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United States District Court, S.D. Ohio, Western Division.

Asbjorn OSTEVOLL, Petitioner
v.
Lisa Grote OSTEVOLL, Respondent

No. C-1-99-961.
|
Aug. 16, 2000.

Attorneys and Law Firms

Gregory L. Adams, Croswell & Adams Co., LPA, Cincinnati, OH, for Defendant or Respondent.

ORDER and REPORT AND RECOMMENDATION

HOGAN, Magistrate J.

***1** This matter came before the Court on June 29, 2000 for hearing on the Petition for the Return of Children to Petitioner (Doc. 1), Respondent's Motion to Strike Petition (Doc. 8), Respondent's Motion to Dismiss Petition (Doc. 27), and Petitioner's Motion to Change Venue (Doc. 32). Petitioner seeks the return of his children pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 (hereinafter "the Hague Convention"), and the International Child Abduction Remedies Act (hereinafter "ICARA"), 42 U.S.C. § 1160, et seq. For the reasons which follow, we recommend that the Petition for the Return of Children to Petitioner (Doc. 1), Respondent's Motion to Strike Petition (Doc. 8), and Respondent's Motion to Dismiss Petition (Doc. 27) be denied. Petitioner's Motion to Change Venue (Docs.32) is likewise denied.

PROCEDURAL HISTORY

On November 12, 1999, Petitioner, proceeding pro se, filed a Petition for Return of Children to Petitioner. (Doc. 1).[1] On January 7, 2000, Petitioner filed a Motion for Preliminary Injunction. (Doc. 2). Respondent was served with a copy of said Petition on January 18, 2000 and filed an Answer and a Motion to Strike Petition on February 7, 2000. (*See* Docs. 6, 8). On February 28, 2000, this Court met with counsel for Respondent and the Petitioner, who represented to the Court that he had retained counsel but his attorney could not be present for an informal conference on that date. Therefore, at Petitioner's request, the Court rescheduled the informal preliminary conference for March 21, 2000. (*See* Doc. 12). Thereafter, on or about March 24, 2000, Petitioner requested a continuance, ostensibly for the purpose of retaining counsel. Petitioner's request was granted and the informal preliminary conference was rescheduled for March 28, 2000. (*See* Doc. 13). Petitioner was unable to attend the conference on March 28, 2000 due to a medical condition which prevented him from traveling. Thus, the Court issued an Order rescheduling the conference to April 4, 2000. (*See* Doc. 16). Petitioner contacted the Court on April 4, 2000 to explain that he had just received his copy of the March 28 Order and, for obvious reasons, he would not be able to attend the conference.[2] Petitioner then offered dates on which he would be available to appear for a hearing on his Motion for

Preliminary Injunction. Thus, the hearing on Petitioner's Motion for Preliminary Injunction was rescheduled to May 23, 2000. (*See* Docs. 17, 18). At this time, Petitioner was warned that failure to appear would result in a recommendation that his case be dismissed with prejudice. (*See* Doc. 18). On May 23, 2000, the Court heard oral argument on Petitioner's Motion for Preliminary Injunction. Counsel for Respondent was present. However, neither Petitioner nor any attorney of record appeared on Petitioner's behalf. Michael W. Davis, Esq., Petitioner's state court attorney, appeared as a "friend of the court," but declined to enter an appearance on Petitioner's behalf. Since Petitioner was unable to meet his burden of going forward with any type of evidence demonstrating why the children should be returned to Norway and because the Domestic Relations Court had decided to proceed with the pending domestic case, this Court denied Petitioner's Motion for Preliminary Injunction (*See* Doc. 22). The Court then set the matter for a hearing on the merits of the Petition for June 28, 2000.[3] On June 21, 2000, Petitioner faxed a Motion for Continuance to the Clerk of Court requesting a continuance because Petitioner's "Hague attorney" and several of his witnesses were unable to attend the evidentiary hearing. (*See* Doc. 26). At this time, there still remained no attorney of record for Petitioner. This motion was denied. (*See* Doc. 29).[4] An evidentiary hearing on the merits of Petitioner's Hague Petition was held on June 29, 2000. Respondent, Respondent's counsel and several witnesses were present at this hearing. The Court also spoke with the parties' two eldest children *in camera*. Neither Petitioner nor any attorney of record appeared on Petitioner's behalf.

FACTUAL BACKGROUND

***2** The parties were married in Cincinnati, Ohio on June 16, 1984. (Doc. 1, Petition for Return of Children to Petitioner, ¶ 3.1). The parties' three children, Kirsten Frances Ostevoll, presently age 13, Lena Elise Ostevoll, presently age 11, and Mariella Patricia Ostevoll, presently age 8, were born in New Jersey. (Id. at ¶ 3.2). The parties lived in New Jersey until the summer of 1995. (Id. at 3 .3; Transcript of June 29, 2000 hearing, (hereinafter "Tr. __"), p. 51). Petitioner left for Norway in June of 1995, ostensibly to manage the improvement of a hotel owned by the parties until it could be resold. (Doc. 1, at ¶ 3.3; Tr. 51). Respondent and the children followed. (Tr. 51). According to Respondent, it was her understanding at the time that the situation was to be a temporary one lasting at a minimum, six months, but at the most, a year. (Id. at 51-52). Respondent testified that the family's home in New Jersey was not put up for sale and that she and her daughters packed one duffel bag a piece, packing only enough clothing for the summer.[5] (Id.).

On November 15, 1998, Respondent returned to the United States with the three children. (Doc. 1, at ¶ 4.1; Tr. 41, 67-68). While Petitioner claims that Respondent removed the children from Norway without his knowledge or consent, Respondent contends that she phoned Petitioner from the train station informing him of her intentions. (Doc. 1, at ¶ 4.1; Tr. 68). Upon her arrival in the United States, Respondent filed a Petition for Domestic Violence Civil Protection Order pursuant to O.R.C. § 3113.31 seeking protection from Petitioner. (Tr. 68-69). Respondent testified that, prior to moving to Norway, Petitioner was physically, emotionally and verbally abusive to her on a regular basis. (Tr. 52). Respondent alleges that, once in Norway, she and her children suffered numerous incidents of physical and emotional abuse at the hands of her husband. (Tr. 52-53, 54-56, 59, 62-66). Thereafter, on or about November 17, 1998, the Court of Common Pleas, Domestic Relations Division, Hamilton County, issued a Domestic Violence *Ex Parte* Civil Protection Order in favor of Respondent, granting her temporary custody of the children and ordering Petitioner to stay away. (*Lisa Grote Ostevoll v. Asbjorn Ostevoll,* Case No. 980581 (C.P.Ham.Cty.); Doc. 8, Respondent's Motion to Strike, Ex. A, attached).

On December 11, 1998, Petitioner filed a Petition for the Return of Children in the Hamilton County Court of Common Pleas. (*Asbjorn Ostevoll v. Lisa Grote Ostevoll,* Case No. DR9803492 (C.P. Ham. Cty .); Doc. 1, Ex. E, attached). The matter was set for trial on March 3 and 5, 1999 and then subsequently rescheduled, at Petitioner's request, to April 19 and 21 1999. (*See* Doc. 31, Ex. D1, Decision on Defendant's Objections, *Lisa Grote Ostevoll v. Asbjorn Ostevoll,* Case No. DR9901299 (C.P.Ham.Cty)). Thereafter, Petitioner sought to have the matter continued once again. (Id.). The request was denied and on April 22, 1999, Petitioner voluntarily dismissed his Petition. (Id.).

***3** On July 9, 1999, Petitioner initiated a civil action in the Sor-Gudbrandsdal District Court in Lillehammer, Norway seeking temporary and permanent custody of the children. (*Asbjorn Ostevoll v. Lisa Grote Ostevoll,* Case No. 99-00284A; Doc. 8, Ex. D, Extract of the Records of the Sor-Gudbrandsdal District Court, attached). On November 16, 1999, the Norwegian court denied Petitioner's request for a provisional award of custody of the children. (Id.). The court then scheduled the matter for trial on January 25, 2000 but subsequently vacated the date. According to Respondent, no new date has been set. (Id. at p. 6).

PETITIONER'S MOTION TO CHANGE VENUE IS DENIED

On June 29, 2000, Petitioner filed a Motion to Change Venue (Doc. 32) stating that because he lives in Norway and because the Court has failed to give proper notification on the scheduling of his case, he requests that jurisdiction be transferred to Norway. Although signed by Petitioner, the motion was written by "Attorney Dag Erlandsen's office on behalf of Mr. Ostevoll." (Id.). As grounds for his request, Petitioner states that he has requested that the Court contact him or his attorney "to see if time is available" and that the Court has failed to properly notify him of the scheduling of his case. Petitioner feels that the Court is "working against him with a total lack of cooperation since he is not living 15 minutes away from the Court" as Respondent is. Petitioner is under the mistaken impression that this Court must consult with parties and their attorneys prior to scheduling matters on its docket. This is simply not the case. The Court is required to notify Petitioner of matters set before it which it has attempted to do as expeditiously as possible. The Court acknowledges that Petitioner does not live in the United States. However, the Court also acknowledges that Petitioner has kept himself apprised of the matters before this Court when it has suited him through numerous phone calls to the Court, the Clerk's office, as well as his local counsel. The Court has sent copies of its Orders to Petitioner, Petitioner's local state court attorney and his Norwegian attorney. The Court has also attempted to serve its orders upon Petitioner via facsimile, although all such attempts have been unsuccessful. (*See supra,* note 2). In light of Petitioner's numerous eleventh-hour requests for continuances and his continued failure to appear, this Court finds that it has been more than generous with Petitioner. Furthermore, the Court has complied with the proper procedures for serving notice upon Petitioner. *See* Fed.R.Civ.P. 5. The Hague Convention contemplates that the judicial authority will "act expeditiously in proceedings for the return of the children." Hague Convention, Article 11. Thus, the Court simply cannot continue to allow Petitioner to delay this matter further.

Petitioner's Motion to Change Venue is Denied

In support of his Motion to Change Venue, Petitioner states that he does not feel that he should be required to travel all the way to the U.S. As such, he requests that the Court transfer jurisdiction to Norway.

***4** There are two federal statutes which govern most transfers. 28 U.S.C. § 1406(a) provides that if a case is filed in the wrong district or division, the court may either dismiss the action, "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *See Creditor Collection Bureau v. Access Data, Inc.,* 820 F.Supp. 311, 312 (W.D.Ky.1993). 28 U.S.C. § 1404(a), the other transfer statute, provides that even when a court enjoys proper venue, it may nevertheless transfer a case for the convenience of the parties and witnesses, in the interest of justice.[6] *Id.* The distinction between these two statutes is important because a transfer under § 1404(a) permits the court to change the location of the case, but does not allow a change of the applicable law. By contrast, when a case is transferred pursuant to § 1406(a), such a transfer may involve a change in the applicable law. *Id.* (citing *Tel-Phonic Services v. TBS Int'l,* 975 F.2d 1134, 1141 (5th Cir.1992)). *See also Union Planters Bank, N.A. v. EMC Mortgage Corp.,* 67 F.Supp.2d 915, n. 11 (W.D.Tenn.1999).

Petitioner does not argue that venue does not lie in this district. Rather, Petitioner moves the Court to transfer this case to Norway. Petitioner contends that a change of venue is necessary for his convenience and, presumably, the convenience of his witnesses. Neither party addressed the question of whether the action otherwise may have been brought in Norway. Thus, as a preliminary matter, the Court must determine whether the action "may have been brought" in the proposed transferee forum. *United States v. Cinemark USA, Inc.,* 66 F.Supp.2d 881, 887 (N.D.Ohio 1999); *McNic Oil & Gas Co. v. IBEX Resources Co., LLC, JMA,* 23 F.Supp.2d 729, 739 (E.D.Mich.1998).

The International Child Abduction Remedies Act, the United States enabling legislation for the Hague Convention, provides jurisdiction only to courts "in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b).[7] As the children were located in the Southern District of Ohio at the time the Petition was filed, and are currently located within this district, Norway does not have jurisdiction over Petitioner's action under the Hague Convention. As such, this action could not have been brought in Norway. *See Ohlander V. Larson,* 114 F.3d 1531, 1539 n. 7 (10th Cir.1997).

However, even assuming that Petitioner's action may have been brought in Norway, Petitioner has failed to demonstrate that the balance of factors the Court must consider in evaluating a motion under 28 U.S.C. § 1404(a) weighs in favor of transfer. Under 28 U.S.C. § 1404(a), the decision to grant or deny a motion to transfer is left to the sound discretion of the court.

Stewart Org. v. Ricoh Corp., 487 U.S. 22, 29 (1988); *United States v. Cinemark USA, Inc.,* 66 F.Supp.2d 881, 886-87 (N.D.Ohio 1999)(citing *Phelps v. McClellan,* 30 F.3d 658, 663 (6th Cir.1994)). The Court must consider the private interests of the parties, including their convenience and the convenience of the witnesses, as well as other public policy concerns such as systemic integrity and fairness. *Cinemark,* 66 F.Supp.2d at 887 (citing *Moses v. Business card Express, Inc.,* 929 F.2d 1131, 1137 (6th Cir.1991)); *Creditor's Collection,* 820 F.Supp. at 313. The factors which the Court must consider include petitioner's choice of forum, location of relevant documents, convenience of the witnesses, possibility of prejudice in either forum, the ability of the parties to compel attendance of unwilling non-party witnesses, the costs associated with obtaining willing witnesses, and any other practical problems associated with trying the case expeditiously and inexpensively. *Cinemark,* 66 F.Supp.2d at 887; *McNic Oil & Gas Co. v. IBEX Resources Co., LLC, JMA,* 23 F.Supp.2d 729, 740 (E.D.Mich. 1998). The party requesting the transfer, in this case, Petitioner, bears the burden of demonstrating that the balance of all relevant factors weighs in favor of transfer.[8] *Mead Data Central, Inc. v. West Publishing Co.,* 679 F.Supp. 1455, 1457 (S.D.Ohio 1987)(citing *Norwood v. Kirkpatrick,* 349 U.S. 29, 32 (1955)); *Roberts Metals, Inc. v. Florida Properties Marketing Group, Inc.,* 138 F.R.D. 89, 93 ((N.D.Ohio 1991).

***5** While not determinative, Petitioner's choice of forum is nevertheless a factor which the Court must weigh when deciding whether to transfer a case under § 1404(a). *Lewis v. ACB Business Servs., Inc.,* 135 F.3d 389, 4113 (6th Cir.1998). Although not his first choice, it is Petitioner who chose this forum.[9] Consequently, the Court finds that the Petitioner's choice of forum weighs in favor of retaining venue in this judicial district.

Next, the Court must consider the convenience of the parties and the witnesses. Clearly, no matter where the case is tried some of the parties will be required to travel a significant distance. Petitioner has failed to demonstrate that travel to this district would be any more onerous for his representatives than it would be for Respondent's representatives to travel to Norway. It appears to this Court that the relative expense of such travel could be bourne easily by either party. However, Petitioner has failed to offer any evidence in support of his relative financial status, nor has he presented any proof demonstrating that travel to this district would cause him hardship. *See United States ex. rel. Grand,* 811 F.Supp. at 332 (citing *AMF, Inc. v. Computer Automation, Inc.,* 532 F.Supp. 1335, 1343, 1344 (S.D.Ohio 1982) (holding that a court may consider the relative financial status of the parties in considering a motion to transfer). Indeed, the Court wishes to note that Petitioner has maintained Lawful Permanent Residence status or "green card" status in the United States most of his adult life and that, by his own admission, he travels often to the United States on business.

In a similar vein, Petitioner has presented neither an affidavit nor any other evidentiary material to the Court demonstrating that his witnesses would be inconvenienced by appearing in this district, or that certain non-party witnesses would refuse to appear at trial if they were not subject to the subpoena powers of this Court. In fact, Petitioner has failed to provide this Court with the identity of any witnesses whom he intends to call in support of his case. Petitioner's mere allegations in support of his motion to transfer are not sufficient to satisfy his burden of demonstrating that transfer is appropriate. *See Roberts Metals,* 138 F.R.D. at 93 ("bare allegations unsupported by affidavit provide no factual basis on which to conclude that the convenience of the witnesses weighs in favor of transfer"); *Armco,* No. C-1-96-1149, 1997 WL 311474, at *5 (S.D.Ohio May 30, 1997)("In order to meet its burden of proof, the Defendant must submit evidence indicating that their witnesses have refused to attend trial in the Southern District."); *AMF,* 532 F.Supp. at 1335 (where movant argues that witness will be unable to testify if transfer is not granted, it is incumbent upon the party moving for transfer to provide information concerning the materiality of the witness's proposed testimony).

***6** As for the remaining factors, the Court does not find that any of them weigh in favor of transfer. Petitioner does not argue, and the Court does not find that the possibility of prejudice exists in either forum. Because the case is before the Court pursuant to the Hague Convention, it is clear that no matter where the case proceeds, one party is necessarily a non-resident. However, that alone is not enough to indicate prejudice.

In conclusion, the Court finds that Petitioner has failed to demonstrate that the balance of factors the Court must consider in evaluating a motion under 28 U.S.C. § 1404(a) weighs in favor of transfer. For all the foregoing reasons, Petitioner's motion to change venue is denied.

Petitioner's Motion to Recuse is Denied

Additionally, Petitioner is apparently uncomfortable with the Court's knowledge of Respondent's family which was disclosed to the parties on February 28, 2000. At that time, the Court informed the parties that, approximately thirty (30) years ago, he

was employed as a teacher and football coach by Summit Country Day Elementary School. As a teacher and the football coach, he was acquainted with Respondent's brother who attended the school and played on the football team. The Court went on to inform the parties that he had never met Respondent nor had he seen Respondent's brother since his graduation from grade school. For the first time since February 28, Petitioner indicates that he is uncomfortable with the Judge's knowledge of Respondent's family and believes the Judge should withdraw from the case. (Doc. 32). As such, this portion of Petitioner's motion shall be treated as a Motion to Recuse.

There are two statutory provisions that govern recusal of a judge in federal court. One such statute, 28 U.S.C. § 144, provides:

> [w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for the failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The mere filing of an affidavit under § 144 does not result in the automatic recusal of a judge. *United States v. Kehlbeck,* 766 F.Supp. 707, 709 (S.D.Ind.1990). Rather, "a judge has an affirmative duty to inquire into the legal sufficiency of such affidavit and not to disqualify himself unnecessarily." *City of Cleveland v. Cleveland Electric Illuminating Company,* 503 F.Supp. 368, 370 (N.D.Ohio 1980). Indeed, a trial judge has as much obligation not to recuse himself where there is no reason to do so as he does to recuse himself when the converse is true. *Id.* (citing *United States v. Bray,* 546 F.2d 851, 857 (10th Cir.1976)). Recusal will not occur until the judge rules on the affidavit or motion. *Kehlbeck,* 766 F.Supp. at 709.

***7** Petitioner has neither attached an affidavit to his motion nor separately filed an affidavit in support of said motion. Accordingly, Petitioner cannot satisfy the requirements of § 144 and his motion to recuse, to the extent that he sought to bring one under this provision, shall be denied. *See* 28 U.S.C. § 144.

The fact that Petitioner's motion to recuse will be denied under 28 U.S.C. § 144 does not end this Court's inquiry. Assuming *arguendo* that Petitioner seeks recusal pursuant to 28 U.S.C. § 455, the Court must determine whether *sua sponte* recusal is appropriate. The statute provides in pertinent part:

> (a) [a]ny justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> ...
>
> (5) He ...:
>
> (iv) Is to the Judge's knowledge likely to be a material witness in the proceeding....

28 U.S.C. §§ 455(a), (b)(1) & (b)(5)(iv). Thus, 28 U.S.C. § 455 requires a judge to *sua sponte* recuse himself where he knows of facts that would undermine the appearance of impartiality, where he has a personal bias or prejudice concerning a party, or where he has personal knowledge of disputed evidentiary facts. *Liteky v. United States,* 510 U.S. 540, 547-48 (1994).

In 1974, Congress amended § 455 to specifically spell out the grounds for recusal previously covered by the statute, *see* 28 U.S.C. § 455(b)(2)-(b)(5), and to incorporate the general elements of "bias and prejudice" recusal that had previously been addressed only by § 144. *See* 28 U.S.C. § 455(b)(1); *Liteky,* 510 U.S. at 548. Paragraph (b)(1) of § 455 entirely duplicates the grounds of recusal set forth in § 144 while making them applicable to all justices and judges, not just district judges. *Liteky,* 510 U.S. at 548. In addition, § 455 does not limit recusal to instances where a motion or affidavit is filed. *Liteky,* 510 U.S. at 548. Rather, § 455 places the obligation to identify the existence of grounds for recusal on the judge himself. *Id.*

Finally, Congress added a new provision to the statute that bases recusal on both "interest and relationship" and "bias and prejudice" grounds. *See* 28 U.S.C. § 455(a). Unlike the recusal provisions of § 144 which require a showing of actual bias, under § 455(a), the grounds for recusal must be evaluated on an objective basis to determine whether an appearance of bias or prejudice exists. *Liteky,* 510 U.S. at 548; *Kehlbeck,* 766 F.Supp. at 712. In other words, a judge should disqualify himself pursuant to § 455(a) if "a reasonable person would infer, from all the circumstances, that the judge's impartiality is subject to

question." *United States v. Sammons,* 918 F.2d 592, 599 (6th Cir.1990). *See also Baker v. Detroit,* 458 F.Supp. 374, 376 (E.D.Mich.1978); *Warner v. Global Natural Resources PLC,* 545 F.Supp. 1298, 1302 (S.D.Ohio 1982)(Spiegel, J.); *Story,* 716 F.2d at 1091. However, § 144's extra-judicial source doctrine applies equally to § 455(a) such that recusal is only justified when based on something other than what a judge has learned from his participation in a case. *Sammons,* 918 F.2d at 599, *Liteky,* 510 U.S. at 1157.

***8** Under § 455(a), the Court must apply an objective standard to determine whether, given all the facts and circumstances, a reasonable person would question this judge's impartiality. Petitioner's motion clearly fails to set forth such grounds. Furthermore, the fact that this judge coached Respondent's brother in football thirty years ago does not automatically create circumstances under which a reasonable person would question his impartiality. This judge has no interest in the present action. Nor does he have any relationship to any of the parties that would give rise to even the appearance of partiality. Clearly, recusal is not appropriate based on § 455(a).

Turning to § 455(b), it is important to note that the provisions of both 28 U.S.C. § 144 and 28 U.S.C. § 455 must be read *in pari materia. City of Cleveland,* 503 F.Supp. at 371-72; *Story,* 716 F.2d at 1091. There is no basis to conclude that any portion of § 455(b)(2)-(b)(5) is applicable to the case at bar. As noted above, § 455(b)(1) duplicates the grounds of recusal set forth in § 144. *Liteky,* 510 U.S. at 548. There are simply no facts to establish that this judge is biased or prejudiced against Petitioner in favor of Respondent. Because the Court has already denied Petitioner's motion to recuse based on § 144, there is clearly no basis to grant the motion based on § 455(b)(1). For the foregoing reasons, Petitioner's motion, to the extent it seeks recusal, is denied.

RESPONDENT'S MOTION TO STRIKE PETITION (Doc. 8) SHOULD BE DENIED

The Petition for Return of Children, which is the subject of the matter before us, was filed on November 12, 1999, slightly less than a year from the date of the alleged wrongful removal of the children from Norway. (Doc. 1). Under Article 12 of the Hague Convention, where the proceedings have been commenced after one year from the date of wrongful removal, the Court may deny the petition if it is established that the children have "settled in [their] new environment." Hague Convention, Article 12. Thus, the date of the filing of a petition under the Hague Convention is significant.

Respondent asserts that the Petition filed on November 12, 1999 was unsigned and that, sometime after November 16, 1999, but prior to December 20, 1999, two signed pages were substituted for the unsigned pages. (Doc. 8, Respondent's Motion to Strike, Exs. E, F, attached). The two signature pages at issue are clearly faxed pages separate from the body of the originally filed Petition. The Petition bears a date/time stamp indicating that the Petition was filed in the U.S. District Court for the Southern District of Ohio, at 2:12 p.m. on November 12, 1999. However, the two signed pages indicate that they were faxed to the office of Michael W. Davis, Esq ., at 3:37pm on November 12, 1999. From this, the Court can reasonably infer that the *signed* signature pages were not filed concurrently with the body of the Petition. Unfortunately, because the signed but undated pages were inserted into the original Petition and not filed separately as an amendment to the original Petition, we cannot ascertain the exact date on which the Petition was properly signed.

***9** Fed.R.Civ.P. 11 allows for the correction of an unsigned pleading if corrected promptly following notification of the party. Because the said omission was not discovered by the Court prior to the correction of such, there was no notification provided to Petitioner. Thus, we cannot say that the omission was not corrected promptly and cannot strike the Petition on this basis. Moreover, because Rule 11 allows for the correction of an unsigned pleading by either signing the pleading on file or by submitting a duplicate that contains the signature, the Petition, filed on November 12, 1999 but signed thereafter, is considered a properly filed pleading.[10] Thus, despite the irregularities surrounding the filing of the Petition, we find that it was properly filed within one year from the date of the children's removal from Norway, namely on November 12, 1999.

Respondent also argues that the Petition should be stricken pursuant to Fed.R.Civ.P. 11 because, although allegedly filed pro se, Petitioner has obviously received substantial assistance from counsel in the preparation and filing of the Petition. Respondent alleges that the Petition filed with this Court is a photocopy of the petition filed with the Common Pleas Court in December of 1998.[11] However, rather than bearing the signature of Petitioner's counsel from the domestic relations case, the current Petition contains a signature line for Petitioner's signature, "pro se." Respondent further contends that the Summons and Petition which were served upon her on January 18, 2000 totally omit the signature pages of the Petition and were delivered in a large envelope to which was affixed the business envelope of Petitioner's local counsel. (Doc. 8, Exs.G, H, attached). The Summons directs that a response be sent to Petitioner "c/o Michael W. Davis, Esq." It is Respondent's contention that while Petitioner purports to be acting pro se, he has in fact received significant assistance from counsel.

Rule 11 provides in pertinent part that,

> [e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party....

Fed.R.Civ.P. 11(a). Respondent's primary issue is one involving the ghostwriting of Petitioner's pleadings by counsel. Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. *See Laremont-Lopez v. Southeastern Tidewater Opportunity Center,* 968 F.Supp. 1075, 1077 (E.D. Va. June 3, 1997). The court in *Laremont-Lopez* went on to hold that, while not prohibited by any specific rule, the practice of ghostwriting "unfairly exploits the mandate that pleadings of pro se litigants be held to a less stringent standard than pleadings drafted by lawyers, as well as "effectively nullifies the certification requirements" of Fed.R.Civ.P. 11. *Id.* at 1078. Moreover, this practice allows counsel to escape the obligation imposed on members of the bar under Rule 11 of representing to the court that there is good ground to support the assertions made. *See Ellis v. State of Maine,* 448 F.2d 1325, 1328 (1 st Cir.1971). Finally, it has been held that such conduct implicates the ABA's Model Code of Responsibility DR I-102(A)(4), which states that an attorney should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See Ricotta v. State of California,* 4 F.Supp.2d 961 (S.D.Cal. Apr. 15, 1998). We agree. Thus, this Court agrees with the 1 st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. *See Ellis* at 1328.

***10** While the Petition was clearly not written by Petitioner, it appears to the Court that Petitioner merely photocopied the Petition from his state court case and caused it to be filed with this Court.[12] Likewise, it is clear to the Court that Petitioner did not draft the Motion for Preliminary Injunction, faxing, instead, the signed signature pages to his local counsel, Michael W. Davis. Thereafter, the Court has been inundated with faxed letters from Petitioner, his attorney in Norway, and letters from local (state court) counsel.[13] Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. Petitioner and counsel have failed to heed the admonitions of the Court with regard to the lack of appearance by counsel on behalf of Petitioner. Instead of retaining counsel to represent him in this matter and having counsel enter an appearance, Petitioner simply utilizes local counsel and his Norwegian attorney, neither of whom is counsel of record, to make requests on behalf of Petitioner through correspondence while, at the same time, making it clear that they are not representing Petitioner in the matter before this Court.[14] We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.

Nonetheless, because we find that the photocopying of the state court Petition and its filing with this Court are not specifically prohibited by the Rules and did not result in Petitioner gaining an unfair advantage over Respondent, we decline to strike the Petition. We do, however, wish to reiterate that we consider the conduct following the filing of the Petition, outlined above, to be a violation of the Court's Rules and stress that we will not tolerate any further such conduct.

THE PETITION FOR THE RETURN OF CHILDREN TO PETITIONER (Doc. 1) SHOULD BE DISMISSED WITH PREJUDICE FOR FAILURE TO PROSECUTE

The Convention on Civil Aspects of International Child Abduction was adopted by the signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." *Friedrich v. Friedrich,* 983 F.2d 1396, 1399-1400 (6 th Cir.1993)(*"Friedrich I"*)(citing Hague Convention, Preamble). Both the United States and Norway are signatory nations. The Convention is designed to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic forum. *Friedrich II,* 78 F.3d at 1064 (citing Pub. Notice 957, 51 Fed.Reg. 10494, 10505 (1986)); *Friedrich I,* 983 F.2d at 1400; *Rydder,* 49 F.3d at 372; *Feder,* 63 F.3d at 221; *Wanninger v.. Wanninger,* 850 F.Supp. 78, 80 (D.Mass.1994).

Pursuant to the International Child Abduction Remedies Act, state and federal courts have concurrent jurisdiction of actions arising under the Convention. 42 U.S.C. § 11603(a). A person seeking the return of a child under the Convention may

commence a civil action by filing a petition in a court where the child is located. *Id* § 11603(b). Under the Convention, a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute. Hague Convention, Article 19; 42 U.S.C. § 11601(b)(4); *Friedrich v. Friedrich,* 78 F .3d 1060, 1063-64 (6 th Cir.1996) (*Friedrich II*); *Friedrich I,* 983 F.2d at 1400; *Rydder v. Rydder,* 49 F.3d 369, 372 (8 th Cir.1995); *Feder v. Evans-Feder,* 63 F.3d 217, 221 (3d Cir.1995).

***11** Under the ICARA, Petitioner bears the initial burden of establishing by a preponderance of the evidence that the children have been "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 11603(e)(1)(A); *Rodriguez v. Rodriguez,* 33 F.Supp.2d 456, 458 (D.Md. Jan. 26, 1999). Pursuant to Article 3 of the Convention, the removal of a child from one country to another is wrongful when:

> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
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> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
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> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, Article 3. Once Petitioner has satisfied his burden, the children must be returned to Norway unless the Respondent can demonstrate,

> 1) by clear and convincing evidence that there is a grave risk that the return of the children would expose the children to physical or psychological harm, Hague Convention, Article 13b, 42 U.S.C. § 11603(e)(2)(A);
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> 2) by clear and convincing evidence that the return of the children "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms;" Hague Convention, Article 20, 42 U.S.C. § 11603(e)(2)(A);
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> 3) by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child has become settled in its new environment; Hague Convention, Article 12; 42 U.S.C. § 11603(e)(2)(B); or
>
> 4) by a preponderance of the evidence that the petitioner was not actually exercising the custody right at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; Hague Convention, Article 13a; 42 U.S.C. § 11603(e)(2)(B).

Friedrich I, 983 F.Supp. at 1400.

Therefore, as a threshold matter, Petitioner must prove by a preponderance of the evidence that Respondent removed the children from their "habitual residence," and that Petitioner was exercising his parental custody rights over the children at the time of removal, under the law of the state of the children's habitual residence. If Petitioner carries this burden, Respondent may look to one of the four affirmative defenses mentioned above. An evidentiary hearing on the merits of Petitioner's Hague Petition was held on June 29, 2000. Respondent, Respondent's counsel and several witnesses were present at this hearing. The Court also spoke with the parties' two eldest children *in camera.* However, neither Petitioner nor any attorney of record appeared on Petitioner's behalf.

***12** District courts have the inherent power to *sua sponte* dismiss civil actions for want of prosecution to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.,* 370 U.S. 626, 630-31 (1962). Failure of a party to respond to an order of the court warrants invocation of the Court's inherent power. *See* Fed.R.Civ.P. 41(b). The Sixth Circuit has held that dismissal is an appropriate sanction pursuant to Rule 41 of the Federal Rules of Civil Procedure when there is a "clear record of delay or contumacious conduct by the plaintiff." *Carter v. City of Memphis, Tennessee,* 636 F.2d 159, 161 (6 th Cir.1980)(quoting *Silas v. Sears, Roebuck & Co., Inc.,* 586 F.2d 382, 385 (5 th Cir.1978); *see also Coleman v. American Red* Cross, 23 F.3d 1091, 1095 (6 th Cir.1994). As the court in *Carter* explained, "the key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, ... or failure to comply with the pre-trial order." 636 F.2d at 161 (quoting *J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp.,* 542 F.2d 1318, 1323 (7 th Cir.1976)(per curiam)). The record is replete with examples of Petitioner's attempts to delay this matter. Petitioner was expressly advised that his failure to appear would result in a recommendation that his case be dismissed with prejudice. The Convention envisions that a judicial authority will act expeditiously in proceedings for the return of the children. Hague Convention, Article 11. Thus, Petitioner's delaying tactics cannot be tolerated. Petitioner failed to appear, and thus, his Petition should be dismissed with prejudice for failure to prosecute.

THE PETITION FOR THE RETURN OF CHILDREN SHOULD BE DENIED ON THE MERITS

I. *Prima Facie Case of Wrongful Removal*

While we find that the Petition should be dismissed for failure to prosecute, we will, nonetheless, address the merits of the Petition in order to provide the most complete record for review. The Court finds that, while Petitioner may have carried his burden, through his initial Petition, of demonstrating that the children were wrongfully removed within the meaning of the Convention, Respondent has established by clear and convincing evidence that there is a grave risk that returning the children to Norway would expose them to physical and psychological harm. Moreover, Respondent has demonstrated by a preponderance of the evidence that Petitioner subsequently acquiesced in the children's removal. *See* Hague Convention, Articles 13a and 13b; 42 U.S.C. § 11603(e)(2)(A) and (e)(2)(B). Finally, we note that the two eldest children object to being returned to Norway. *See* Hague Convention, Article 13b; 42 U.S.C. § 11603(e)(2)(B).

A. *Habitual Residence*

The Convention does not define "habitual residence." The Sixth Circuit has had the opportunity to address the meaning of "habitual residence" under the Convention. The Sixth Circuit has stated that:

> ***13** [a] person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The Court must look back in time, not forward.

Friedrich I at 1401. Citing a British Court case, the court went on to state that the focus is on the child and not the parents and that past experience and not future intentions is the test. *Id* (citing *In re Bates,* No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989)).

Here, the parties and their children continuously resided in Norway from mid-1995 to November 1998. The children attended school in Norway and worked in the family's hotel. Respondent argues that, because the family never intended to live permanently in Norway, it was not the habitual residence. Respondent states that the intention was to stay in Norway for six months to, at most, a year while she and Petitioner managed the improvement of their hotel until it could be resold. As support for this argument, Respondent testified that she and her children packed only one small bag of clothes a piece, taking only enough clothing for one season. Respondent also testified that the family home in New Jersey was not put on the market and that the house and its contents were left intact.

As stated previously, Respondent's testimony conflicts with evidence presented in the Norway proceedings that the parties had their furniture sent over earlier in the Fall of 1998, thus detracting from her argument that the parties' stay was intended to be brief. Nonetheless, habitual residence is not conditioned upon an intention to remain in Norway forever. Rather, the Court must "look back in time not forward" and focus on the children, not the parents. *Friedrich I,* 983 F.Supp. at 1401. Thus, the parents' future intentions are irrelevant. *Id.* Inherent in this concept of habitual residence is a "degree of settled purpose." *In re Bates,* No. CA 122.89 at 10. As the court in *Bates* stated, "[a]ll that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." *Id.* We find that three years of residence in Norway during which time the children attended school, interacted socially and assisted their parents in the operation of the family hotel establishes a sufficient degree of continuity to be properly described as "settled."

Respondent also attempts to argue that Norway was not the habitual residence of the children as she and the children were

held there against their will. Respondent argues that Petitioner took her passport and the children's passports to prevent them from leaving the country. (Tr. 54). She also testified that she was rarely permitted to take the children with her when she left the hotel for extended periods of time, stating that she was only permitted to take the girls to church services, albeit infrequently. (Tr. 57-58).

***14** While we agree with the court in *Ponath,* that "coerced residence is not habitual residence within the meaning of the Convention," we do not find that such is the case under the current set of facts. Respondent testified that it "got to the point" where they would have arguments during which Petitioner was physically abusive to Respondent and that she would, "at different intervals," ask for the passports. However, Respondent claims that Petitioner refused to give them to her or tell her where they were. (Tr. 54). Respondent further testified that she was rarely permitted to leave the hotel by herself and that Petitioner would often accompany her on her errands. Respondent stated that "in the end" she was never permitted to leave the hotel with the children except to take them to Mass on Sunday nights. (Tr. 58). While we believe that Respondent was in a difficult position, we are not convinced that she was held in Norway against her will. Regardless of whether Respondent remained in Norway against her will "in the end," it is clear that she went to Norway voluntarily in 1995, intending to remain indefinitely, remaining voluntarily for much of the three years until the situation worsened to such a degree that she "fled" the country with her children.[15] Accordingly we find this argument to be without merit and find that, for the reasons outlined above, the children were habitually resident in Norway prior to their removal.

B. *Exercising Custody Rights*

Next we must consider whether Petitioner was exercising his parental rights over the children at the time of their removal from Norway. It is undisputed that, from 1995 to November 15, 1998, the parties and their children resided together in the family's hotel. Under Norwegian law, parents who are married have joint parental responsibility of the children. *See* Act No. 7 of April 8, 1981 relating to Children and Parents (The Children Act), § 34. With regard to this issue, the Sixth Circuit has stated that "if a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to 'exercise' those custody rights under the Hague convention short of acts that constitute clear and unequivocal abandonment of the child." *Friedrich II,* 78 F.3d at 1066. In this case, Norwegian law gave Petitioner custody rights over the children. The facts before us establish that Petitioner exercised those rights on a daily basis. Moreover, Respondent has offered no evidence to suggest that Petitioner clearly abandoned those rights prior to the children's removal from Norway. Thus we find that, because Petitioner had custody rights over the children as a matter of Norwegian law, and did not clearly abandon those rights prior to November 15, 1998, the removal of the children without his consent was wrongful under the Convention.

II. Affirmative Defenses

A. *Grave Risk of Harm*

Under the Hague Convention, the Court's inquiry does not end upon a finding of wrongful removal. Once Petitioner establishes that the children were wrongfully removed from Norway, the children must be returned unless Respondent can establish that any of the Hague Convention's affirmative defenses apply. 42 U.S.C. § 11603(e)(2); *Friedrich II,* 78 F.3d at 1067. Respondent contends that the children should not be returned to Norway because there is a grave risk that doing so would expose the children to physical and psychological harm.

***15** Addressing the issue, the Sixth Circuit stated, in dicta, that,

> [a]lthough it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the

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

Friedrich II, 78 F.3d at 1069. However, unlike the respondent in *Friedrich,* Respondent alleges more than mere adjustment problems, citing a history of physical and emotional abuse of herself and her children at the hands of Petitioner. The Court heard the testimony of two experts who both very clearly expressed that, due to the past abuse by their father and his refusal to seek counseling, returning the children to Norway would expose them to grave risk of physical and psychological harm. Furthermore, both experts believe the two eldest children to be of suitable age and maturity to be able to express their opinions about their wishes in this matter. (Tr. 26, 36).

Dr. Susan Eppley testified that she began counseling the children on November 19, 1998 at which time she learned that the children and their mother had sustained considerable trauma, physical abuse, emotional abuse and verbal abuse. (Tr. 14-15). Dr. Eppley diagnosed the children as suffering from post traumatic stress syndrome, having all experienced the abuse themselves as well as having witnessed their mother's abuse. (Tr. 21). Dr. Eppley testified that the each child related multiple episodes of physical and emotional abuse by their father. According to Dr. Eppley, while the children are now thriving in their new environment, they still fear returning to Norway. (Id.). She stated that she has offered to cooperate with any psychologist which Petitioner would work with but to date, she has not been contacted by anyone on Petitioner's behalf. Because Petitioner has not sought counseling and because Dr. Eppley has no evidence that anything has changed in Norway since the children have left, she opined that returning the children to Norway would create an intolerable situation for the children. (Tr. 24). More specifically, she opined that returning the children to Norway would not only result in the loss of all the gains they have made, but would also retraumatize them to the point that they would probably shut down emotionally. (Tr. 24).

Dr. Murray Tieger also testified on behalf of Respondent. (Tr. 27-40). Dr. Tieger was initially retained by Petitioner's previous counsel, in conjunction with the first Hague proceeding, to help determine whether the children would be exposed to an intolerable situation or to grave psychological harm by being returned to Norway. (Tr. 29). Dr. Tieger met with the children individually on March 30, 1999 and with Respondent on April 1, 1999 for an extended personal history and clinical interview. (Id.). He also spoke with Petitioner several times by phone, the most comprehensive interview taking place on April 12, 1999.(Id.). He later met with Dr. Eppley to exchange clinical impressions. (Tr. 30). While he stated that he did not meet with the children "extensively enough to ascertain all the criteria necessary for a diagnosis of post traumatic stress syndrome," his own "diagnostic impression was at the very least severe stress disorder for each of the children." (Tr. 30-31). Dr. Tieger further testified that each child described Petitioner's excessive drinking and related various incidents of abuse, directed at them and at their mother. (Tr. 31-32). From his phone conversations with Petitioner, Dr. Tieger opined that Petitioner suffered from a narcissistic character disorder with marked controlling attitudes. (Tr. 33). According to Dr. Tieger, this character disorder would pose a grave risk of harm to the children and place them in an intolerable situation were they to be returned to Norway. (Tr. 34). Moreover, Dr. Tieger testified that the children would suffer irreparable psychological harm merely by being ordered to return to Norway regardless of whether they are ordered to return to Petitioner's custody. (Tr. 35). Finally, Dr. Tieger stated that it would be a grave risk to the children's psychological well-being to even permit extended visitation here in the states. (Tr. 37).[16]

***16** The Sixth Circuit has made it clear that this exception is to be narrowly construed. *Friedrich II,* 78 F.3d at 1067. The exception for grave risk of harm is not "license for a court in the abducted-to country to speculate on where the child would be happiest." *Id.* at 1068. Thus, the testimony elicited from Respondent and the experts regarding the children's rather grim life in Norway, namely being required to provide "maid service" for the family hotel in addition to their "regular chores," is irrelevant to our obligation under the Convention. *See Id.* What we find to be relevant is the physical and psychological abuse which the children experienced in Norway at the hands of their father.

While some courts addressing the issue of domestic violence under the Convention focus merely on whether the children themselves suffered the physical abuse, we feel that such a view is myopic at best. *See Nunez-Escudero v. Tice-Menley,* 58 F. 3rd 374 (8 th Cir.1995). Such a view fails to consider the psychological harm suffered by children who are forced to witness acts of violence perpetrated by one parent upon the other. Moreover, studies have shown that serial spousal abusers are also likely to be child abusers. *Walsh v. Walsh,* 2000 WL 1015863, Nos. 99-1747, 99-1878 at 13 (1 st Cir.2000)(citing Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Woman Battering, 5 Violence Against Women 134 (1999); Anne E. Appel & George W. Holden, The Co-Occurrence of Spouse and Physical Child Abuse: A Review and Appraisal, 12 J. Fam. Psychol. 578 (1998); Lee H. Bowker et. al., On the Relationship Between Wife Beating and Child Abuse, in Kersti Yllo &

Michele Bograd, Feminist Perspective on Wife Abuse 158 (1988); Susan M. Ross, Risk of Physical Abuse to Children of Spouse Abusing Parents, 20 Child Abuse & Neglect 589 (1996)). Recognizing that children are at increased risk of physical and psychological harm when in contact with a spousal abuser, a congressional resolution was passed in 1990 finding that:

> [w]hereas the effects of physical abuse of a spouse on children include ... the potential for future harm where contact with the batterer continues;
>
> ....
>
> [w]hereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent; ...

Walsh, 2000 WL 1015863 at *13-14 (quoting H.R. Con. Res. 172, 101 st Cong., 104 Stat. 5182, 5182 (1990)); (citing also Opinion of the Justices to the Senate, 691 N.E.2d 911, 917 n. 5 (Mass.1998)). For these reasons, we find that we are obligated to consider not only the abuse actually suffered by the children but also the abuse of their mother which they witnessed.

The uncontroverted testimony of Respondent, Drs. Eppley and Tieger, and the *in camera* discussions with the two older children, establish that Petitioner physically abused Respondent in the presence of the children and physically and emotionally abused the children. (Tr. 16-17, 19, 31, 52, 54-56, 59, 62-66, 106-107, 112-13). Although we believe grave risk of harm for purposes of the Convention to be broader than that outlined previously, *see supra* at 25, we find that Respondent has shown by clear and convincing evidence that there is a grave risk that the return of the children would expose the children to physical or psychological harm. The United States Department of State in addressing the grave risk/intolerable situation exception stated that:

> ***17** [a]n example of and "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.

Pub. Notice 957, 51 Fed.Reg. 10494, 10510 (1986). As the court in *Rodriguez* found, there is no "reason to conclude that being physically abused ... is any more tolerable." *Rodriguez v. Rodriguez,* 33 F.Supp.2d 456, 462 (D.Md. Jan. 26, 1999). Thus, like the court in *Rodriguez,* we find the present case sufficiently analogous to the type of situation identified above. We find that there is clear and convincing evidence that there is a grave risk that ordering the return of the children to Norway would expose the children to physical and psychological harm such as to place them in an intolerable situation.

While neither Article 13 nor the interpretive guidelines issued by the United States Department of State make any reference to the home country's ability to protect the child, several courts have held that "the trial court must conduct a thorough analysis of ameliorative measures." These measures include "whether the child safely might be returned under the care of the parent defending against the petition or another appropriate third party, and whether the judicial authorities of the child's home country are capable of enforcing those measures, thereby eliminating the harm that the child might otherwise face upon repatriation." *Turner v. Frowein,* 752 A.2d 955, 972 (Conn. May 17, 2000); *see also Walsh,* 2000 WL 1015863 at *12; *Blondin v. DuBois,* 189 F.3d 240, 248 (2 nd Cir.1999); *Friedrich II,* 78 F.3d at 1068; *Thomson v. Thomson,* [1994] 3 S.C.R. 551, 599 (Can.). We have thoroughly considered the options which would allow for the safe return of the children to Norway. While the authorities in Norway quite possibly may be able to protect against physical harm, the same cannot be said regarding the psychological harm which we believe the children will suffer if ordered to return. Moreover, we are not willing to take the chance that the authorities may fail, as authorities sometimes do, to protect the children from physical harm. Likewise, we do not believe that institutionalizing the children for the pendency of the custody proceedings is the answer. Based on the testimony of the Drs. Eppley and Tieger, we find that the return of the children under any arrangement would present a grave risk of psychological, if not physical, harm. (Tr. 24, 35).

B. *Petitioner has Acquiesced in the Removal of the Children from Norway.*

Respondent also claims that Petitioner subsequently acquiesced in the removal of the children from Norway to the United States. Article 13a provides that the court may decline to order the return of the children if the person seeking the return of the children "subsequently acquiesced in the removal or retention." Hague Convention, Article 13a. The Sixth Circuit has made it clear that "subsequent acquiescence requires more than an isolated statement to a third-party." *Friedrich II,* 78 F.3d at 1070. It requires "either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing renunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Id.*

***18** Respondent argues in her Motion to Dismiss that the decision of the Court of Common Pleas, Domestic Division is entitled to preclusive effect on the issue of acquiescence. Section 11603(g) provides that, "[f]ull faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering ... the return of a child, pursuant to the Convention, in an action brought under this chapter." "Full faith and credit" as used in 42 U.S.C. § 11603(g) has been held to mean that a court must give "preclusive and dispositive weight to a prior decision of another court that requires the return of a child from one country to another under the provisions of the treaty." *Morton v. Morton,* 982 F.Supp. 675, 685 (D.Neb. Oct. 30, 1997). Such is not the case in the instant matter. At the time of the court's decision, no Hague Petition was before the court, nor did the state court order the return of the children pursuant to the Hague Convention, thus, we are not required under 42 U.S.C. § 11603(g) to accord the decision preclusive effect.

Respondent argues in the alternative that even if the Domestic Relation's Court's determination of custody did not result in claim preclusion, its finding of acquiescence constitutes issue preclusion preventing the granting of the Petition. Issue preclusion prohibits the relitigation of an issue that has been "actually and necessarily litigated and determined in a prior action." *Metrohealth Med. Ctr. v. Hoffman-LaRoche, Inc.,* 685 n.E.2d 529, 533 (Ohio 1997). Issue preclusion is applicable when a fact or issue "(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom it is asserted was a party in privity with a party to the prior action." *Thompson v. Wing,* 637 N.E.2d 917, 923 (1994).

Because Petitioner's Hague Petition was not before the state court at the time of its decision, the issue of acquiescence under the Convention was not actually or directly litigated in the state court proceedings, nor was it necessary to the custody determination. Pursuant to the Convention, a court may determine the merits of rights of custody if the "application under the Convention is not lodged within a reasonable time following receipt of notice." Hague Convention, Article 16. Thus, the court need only have determined whether Petitioner lodged his application under the Convention within a reasonable time. As such, the issue of acquiescence under the Convention was not necessary to the court's determination of its right to proceed with the parenting determination and we are not bound by the state court's determination of this issue. *See Morton v. Morton,* 982 F.Supp. 675, 684 (D.Neb. October 30, 1997). Accordingly, we find that Respondent's Motion to Dismiss Petition based on the principles of claim and issue preclusion should be denied.

***19** Article 13a of the Convention permits a court to decline to return the children if it is established that Petitioner subsequently acquiesced to the wrongful removal or retention. In order to prevail, Respondent must prove by a preponderance of the evidence that Petitioner consented to or subsequently acquiesced to the children remaining in the United States. Hague Convention, Article 13a; 42 U.S.C. § 11603(e)(2)(B); *Friedrich II,* 78 F.3d at 1067. The Sixth Circuit has held that "acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing enunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Friedrich II,* 78 F.3d at 1070.

In *Friedrich II,* the court weighed the contradictory testimony regarding whether petitioner told his wife that he consented to the removal of their child and concluded that, in the absence of other evidence, respondent's deliberate secretive departure from the habitual residence was the strongest evidence that petitioner would not have consented to the removal of their child. *Id.* at 1069. Courts in the United States, England and France have found that acquiescence is a subjective test. *See Re H and Others,* (1997) 2 W.L.R. 563, 573B (citing *Friedrich II,* 78 F.3d at 1060; *Wanninger,* 850 F.Supp. at 78; and *Horlander v. Horlander,* 1992 Bull.Civ. I, No.91-18.177). In *Horlander,* the court found that acquiescence is subjective and refused to find acquiescence where the petitioner's intention to acquiesce was not "unequivocal." *Horlander,* 1992 Bull.Civ. I, No. 91-18.177. In *Wanninger,* the court dismissed circumstantial evidence of acquiescence once it was established that the petitioner's intentions were not to acquiesce but to reconcile his marriage. *Wanninger,* 850 F.Supp. at 82. Such is not the case here. Both parties unequivocally state that the marriage is over. However, while Petitioner may not have consented initially to the removal of the children, we find that Petitioner has demonstrated a consistent attitude of acquiescence over the year and half since the children left Norway.

It is undisputed that Petitioner filed his application for the return of the children with Norway's Central Authority, nine days after the children's wrongful removal. He then filed his petition under the Hague in state court on December 11, 1998, less than one month following their removal. However, since the filing of his Hague petition in state court, Petitioner has consistently engaged in delaying tactics which belie his stated intentions of seeking the return of his children. After requesting several continuances for various reasons, Petitioner dismissed his Hague petition only to re-file said petition in the

federal court some seven months later. The testimony elicited at the hearing, established that since April 1999, Petitioner has made no effort to seek physical or telephone contact with the children.[17] Moreover, Petitioner has not formally sought custody or visitation with his children in either our courts or the Norwegian courts.[18] Petitioner failed to respond to Respondent's Complaint for divorce waiving any defenses which may have been raised. *See* Oh. R. Civ. P. 12(H)(1). Petitioner likewise did not file objections to the Domestic Court Magistrate's denial of his motion to dismiss contesting jurisdiction, waiving any personal jurisdiction argument he might have raised. *See* Oh. R. Civ. P. 53(E)(3)(b). While Petitioner filed objections to the Domestic Court Magistrate's decision awarding Respondent custody of the children, arguing that the custody proceedings should be stayed until his Hague Petition in federal court was decided, he failed to follow through with his objections by filing any memorandum in support of his position.

***20** Finally, Respondent testified that on December 8, 1998, she received through Petitioner's then attorney a letter stating that Petitioner would permit her to keep the children in the United States if he was paid the sum of $1.5 million. (Tr. 87).[19] "As a general rule, courts should be careful not to translate negotiation as acquiescence" because doing so "could lead lawyers to refuse to negotiate at all for fear of creating the impression of acquiescence." Linda J. Silberman, Hague Convention on International Child Abduction: A Brief Overview an Case Law Analysis, 28 Fam.L.Q. 9, 26 (1994). As stated above, the evidence indicates that no attempt at reconciliation was made between the parties since the removal of the children from Norway. Thus, we find that Petitioner was not seeking to negotiate with Respondent toward any reconciliation of the family. Rather, we are inclined to believe that Petitioner merely sought to capitalize on the situation to his financial benefit.

In conclusion, we find that Petitioner's haphazard attempts at litigating the matters before this Court as well as other courts demonstrate to us that it is not so much the return of his children which Petitioner seeks as it is the vexation and aggravation which he can cause to Respondent through his course of conduct. Thus, we find that Respondent has shown by a preponderance of the evidence that through his dilatory conduct, Petitioner has demonstrated a consistent attitude of acquiescence in the children's retention in the United States.

C. *The Children's Objections*

Article 13 also permits a court to decline to order the child returned if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views. Pub. Notice 957, 51 Fed.Reg. 10494, 10510 (1986).[20] As with the other Article 13 exceptions to the return obligation, this exception is not mandatory. *Id.* The discretionary aspect of this exception is significant due to the potential for brainwashing of the child by the abducting parent.

In this case, both experts agree that the two eldest children are of suitable age and maturity so that it is appropriate to take into account their wishes. (Tr. 26-27, 37). Moreover, Dr. Tieger testified that he found no evidence that the children were being unduly influenced by anyone, including their mother. (Tr. 36). The Court interviewed the two eldest children *in camera* outside the presence of their mother but with Respondent's counsel present. The children stated unequivocally that they wish to remain in the United States with Respondent. While the children expressed that their lives here are more pleasant and that they are happier here, the children also expressed, through their testimony regarding Petitioner's abusive behavior, their fear of returning to Norway. (Tr. 106-108, 112-13). Therefore, exercising our discretion on this issue, we find that the two eldest children are of sufficient age and maturity to relate their wishes to the Court and that they most definitely object to returning to Norway.

***21** Although we find that the children were wrongfully removed from Norway by Respondent, we find that Respondent has shown by clear and convincing evidence that there is a grave risk that the return of the children to Norway would expose the children to physical and psychological harm. We further find that Respondent has shown by a preponderance of the evidence that Petitioner subsequently acquiesced in the removal or retention of the children in the United States. Finally, we find that the children object to being returned to Norway. Accordingly the Petition for the Return of the Children to Petitioner (Doc. 1) should be denied.

IT IS THEREFORE RECOMMENDED THAT:

1) The Petition for the Return of Children to Petitioner (Doc. 1) be DENIED.

2) Respondent's Motion to Strike Petition (Doc. 8) be DENIED.

3) Respondent's Motion to Dismiss Petition (Doc. 27) be DENIED.

IT IS THEREFORE ORDERED THAT:

1) Petitioner's Motion to Change Venue (Doc. 32) be DENIED.

All Citations

Not Reported in F.Supp.2d, 2000 WL 1611123

Footnotes

1	While Petitioner is represented by counsel in state court and in Norway, counsel has not entered an appearance on behalf of Petitioner, despite repeated admonitions to do so.
2	The Court attempted, over the course of several days, to serve Petitioner with a copy of the March 28 Order via facsimile but was unable to do so as Petitioner's facsimile line was engaged.
3	Because of a conflict on the Court's calendar, the hearing was continued to June 29, 2000. (Doc. 23).
4	The Court notes that throughout these proceedings, Petitioner has maintained frequent contact with the Clerk's Office, the Court's Chambers and his local counsel, Michael Davis. With regard to the June 29 hearing, Petitioner phoned the Clerk of Courts on June 22 and 23, and was instructed that his Motion for Continuance had not yet been decided. Thus, at the time of his calls, Petitioner was aware, or should have been aware, that the hearing date was still valid.
5	The Court notes that Respondent's testimony in this regard conflicts with evidence presented to the Sor-Gudbrandsdal District Court in Norway. During the hearing before the Court in Norway, at which Respondent was represented and presented argument on her behalf, the evidence indicated that the parties had their furniture sent over in the Fall of 1998, thus, detracting from Respondent's argument that their stay in Norway was to be a brief one.
6	28 U.S.C. § 1404(a) states: "[f]or the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
7	The ICARA provides, in pertinent part that: [a]ny person seeking to initiate judicial proceedings under the [Hague] Convention for the return of a child ... may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed. 42 U.S.C. § 11603(b).

8	A split of authority appears to exist among the district courts of Ohio, including within the Southern District of Ohio, concerning whether the party requesting transfer must demonstrate that the factors "weigh strongly" in favor of transfer, or whether the movant need only show that the balance favors the party seeking transfer. *Compare Cinemark,* 66 F.Supp.2d at 887; United States ex. rel. Grand v. Northrop Corp., 811 F.Supp. 330, 332 (S.D.Ohio 1992)(Spiegel, J.). with *Roberts Metals,* 138 F.R.D. at 93; *Armco Inc. v. Reliance Nat'l Ins. Co.,* 1997 WL 311474, at *4-5 (S.D.Ohio May 30, 1997)(Dlott, J.). While this Court is inclined to agree that a movant need not show the balance of relevant factors "weighs strongly in favor of transfer," the Court need not decide which standard of proof is controlling. As will be set forth more fully in the remainder of this opinion, under either standard, Petitioner has failed to carry his burden of demonstrating that transfer is appropriate.
9	Petitioner filed his first Hague petition in the Court of Common Pleas for Hamilton County, Domestic Relations Division, but subsequently dismissed said petition following the denial of his request for a continuance. *See Lisa Grote Ostevoll v. Asbjorn Ostevoll,* Case No. DR9803492.
10	While Petitioner did not sign the pleading on file nor file a duplicate, he submitted the signed signature pages via facsimile. In light of the time constraints with which Petitioner was faced, we consider this a proper means of correction under Rule 11.
11	It is also apparent from the body of the Petition that this is a photocopy as the Petition refers to "other proceedings pending in this Court, case number DV980581." However, Rule 11 does not preclude the filing of a photocopied pleading so long as it is signed by an attorney of record or the party if filing pro se.
12	Whether Petitioner, himself, filed the Petition is unclear, but it is apparent that Petitioner used his present local counsel to effectuate the filing of the signature pages. (*See* discussion *supra* at p. 4). The Petition itself was drafted by Petitioner's previous local counsel.
13	Petitioner's Motion for Continuance (Doc. 26) also appears to have been drafted by counsel, possibly in connection with another matter, but was faxed by Petitioner to the Clerk of Courts directly.
14	Neither counsel has submitted legal arguments on Petitioner's behalf. However, the Court finds their practice of running interference for Petitioner equally inappropriate.
15	Respondent did not pinpoint the exact date that her residence in Norway became coerced, instead stating that "in the end," Petitioner restricted her movements so that she was not permitted to leave the hotel with the children. By "in the end," we assume Respondent is referring to the few months prior to her leaving Norway in 1998. Thus, we find it safe to presume that, for much of the three years, Respondent remained in Norway voluntarily, albeit reluctantly. We further note that Respondent, by her own testimony, was fully aware of Petitioner's abusive nature prior to moving to Norway. Thus, the abusive nature of their relationship was not a recent development but rather, was one with which Respondent had been dealing for years. Rather than holding her against her will, we find that Petitioner's abuse, "in the end," provided the impetus necessary for her to remove herself (and her children) from a bad marriage.
16	We consider this testimony only as it pertains to the allegations of abuse and the determination of grave risk of harm and not to matters of custody or visitation.
17	While Respondent's father testified that he forbade Petitioner from calling his home to speak with the children, Respondent testified that the state court restraining order was set up to provide Petitioner with telephone contact with the children. Thus, the record reflects Petitioner's earlier attempts to maintain communication with his children.
18	Petitioner did initiate a civil action in the Sor-Gudbrandsdal District Court in Lillehammer, Norway seeking temporary and permanent custody of the children. (*Asbjorn Ostevoll v. Lisa Grote Ostevoll,* Case No. 99-00284A; Doc. 8, Ex. D, Extract of the Records of the Sor-Gudbrandsdal District Court, attached). On November 16, 1999, the Norwegian court denied Petitioner's request for a provisional award of custody of the children. (Id.). The court then scheduled the matter for trial on January 25, 2000 but subsequently vacated the date. According to Respondent, no new date has been set. Petitioner also declined to contest the custody issue in state court as well. Thus, we find that Petitioner has failed to diligently pursue his rights in the Norway or the United States.
19	While the letter itself curiously was not made an exhibit in this matter, we find that, as the testimony is uncontradicted, we shall accept Respondent's testimony in this regard.

20	Similarly, we note that Norwegian law attaches great importance to the wishes of children who are at least twelve years of age regarding personal matters affecting them. The Children Act, Chapter Five, § 31.