

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMILIA DUARTE, <i>Plaintiff-Appellant,</i> v. HECTOR BARDALES, <i>Defendant-Appellee.</i>

No. 06-56808
D.C. No.
CV-06-00158-TJW
Southern District of
California,
San Diego
ORDER

Filed July 1, 2008

Before: Myron H. Bright,* Harry Pregerson, and
Carlos T. Bea, Circuit Judges.

ORDER

The majority of the panel has voted to deny petition for rehearing by the panel. Judge Pregerson votes to deny the suggestion for rehearing en banc and Judge Bright so recommends. Judge Bea votes to grant the petition for panel rehearing and suggestion for rehearing en banc.

The panel has voted to deny Appellant's motion and amended motion to strike appellee's petition for panel rehearing or rehearing en banc; motion and amended motion to seal and motion and amended motion for sanctions.

We have, however, noted Appellee Bardales' assertion that the two children, now ages 11 and 10, would be subject to a

*The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

potentially abusive environment if returned to the custody of the mother, Duarte, in Mexico.

The matter of abuse is not before us and was not reached by the district court. Thus, it is a non-issue but, nevertheless, a matter of concern. The proper place to assert such claim is in the district court under appropriate provisions of the Hague Convention and the affirmative defense of “Grave Risk” which Bardales has asserted in district court but which was never reached by the district judge.

We remind Bardales and his counsel that the Hague Convention, Article 13(b) provides: “The requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that (b) 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.”

Bardales will have the opportunity to establish by appropriate evidence that returning the children to the mother in Mexico will put the children at great risk of physical or psychological harm and that, therefore, the children should remain in California.

Appellant’s motion and amended motion to strike appellee’s petition for panel rehearing or rehearing en banc; motion and amended motion to seal and motion and amended motion for sanctions are DENIED.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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