United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 00-6066

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FELIX BLONDIN,

Petitioner-Appellant,

- v. -

MARTHE DUBOIS,

Defendant-Appellee.

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**BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA**

**SUPPORTING PETITIONER-APPELLANT AND SUPPORTING REVERSAL**

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**Preliminary Statement**

Pursuant to 28 U.S.C. § 517 and Rule 29 of the Federal Rules of Appellate Procedure, the United States submits this brief as amicus curiae to express its views on the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, implemented by the International Child Abduction Remedies Act (the "ICARA"), 42 U.S.C. §§ 11601-11610.

**INTEREST OF THE UNITED STATES**

The Hague Convention is designed 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.” Hague Convention Preamble. The Department of State has long been involved in the difficult human, legal, and diplomatic problems surrounding international parental child abduction. The Department of State represented the United States at the negotiation of the Convention, and was instrumental in proposing its implementing legislation to Congress. (A237). The Department of State has also attended periodic international meetings to review the operation of the Convention. (A237-38).

The Hague Convention requires each party State to designate a "Central Authority" to cooperate with its counterparts in other party States to "secure the prompt return of children and to achieve the other objects of this Convention." Hague Convention, arts. 6, 7. The Department of States' Office of Children's Issues is the designated Central Authority in this country. 22 C.F.R. § 94.2.\* To facilitate the proper functioning of the Convention, the Office of Children's Issues carries out an active program of communications with private applicants, other Central Authorities, and, where appropriate, courts in the United States and abroad. (A238).

The Department of State has a strong interest in promoting

(as did the district court in its initial ruling in this case, 19 F. Supp. 2d at 127-29) that the return would be to the custody of the abusive "custodial parent." 51 Fed. Reg. at 10,510. The example did not consider the additional possibility of return in the custody of the non-abusive parent, or of other alternative arrangements to protect the child in that situation.

The district court also erroneously concluded that, even under what it regarded as this Court's "unduly narrow" standard, a grave risk of harm had been established. Blondin III, 78 F. Supp. 2d at 299. The district court believed that its findings of past abuse made this case exceptional, and warranted its acceptance of expert testimony regarding the children's emotional ability to adjust to a return to France. Id. at 297. Both portions of this conclusion were incorrect. First, while allegations of abuse are not always made, invocation of such allegations is becoming more ordinary as "parents attempt to stave off return orders in the name of the child's welfare." Linda Silberman, Hague International Child Abduction Convention: A Progress Report, 57 LAW & CONTEMP. PROBS. 210, 267 (Summer 1994). Moreover, much of the testimony credited by the district court was primarily addressed to the psychological harm that may flow to the children based on the uncertainties of custody proceedings in France. See 78 F. Supp. at 295-96. The district court acknowledged that uncertainties are inherent in any custody proceeding, id., but then failed to appreciate that crediting such uncertainties, even those existing against a background of past abuse, as a basis for non-return under the Convention expands the "grave harm" exception to the point where it threatens to undermine the central goal of the Convention, namely, the prompt return of abducted children to their country of habitual residence.

While expert testimony addressing whether grave psychological harm might follow from return to a particular custodian or specific living situation may be relevant under Article 13(b), the type of testimony credited by the district court in this case was addressed to which country the children would fare better in for purposes of their long-term psychological health, even on the assumption that the French courts would protect them from future abuse by their father. Indeed, the psychiatrist giving this testimony described his own view of his role as follows: “We were here to deal with the children’s best interests at the Court’s request.” (A367). Such evidence is addressed to the issue of custody, and is for the courts of the country of the children's habitual residence. It has little relevance to the question of whether children should be returned under the Convention, even where allegations of abuse are present. See Friedrich II, 78 F.3d at 1067, 1069; In re Walsh, 31 F. Supp. at 206; Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850-51 (Ky. Ct. App. 1999), petition for cert. pending, No. 99-1496 (U.S.)\*; Tahan v. Duquette, 259 N.J. Super. 328, 333-35 (N.J. Super. 1992); compare Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 461-62 (D. Md. 1999) (relying on similar type of psychological evidence to find exception to return, but relying on now-vacated opinion in Blondin I); Krishna v. Krishna, No. C 97-0021, 1997 U.S. Dist. LEXIS 4706, at \*9-10 (N.D. Ca. Apr. 11, 1997) (refusing return that would put child back into psychologically damaging environment of prior abuse, but also finding that removal was not "wrongful" where father acquiesced in child's leaving country).

In sum, the district court relied on testimony that the children would suffer grave psychological harm not from return to any specific abusive or otherwise intolerable situation, but merely from return to the country of France, where past abuse had occurred, and from custody proceedings there. 78 F. Supp. 2d at 296-97. Such a finding cannot alone justify relief under the narrow exception to return contemplated by Article 13(b).\*

In comparable circumstances, the United States would expect the French courts to return children to our system for an appropriate custody determination in our courts. The district court’s failure to return the children to France in this action erodes the system of trust and cooperation essential to the functioning of the Hague Convention and potentially opens the door to unregulated and uncontrollable international abductions in child custody matters.\*\*

**C.The District Court Incorrectly Analyzed, as a Legal Matter,**

**Whether Marie-Eline Objected to Return and Whether**

**She Has Attained a Sufficient Age or Degree of Maturity**

**to Have Any Such Objection Given Effect**

At the December 20, 1999 hearing, the district court heard evidence to determine whether Marie-Eline had, at age eight, attained an age and degree of maturity such that it would be appropriate to take account of her objection to return. The district court then played with Marie-Eline and Francois in Chambers. Based on that playtime, the district court reported: “Marie-Eline explicitly stated that she does not want to return to France because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Blondin III, 78 F. Supp. 2d at 296. The district court considered this an “objection to being returned to France.” Id. The court then noted that it considered the child's "views" as only one of several reasons why it was invoking Article 13(b). Id. This was an erroneous application of the standard for taking account of an older child's objection to return.

**1.Marie-Eline Did Not Express an “Objection to Return” Within the Meaning of the Convention**

As this Court stated in its initial opinion, that Marie-Eline may have expressed a preference to remain in the United States is not appropriately relied upon by a court when applying the exception to return under Article 13(b) of the Convention. Blondin II, 189 F.3d at 247. Rather, "[t]he Convention includes a separate provision allowing the court to take into account a child's objection to being returned 'if [the court] finds that the child . . . has obtained an age and degree of maturity at which it is appropriate to take account of its views.'" Id. (quoting Hague Convention, art. 13) (emphases added). This provision does not contemplate a general airing of a child's "views" as part of an Article 13(b) analysis of "grave risk"; rather, it permits, although does not require, a court to refuse return based on the separate ground of an older child's maturely considered objection to return. The district court correctly recognized that Marie-Eline's views were not sufficiently "dispositive" to permit non-return under that provision alone. Id. at 296.

Moreover, Marie-Eline did not express an "objection" to return within the meaning of the "age and maturity" provision. The district court concluded that Marie-Eline did not want to return to France “because she does not want to be subjected to further physical and emotional abuse at the hands of her father.” Id. This is not an objection to returning to France; rather, it is an objection to returning to the custody of her father. Indeed, the record contains ample evidence that Marie-Eline may want to return to France if she is not with her father. For example, the psychiatrist stated that Marie-Eline “loved France and if she could go back to France safely someday, she would love to do so . . . .” (A328). When asked to elaborate on that comment, he stated, “She loves France, but she separates it from the France with her father and the France without her father.” (A335). Similarly, when Marie-Eline was herself asked, “And would you mind going back to France if you did not have to live with your daddy,” she responded, “Yes, I wouldn’t mind.” (A383). When asked if she preferred New Jersey or France, she replied New Jersey, but when asked why, she stated, “because I don’t want to live with my daddy.” (Id.) Again, her focus was on avoiding her father, not France. This is simply not the type of “objection” envisioned by the Convention.

**2.The District Court Incorrectly Applied the**

**“Age and Maturity” Standard**

Even if a child articulates a firm objection to return, a court should nonetheless proceed with extreme caution, and carefully consider whether the child actually has reached the age and maturity threshold required by the Convention. That threshold can be satisfied only where the child has attained sufficient maturity independently to express her own interests in the manner necessary to make a determinative decision for herself. Perez-Vera Report at 433.

In this case, Marie-Eline, now eight years old, was abducted to the United States at the age of six, and has been in the exclusive care of her abducting parent since that time. The Convention applies to children up to sixteen years of age, and Marie-Eline therefore was far below the age of the older children that the drafters of the Convention had principally in mind in drafting this provision. Id. (citing fifteen-year-old as example). At the outset, therefore, there is substantial reason to doubt whether any eight-year-old could satisfy the "age and maturity" standard. Indeed, at least one court has found that this standard “does not apply to a 9-year-old child.” Tahan, 259 N.J. Super. at 335.

This substantial doubt is reinforced in this case by the testifying psychiatrist, who described Marie-Eline’s ability to testify as follows:

I believe that her view can be given great weight when it emerges in a clinical play situation. I believe that the French are correct formally. If you put her on the stand and say do you swear to tell the truth, the whole truth and nothing but the truth, her concept of truth is not as fully developed yet as it will be when she is 12 or 13. . . . [I]n a spontaneous clinical interview I believe you can get valid impressions . . . . Usually what I advise is to do it at the child’s home where the child feels safe, and to take with them some crayons . . . and then to either sit on the floor or sit on a little chair or stool like I do now . . . and to ask them what they would like to play with. As they are playing find out -- for example, one of my favorite ways of doing it is to pretend.

(A336). Similarly, in his report, the psychiatrist stated:

Though we could, and at times did, raise direct questions with Marie-Eline, we were aware that an interview limited to questions and answers could easily go beyond Francois's and Marie-Eline's expected, age-appropriate cognitive capacity. Furthermore, from our clinical experiences, and from published literature, we were aware that direct questions from friendly strangers can be experienced by young children as a test for which the interviewer has a correct answer in mind. The child then tries to please the adult interviewer by providing the "correct" answer . . . .

(A121-22). In sum, her own expert testified that Marie-Eline is not old enough to testify under oath, or even in a question-and-answer format. A fortiori, the child could not be viewed as having a “sufficient age and maturity” under the Convention.

In addition, in weighing the testimony of a younger child, a court should consider carefully whether it reflects the child’s views, or an attenuated version of the abducting parent’s. 51 Fed. Reg. at 10,510. Applying this standard, courts have found that children aged nine and ten have been sufficiently influenced by their abductors that their views on return should not be taken into account. See Sheikh v. Cahill, 546 N.Y.S.2d 517, 521-22 (Sup. Ct. Kings County 1989); In re Robinson, 983 F. Supp. 1339, 1343-44 (D. Colo. 1997).

In August 1998, the district court concluded that Marie-Eline, then seven, had been “prepared, to a degree,” for a conversation with the court concerning her views on return. Blondin I, 19 F. Supp. 2d at 128. Moreover, in December 1999, the psychiatrist readily admitted that some of Marie-Eline’s “spontaneous” expressions of abuse, such as a fear of her father strangling her, or living in a shelter, could have come only from descriptions of abuse given to her by her mother, since such incidents occurred when Marie-Eline was too young to remember them. (A348-50). Notwithstanding this testimony, the district court summarily concluded that it did not believe Marie-Eline's statements were influenced by her mother. Given the circumstances, it is extremely unlikely that Marie-Eline's views could have been sufficiently free of her abducting parent’s influence to amount to an objection properly cognizable under the Convention.

We do not suggest that the testimony of a younger child cannot be considered as evidence that abuse has occurred or that return to the immediate custody of an abusive parent would pose a grave risk of harm. That is different, however, from giving effect to a carefully considered “objection” by an older child to returning to her former country of residence, based on her independent and mature assessment of her own interests.

**CONCLUSION**

T**he judgment of the district court should be reversed.**

Dated:New York, New York

May 8, 2000

Respectfully submitted,

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**Certificate of Compliance**

Pursuant to Rules 29(c), (d), and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6964 words in the brief.

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