

Not Reported in F.Supp.2d, 2003 WL 23162326 (E.D.Pa.)

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United States District Court,

E.D. Pennsylvania.

Michael G. HARRIS, Petitioner

v.

Wendy Reilly HARRIS, Respondent

No. Civ.A. 03-5952.

Filed Oct. 27, 2003.

Dec. 12, 2003.

represented by David S. Rasner, Jane E. Lessner, Fox, Rothschild, O'Brien & Frankel, Philadelphia, PA, Lead Attorney, Attorney to be Noticed, Julia Swain, Fox Rothschild LLP, Philadelphia, PA, Lead Attorney, Attorney to be Noticed, for Michael G. Harris, for Stephanie Reilly Harris, Dob: 5/13/95 and Michaela Reilly Harris, Dob: 8/26/97, Petitioner.

represented by Kevin C. McCullough, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, Lead Attorney, Attorney to be Noticed, for Wendy Reilly Harris, Respondent.

MEMORANDUM AND ORDER

MCLAUGHLIN, J.

*1 The petitioner, Michael Harris, has filed a petition for the return of his daughters, Stephanie Reilly Harris and Michaela Reilly Harris, from the United States to the Czech Republic, pursuant to 42 U.S.C. s 11603 and the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 28, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 ("the Hague Convention"). The Court held a bench trial on November 25 and 26, 2003 and will now grant the petition.

I. Findings of Fact

A. Prior to September 2002

1. The parties, Michael G. Harris ("the petitioner") and Wendy Reilly Harris ("the respondent"), are husband and wife having been married on February 16, 1985. Pet'r Ex. 3 at 1.
2. The parties adopted two children, Stephanie Reilly Harris and Michaela Reilly Harris. Pet'r Ex. 1 at 1; Pet'r Ex. 2 at 4; Transcript of November 26, 2003 Trial ("Tr.II") at 3-4.
3. Stephanie Reilly Harris was born in Otwock, Poland on May 13, 1995. Pet'r Ex. 3 at 1; Tr. II at 3-4.
4. Michaela Reilly Harris was born in Otwock, Poland on August 26, 1997. Pet'r Ex. 3 at 1; Tr. II at 3-4.
5. Both parents cared for the children and were active in their daily lives. Tr. I at 75-76.
6. The family lived together in Asheville, North Carolina until January 4, 1999. Pet'r Ex. 1 at 3; Pet'r Ex. 2 at 1; Pet'r Ex. 4 at 2.
7. On January 5, 1999, the family relocated to Prague, Czech Republic for the petitioner's employment. Pet'r Ex. 1 at 3; Pet'r Ex. 2 at 1, 4; Transcript of November 25, 2003 Trial ("Tr.I") at 72.
8. The petitioner was employed by Winslow Partners from January 5, 1999 until September of 2002. Tr. I at 76, 157; Tr. II at 5.
9. The family lived together in an apartment in Prague that, initially, was rented by the petitioner's employer, Winslow Partners. Tr. I at 158.
10. Both children were enrolled in the International School of Prague during the 2002-2003 school year. Resp't Ex. 1; Resp't Ex. 2.

B. September 2002 to May 2003

11. After the petitioner was terminated from his employment with Winslow Partners in September 2002, the petitioner rented the family's apartment in his own name, and the lease changed to a month-to-month basis. Tr. I at 158; Tr. II at 11-12.
12. The parties did not intend for the lease to extend past June 2003. The parties intended to move out of their apartment in Prague following June 2003. Tr. I at 79, 158; Tr. II at 12.
13. The parties were uncertain where they were moving after the expiration of the

apartment lease. The petitioner made arrangements for the contents of the family's apartment to be stored in or near Prague following the end of the lease.

Tr. I at 79; Pet'r Ex. 19 at 1. The petitioner was pursuing job opportunities in the Czech Republic and in Europe. Tr. I at 47, 54; Tr. II at 82, 84. The parties looked at schools in Pennsylvania in November 2002. Tr. I at 158-59.

14. The petitioner and the respondent traveled to Pennsylvania in November 2002. Tr. II at 6. The family also visited the United States in late December 2002 and early January 2003. The respondent's mother, her sister and her family live in Pennsylvania. The petitioner's parents and his older brother's family also live in Pennsylvania. Tr. II at 14.

*2 15. The parties' marriage was deteriorating during this time period. Tr. I at 77; Tr. II at 17.

16. The petitioner was away from home several times during this time period. He gave the respondent no explanation as to where he was, and he would sometimes turn off his cell phone so he could not be reached. Tr. II at 17-19.

17. The petitioner grew ambivalent during this time period about his marriage and where he wanted to live. Tr. I at 77-78.

C. May 2003 through June 12, 2003

18. On or about Saturday, May 24, 2003, the petitioner told the respondent that he had problems with their marriage and he had developed a relationship with another woman. Tr. I at 80. The parties were at a cafe at the time and an argument ensued. Tr. I at 81.

19. The parties returned to the apartment the evening of May 24, 2003, and they again argued. He left the apartment but returned later that same evening. The next day, Sunday, May 25, 2003, he left the apartment for coffee, and when he returned, the respondent had locked him out of the house. The petitioner did not stay at the apartment on Sunday night. On Monday, May 26, 2003, the petitioner returned to the apartment during the day. Tr. I at 81-83.

20. For the next several nights, the petitioner did not stay at the apartment. Tr. II at 28-29; Pet'r Ex. 22. On Thursday, May 29, 2003, the petitioner went to Paris and returned the afternoon of Sunday, June 1, 2003. The parties discussed marriage in the apartment on Sunday. They did not discuss the respondent moving to the United States nor did they decide to separate. The petitioner stayed at the apartment on Sunday night. Tr. I at 84.

21. On Monday, June 2, 2003, the children went to school, taken there by the taxi driver who drives them to and from school. That day, the respondent left the family's apartment, after packing up some boxes into her car. Tr. I at 85-86. The respondent

and the children did not return home on Monday, and the petitioner was unable to contact them. Tr. I at 87. The petitioner learned from the taxi driver that the respondent left with the children and checked into some undisclosed Prague hotel. Tr. I at 88; Tr. II at 86. The respondent did not tell the petitioner where she and the children were staying. Pet'r Ex. 2; Tr. I at 89; Tr. II at 86.

22. On Tuesday, June 3, 2003, the parties spoke via telephone. The respondent would not reveal their location. They set up a meeting place at a club, Erpet, for Tuesday or Wednesday night. Tr. I at 89, 93.

23. During this time period, the petitioner consulted with a lawyer in the Czech Republic regarding the return of his children. Tr. I at 90-91.

24. During this time period, the petitioner froze joint accounts and cancelled the respondent's credit cards. Pet'r Ex. 26 at 2; Pet'r Ex. 28 at 1; Tr. I at 95-96.

25. The parties met at Erpet on or about Tuesday or Wednesday evening. The children came along and exchanged greetings with the petitioner. The parties had another argument, and the petitioner left. Tr. I at 93-97.

*3 26. On Friday, June 6, 2003, the parties met at a restaurant in the evening. This meeting between the parties also ended in a confrontation. Tr. I at 98-99.

27. On or about June 7 and 8, 2003, the respondent told the petitioner that she was taking the children and leaving for Greenwich, Connecticut on June 12, 2003. Tr. I at 100-01; Tr. II at 36. The petitioner argued with the respondent that she could not take the children. Tr. I at 101.

28. On Sunday evening, June 8, 2003, the petitioner met the children and the respondent at an arcade. The parties again discussed the respondent's plans to leave the country, and the petitioner again stressed that she could not leave with the children. Tr. I at 103. The respondent did not provide the petitioner with an address of where she and the children would be staying in Greenwich, Connecticut. Tr. I at 104.

29. At no time during this period did the petitioner agree to the respondent leaving Prague with their children. Tr. I at 101-03.

30. On June 10, 2003, the petitioner traveled to Asheville, North Carolina to consult with an attorney. Tr. I at 107. On June 12, 2003, the petitioner initiated legal proceedings in Asheville, North Carolina for custody, divorce and equitable distribution. Pet'r Ex. 1.

31. On June 11, 2003, the petitioner wired the respondent \$5000.00 for her living expenses and for the children. Pet'r Ex. 28 at 2; Resp't Ex. 12.

32. The petitioner and the respondent had several conversations and arguments about their marriage and the children in the period between May 24, 2003 and June 12, 2003. Tr. I at 81, 84, 93-94, 98-99.

33. On Thursday, June 12, 2003, the respondent and the children flew from Prague to New York and then traveled to Greenwich, Connecticut. Tr. II at 38.

34. Upon arrival in Greenwich, Connecticut, on June 12, 2003, the respondent and the children stayed at an undisclosed hotel. The respondent refused to give their address or phone number to the petitioner. Tr. II at 40-41; Pet'r Ex. 13; Pet'r Ex. 14 at 1; Pet'r Ex. 20 at 1; Pet'r Ex. 23 at 1; Pet'r Ex. 25; Pet'r Ex. 28 at 2.

35. Custody rights in the Czech Republic are determined by the Czech Family Code (94/1963 Sb.).FN1 Under Czech law, both parents have a right to custody of their children and neither parent can remove the children without the other parent's consent. Tr. I at 14-18; Pet'r Ex. 8; Pet'r Ex. 9; Pet'r Ex. 10. When there is a dispute over custody, the Czech court enters an order that is in the interest of the child. Tr. I at 14-18; Pet'r Ex. 9.

FN1. The Court may "take notice directly ... without recourse to the specific procedures for the proof of that law...." The Hague Convention, art. 14; see also *Feder v. Evans-Feder*, 63 F.3d 217, 225 (3d Cir.1995).

D. June 13, 2003 through August 2003

36. On June 16, 2003, a North Carolina court issued an Ex Parte Order that included Findings of Fact that the respondent unlawfully removed the children from their home in Prague and secreted them from the petitioner. Pet'r Ex. 2 at P 5.

37. On June 20, 2003, the petitioner filed an Application for Assistance under the Hague Convention seeking the children's return to Prague. Pet'r Ex. 3.

*4 38. The respondent was served in the North Carolina matter on June 24, 2003, at the Harbour House in Connecticut. Addendum to the Record of November 26, 2003 at 1.

39. On or about June 27, 2003, the respondent initiated legal proceedings in Connecticut for custody, divorce and support. The respondent did not disclose her exact location in the legal action. Pet'r Ex. 4 at P 4.

40. On July 10, 2003, a North Carolina court issued an order that the petitioner must provide the court with some proof from the government of the Czech Republic that it will assume jurisdiction. The court also stayed the ex parte order of June 16, 2003. Resp't Ex. 33.

41. The respondent continued to refuse to disclose her and the children's whereabouts to the petitioner. Pet'r Ex. 13; Pet'r Ex. 14 at 1; Pet'r Ex. 20 at 1; Pet'r Ex. 23 at 1; Pet'r Ex. 25; Pet'r Ex. 28 at 2. The respondent only provided her uncle's information so that he could act as an intermediary between the parties. Tr. II at 40-41; Pet'r Ex. 20. The respondent did not reveal a phone number to the petitioner out of vengeance, in retaliation against the petitioner for having left without providing any contact information in the past.FN2 Tr. II at 41; Pet'r Ex. 22.

FN2. This is the respondent's specific testimony. See Tr. II at 41. The Court accepts it as true.

42. The petitioner attempted to find the children by calling the respondent's family members and hotels in Greenwich, Connecticut. Tr. I at 114.

43. The petitioner was unable to locate the respondent until a hotel charge for the Harbour House appeared on his credit card bill. Tr. I at 113, 150.

44. There were two shipments of the parties' belongings in Prague sent to the respondent in the United States for which the petitioner paid. Tr. I at 185. The first shipment was by air and included some of the children's clothes, books, and toys. Tr. I at 167-68; Tr. II at 59-60. The second shipment, arranged by the petitioner, consisted of the rest of the children's clothes, books, and toys, as well as kitchen items and furniture. Tr. I at 168-69; Pet'r Ex. 19 at 1. Of the family's furniture, one sofa and a chair were shipped to the United States; the televisions remained in Prague, as did another sofa and two chairs. Tr. I at 168-69. This second shipment was sent from Prague on September, 23, 2003 and arrived in the United States on October 16, 2003. Tr. II at 61; Pet'r Ex. 19 at 1.

45. From June 13, 2003 through August of 2003, the parties communicated via cell phone conversations, cell phone text messages, and email messages. Tr. I at 121. The parties exchanged many email messages that were admitted into evidence. Pet'r Ex. 13, 19-38; Resp't Ex. 11, 15. It is not clear whether these email messages are all of the messages exchanged.

46. In August of 2003, the petitioner visited the respondent and the children in West Virginia and in Connecticut. Tr. I at 129-30; Tr. II at 46, 53. During his visit to Connecticut, the petitioner accompanied his daughter, Stephanie, to a pediatrician so that she could receive the vaccinations required for school. Tr. I at 189; Tr. II at 53.

*5 47. On or about August 9, 2003, the petitioner wrote a check to the respondent for \$10,000.00 for the maintenance and support of the respondent and the children. Pet'r Ex. 19.

48. During this time period, the parties discussed and made attempts at reconciliation. Tr. I at 120, 129; Tr. II at 105; Pet'r Ex. 23; Pet'r Ex. 30.

49. The respondent did not provide the children's address and telephone number to the petitioner during the summer of 2003. Tr. II at 77.

E. September 2003 to Present

50. On or about September 2, 2003, the respondent moved with the children to Pennsylvania. From September 2, 2003 until September 19, 2003, the respondent and the children stayed at the Wyndham Valley Forge Suites. Tr. I at 180; Tr. II at 51.

51. On September 7, 2003, the petitioner stayed in the hotel room with the respondent and their children for three nights. Tr. I at 180; Tr. II at 51.

52. On September 17, 2003, the petitioner signed a month-to-month lease with Home Properties of Devon for a furnished apartment in Devon, Pennsylvania. Tr. I at 132; Pet'r Ex. 17.

53. The purpose of the petitioner's signing of the lease was to provide more suitable shelter, albeit temporary, for the respondent and the children. Tr. I at 133; Pet'r Ex. 33.

54. The respondent and the children presently reside in the said Devon apartment. The petitioner never resided in the apartment. Tr. I at 132-33. The petitioner lives by himself in Prague, in an apartment that he rents on a month-to-month lease. Tr. I at 71-72.

55. The respondent enrolled the children at Valley Forge Elementary School. Tr. II at 98. The children started school on September 9, 2003. Tr. II at 52.

56. The petitioner went to an open house at the children's school on September 8, 2003. He met with the children's teachers during the week of September 29, 2003. Tr. I at 181-82.

57. In September of 2003, the respondent withdrew her legal action pending in Connecticut. Resp't Ex. 32.

58. On October 27, 2003, the petitioner filed a Petition for Return of Children under the Hague Convention.

59. On November 3, 2003, the petitioner voluntarily dismissed his legal action in North Carolina. Resp't Ex. 20.

60. During and after the summer, the respondent was aware of the petitioner's Hague Application, filed in June of 2003, seeking the return of the children to Prague.FN3 Pet'r Ex. 38 at 1.

FN3. The respondent testified that she knew, as of either June 24, 2003, or on or about July 19, 2003, that the petitioner wanted the children to return

with him to Prague. Tr. II at 73, 95-96.

61. The petitioner did not tell the respondent that he agreed to the respondent and the children living in the United States. Tr. I at 134.

II. Conclusions of Law and Additional Findings of Fact

The objectives of the Hague Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State," and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." The Hague Convention, art. 1.FN4

FN4. The Hague Convention is codified in the International Child Abduction Remedies Act, 42 U.S.C. s 11601, et seq. ("ICARA").

The Hague Convention sets forth that removal or retention is wrongful if:

*6 a) it is in breach of rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised ... or would have been so exercised but for the removal or retention.

The Hague Convention, art. 3. The petitioner has the burden of proving the wrongful removal by a preponderance of the evidence. 42 U.S.C. s 11603(e)(1)(A).

This Court must ask four questions when determining whether wrongful removal occurred: (1) when did the removal take place; (2) where were the children habitually resident immediately prior to the removal; (3) did the removal breach the petitioner's rights of custody under the laws of the country of habitual residence; and (4) was the petitioner exercising those rights at the time of the removal? *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir.2001).

Once the petitioner meets the burden of proving wrongful removal, the respondent has the burden of proving any affirmative defenses. The exception that the respondent argues in this case-that the petitioner consented to or subsequently acquiesced in the removal of retention-must be shown by a preponderance of the evidence. The Hague Convention, art. 13(a); 42 U.S.C. s 11603(e)(2)(B).

The Court will only determine the issues raised by this petition for the return of children and "not the merits of any underlying custody claims." 42 U.S.C. s 11601(b)(4).

A. Wrongful Removal

The respondent removed the children from the Czech Republic to the United States

on June 12, 2003. To determine if that removal was wrongful, the Court must first decide, as a threshold matter, which country was the habitual residence of the children at that time. See *Feder v. Evans-Feder*, 63 F.3d 217, 222 (3d Cir.1995). The determination of habitual residence is a mixed question of law and fact. *Delvoye v. Lee*, 329 F.3d 330, 332 (3d Cir.2003), cert. denied, 124 S.Ct. 436 (2003); *Feder*, 63 F.3d at 222.

Habitual residence is not defined by the Hague Convention, but there is case law on the subject. This Court has previously analyzed the issue of habitual residence. *Grammes v. Grammes*, No. 02-7664, 2003 U.S. Dist. LEXIS 19830, at *19-*22 (E.D.Pa. Oct. 6, 2003). The Third Circuit in *Feder* defined habitual residence of a child as "the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective." *Feder*, 63 F.3d at 224. This standard focuses on the parents' present, shared intentions about their children's presence there. *Id.*

The intention of the parties alone does not determine habitual residence. A change in a child's habitual residence requires a period of time to pass sufficient for acclimatization. *Id.* The Ninth Circuit observed that even a long period of time in a country might not transform habitual residence if there are circumstances that hinder acclimatization. *Mozes*, 239 F.3d at 1078. The Ninth Circuit went on to caution that even when there is substantial evidence of acclimatization, courts should be slow to infer that a previous habitual residence has been abandoned if no settled parental intent exists. *Mozes*, 239 F.3d at 1079.

*7 The respondent initially conceded that the Czech Republic was the children's habitual residence. Answer P 1, 10. The respondent later suggested that the children's habitual residence shifted from the Czech Republic to the United States. She contends that the parties together decided to move to the United States, at which time the children's habitual residence shifted. The Court rejects the respondent's argument on two grounds. First, the argument is inconsistent with the language of the Hague Convention which looks at habitual residence "immediately before the removal." The Hague Convention, art. 3(a); see also *Feder*, 63 F.3d at 222. This argument also conflicts with the Third Circuit's requirement that the children are physically present in the country before habitual residence can be established. *Id.* at 224. The United States was not the habitual residence of the children, because the children were not physically present or in no sense resided there immediately prior to their removal from the Czech Republic. Second, the Court has found as a fact that at the time of the respondent's removal of the children to the United States, the parties had not decided to move together to the United States. See discussion below; see also Findings of Fact ("FOF") P 13.

The Court, therefore, holds that the Czech Republic was the children's habitual residence immediately prior to the removal. The parties moved, as a family, to Prague

and intended to stay indefinitely. The family lived in Prague from January 5, 1999 until June 12, 2003. See FOF PP 7, 33. The children attended school in Prague. See FOF P 10. Most importantly, by her argument that the habitual residence shifted away from Prague, the respondent admits that the Czech Republic was the children's habitual residence at some point. For those reasons, the Court finds the Czech Republic was the children's habitual residence immediately prior to the removal.

The Court turns now to the issue of whether the removal breached the petitioner's rights of custody under the laws of the Czech Republic. The only dispute here is whether the petitioner consented to removal.FN5 Under the Hague Convention, consent is an affirmative defense, and it must be shown by a preponderance of the evidence by the respondent. The Hague Convention, art. 13(a); 42 U.S.C. s 11603(e)(2)(B). Consent, however, also impacts the issue of whether the children were wrongfully removed in this case. Czech law gives custody rights to both parents, and neither parent can remove their children without the other parent's consent or an order from a Czech court. See Czech Family Code (94/1963 Sb.); FOF P 35. Because the petitioner must prove that the removal was wrongful by a preponderance of the evidence, the Court will assume that the petitioner also carries the burden to show that he did not consent to removal of the children. See 42 U.S.C. s 11603(e)(1)(A).

FN5. The respondent does not dispute that Czech law requires consent for removal. Nor does she argue against the proposition that the petitioner was actually exercising those custody rights at the time of the removal. In addition, the petitioner was married to the respondent and lived with his family up until the time of the children's removal. See FOF PP 1, 5, 7. The petitioner also presented testimony of a Czech family law attorney to show that he was actually exercising custody of his children at the time of removal. Tr. I at 21; Pet'r Ex. 9; see FOF P 35. It is clear that he was actually exercising custody. See *Feder*, 63 F.3d at 226.

*8 The petitioner contends that he never consented to the respondent's removal of the children. The respondent argues that she and the petitioner had previously decided to move to the United States as a family, and that the petitioner also consented to the removal in June 2003.

The Court is not persuaded that the family decided to move to the United States. The evidence shows that the family had made no decision as to their plans following June 2003. The lease for their Prague apartment was intended to expire at the end of June 2003. See FOF P 12. The petitioner had made arrangements for the contents of the apartment to be stored outside of Prague. The petitioner and the respondent traveled to Pennsylvania in November 2002 and looked at schools. They had family members living in Pennsylvania. The petitioner, however, was exploring several job opportunities in Europe and in the Czech Republic. See FOF PP 13, 14.

Even more persuasive is the fact that the parties had not, as of the end of May 2003, bought or otherwise arranged for housing, enrolled the children in school for the 2003-2004 school year, or found employment. In addition, the marriage of the petitioner and the respondent was deteriorating even before his admission of an affair. See FOF P 15. The lives of the petitioner and the respondent were clearly in flux, and they had made no decisions about where they would live after June 2003.

The respondent also argues that the petitioner consented in June to the removal of the children. She maintains that the petitioner told her that he would go to the United States just a few days later than the respondent and the children. Tr. II at 32-33. She testified that the petitioner agreed to the respondent and the children moving to the United States. Tr. II at 30-31.

The petitioner testified that he never agreed to the removal. See FOF PP 27-29. The respondent left the family's apartment with the children on June 2, 2003 and did not reveal their whereabouts in Prague. See FOF P 21. While she and the children were in Prague staying at an undisclosed location, she told the petitioner that she was leaving with the children for the United States. See FOF P 27. The "deliberatively secretive nature" of the respondent's actions demonstrates that there was no consent. See *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir.1996) ("Friedrich II").

The parties' conduct after removal is also relevant to the issue of consent. See *Gonzalez-Caballero v. Mena*, 251 F.3d 789, 794 (9th Cir.2001). The respondent did not reveal their location after they arrived in Connecticut. She only gave the petitioner her uncle's contact information. She admitted that she kept the location of the children from the petitioner as revenge for the times he left home and she had no way to reach him. See FOF P 41.

The petitioner filed for custody of the children in North Carolina on the same day she removed the children from Prague. See FOF P 30. He also filed an Application for Assistance under the Hague Convention on June 20, 2003. The actions of both the parties show that the petitioner did not consent to the removal. The respondent's argument that the petitioner said he would meet them in the United States in several days makes no sense in light of the fact that the respondent would not reveal her location in Greenwich, Connecticut to the petitioner. The Court did not find this testimony by the respondent credible.

*9 The Court finds that the petitioner did not consent to the removal of the children. The petitioner has met his burden of proving by a preponderance of the evidence that the children were wrongfully removed.

B. Consent or Acquiescence

The respondent raises the affirmative defense that the petitioner consented and acquiesced to the removal. The Hague Convention, art. 13(a); 42 U.S.C. s 11603(e)(2)(B). The respondent must prove this defense by a preponderance of the evidence. *Id.* Courts should analyze the consent and acquiescence issues separately. See *Gonzalez-Caballero*, 251 F.3d at 794; *Friedrich II*, 78 F.3d at 1070. Because the Court has found that the petitioner did not consent to the removal, the only issue left for the Court to decide is whether he acquiesced to the children living in the United States after the removal.

Acquiescence has been characterized as a test of subjective intent. See *Antunez-Fernandes v. Connors-Fernandes*, 259 F.Supp.2d 800, 813 (N.D.Iowa 2003); *Pesin v. Osorio Rodriguez*, 77 F.Supp.2d 1277, 1289 (S.D.Fla.1999). To establish her defense of acquiescence, the respondent must show "an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written enunciation of rights; or a consistent attitude of acquiescence over a significant period of time." *Friedrich II*, 78 F.3d at 1070 (citations omitted).

The question relevant to this case is whether the petitioner demonstrated a consistent attitude over a significant period of time.

There are several factors that undermine the respondent's allegation of acquiescence. The petitioner promptly filed a custody and divorce action and an Application for Assistance under the Hague Convention. He did not dismiss the North Carolina action until after he filed the Petition for Return of Children under the Hague Convention. There was, at all times following the removal of the children, legal actions pending regarding the return of the children to the petitioner.

The petitioner did not know where the children and the respondent were for most of the summer of 2003. The respondent refused to give her address and phone number to the petitioner. See FOF PP 41, 49. Although the parties communicated via cell phone and email, the petitioner did not see the children until August of 2003. See FOF PP 45, 46. The legal proceedings and the respondent's refusal to disclose her location weigh heavily against acquiescence.

The respondent points to several facts to support the finding of acquiescence. The petitioner gave money to the respondent and the children. See FOF PP 31, 47. The petitioner paid for some of the family's possessions, including furniture, to be sent from Prague to the United States. See FOF P 44. He signed a lease for an apartment in Pennsylvania for the respondent and the children. See FOF P 52. The petitioner took one of his children to the pediatrician. See FOF P 46. He visited his children's school in Pennsylvania and met with their teachers. See FOF P 56. The petitioner also visited the respondent and the children on several occasions.

*10 The Court finds that the evidence is probative of reconciliation and not of acquiescence. See *Antunez-Fernandes*, 259 F.Supp.2d at 813; *Bocquet v. Ouzid*, 225 F.Supp.2d 1337, 1350 (S.D.Fla.2002); *Pesin*, 77 F.Supp.2d at 1290. Other courts have

ruled that evidence similar to that of this case demonstrates the parties' attempts at reconciliation. See *Bocquet*, 225 F.Supp.2d at 1350 (ruling that continued visits by the petitioner were not proof of acquiescence); *Pesin*, 77 F.Supp.2d at 1290 (finding that the petitioner's \$7000 monthly payments and the shipment of the children's clothes to the respondent demonstrated reconciliation attempts and not acquiescence).

The parties attempted and discussed reconciliation during the same time period that the petitioner was providing the respondent and the children with various types of support. See FOF P 48. In light of the reconciliation attempts, the legal actions, and the fact that the respondent did not reveal the children's address during this summer, the Court finds that the petitioner did not subsequently acquiesce to the retention of the children in the United States.

An appropriate Order follows.

ORDER

AND NOW, this 12th day of December 2003, upon consideration of Michael Harris's Petition for Return of Children under the Hague Convention (Docket No. 1), Wendy Reilly Harris's response thereto, and the petitioner's reply, and following a trial held before this Court on November 25 and 26, 2003, IT IS HEREBY ORDERED that the petition is GRANTED for the reasons set forth in a memorandum of today's date. IT IS FURTHER ORDERED that:

(1) The petitioner and respondent's two minor children, Stephanie Reilly Harris, born May 13, 1995, and Michaela Reilly Harris, born August 29, 1997, shall be returned in the company of the petitioner to the Czech Republic on December 29, 2003 or another date on which the parties agree through counsel, and the petitioner is to report the delivery of the children to the appropriate authorities within that jurisdiction.

(2) By virtue of this Order, the petitioner has exclusive right to the physical and legal custody of the children during the period of time required to return the above-named minors to the Czech Republic. This Order is not a determination of the merits of any custody issues within the meaning of Article 19 of the Convention.

(3) The Order of this Court is made under the authority of 42 U.S.C. s 11603(a), conferring upon this Court original and concurrent jurisdiction with federal district and state courts of the United States.

(4) Any peace officer in the state of Pennsylvania or any federal officer is hereby commanded to enforce the instant Order allowing the petitioner to remove the above-named children from the United States and to allow the petitioner to accompany them to the Czech Republic, giving the petitioner the right, without interference, to have said children in his lawful custody for the purposes described herein.

*11 (5) The petitioner shall submit its application for attorneys' fees under

42 U.S.C. s 11607 with a legal memorandum on or before December 22, 2003. The respondent shall respond within fourteen days of when the petitioner files his application for attorneys' fees.

E.D.Pa.,2003.

Harris v. Harris

Not Reported in F.Supp.2d, 2003 WL 23162326 (E.D.Pa.)

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