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Abu Zahar v. Abu Zahar: Appellate Division Declines to Adopt a Bright-Line Rule Prohibiting Out-of-Country Visitation

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Often fueled by intense parental sentiments, custody disputes rank high among the fiercest of legal battles known to jurisprudence. Corollary issues concerning parenting time and post-divorce travel abroad with a child have gained increasing judicial scrutiny in an ever-changing complex and divisive world.

For matrimonial practitioners the first question concerning a parent's prospect to travel with a child abroad is whether the country of destination is a signatory to The Hague Convention on the Civil Aspects of International Child Abduction. If so, the return of the child is more likely to be secured from such a country.

However, if the country in question is not a signatory to the Convention, the left behind parent's efforts to have the child returned are likely to be plagued by great difficulty and uncertainty.

Notwithstanding the inherent difficulties and risks of unlawful retention of a child in a non-Hague Convention country, the courts should not adopt a blanket prohibition against travel with a child to such a country. Bright-line rules in fact-sensitive cases, as most custody determinations are, are harsh and arbitrary. They are likely to circumvent the paramount best interest analysis mandated by our well established custody jurisprudence.

In a recent case, the New Jersey Appellate Division declined to adopt a bright-line rule prohibiting such travel abroad. In addition, in several out-of-state decisions, courts have been faced with allegations of "likely abductions" to nonsignatory countries. Section Common principles emanating from this case law form the basis of recommendations and suggestions of how to institute a more uniform and coherent approach when faced with this increasingly common dilemma.

NEW JERSEY RULING In *Abouzahr v. Abouzahr*, 361 N.J. Super. 135 (App. Div. 2003), the parties were married in 1986 in St. Louis, Mo. The father came from Lebanon to the United States in 1984 to complete his medical studies. The parties met in the United States and after their marriage, they both became dual citizens of the United States and Lebanon. Their daughter was born in the United States on March 18, 1992, and she also gained dual citizenship. Both parties were medical practitioners: the mother a gynecologist and the fa-

ther a plastic surgeon. They practiced in New York and lived in New Jersey, and during their marriage they traveled to Lebanon twice, once with their daughter and once without her. The parties were divorced in 1998. They incorporated their negotiated property settlement agreement into their judgment of divorce. The parties agreed to joint legal custody of their daughter, then age seven, with the mother as primary physical residential custodian of the child. The father was to have liberal visitation, including one month each summer with the child. The agreement specifically provided that the child could travel to Lebanon with the father during the one-month period. After an argument about the religious upbringing of their daughter, the mother obtained information about Lebanese custody laws that disturbed her and raised concerns that if her daughter was retained in Lebanon, it would be extremely difficult to secure her return to New Jersey. At the time of scheduled vacation travel to Lebanon, the mother served the father with an order to show cause and temporary restraint against his removing their daughter from New Jersey. After the plenary hearing, the trial judge denied the mother's application to restrict visitation. The judge found that before the mother signed the property settlement agreement, she was aware of potential difficulties if the father took their daughter to Lebanon and refused to return her. The trial judge further found that the mother agreed to parenting time in Lebanon because she trusted the father, and only subsequently changed her mind because of concerns that their daughter may not be returned. The court held that no change of circumstances occurred to warrant any modification and noted that the parties had already stipulated in their agreement that it was in the best interest of their daughter to spend time with her father in Lebanon and to have contact with her extended family in that country. While noting the extreme consequences of a wrongful detention of the child in Lebanon, the evidence presented at trial made it unlikely that the father would refuse to return with the daughter to the United States. Among other things, the trial judge explained: If Dr. Abouzahr were to take Alessandra to Lebanon, according to the experts, ... he would not ever be able to return to the United States. Nor would he be able to return to any country which is a signatory of the Hague Convention. Dr. Abouzahr [needs] to come to the United States once a year for a [professional] conference. He has many contacts in the United States. He worked here. He receives patients through his contacts in the United States. He also goes to conferences in the European countries. ... I find that he genuinely and sincerely believes it's in Alessandra's best interest to be raised in the United States. Secondly, for his own self interest and his desire to further his career and be a successful doctor and travel, he will not take Alessandra and keep her in Lebanon. On appeal, the mother argued that the trial court erred in not finding sufficient proof of a change of circumstances to modify the property settlement agreement to prohibit out-of-country visitation. Moreover, the mother argued that such visitation would no longer be in the best interests of the child. The appellate division affirmed the trial court's determination and asserted: We do not doubt that mother's fear is genuine, but fear alone is not enough to deprive a noncustodial parent of previously agreed upon visitation. Such a rule would unnecessarily penalize a law-abiding parent and could conflict with a child's best interest by depriving the child of an opportunity to share his or her family heritage with a parent. Moreover, it would mistakenly change the focus from the parent to whether his or her native country's laws, policies, religion or values conflict with our own. Such an inflexible rule would border on xenophobia, a long word with a long and sinister past. The Appellate Division then proceeded to set forth guidelines to address similar concerns with parenting time in non-Hague countries: The danger of reten-

tion of a child in a country where prospects of retrieving the child and extraditing the wrongful parent are difficult, if not impossible, is a major factor for a court to weigh in ruling upon an application to permit or to restrain out-of-country visitation. But it is not the only factor. In addition to the laws, practices and policies of the foreign nation, a court may consider, among other things, the domicile and roots of the parent seeking such visitation, the reason for the visit, the safety and security of the child, the age and attitude of the child to the visit, the relationship between the parents, the propriety and practicality of a bond or other security and the character and integrity of the parent seeking out-of-country visitation as gleaned from past comments and conduct.

OTHER JURISDICTIONS

In *Al-Zouhayli v. Al-Zouhayli*, 486 N.W.2d 10 (Minn. App. 1992), the father was born and brought up in Syria. The parties married in December 1983 and settled in Minnesota in 1984. The father became a naturalized citizen of the United States but also retained his Syrian citizenship. The parties' son, born March 22, 1989, had dual United States and Syrian citizenship. At trial, the mother requested that supervised visitation be continued because she feared the father would abduct the child to Syria or Saudi Arabia. The trial court found that prior to the separation, the father had expressed his intent to return to Syria or emigrate to Saudi Arabia and that the father made a statement in the past that his child would never be raised by another man and that he would have his child regardless of what the court ordered. The trial court also found that the father was dishonest or showed a lack of integrity. Despite such factual findings, the trial court found that the mother failed to carry her burden to prove by a preponderance of the evidence that the danger of abduction was so high that supervised visitation should continue. As such, the trial court awarded unsupervised visitation to the father, with the following conditions: parenting time to take place within the state; continued employment within the state; the mother to retain possession of the child's passport; and the father may not apply for a replacement passport without the written consent of mother or the court. The mother argued on appeal that the trial court erred in finding that a strong probability of abduction must be shown by a preponderance of the evidence because to restrict visitation under Minnesota law, it is necessary only to find that an action is "likely to endanger" the physical or emotional health of the child. The Court of Appeals disagreed with the mother and held: In view of the importance of meaningful visitation, and because the allegation of endangerment was based solely on speculation as to what respondent *might* do, and not on any past mistreatment of the child, we find that the trial court properly characterized appellant's burden. Despite the fact that Syria and Saudi Arabia are not signatories to the Hague Convention, the court made clear that "the decision whether to order supervised visitation must depend ... on the particular facts of the case, and the unwillingness of the noncustodial parent's native country to enforce the trial court's custody order is not controlling." The appellate court also recognized that the trial court, as required under Minnesota precedent, carefully balanced the "harmful effect of supervised visitation on the parent-child relationship against the risk of abduction[,]" to reach its decision to permit the father unsupervised visitation only in the Twin Cities metropolitan area -- with the condition that he maintain his continued employment in Minnesota.

In *Long v. Ardestani*, 624 N.W.2d 405 (Wisc. App. 2001), the mother filed a motion to prohibit the father from traveling to Iran with their minor children to visit his extended family. The father was born in Iran and moved to the United States in 1978. The parties were married in 1980 and had four children. The stipulated judgment of divorce provided that the parties would have joint legal custody of the four children. The mother had primary physical custody and the father had alternate weekends, weekday visitation and three to six weeks of parenting time in the summer. The parties' stipulation also provided that in the event the father desired to take the children outside of the United States, he had to give the mother 60-days notice to permit the mother to make a post judgment application to prohibit the travel, if needed. In November 1999, the father notified the mother that he intended to take the children for vacation to Iran and the mother filed a motion with the court to prohibit him from doing so. She alleged that the father had threatened to keep the children in Iran, a country which did not accede to the Hague Convention and which did not have diplomatic relations with the United States. The mother also argued that under Iranian law, custody is determined through a gender and age specific criteria -- not according to the child's best interest. The mother further argued that because she was not Muslim, it was more than likely that the father would obtain custody and the children would never be returned to the United States. In response to the mother's allegations, the father testified that he would do whatever is necessary to guarantee the return of his children to the United States, including signing over his pension as security. After reviewing the trial testimony, the court found that mere fears and arguments between the parties were not sufficient to prove the existence of a likelihood that the father would not return the children. The court further noted that the mere possibility of retention of the children in Iran and the devastating consequences thereof was not sufficient to prohibit the travel to Iran. The court remarked that not being a signatory to the Hague Convention is only one factor to be considered. However, the court declined to set forth the other factors and guidelines for future similar matters and asserted that the general best interest standard is sufficient to address these types of cases: The virtue of the best interests standard is that it permits the trial court to take into account all facts and circumstances bearing on the best interests of the particular child, and we view an attempt to define what those might be in a general category of cases as neither necessary nor fruitful. Interestingly however, as a measure of protection, the court permitted the mother to obtain a security interest in the father's pension rights pending the return of the children.

In *In re Marriage of Jawad and Whalen*, 759 N.E.2d 1002 (Ill. App. 2001), the father was born in Iraq and came to the United States in 1980. The parties were married in August 1993. Three children were born during the marriage. During the divorce litigation, the trial court awarded the father parenting time alternate weekends. The court specified that parenting time was to be exercised within the state. In 2001, the mother filed an emergent application seeking a temporary restraining order and a preliminary injunction based on the allegation that the father threatened to remove the children from this country. The trial court denied her application for supervised visitation but restrained the father from removing the children outside of Illinois. The trial court commented that none of the father's alleged statements to the mother or his tape-recorded statements contained specific threats to abduct the children. Rather, the trial court found that these statements were made in the context of a bitter divorce and custody dispute. Although the trial court found that some of

the father's comments were intemperate and reasonably caused concern to the mother, it decided that these comments did not constitute a threat of abduction. The trial court also found that other factors militated against the possibility that the father might abduct the children: the father was a United States citizen and had been in the United States for over 18 years; the father would have difficulty applying for an Iraqi passport because the United States does not have diplomatic relations with Iraq; the father would be in danger if he returned to Iraq because he did not serve in the Iraqi armed forces; and the father had actively participated in the court proceedings and had complied with the visitation order for 18 months. The Court of Appeals affirmed and concluded: None of the evidence appearing in the record directly supports a finding that the children are at risk of abduction. Lacking such a showing, we do not believe that the trial court abused its discretion in denying the request for supervised visitation. We note that, notwithstanding the denial of supervised visitation, the trial court nonetheless prohibited the parties from taking the children out of the state. On the basis of the evidence before us, we believe that such an order will sufficiently preserve the status quo pending a resolution of the remaining issues in this dissolution proceeding. COMMON PRINCIPLES A set of common principles evolves from a careful review of the case law. These principles serve as an invaluable road map in the analysis of any case involving prospective travel with a child to a non-Hague Convention country. First, there seems to be uniformity of opinion that whether the country of destination is not a signatory to the Hague Convention is but one, nondispositive factor for the court's consideration. Second, the applicable test in such situations continues to focus on the child's best interests, which should consider the harmful effect of supervised visitation on the parent-child relationship against the risk of abduction. Third, there is general consensus that the burden of proof in an application to prohibit a parent's travel with the child to a non-Hague Convention country rests with the objecting parent. Fourth, it is the objector's burden to prove an actual likelihood of unlawful retention; mere fear that the child will not be returned, even though reasonable, is insufficient to prohibit the travel. Fifth, the courts often examine the assurances of return offered by the parent who intends to travel abroad. In this regard, courts examine how deeply rooted that parent's ties are to the United States and what security the parent can provide for the return of the child. The court examines factors such as the citizenship of the parties, the duration and nature of employment in the United States, the nature and extent of the parent's real and personal possessions here and abroad, any history of abduction or wrongful retention of the child, and whether the traveling parent had in the past respected the court's orders and fully participated in the requisite proceedings. In the past decade, ground breaking research and surveys of child abductions have revealed interesting trends and common patterns in these types of cases that are invaluable to identify and prevent future child abductions. See generally L. Girdner and J. Chiancone, "Prevention of Parent and Family Abduction Through Early Identification of Risk Factors," Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention (1997), and Patricia M. Hoff, "Parental Kidnapping: Prevention and Remedies," Washington, D.C.: ABA Center on Children and the Law (2000). These studies have listed the following red flags: ? previous abductions or threatened abduction; ? no strong ties to the child's home state; ? foreign citizenship and strong ties to country of citizenship; ? friend or family living out of state or abroad; ? a strong support network; ? no financial reason to stay in the United States; ? engaged in planning activities -- quit a job, sold a home, terminated a lease -- and so on; ? a history of marital instability, a lack of pa-

rental cooperation, domestic violence or child abuse; and ? a prior criminal record. As will be immediately observed, the courts considered these red flags in their analyses in the reported decisions on non-Hague parenting time. Furthermore, the research has uncovered six personality profiles for abduction: ? parents who have threatened to abduct or abducted previously; ? parents who are suspicious and distrustful due to a belief that abuse has occurred (with social support for these beliefs); ? parents who are paranoid-delusional; ? parents who are sociopathic; ? parents who have strong ties to another country and who are ending a mixed-culture marriage; and ? parents who feel disenfranchised from the legal system (e.g. poor, minority, victim of abuse) and who have family/social support in another geographic area. It is best to have a county diagnostic risk analysis be performed in each case implicating an application to prohibit a parent's travel with the child to a non-Hague Convention country. The psychologist should be trained to evaluate the noncustodial parent's abduction risk by incorporating the above red flags and risk profiles into their reports. It is further strongly recommended that courts consider these red flags and personality profiles within the context of the "best interests of the child" analysis to adequately and thoroughly determine whether to prohibit the parenting time abroad. There is no 100 percent guarantee that a child traveling abroad will not be abducted. Incorporating these factors into the court's analysis would constitute a further measure of precaution. In the end, however, mere fear of abduction should not deny a parent the right to have meaningful parenting time with a child abroad.

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