SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
CHANCERY DIVISION: FAMILY PART
DOCKET NO.: FD 02-906-11
A.D. #____

SHARON BEN HAIM,	)	
	)	
Plaintiff,	)	PROCEEDING
	)	
vs.	)	Order to Show Cause
	)	
OSHRAT BEN HAIM,	)	Judge Mizdol's Ruling
	)	
Defendant.	)	
	)	

Place: Bergen County Courthouse
10 Main Street
Hackensack, New Jersey 07601

Date: August 25, 2011

BEFORE:

HONORABLE BONNIE J. MIZDOL, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC M. MARK, ESQ. (Eric M. Mark Attorney-at-Law)

APPEARANCES:

ERIC M. MARK, ESQ. (Eric M. Mark Attorney-at-Law)
Attorney for Plaintiff

OSHRAT BEN HAIM
Pro Se

Sara L. Kern, CET**D-338
KING TRANSCRIPTION SERVICES
FRANK H. ULRICH
65 Willowbrook Boulevard
Wayne, New Jersey 07470

Audio Recorded
Recording Opr:

(Commencement of proceedings)

THE COURT: Okay.

Hello?

MS. BEN HEIM: Hello?

THE COURT: Hi. Ms. Ben Haim, can you hear me?

MS. BEN HEIM: Yes.

THE COURT: Okay. We're going on the record. And this is the matter of Sharon Ben Haim and Oshrat Ben Haim.

Counsel, may I have your -- your appearance, please.

MR. MARK: Eric Mark, Newark, New Jersey, for Mr. Ben Haim.

THE COURT: Okay. Let the record reflect that Mr. Ben Haim is present in my courtroom, that I am permitting Oshrat Ben Haim to participate telephonically from Israel.

This is a matter that was brought to the Court's attention. I -- the -- the complaint in this matter specifically was filed via an order to show cause. That order to show cause was filed on February 4th of 2011, and in essence it sought the emergent return of the parties' child to the United States from Israel. At that time -- and the child's name is Ofir.

At the time, both parties were represented by counsel, and it was represented to me that there were matters

pending in the courts of Israel. This Court saw fit to defer decision-making in this matter until such time as I could secure the determination of the Israeli court. Since the inception of this matter, there have been several decisions, and I believe the easiest way for me to do this is to provide background.

The order to show cause application filed by the father in this court was done actually on February 2d. The request was that the defendant mother and the child be required to return to the United States from Israel. There is a timeline that this Court must consider in making this determination, and that timeline is that both of these parties are Israeli citizens, and they both came to the United States in or about 2004, and they resided in New Jersey. They married sometime in 2008. That marriage ceremony took place in Israel. The parties returned to the United States. And ultimately on September 10th of 2009, their child Ofir was born here in Englewood, New Jersey.

Thereafter, in or about November or December of 2009, these parties returned to Israel. They opened a children's clothing shop sometime in January of 2010. And after opening that shop in Israel, the parties returned to the United States in February of 2010. They then went back to Israel for the Passover holiday in March of 2010. And at that time, the defendant, who is the wife, filed for divorce

with the rabbinical court in Israel. That filing was done on April 7th of 2010.

On April 11th of 2010, the parties met and they began the negotiation of a marital settlement agreement. The agreement was never signed. Ultimately, the wife disagreed with a portion of that agreement that addressed monetary issues.

The plaintiff husband left Israel, and he returned to the United States on April 19th of 2010.

There is no question, based upon the facts presented, that prior to going to Israel for the Passover holiday, these parties had agreed that the wife and the child would return to the United States on June 20th of 2010, and, in fact, there were airline tickets confirming that return.

About a month before the return date, the plaintiff's attorney wrote to the wife warning that if she did return to the United States with the child, that the plaintiff father would move under the Hague Convention for the child's return. And on July 1st of 2010, the father filed for return of the child with the central registry under the Hague Convention in the United States.

A few days thereafter, on July 5th of 2010, the Haifa rabbinical court in Israel granted the defendant wife temporary custody of the child.

I first want to address the fact that courts in New

Jersey have previously addressed the issue of ecclesiastical court rulings in other jurisdictions, and I particularly note Innes v. Carrascosa, which is 391 N.J. Super. 453. And in that case, the defendant mother had argued that the religious annulment that she had filed for in Spain first should be recognized.

In this case, the defendant mother filed for divorce in the rabbinical court in Haifa, again an ecclesiastical court. That court granted her temporary custody. And this Court finds that that ruling is not to be recognized by the State of New Jersey. As in Innes v. Carrascosa, the rabbinical court is a religious court whose is ruling not given any civil effect. New Jersey case law provides that such rulings should not be recognized, and as a result, that ruling has no bearing on the decision to be made by this Court.

In or about November of 2010 until March of 2011, it is without doubt that the plaintiff husband took part in litigation before the regional court in Nazareth. This is a civil court.

The plaintiff husband had filed a complaint with the family court in Nazareth on August 31st of 2010, seeking, again, return of the child. And on December 20th, the family court in Nazareth ruled that the habitual residence of the child was New Jersey. The family court found that the

parties did not arrive in Israel to stay but that their intentions were to return to the U.S. Further, the family court rejected the defendant mother's claim that the father had consented to the child's retention in Israel. She attempted to rely on an unsigned draft of the settlement agreement, and that argument was rejected by the family court indicating that that agreement had no binding value.

The family court ordered that the child be returned to the United States on the proviso that father deposit the sum of $6,000 in Israeli shekels as support for the child when she returned to the United States and to enable the defendant mother to live in a rented apartment for six months.

Mom appealed that ruling to the regional court in Nazareth, and on January 20th of 2010, that court rendered its decision. And in its opinion, the court ruled that again the habitual state of residence of the child was New Jersey, and as such, the child should be returned to New Jersey.

The mom then took an appeal to a three-judge panel of the Supreme Court of Israel.

While the appeal to that three-judge panel was pending, the husband in this matter in February of 2011 filed the order to show cause in Bergen County. That order to show cause requested that the defendant be compelled to return to the United States with the child. The order to show cause

was denied without prejudice and converted to a motion, and that was to enable proper service to be effectuated on the defendant wife. At the time of the filing, the husband was in Israel participating in the proceedings before the regional court. And on April 29th of 2011, I thereafter held a case management conference awaiting determination of the Israeli three-judge panel and permitting there to be daily Skype communication with the child.

On May 17th of 2011, the three-judge panel of the Israeli Supreme Court rendered opinions very different than those done here in New Jersey or the United States. Each of the judges on that panel rendered separate and independent opinions. The first opinion was the opinion of Judge Arbel. The opinion overturned the regional court's decision that the child be returned to the United States, and although every member of that three-judge panel found that the habitual residence of the child was New Jersey, two of the judges found defenses under Article 13 of the Hague Convention applicable. The third judge found no such application.

So the first judge on the panel, Judge Arbel, determined that the father had consented in advance to the wife having custody of the child in Israel and had thereby relinquished the immediate aid to be given to him by the Convention. Judge Arbel determined that the child should not be returned to the United States and that the custodial issue

should be litigated in Israel. He [*sic*] based his findings on the unsigned agreement that had been negotiated by these parties. And he assumed that the father consented to the minor's stay in Israel as a result thereof.

This Court disagrees with application of the consent defense as the facts in this matter do not sustain its application. The couple's original plan was that the father would return by himself to the United States in April and that the mother and daughter would return in June. This Court finds that the father's return to the United States by himself attests only to the fulfillment of the original plan and does not allow for an assumption of consent to the retention of the minor daughter.

This Court finds that the entire situation was laden with duress. That the plaintiff in good faith willingly began to negotiate with the defendant to reach some type of an agreement would be the only thing a parent in this set of circumstances could possibly do under this abduction. The Court finds that the mere fact of a parent arriving in the state to which the child was abducted and later returning by himself to his habitual residence cannot be interpreted as consent.

The United States is the plaintiff father's habitual residence, and all courts involved have held that the child's state of habitual residence is New Jersey as

well. Therefore, the plaintiff father's return to the United States will not be used against him. Further, reliance upon an unexecuted agreement does not equate to consent.

The second judge of the three-judge panel was Judge Melzar. He determined that although Judge Arbel was correct in that one of the defenses under Article 13 of the Hague Convention applies, he did not agree that it was the defendant -- the defense of consent. He determined it was the defense of acquiescence, and he opined that the father acquiesced after the date of wrongful detention by inferring acquiescence from the unsigned agreement. Judge Melzar reasoned that the father was estopped by the terms of the unsigned agreement.

Since I found that the unexecuted agreement does not constitute consent, it clearly does not constitute acquiescence. The father's lack of consent or acquiescence is demonstrated by his correspondence directed to the wife from his counsel, his institution of proceedings in New Jersey. This Court finds that acquiescence needs to be expressed clearly and unequivocally, as stated in the minority opinion of Judge Fogelman.

I need to go back for one moment and talk about the Hague Convention in general because the Hague Convention was designed specifically to restore the factual status quo, which is unilaterally altered when a parent abducts child.

Its purpose is to protect the legal custody rights of the nonabducting parent, and it empowers a court to determine the merits of the alleged abduction, but not the merits of the underlying custody claims or issued [*sic*]. Those custody rights are to be determined by the law of the child's habitual residence.

Any person seeking the return of a child under the Convention may commence a civil action by filing a petition in the court where the child is located. The petitioner bears the burden of showing by a preponderance of the evidence that the removal or the retention was wrongful. It is the respondent's burden to show by clear and convincing evidence that one of Article 13's exceptions apply.

In this case, the Israeli courts have acknowledged that the habitual residence of Ofir is the state of New Jersey. Notwithstanding the determination, the Israeli courts have also held that one of the defenses under Article 13 applies. Application of the Hague to the case before this Court requires four factors to be considered in order for relief to be invoked. The first is that the nations involved must be signatories to the Hague. There is no question that both Israel and the United States are signatories to the Hague, so that Prong 1 is met.

Prong 2 is that the child must be a habit- -- a habitual resident of a contracting state immediately before

any proceeding, breach of custody or access right. There is no question that this child's habitual state of residence was New Jersey from the time of birth. As I mentioned before, the timeline provides that these parties had lived in the United States since 2004, that while they were married in Israel, they returned to the United States. The child was born in the United States. After the birth, the parties traveled to Israel, returned again to the United States, and then were going to take a holiday in Israel, at which time the child was retained. So I find clearly that the child's habitual residence is New Jersey.

The child must be under the age of 16 years of age. This is without question. She was born on September 10th of 2009. Therefore, the third prong is likewise satisfied.

The fourth prong is that the child's removal or retention in a country other than their place of habitual residence must have been wrongful. I find that the actual removal of the child to Israel in this case was not wrongful; both parties accompanied the child to Israel for a Passover holiday. There was no question that the agreement was that the wife and the child and the father would be returning to the United States; the father returning prior, the mother and the child to return on June 20th. Therefore, this Court considers the date of wrongful retention to be June 20th of 2010 because the wife retained the child in Israel after that

point in time.

This Court also finds that the plaintiff father was exercising custody rights. The parties were married and living in New Jersey prior to this vacation, this holiday Passover vacation in Israel, and that our law specifically provides that parents have equal rights to their children when no specific court order has been effectuated. And that's 9:2-4 of our statutes.

Finding that jurisdiction lies here in New Jersey as the habitual state of residence of the child, the Court must now consider whether there are exceptions which would permit there to be a different consideration of the facts.

The first exception is that the parent who filed the petition was not actually exercising their custody rights at the time of removal or retention. This is clearly not the case in this file. These parties were a married couple living together in a familial unit. They went to Israel with a full intention of returning. This is evidenced by prepaid plane tickets bought specifically for their return. And both parties are entitled to the child under the statute just cited, 9:2-4. That statute specifically provides that this legislature finds and declares that it is the public policy of New Jersey to assure minor children a frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and that it is in the

public interest to encourage parents to share the rights and responsibilities of child-rearing in order to effect that policy.

Further, our statute 9:2-2 is a statute of *ne exeat* and as interpreted by our United States Supreme Court in the case of Abbot v. Abbot, 130 S.Ct. 1983, where a state bars the exit of a child without the consent of either parent or court order, a *ne exeat* right exists, and that is a custody right pursuant to the Hague Convention. Our statute is clear that provided this Court has jurisdiction over the custody and maintenance of minor children and that the children are natives of this state, which I find Ofir to be, that the child cannot be removed out of its jurisdiction unless it is with consent of both parents or unless there is an order of the court. I find neither of these to exist, so I find no exception under the first prong of exceptions. I find that the plaintiff father was, in fact, exercising his custodial rights at all times.

The parent who filed the petition consented to or acquiesced in the removal or retention, I need not repeat my findings. I find that no consent existed. I find no acquiescence existed based upon an unsigned agreement during a period laden with duress.

Another exception is that grave risk of harm could happen upon this child or the child would be placed in some

intolerable situation. The defendant in this proceeding indicates that if she would -- if she were to return to the United States, she would have to do so under a visa status, and that would not allow her to work or support herself in any way and that she would be relying upon the plaintiff in order to support the family. This Court does not find that to be the type of risk that the Hague Convention was designed to protect. The Convention was designed to protect from grave risk of harm; for example, war, civil unrest, something that rises to that magnitude. Mere unemployment status does not rise to the level of presenting risk to this child, particularly since the dad is able to well afford the child.

Further, the proceeding must have been commenced within a year after the date of the wrongful removal. There is no doubt that this proceeding was commenced within the one-year mark of the wrongful retention. The date of the wrongful retention was June 20th of 2010. The husband filed a complaint with the central authority here in the United States on or about July 1st of 2010. He filed an order to show cause in February of 2011. And he vociferously participated in the defense of the proceeding in the Israeli courts, all within one year of that period. I find that he did nothing less than act diligently to try to ensure the return of this child to the United States that.

As such, I find that none of the four exceptions to

the Hague apply.

Therefore, I cannot afford comity to the decisions made by the Israeli court. Full faith and credit is to be accorded to participants of the Hague Convention provided that the underlying decision was properly made. The rule of comity is grounded in the policy of avoiding conflicts. However, it is only afforded if the underlying issue was decided correctly.

I cannot agree with the final determination of the Israeli court. I find that the Hague applies. I find, as did every other judge who has entertained this application, found that New Jersey is the habitual residence of the child. And I find that the child must be returned to New Jersey. The Israeli court failed to follow the provisions established within the Hague. I find that the decisions were not based in the facts and that they have exceeded their boundaries.

And as such, I will not accept that decision. I will not afford it comity. And I am going to order that the child be returned to the state of New Jersey. I'm going to order that that be done not later than September 10th.

Ms. Ben Haim, do you understand the decision? Hello?

(Telephone call is disconnected)

THE COURT: I'm trying to get her back on the line or you don't have it or we can't do it.

Okay. I want the record to reflect that the Court could hear the click of the phone as the decision was finalized.

The Court will enter an order. It will be necessary for you to serve this on Israeli counsel as well. Okay? We'll prepare an order for you, counsel.

MR. MARK: Thank you, Judge.

(Conclusion of proceedings)

CERTIFICATION

I, Sara L. Kern, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on Audio File Room 265, Thursday, August 25, 2011, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate, non-compressed transcript of the proceedings as recorded.

S/ *Sara L. Kern* August 29, 2011

Signature of Approved Transcriber Date

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