vs. Bork, PD XLIX(2) 431, 437-438 (1995) under the judgment issues by judge A. Goldberg (hereinafter the Matter of Stagman)).**
>
> **XXI. Unlike adoption or custody cases, the ruling as part of proceedings pursuant to the Convention is characterized by impermanence and does not rule in respect of the child's permanent residence and custody. The relief granted as part of such, according to its purpose, is an emergency relief in abduction cases, which is intended to be quick, urgent and immediate A sort of "first aid" for preventing the results of the**

> **abduction, the remedy for which is restitution of the situation, in order to prevent damage as a result of delay of the return (the Matter of Torna, pp. 46; the Matter Gabay, pp. 251).**
>
> **[...] "A child is not an object, and should not be moved from place to place in order to determine the place for hearing the rights related to him. The child himself has rights, and his best interests require that ruling on his rights will be held at his habitual residence, and will not be affected by abduction actions" (the Matter of Gabay, pp. 251-252 of president Barak's judgment). The assumption underlying this approach is that any court of a country that is a party to the Convention, will consider the best interests of a minor as a primary principle when ruling on the issue of custody (the Matter of Dagan, pp. 271-272), and thus his return to the country from which he had been abducted does not adversely affect his best interests, and the theory does not prevent that following an in-depth and comprehensive examination by the competent court it will be ruled, ultimately, that the place of the child is to be the country to which he had been taken. In any event, the foundation as aforementioned is international order and maintenance thereof."**

See: AFLA 2270/13 Jane Doe vs. John Doe [published in Nevo], Sections XX-XXI under the honorable judge Rubinstein's judgment (30.5.13).

1). Damage the Minor May Incur Due Separation From Her Mother

148. **The Mother** argues in Section 14 of her summations that the Minor is a 16 month old infant, deeply bonded to her Mother. Since the Defendant has no legal manner to stay and work in the United States, she is prevented from returning to the United States. Even should a visa will be granted for holding the proceedings, she has no means for living and funds for holding proceedings. The meaning of accepting the claim means separation between the infant and her Mother. The Defendant repeats that it had been required to appoint an expert to examine the damage the Minor will incur due to separation from her Mother.

149. **The Father** argues that the damage claimed by the Mother is under her control and is the result of the Defendant's behavior sand her refusal to return to the United States. The Father argues that the Defendant has an entry visa to the United States and she is not prevented from returning there. The Father reminds that the Mother is the one who had canceled the interview scheduled for her at the embassy for obtaining the visa and she cannot rely on her refusal to return with

the Minor as a defense argument that the separation will inflict damage on the Minor.

150. The intention of the grave concern exception is that such is concern of returning the Minor to the country she had been abducted from rather concern of her estrangement from the alienating parent:

> **"Additionally <u>it had been ruled that the exception in question refers to damage that will be incurred by the Minor as a result of her return to the country from which she had been removed</u>, <u>and not</u> as a result of returning her to the parent from whom she had been abducted, <u>or her separation from the abducting parent</u> (see: OCR 1648/92 Torna vs. Meshulam PD XLVI(3) 38, 46 (1992)). Accordingly, in many cases the claim of parental incapacity of a parent requiring the remedy by virtue of the Convention is rejected, as well as the claim that the abducting parent is expected to face deportation or significant financial difficulties as a result from returning the child to the country he left (see for example: CA 5532/93 Gunzburg vs. Greenwald, PD XLIX(3) 282 (1995)).**" (Underlined emphasis - added).

See: FA 741/11 Jane Doe vs. John Doe [published in Nevo], Section 25 under the honorable judge Arbel's judgment (17.5.11).

151. **<u>Regarding the Defendant's claim that the court should have appointed an expert to assess the damage the Minor will incur due to separating her from her Mother</u>** - in my ruling dated 10.3.2020 the Mother's requ est to appoint an expert in this aspect had been deliberated upon. I have examined the issues again as the full picture has been revealed and I have not been convinced that such an appointment was unnecessary. As part of the ruling I have specified the reasons why the appointment of such an expert is unnecessary as part of a Hague Convention case (see extensive details of the overall ruling in the Factual Background Chapter):

> "**11. I have not been convinced that the damages claimed by the Mother in aspects regarding which the appointment of an expert had been requested are related to the direct aspects for proving damage pursuant to the Convention. Such are directly related to the Parties' conduct in these proceedings and the circumstances of the dispute between the Parties, of whether or not illegal estrangement of the Minor had been conducted. An appointment of an expert on**

these issues is not required and it will be possible to rule on such according to the Parties' evidence and their testimonies.
[...]

14.There is no dispute that the Parties arrived in Israel for the purpose of renewing the visa and adjusting such to work in the United States. There is no dispute that the Father appeared for the interview scheduled for both Parties at the United States embassy and his visa was renewed. The Mother had failed to appear for the interview and had notified the embassy via her counsel that she is not arriving for the interview (as well as the reasons for her avoidance to appear due to the legal proceedings between the Parties).

15.To the file had been added the claims of both Parties regarding the Mother's possibility to return to the United States. During the hearing today the Mother had honestly responded that she will exhaust all legal proceedings required so that the Minor will not return to the United States, and she herself does not intend to return to the United States. To this had been added the claim of lack of visa and detachment of the Minor from the Mother. It is the Mother's full and important right to exhaust the legal proceedings, and this right is granted to her under law and it will be maintained.

16.However it should be emphasized - that even according to the Mother there is no legal prevention of her entry into the United States. Whether or not the Mother will be able to work, and the issue of holding the legal proceedings in the United States, I will address as part of the judgment. This matter does not require an expert in terms of damages incurred by the Minor and it is more related to the Mother's decision not to return to the United States. A decision that of course she may change at any given moment and of course depending on the results of the legal proceedings (as should the claim be dismissed she will not be required to do so). The question of the Mother's joining the return to the United States - yes or no - is not related to the question of what had been the Minor's habitual residence and whether she had been unlawfully estranged. It is more related to distribution

of custody and visitations of the Minor with her parents rather than under the scope of the Convention. "

152. The issue of the Mother's possibility to return to the United States on a suitable visa has been deliberated upon in detail above, see the Chapter "Date of (Non) Return". However I shall pinpoint here a number of issues in the aspect of the damage to be inflicted on the Minor as argued by the Mother.

153. The Father, as aforementioned, had attached the opinion of the American attorney regarding the visas. The Mother had not refuted the aforesaid opinion. Indeed she claimed in her cross examination that she had examined the issue, however had not presented any evidence to the claimed examination. Moreover, during her cross examination the impression had been that the prevention is not by the immigration authorities, but rather the prevention is the Mother's explicit unwillingness to return to the United States.

154. The Mother had not presented any real action she took for examining the possibilities of her stay and work in the United States following the Parties' separation. She had claimed during her cross examination that she had examined it vis-a-vis her place of work (see: Protocol dated 10.3.2020 pp. 61 (lines 30-36) - which is the same place of work in the United States and currently she is employed at its extension in Israel - however had not attached anything in this respect.

155. **The Mother** had been questioned during her cross examination, and had explicitly responded that she is allowed to enter the United States. This, contrary to that argued by her in the court documents that "she is prevented from returning to the United States":

Q: [...] <u>Please only confirm for me that you may enter the United States</u>, I am not talking about work now.

A: <u>As a tourist only</u>, while I cannot declare of any residential address other than a hotel.

[...]

[...]

A: <u>I guess I may enter.</u> It depends on the interview I will have at that location. <u>This is how I had entered in September. I declared that I am entering as a tourist.</u>

Q: In September you entered on a tourist visa, right?

A: Tourist.

Q: You had entered the United States and had stayed there throughout the period until?

A: Two months.

Q: And did you work during this period?

A: The truth is that I have worked during that period without an actual agreement [...]". (Underlined emphasis - added).

(See: Protocol dated 10.3.2020 pp. 62 (lines 4-18).

156. Later in her cross examination the **Mother** had contradicted herself again and answered that she is prevented from traveling, although she had confirmed that she could stay on a tourist visa:

"**Q: <u>Incidentally, the full picture is really, that despite the fact that you may enter and despite the fact that you have a spouse who is working</u>, earning and able to pay for child support if necessary, <u>will you really, when the court will rule on returning the Minor to the United States</u>, the Child to the United States, <u>you really won't go?</u>**

A: <u>Unfortunately yes, since I am prevented from traveling. I cannot enter the United States.</u>

Q: I did not ask why. I asked, won't you go?

A: So I am explaining that unfortunately yes. I will not be able to travel, since the moment he leaves her there, <u>I cannot stay there</u>. <u>I can stay there for six months on a tourist visa if I will be able to enter.</u>" (Underlined emphasis - added).

(See: Protocol dated 10.3.2020 pp. 63 (lines 4-12).

And later in her cross examination when she was asked whether she will go even only for six months, which also according to her is possible, she had answered that she will not go:

"Attorney Moran: [...] You just said that you may go for six months.

The witness, Ms. ---: As a tourist only, without being able to legally work and stay.

Q: As a tourist only without being able to work, you can go for six months. Are you going back for six months or are you staying here?

A: No, I am staying in Israel.

Q: You are staying in Israel?

A: Yes.

Q: Even if the court will order of returning the Child and he takes the Child?

A: So I will first appeal to the Supreme Court and I will do everything I can to prevent returning the Child. Furthermore, if the Child is there, I cannot see her. If the Child is here, there is nothing to prevent him from seeing her, since he can stay here and no damage will be inflicted on him, except for financial damage.

Q: The answer is that you're not returning?

A: Unfortunately I will not be able to return. It prevents me from returning." (Underlined emphasis - added).

(See: Protocol dated 10.3.2020 pp. 64 (lines 4-18).

157. The **HCCH Guide to Good Practice** document includes reference also to a situation where the uprooting party raises a claim that returning the minor to the country of origin will inflict damage on the minor due to his separation from that parent who had not returned with him to the country of origin. It has been stated there that a situation cannot be allowed where a parent determines that he will not go back to the country of origin and then claim of inflicting damage of grave consent caused merely by his unwillingness to return:

"In some situations, the taking parent unequivocally asserts that they will not go back to the State of the habitual residence, and that the child's separation from the taking parent, if returned, is inevitable. In such cases, even though the taking parent's return with the child would in most cases protect the child from the grave risk, any efforts to introduce measures of protection or arrangements to

> **facilitate the return of the parent may prove to be ineffectual since the court cannot, in general, force the parent to go back. It needs to be emphasised that, as a rule, the parent should not – through the wrongful removal or retention of the child – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish the existence of a grave risk to the child."**
>
> (Underlined emphasis - added).

See:

Guide to Good Practice, Part VI – Article 13(1)(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Pp. 47, Section 72.

https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

158. **I have been convinced that the key to both formation of the damage as well as resolving such - is in the hands of the Defendant.** The Mother has failed to prove that the prevention of traveling to the United States is related to the United States authorities or the Father. The case here is not one of the cases that had been discussed in case law, which had also been given a solution, where the alienating parent is facing criminal proceedings due to the abduction and his concern of the return is justified (and also there the possibility had been given to be assisted by the central authority for assistance in arranging the visa) (see for example: CLTA 7994/98 Dagan vs. Dagan PD LII(3) 254, 283). This is not the case before me.

159. **Therefore, as the claim that damage may be incurred by the Minor due to her estrangement from her Mother is entirely dependent on the Mother's will, the grave concern exception does not hold true.**

2). The Health Risk Posed to the Minor due to the Corona Epidemic

160. The Mother had requested in the bottom clause of the summations in Section 16 that the court will instruct of postponing the ruling in the case and instruct of prohibiting the Minor's exit from the country until the restrictions on behalf of the Ministry of Health and the World Health Organization will be removed. I cannot accept this request, in the procedural aspect as well as the substantive aspect.

161. These days are difficult times for most countries around the world. The corona epidemic requires struggles that had not been known to nations world wide in modern times. We have become accustomed to a world with no boundaries and

restrictions and now due to the corona epidemic, countries world wide have redefined their boundaries in order to protect their citizens.

162. It should be noted that the Courts Administration's notification regarding types of issues to be heard in courts pursuant to the the Courts and Execution Offices Regulations (Legal Procedures in a Special Emergency), 5751-1991, under Section 3(4) it had been determined that the Family Court will continue hearings regarding the Convention. Consequently it is indicated that had the legislator and the sub-legislator and the Administration's instructions, believe that the emergency situation prevents the application of the Convention at this time, it would have instructed of so. However **the instruction is explicit and clear - regarding proceedings pursuant to the Convention it is required to continue hearings notwithstanding the emergency situation, To show the importance of continuing routine in all regarding illegal estrangement of children these days as well.**

163. **Lack of parental consent requires the court especially during these times to assess the Minor's rights and to ensure that her rights, well-being and best interests will be kept also under the difficult circumstances prevailing outside. There is extreme importance that precisely in times of great uncertainty it is heard loud and clear that Minors' rights are not an anarchy and the emergency situation cannot be exploited for change status de-facto disregarding the Minor's rights, her Father's rights and ignore the provisions under International Conventions designed for ensuring minors' rights and intended to settle complex legal and urgent situations between countries.**

164. As the honorable judge Amit has noted a few days ago (in a governmental aspect that is not related to the issue before me, however may have ramifications on the conduct expected between people especially these days, and particularly as the court discussed the matter of protection of the weak in the society (such as minors)), particularly these days we must follow the law and even more so:

> "[...] **During difficult times, we must protect the carriage's hoops and shafts, so that such will not to fall apart. Especially during the sensitive and difficult times we are in, we should refrain from undermining the very existence of the system and the game's written and practices should not be deviate from."**
>
> HCJ 2144/20 the Movement for Quality Government in Israel et al vs. the Chairman of the Knesset et al [published in Nevo] (23.3.2020) clause 1 under the honorable judge Amit's judgment.

165. The **Mother** argues that in light of the corona epidemic exposure of the Minor to airports and flight endangers her health. According to the Mother this is an emergency situation the entire world is experiencing, and it appears that even the judiciary system had not coped with such a situation in the past, and the Plaintiff is completely ignoring (so in her word in section 14 of her summations). For concluding this Part the Defendant is claiming in her summations that: **"There there is a real health danger to the Minor, and each day worsens and increases the risk of damage should she fly. According to experts, the epidemic in the United States is not under control at this point**". The Mother had also attached to her summations in Appendix 10 correspondence between counsels for the Parties including reference by each of them to the level of risk posed to the Minor. Additionally she had attached in Appendix 11 to her summations an article taken from the YNET website: "More than China: The United States is first in the number of corona patients".

166. The **Father** argues in Section 76 of his summations that the claim regarding the health damage posed to the Minor is to be rejected, should the court instruct of her return to the United States. The Father argues, while referring to the Klalit Health Services' website, that the risk of contraction of children the age of the Minor is very low, and according to the data that had been published the contraction rate in California is 3.5 times lower than in Israel relative to the number of residents. Additionally, the Father also reminds that the Minor has broad and comprehensive medical insurance in the United States, while in Israel she has no medical insurance.

167. **"It should be clearly stated that the emergency situation raises legitimate and natural concern and worries, and both parents' wish to protect the Minor and keep her from all harm - is clear and required. Therefore the issue of the Minor's health insurance in each country has been examined, although this issue goes beyond the classical aspects of the Convention. It should be noted that no one of the parents claims that the Minor has special or unusual health needs requiring special reference particularly in Israel.**

168. The Mother has failed to address in her summations to the **combination** of two essential matters: The fact that the corona epidemic constitutes a crisis both in Israel as well as in...., and the fact that the Minor has much better health insurance in the United States than in Israel.

169. The concern described in the Convention refers to damage a minor will incur as a result of the return to the country from which he had been taken. The Defendant had been required to prove that there is grave concern that returning the Minor will expose her to physical - health damage in .... particularly. However in our case - The health crisis situation exists in both countries and the Minor is exposed

to the same type of risk in both countries. As to this should be added that the Minor has a wider and more appropriate solution particularly in....

170. The **HCC Guide to Good Practice** document includes reference also to the issue of the claim regarding a health risk posed to the minor due to his return to the country of origin, and it had been ruled that the focus should be on whether it is possible to provide the minor with medical care in the country of origin. Additionally it had been set forth that the grave concern will occur only when the the minor requires urgent or special medical treatment that is not provided in the country of origin or that the minor's medical condition does not enable his trip back:

> "**In cases involving assertions associated with the child's health, the grave risk analysis usually should focus on the availability of treatment in the State of habitual residence of the child, and not on a comparison between the relative quality of care in each State. A grave risk will typically be established only in situations where a treatment is or would be needed urgently and it is not available or accessible in the State of habitual residence, or where the child's health does not allow for travel back to this State at all".** (Underlined emphasis - added).

See:

Guide to Good Practice, Part VI – Article 13(1)(b) of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Pp. 42, Section 62.

https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

171. In the **cross examination of the Father** he had been asked about the Minor's medical coverage in each country:

> **"... does not have health insurance in Israel. If something happens to her now, we do not have any manner of treatment, which is, let's say (unclear), and the health insurance in the United States has also been for me, for the Mother and for the child, and she receives the best medical care there. On the other hand in Israel she does not receive any medical care since she is not insured anywhere, she is not registered with the Population Registry, etc.** (Underlined emphasis - added).

See: Protocol dated 10.3.2020 pp. 49, lines 13-18.

172. **The Mother too in her cross examination** had confirmed the same information regarding the Minor's health insurance in each country:

> **"Q:** And does the child have insurance in the United States?
>
> **A: <u>She has insurance in the United States.</u>**
>
> **Q: And do you have insurance in the United States?**
>
> **A: Yes, on behalf of his place of employment <u>we have all been insured</u>.**
>
> **[...]**
>
> **A: If we stay there for even two months, we need insurance. On the other hand <u>we did not do so here</u>.**
>
> **Q: <u>Do you have an HMO in Israel?</u>**
>
> **A: <u>I am prevented</u> from doing so at the moment."** (Underlined emphasis - added).

See: Protocol dated 10.3.2020 pp. 67, lines 34-36, pp. 68, lines 1-6.

173. The Mother's representation in her summation that the Father wishes to endanger his Daughter due to his insistence to return her to the United States, is not backed up by evidence. The **Father** had been asked regarding the corona situation and he had replied regarding the medical care and insurance coverage:

> **"[...] The corona situation as you know is a problematic situation worldwide, not only, by the way, the situation in Israel is worse than the situation in California. The prevalence of people who had contracted the disease relative to the size of the population is much higher in Israel compared to California. ---- has health insurance in the United States, she has no health insurance in Israel. If, God forbid, something happens to her, then there is the place where she should be. Moreover, there is no, as far as we know, and I get my information from the media, children are hardly at risk, the risk is marginal or non-existent, and this entire argument of the corona is a claim, again, only for the purposes of these proceedings. This is her place of residence and if we need, there is no need at all for us to go**

> **isolation here, unless all sorts of proceedings are held here, and I will of course make the decisions according to the situation where I will not break the law."**

See: Protocol dated 10.3.2020 pp. 55, lines 24-34.

174. There is no dispute that the corona epidemic exists in both countries. Additionally, in questioning the Parties it had been proven that it is precisely the Minor's stay in Israel with no health insurance and no HMO which is riskier for Minor than return to her country of origin where she is a citizen and has appropriate health insurance.

175. **It has been proven that the medical solution that is available to the Minor in the United States is better than the solution in Israel in light of the insurance coverage there. Since the corona epidemic crisis exists in both countries and is not related to the Minor's health condition, the exception of grave concern in this regard does not hold true.**

176. **Therefore and in light of the aforementioned, I rule that the grave concern exception does not exist in our case in respect of both of the damages the Mother has claimed.**

III(4). The Terms for Returning the Minor

177. After I have found that all of the criteria required under the Convention for returning the Minor hold true, it is required to instruct of a number of terms for returning the Minor. Neither party had addressed this issue in their summations.

178. As part of FA 2070-07-19 A. v. G. [published in Nevo] (7/17/2019), Clause 34 of the judgment placed an emphasis on the importance of setting the terms for returning the minors to the country of origin

> **"Upon the court's instruction of returning the minors to their habitual residence it appropriate that it add and also set the terms for the return, and this in order to ensure the minors' safety as well as physical and mental wellbeing during the first period after the return and until the party wishing to turn to the local courts for arranging the custody details and its procedures and be given a solution to his application (for the issue of the need for setting the terms of the return for ensuring the wellbeing of the minors and proper arrangement of the return see, as an example, CA 4391/96 Roe vs. Roe [Published in Nevo] (1997); FC 38430/00 (Tel Aviv)** P. vs. P. **(2000); FC 103880/99 (Tel Aviv)**

John Doe vs. John Smith [published in Nevo] (2001) and many others).

As part of FA 2070-07-19 A. v. G. [published in Nevo] (17.7.2019) Clause 34 of the judgment. In LTA that had been filed to the Supreme Court also in the aspect of the terms of return had been rejected as part of FLTA 5041/19 Jane Doe vs. Jane Roe [published in Nevo] (8.8.2019.

179. For ensuring the Minor's wellbeing and ensuring her safe return to the United States as well enabling the Mother to return to the United States, I am hereby issuing instructions intended to ensure the Minor's return while ensuring a place of residence and visa for the Mother in the United States. This will constitute a solution for balancing the Parties' rights as well as financial gaps that had been raised as part of the evidentiary hearing.

180. The Minor shall return by exercising the current plane ticket the date of which had been only postponed It is the Father's responsibly to handle the issue vis-a-vis the airline as well as vis-a-vis the Central Authority for ensuring the flight and its conditions in the safest manner. Should it not be possible to prepone the plane ticket, the Father shall purchase at his expense plane tickets for himself and for the Minor. Should the Mother agree to join them, the Father shall bear also the payment of the plane ticket for the Mother.

181. The Central Authority in Israel will operate vis-a-vis the Central Authority in the United States for assisting the Mother in obtaining the residency visa during the legal proceedings in... Both Parties shall cooperate for this purpose.

182. Should the Mother change her mind and return with the Father and the Minor to the United States - the Father shall rent for the Mother an apartment near the current apartment at rental fees not less than the rental fees paid for the Parties' current apartment. The apartment must be in close proximity to the Parties' current apartment. The rental fees shall be paid by the Father for six months.

Ruling on the Expenses of the Proceedings

183. Section 26 under the Convention's Addendum provides, inter alia, as follows: "When ordering the return of the child or issuing an order in respect of visitation rights pursuant to this Convention, the judicial or administrative authorities are entitled to instruct, as necessary, that the person who had estranged the child or had failed to return him or that had prevented exercising visitation rights, **to pay for the indispensable expenses the applicant had incurred, or incurred on his behalf, including travel expenses, costs or payments that had been spent for locating the child, expenses of the applicant's legal representation, and those concerning the return of the child".** Additionally Regulation 295XVII under

the Civil Procedures Regulations prescribes that: "Where the court had issued a judgment for returning the child, it shall be entitled to impose on the respondent the Plaintiff's expenses, including travel expenses, expenses related to locating the child, attorney fees and expenses related to the return of the child".

See also: FA 17278-07-11 John Doe vs. Jane Doe [published in Nevo] Section 20 of the honorable judge Shneller's judgment (2.4.2012) regarding ruling of high expenses adapted to Hague Convention proceedings.

184. The Father had petitioned in his summations for charging the Mother with the expenses for holding the proceedings, the stay in Israel and the costs of the expert opinions as well as attorney fees at the rate of approximately NIS 250,000. However, no receipts had been attached. The Mother had claimed in her summations that the real expenses she had incurred had been in a similar sum of NIS 215,000. She too had failed to attach receipts.

185. At the end of the day, and after examining the proceedings and their results I am ruling of payment for the Father's expenses in the sum of NIS 58,500. I believe that this ruling, even if such is not real and does not constitute complete indemnification for the Father's expenses will constitute a certain indemnification that will balance the sum between the Parties, taking into account the speed of the proceedings with the many efforts counsels for both Parties had invested in holding such. The Mother shall bear the payment of these expenses within 30 days, and if not - the expenses shall bear interest differences and legal linkage.

IV. Conclusion

186. **Consequently and in light of meeting the provisions under the Convention, I instruct of accepting the claim and returning the Minor to the United States, California, ...**

187. Implementation instructions are hereby issued as follows:

a. The Central Authority shall assist the Father in conducting the arrangements to the extent possible in light of the emergency situation in Israel for returning the Minor to .....

b. The Central Authority in Israel will operate vis-a-vis the Central Authority in the United States for assisting the Mother in obtaining the residency visa during the legal proceedings in... Both Parties shall cooperate as required for obtaining the visa, and will take all of the steps required of them for obtaining such.

c. The Father will take care of preponing the existing plane tickets. Should it be impossible due to the emergency situation, the Father will bear the expenses of his and the Minor's plane tickets. Should the Mother agree to return to the United States together with them, the Father shall bear also the cost of the Mother's plane ticket (should it not be possible through the current ticket).

It is the Father's responsibly to handle the issue vis-a-vis the airline as well as vis-a-vis the Central Authority for ensuring the flight and its conditions in the safest manner.

d. Should the Mother refuse to return the Minor to the United States, the Father shall be entitled to do so himself and the Central Authority and the Israeli police are requested to assist him in so.

e. Should the Mother change her mind and return with the Father and the Minor to the United States - the Father shall rent for the Mother an apartment near the current apartment at rental fees not less than the rental fees paid for the Parties' current apartment. The apartment must be in close proximity to the Parties' current apartment. The rental fees shall be paid by the Father for six months.

f. Stay of proceedings is granted until 5.5.2020 in order to enable the right of appeal.

188. The judgment may be published omitting names and identifying information.

189. The **Secretariat** shall close the case.

190. The **Secretariat** shall deliver the judgment to counsels for the Parties and notify them by phone that a judgment had been issued.

Issued today, 11 Nissan, April 5, 2020, in absence of the Parties.

Tamar Snunit Forrer 54678313-/