UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

On behalf of the minor children R.V., N.V., and E.V.,	)	Case No. 20-CV-6659
NIR VELOZNY, Petitioner, v.	)	VERIFIED RESPONSE TO PETITION FOR RETURN OF THE CHILD TO PETITIONER
TAL VELOZNY, Respondent.	)	

Respondent, Tal Velozny, through her undersigned attorneys, Burger Green & Min LLP, responds to the petition for the return of the children to Petitioner as follows:

1. Respondent denies knowledge and information sufficient to form a belief as to the allegations in Paragraph 1 but admits that Petitioner is the father of the children.

2. Respondent is currently residing at 9 Gallatinville Road, Pine Plains, New York 12567.

3. Respondent admits the allegations set forth in Paragraph 3 of the petition but clarifies that the children are currently residing with Respondent at 9 Gallatinville Road, Pine Plains, New York 12567.

4. Respondent admits that the parties resided in Israel since 2005 (not 2004 as alleged in the petition) and that in 2019, the parties decided to divorce and started negotiating a parental access arrangement consistent with their prior discussions where Respondent would move with the children to New York. Respondent notified the Rabbinical court that she would not be able to attend the dispute settlement session referenced in Paragraph 4 of the petition and Petitioner was aware that she would not attend.

5. Respondent denies the allegations in Paragraph 5 however she admits that that she flew to New York with the children on September 27, 2019. She denies that she ever obstructed contact between the Petitioner and the children. The two older children, ages 14 and 12, have their own cell phones and Petitioner is free to contact them. On some occasions, Petitioner asked Respondent's parents to facilitate communication with the children if they were not answering their phones. Respondent's parents cooperated with his requests.

6. Respondent admits the statement set forth in Paragraph 6 of the petition.

7. Respondent states that the allegations in Paragraph 7 constitute a legal conclusion as to which no response is necessary or appropriate.

8. Respondent admits the allegations set forth in Paragraph 8 of the petition.

9. Respondent admits the allegations set forth in Paragraph 9 of the petition.

10. Respondent states that the allegations in Paragraph 10 constitute legal conclusions as to which no response is necessary or appropriate.

11. Respondent states that the allegations in Paragraph 11 constitute legal conclusions as to which no response is necessary or appropriate. To the extent a response is necessary, Respondent denies the allegations set forth in Paragraph 11 of the petition.

12. Respondent states that the allegation in Paragraph 12 constitutes a legal conclusion as to which no response is necessary or appropriate. To the extent a response is necessary, Respondent denies the assertion that Israel is the children's habitual residence.

13. Respondent admits that the statement in Paragraph 13 purports to be a request for relief and Respondent states that the relief be denied.

14. Respondent admits the allegations set forth in Paragraph 14 of the petition.

15. Respondent repeats her responses to the allegations set forth in Paragraphs 1-14 of the petition in response to Paragraph 15 of the petition.

16. Respondent denies the allegations contained in Paragraph 16 of the Petition.

17. Respondent denies the allegations set forth in Paragraph 17 of the petition and states that this Court has no jurisdiction over a state court *habeas corpus* proceeding brought pursuant to CPLR §§ 70, 7002.

18. Respondent admits the allegations set forth in Paragraph 18 of the petition.

19. Respondent states that the allegation in Paragraph 19 constitute a legal conclusion as to which no response is necessary or appropriate.

20. Respondent admits that Paragraph 20 purports to contain a request for relief and states that the relief should be denied.

21. Respondent admits that Paragraph 21 purports to contain a request for relief and states that the relief should be denied.

22. Respondent admits that Paragraph 22 purports to contain a request for relief and states that the relief should be denied.

23. Respondent denies knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 23 of the petition.

24. Respondent requests that the relief requested in the wherefore clause of the petition be denied except to the extent that any final order issued would be dismissing the petition.

AFFIRMATIVE DEFENSES

First Affirmative Defense

25. The petition should be denied based upon Article 13(b) of the Hague Convention. There is a grave risk that the children's return to Israel would expose them to physical and/or psychological harm, and/or otherwise place the children in an intolerable situation.

26. A Court should "refuse to order the repatriation of a child if 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'" *Blondin v. Dubois*, 238 F.3d 153, 156 (2d Cir. 2001) (quoting Hague Convention, art. 13(b)). As defined by the Second Circuit, grave risk exists in "situations in which the child faces a real risk of being hurt, physically or psychologically, as a result of repatriation" *Id*. at 162 *(quoting Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996)).

27. Petitioner has an extensive history of abusing drugs. Upon information and belief Petitioner abuses, at the very least, cocaine, ecstasy, MDMA, crack, molly, various pills, and marijuana. While the parties resided together, Petitioner would bring drugs into the home and within view of the children. Upon information and belief Respondent has abused cocaine for many years and used cocaine on a daily basis in or around the fall, spring, and summer of 2019.

28. Upon information and belief Petitioner was also dealing drugs in or around 2018 - 2019.

29. Petitioner has also an explosive temper and is incapable of controlling his anger. He is verbally abusive and presents a danger to both Respondent and the children.

30. Petitioner has been physically abusive toward Respondent. On August 1, 2019, an incident occurred when Petitioner and Respondent were in a car parked near the parties' residence in Israel. Petitioner was in the driver's seat and Respondent was in the passenger seat. Petitioner reached over and opened the passenger side door, grabbed Respondent, and forcefully pushed her out of the car onto the floor. Petitioner was screaming at Respondent and caused such a scene that

a neighbor called the police. A fifteen-day order of protection was issued against Petitioner ordering him to stay away from Respondent and the children. Photos of the injuries Respondent suffered from the incident are attached hereto as Exhibit 1.

31. In or around June or July 2019, Petitioner became enraged and broke a hole in the wall of the parties' residence with a construction tool in front of Respondent and the children.

32. Respondent has also been psychologically and verbally abusive toward the children, which in part is due to his rampant drug abuse.

33. Both older children's grades were slipping in school in Israel due to the problems at home related to Petitioner's instability and drug use. They are now excelling in school and their grades have improved since moving to New York.

34. In addition, upon information and belief Petitioner obtained black market loans that caused a significant danger to the family. On at least one occasion people Respondent believed to be loan sharks came to the parties' home looking for Petitioner in connection with repayment of the loan/loans he had taken. This caused her to fear for her own safety and the safety of the children. Petitioner also expressed fear that Respondent and the children could potentially be in danger for this reason.

Second Affirmative Defense

35. The petition should be denied based on Article 13 of the Hague Convention.

36. Article 13 includes what has been called the "wishes of the child" defense or exception. The Convention provides:

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Hague Convention, Art. 13.

37. A child's wishes can be the sole reason that a court refuses to order the return of the child to his or her habitual residence. *See Blondin v. Dubois*, 189 F.3d 240, 247 (2d Cir.1999) (internal citations omitted). The children wish to remain in the United States rather than return to Israel.

38. In the instant proceeding the children are ages 14, 12, and three years old. As children approach the age of 16, which is the cutoff age for applicability of the Hague Convention, Courts are more likely to consider their views. Courts routinely consider the views of children in the 12 to 14-year-old age range and deny Hague Convention petitions on that basis. *See Matovski v. Matovski*, No. PKC-06-4259, 2007 WL 2600862, at *4 (S.D.N.Y. Aug. 31, 2007) (finding the eleven and twelve year old girls validly objected to returning to Australia); *see also Laguna v. Avila*, No. ENV-07-5136, 2008 WL 1986253, at *11 (E.D.N.Y. May 7, 2008) (noting that although "there is a recognized tendency for a child to be influenced by the preferences of the parent with whom he or she lives ... the risk of undue influence in a child's testimony is no excuse for judicial paralysis" and finding that the thirteen-year-old child validly objected after living in the United States for fifteen months); *de Silva v. Pitts*, 481 F.3d 1279, 1286–87 & n. 7 (10th Cir. 2007) (exception applied where child was 13); *Man v. Cummings*, No. CV 08–15–PA, 2008 WL 803005, at *2, *4 (D.Or. Mar. 21, 2008) (exception applied where child was 13 and had objected to her return during an in camera interview); *McManus v. McManus*, 354 F.Supp.2d 62, 71 (D.Mass.2005) (exception applied where children were 14–year–old twins); *Diaz Arboleda v. Arenas*, 311 F.Supp.2d 336, 343 (E.D.N.Y.2004) (exception applied where children were 12 and 14 and had objected to their return during an in camera interview).

59. Courts are also disinclined to separate siblings. If this Court considers one or both older children's (ages 14 and 12) wishes to stay, it should deny the petition as to all three children,

including the three-year-old child. *See, e.g., Ermini v. Vittori*, 2013 WL 1703590, at *17 (S.D.N.Y. Apr. 19, 2013) (noting the importance of the relationship between seven-and nine-year-old brothers, where younger brother looked up to older brother "as a kind of super hero"); *Broca v. Giron*, No. 11 CV 818(SJ)(JMA), 2013 WL 867276, at *1, *9 (E.D.N.Y. Mar. 7, 2013), aff'd, 530 Fed.Appx. 46 (2d Cir.2013) (declining to separate three siblings, who were, at the time of hearing, between nine and fourteen years old); *Leonard v. Lentz*, 297 F. Supp. 3d 874, 897 (N.D. Iowa 2017) (finding that separating siblings in context of Hague proceeding would be "cruel," and the court was "unwilling to subject the children to such cruel treatment."); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("children['s] relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the State.'").

Third Affirmative Defense

39. The petition should be denied due to Article 13(a) of the Hague Convention. Consent is an affirmative defense, under which "a district court is not bound to return a wrongfully removed or retained child if the petitioner demonstrates by a preponderance of the evidence that the petitioner `had consented to or subsequently acquiesced in the removal or retention.'" *Mota v. Castillo*, 692 F.3d 108, 117 (2d Cir. 2012) (*quoting* Hague Convention, art. 13(a).

40. The consent defense requires a review of petitioner's subjective intent at the time prior to the children's removal or retention as demonstrated by statements, actions and other circumstantial evidence. *See In re Kim*, 404 F. Supp. 2d 495,516 (S.D.N.Y. 2005) ("The key to the consent inquiry is the petitioner's subjective intent, including the nature and scope of the intent."). Consent may be established by inference and informally. *Larbie v. Larbie*, 690 F. 3d 295, 308-309 (5th Cir. 2012) as "evinced by the petitioner's statements or conduct, which can be rather informal."

41. Article 13(a) also provides that a child need not be returned if the petitioner "subsequently acquiesced in the removal or retention." Acquiescence is established by either a formal statement by petitioner or a consistent attitude of acquiescence over time. *Laguna v. Avila,* No. 07-CV-5136, 2008 WL 1986253, at *7 (E.D.N.Y. May 7, 2008).

42. Petitioner consented and/or acquiesced to the children relocating to New York.

43. Petitioner and Respondent spoke multiple times regarding Respondent moving to New York with the children if the parties' relationship dissolved.

44. In or around the spring/summer of 2019, the parties were discussing divorce. These discussions always involved Respondent moving to New York with the children.

45. In July 2019, Petitioner left the parties' home one day and never returned.

46. Petitioner told Respondent that she should move to New York with the children on August 1, 2019, which was consistent with their prior conversations.

47. Petitioner flew with the children to New York on September 27, 2019.

48. After arriving in New York, Petitioner told Respondent that she should stay in New York with the children.

49. Petitioner has never asked Respondent to return to Israel with the children. Respondent's first notice regarding Petitioner's intention for the children to return to Israel was when she discovered he had filed paperwork related to the instant action.

Fourth Affirmative Defense

50. In order to sustain a Hague Convention *prima facie* claim, a petitioner must establish that (1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner's custody rights

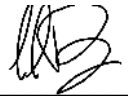
under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention. *See Gitter v. Gitter*, 396 F.3d 124, 129 (2d Cir. 2005).

51. Petitioner consented for the children's habitual residence to shift from Israel to the United States when he agreed for Petitioner to move to New York with the children.

52. Petitioner was not exercising his custody rights at the time the children moved to New York due to his abandonment of the family in July 2019. He never offered or suggested to visit with the children after they arrived in New York.

53. The petition should be denied based on Petitioner's inability to sustain a *prima facie* case.

Dated: September 2, 2020
New York, New York



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VERIFICATION

I, Tal Velozny, solemnly declare and affirm under the penalties of perjury and the laws of the United States of America, that I am the respondent in the within action and have read the foregoing Response and know the contents of the foregoing Response are true, to the best of my knowledge, except as to those matters alleged upon information and belief.

Dated: September 2, 2020

Tal Velozny