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[22/05/2000; Family Court of New York (United States); First Instance]
In the Matter of L.L. (Children), 22 May 2000, Family Court of New York (United States)

FAMILY COURT OF NEW YORK

May 22, 2000

Before: Jurow, J.

Matter of LL. Children

Petitioner father, a Dutch citizen, seeks the return of his two children and their half-sister to the Netherlands pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (1980), T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (the "Convention"), as implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. S, 11601 et seq. He alleges that the children were wrongfully removed by the respondent mother from their habitual residence, the Netherlands, and brought to the United States.

Respondent mother concedes that her removal of her three children from the Netherlands to New York City in August, 1999, without notice to or the consent of petitioner, was wrongful within the meaning of the Convention, but opposes the return of the children, invoking the so-called "grave risk" exception in the Convention. She claims that the children are suffering from psychiatric disorders caused by domestic violence and excessive corporal punishment by the father, which disorders would be exacerbated by a return to the Netherlands. She also claims that the oldest child, age fifteen, has a right to choose to remain in the United States and should not be separated from her half-siblings to whom she is "bonded".

This is a troublesome case which requires the Court to balance the dual objectives of returning wrongfully abducted children and protecting children from grave risk of harm. The case tests the parameters of the "grave risk" exception, a developing and important area of international treaty law with relatively few precedents.

I. The Trial Record

An extensive hearing was held at which both parents testified as well as two clinicians who interviewed the children. The Court interviewed the oldest child in camera. In addition, an array of documents was considered by the Court including medical records, documents from the Netherlands, and a formal written communication from the Dutch government.

The mother was born in the Dominican Republic and emigrated to the Netherlands in 1989. She met the father, a Dutch citizen, in 1989 at a discotheque in The Hague. C. was born in December, 1990. O was born in September, 1992. Although these two children were born in The Hague, J was born in the Dominican Republic to a different father. J was cared for by her grandmother until, at age nine, she emigrated to the Netherlands in 1995 and later became a Dutch citizen. The mother became a Dutch citizen in 1998, apparently retaining Dominican Republic citizenship as well.

Petitioner and respondent lived together in Reiswijk (a short distance from The Hague) until they separated in February, 1998. They never married. Legal documents from Holland confirm, and it is undisputed, that petitioner and respondent are joint custodians of the three children.

Following their parents' separation, the children resided with their mother. The two younger children spent weekends and some weekday afternoons with their father; J saw her stepfather

occasionally but primarily when he picked up and dropped off the other children. In August, 1999 (and after having spent July on vacation in Spain with the two younger children) the father learned that the children were not in school. Unbeknownst to him, the mother in late August, 1999 took the children with her to reside in New York City. After a search, the father in December, 1999 discovered the location of the children and filed the instant application for their return in January, 2000.

The mother testified that she emigrated to the Netherlands in 1989 to get a "better life". She said she did cleaning work at the petitioner's discotheques during the 8 or 9 years they lived together. (In the 1990s the father was in business in The Hague as the owner of two discotheques and a bar.) She characterized her relationship with the petitioner as acrimonious, with constant quarreling. She further testified to domestic violence, claiming petitioner hit her "forty times" including more than once in the face with his fists (although never in the presence of the children); that he once dislocated her arm; that she went to the hospital at various times; that he threatened to kill her; that he once put a gun to her head and threatened her. (Regarding the latter, she stated she went to the police but claimed an officer told her that "just looking at a pistol that is put to your head doesn't mean that they're going to shoot you with it".) She also said: that O told her his father hit him with a stick, that she went to the police, and was told it was normal discipline; J reported to her that she was kicked by her step-father, causing bruising; C complained she was hit during visits with her father.

The mother also testified that the father was hospitalized for 5 months in 1998 for depression; that she saw white powder on the desk at his discotheque; and that he told her he took LSD. The mother denied any psychiatric history, acknowledging only taking tranxene (a valium-like drug) to sleep. On one occasion, after a test revealed a possible malignancy, she sought treatment in the Dominican Republic because she did not "trust the doctors" in Holland.

Finally, the mother testified that she consulted with attorneys in Holland who told her she would never get custody of the children in that country; she concluded that the courts in the United States were preferable to those in Holland or the Dominican Republic.

The father testified and denied any corporal punishment of the children (except for an occasional slap on the hand or backside); any domestic violence, saying he never hit the mother; any threats to the mother; ever displaying a weapon; any psychiatric hospitalization; any cocaine or illicit drug involvement. He told a caseworker that when he met the respondent she was a prostitute and that he got her to stop. (The mother denied any prostitution.) He described the mother as depressed and quarrelsome, a voodoo practitioner (he provided supporting photographic exhibits), and "drugged up" to the point of using J as a surrogate mother for the younger children. He said he "rescued" J from the Dominican Republic and personally brought her to Holland [an undisputed fact], but that his good relationship with her soured after he separated from the respondent. He described J as having a close but domineering relationship with her step-siblings. He attributed the childrens' allegations against him, their professed fear of him, and their desire not to return to Holland, as a product of the mother's brainwashing and "America syndrome", which he defined as "the dream of every kid to come to the United States", something the mother reinforced with her children.

With respect to the mother's psychiatric history, the father provided documentation of a 1994 psychiatric hospitalization of the mother, a 1995 psychiatric consultation, and subsequent prescription of anti-depressive medication (all denied by the mother). [FN1] He also provided a letter from the family physician attesting to the father's "caring impression" and absence of any signs of child neglect. The letter also stated: "I know [the mother] as a sympathetic but often emotional [sic] unstable woman who was most of the time under psychiatric supervision and medication."

Pursuant to this Court's order, the New York City Administration for Children's Services (ACS) evaluated the children in conjunction with New York - Presbyterian Hospital (NYPH). The children were interviewed by the ACS caseworker; by Dr. Nicholas Cunnningham, a pediatrician at NYPH and head of their Child Protection Committee; by Dr. Estelle Paris a psychiatrist at NYPH; and also by Susan Greenberg, the law guardian's social worker. All interviewers reported that all three children told them they were fearful of their father; that their father threatened to harm them if they

disclosed to the mother that he hit them; that their mother treated them well; and that they wanted to be cared for by their mother.

Although describing all the children as in good physical health, and the two younger children as cheerful, Dr. Cunningham concluded that his interviews were suggestive of excessive corporal punishment of the children by the father and of spousal abuse of the mother by the father. He recommended the children not be in the father's custody but be returned to the mother to whom they look for nurturance.

Ms. Greenberg testified that the two younger children are very attached to J, and that all three want to be together with their mother in the United States. She characterized the children as suffering from anxiety, sleep disturbance, concentration difficulties, and stress about the uncertain outcome of the case, which raised a "concern" that the children were suffering from posttraumatic stress disorder. She thought the children might "regress" if returned to the Netherlands, but that therapy and limited contact with the father would reduce their stress on return. Ms. Greenberg acknowledged that it was unusual for children to report parental threats about disclosing corporal punishment, since such threats usually occur in the context of sex abuse (which was specifically denied by the children).

Dr. Paris testified at some length. A recently licensed physician, she had completed a residency in adult psychiatry and was the child psychiatry resident on call the night the children were brought to the NYPH emergency room. She saw them that night and a second time for a follow-up. She testified that all three children had posttraumatic stress disorder (PTSD), which includes symptomotology such as nightmares, intrusive thoughts, and inability to concentrate. C was also diagnosed as having a dissociative disorder (suppressing the emotional content of traumatic events) because she would "smile inappropriately" when reporting certain events and would say, "This happened but it didn't bother me". The cause of the PTSD was the excessive corporal punishment and domestic violence and overall chaotic discord in the home. Dr. Paris said she believed the children would suffer psychiatric harm if returned to Holland, that they would regress and suffer "any number of illnesses" (e.g. depression; learning disabilities; and developmental delays). With respect to C, Dr. Paris opined: "[S]he's at risk for even, you know, multiple personality disorder". The doctor explained that returning to the scene of the trauma (Holland) would make the children feel helpless and unprotected, that is, in "an enemy territory", where, because "it's his country [the father] would have easier access to them" rather than "on hallowed ground" in the United States where "they're physically surrounded by a body of water, which helps them feel safer". If they go back to Holland, "it's like going back to him, even if they're not physically placed in the same residence where he is or they don't see him all the time." Therefore, it would also be difficult for the children to make therapeutic progress in Holland.

On further examination, Dr. Paris conceded that what she conducted was an emergency evaluation involving initial diagnostic impressions of the children rather than an in-depth, full evaluation of the family. She clarified that her use of the diagnostic term PTSD was similar to that of the diagnosis "generalized anxiety disorder" in terms of symptomotology, except that the precipitating stressors (familial violence) were known for the former. [FN2] She agreed that authentic cases of multiple personality disorder are "extremely rare" and that the probability of ultimately developing it is "small", but that C was still "at risk" for being "that rare statistic." She concluded by saying, that the children were not currently in need of hospitalization; that she could not "guarantee" the children would develop serious mental illness or be hospitalized in Holland if returned; that in sum the children are "at higher risk than they would be if they stayed here".

The Court interviewed the subject child J in camera. She said her stepfather brought her to the Netherlands from the Dominican Republic in 1995 but that they soon "became enemies" because she did not like his parental restrictions compared to the freedom she enjoyed in Santo Domingo. She reported instances of excessive corporal punishment by her stepfather, heard him threaten her mother, including displaying a pistol on one occasion, and saw signs that he physically abused the mother although she did not witness it. J complained that the stepfather treated her mother "like his servant" (a complaint also echoed to Dr. Paris), assigning her menial cleaning work at his discotheque. She said she thought her mother came to New York with her children for a vacation,

that she thought she would go back to Holland, and that her mother never told her why they were staying here. She said she did not want to live in the Netherlands because "nobody hears me", in contrast to those "from Holland", like her stepfather who "has all the rights." She asked not to be separated from her half-siblings. She said she wanted to be with her mother and would go wherever her mother went, including back to Holland or to the Dominican Republic (where she missed her family and friends). J's demeanor during the interview was often tearful but she was quite assertive at times, particularly when contrasting the treatment of Dutch natives with that of Dominicans.

The Court's assessment of the above record is as follows: In observing the testimony of the parents, each testified forcefully, emotionally, and with apparent sincerity. However, there is no way to reconcile the content of their testimony standing alone, which was sharply divergent. Other parts of the record suggest that neither parent was completely candid with the Court. The Court had the impression that significant aspects of the personal, business, and family history may have been withheld by each of the parties, either individually or collusively. Among other things, the mother tried to conceal her history of psychiatric difficulty and treatment and the father appeared to be minimizing his physical aggression within the family. With respect to the latter, the consistent reports of all three subject children to the interviewers indicate it highly likely that, notwithstanding the father's denials, he engaged in a pattern of excessive corporal punishment with respect to all three children and domestic violence towards their mother. The possibility remains that the mother and J, clearly disaffected with and feeling like second class citizens in Holland, and in an attempt to remain in the United States, may have fabricated their portrait of the father as abusive (and influenced the younger children to similarly report), but that scenario is unlikely.

II. The Dutch Government Position [FN3]

In a formal written communication, during these proceedings, to the court from the Ministry of Justice of the Netherlands, the Ministry wrote:

> **The Dutch Child Protection Board will immediately present a request to the Juvenile Court Magistrate in the Dutch Family Court to get a family supervision order to entrust the ["LL"] children provisional to a Guardianship- organization, as soon as the children are returned to the Netherlands.**
>
> **In the meantime the children will be taken from the airport by workers of the child Protection Board, who will bring them immediately to a foster-home or foster-family, without contact between them and the father or the mother of the children.**
>
> **The children will stay at the foster-home or foster-family during the intensive investigation by the Child Protection board concerning the allegations of abuse. If the father or the mother of the children will be allowed to visit them, it will only be under supervision of the Child Protection Board. [Letter dated February 7, 2000, in evidence.]**

III. The Hague Convention

The objects of the Convention are: "(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Convention Article 1. Children who are "wrongfully removed" from the country where they were "habitually resident" prior to the abduction "are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies", 42 U.S.C. S11601(a)(4); Convention, Article 3 (emphasis added) The basic purpose of the Convention is thus "... to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court". Friedrich v. Friedrich, 78 F. 3d 1060, 1064 (6th Cir. 1996). The Convention is jurisdictional in that "... a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute."; Friedrich, supra at 1063; Convention, Article 19; 42 U.S.C. S. 11601(b)(4) The merits of the custody dispute are intended to be dealt with by the courts in the country of habitual residence.

Because the parties have stipulated that the subject children were wrongfully removed from their habitual residence (the Netherlands) within the meaning of the Convention, they must be returned to Holland unless the respondent mother can show that one of several exceptions applies. [FN4] The exceptions relevant to this case are:

> **there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. (Convention, Article 13b); or ... 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. (Convention, Article 13).**

The respondent has the burden of proving the former "grave risk" exception by clear and convincing evidence, and the latter "age and maturity" exception by a preponderance of the evidence. 42 U.S.C. S. 11063(e). Even if a court determines that an exception has been established, the Convention still gives the court the discretion to order the return of the child if a return would further the aims of the Convention. Friedrich, supra at 1067.

The most important interpretive principle with respect to these defenses is the well-established view that they must be interpreted narrowly. This principle is established in federal law, see 42 U.S. C. S. 11601(a)(4), supra, and 51 Fed. Reg. 10494, 10509 (1986) ("... very narrowly, lest their application undermine the express purposes of the Convention — to effect the prompt return of abducted children".) All major commentators on the Convention similarly agree on the requirement of strict interpretation. For example, Elisa Perez-Vera, the official Hague Conference reporter for the Convention whose explanatory report is recognized as the official commentary on the Convention wrote:

> **[The exceptions] are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition ... . [T]he child's habitual residence [is] in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention ... 11 E. Perez-Vera, Explanatory Report Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("Perez-Vera Report"), S. 34.**

See also Silberman, Hague International Child Abduction Convention: A Progress Report, Law & Contemp. Problems, Vol. 57, No. 3 (1994) ("Perhaps the most important aspect for success of the Convention will be the ability to limit the uses of defenses ... . [I]f certain contracting states rely on the defenses to avoid return, the return mechanism will be thwarted. International cooperation will be frustrated, and parties will once again resort to self-help", at p. 233); Beaumont & McEleavy, The Hague Convention on International Child Abduction (1999) ("... it should be only in exceptional cases that a return order be refused", at p. 138).

Although dicta, impetus for a "restrictive reading" of the grave harm exception was provided by the Sixth Circuit in a widely cited passage in Friedrich, supra at 1069:

> **[W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.**

Notwithstanding the clear need to prevent the exceptions from turning into an "escape route" (Silberman, supra at 236), the drafters of the Convention, via the grave risk exception,

recognized "... the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation". Perez-Vera Report at S. 30. The State Department has officially recognized one category of "grave risk":

> **An example of an 'intolerable situation', is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an 'intolerable situation' and subjected to a grave risk of psychological harm.**

Fed. Reg., supra at 10510.

Although a review of the reported cases both in the United States and internationally indicates that, in general, courts have been "rigorous" in narrowly construing the "grave risk" exception, some cases have presented circumstances that have resulted in denials of return applications on safety grounds. See generally cases reported in Silberman and in Beaumont & McEleavy, supra. Clearly, the most difficult cases have been those alleging domestic violence and/or physical abuse as a basis for retention, claims similar to those in the instant case. Several such cases have recently been reported in the United States. The most significant of these is the so-called "Blondin" series.

In Blondin v. Dubois, 19 F. Supp. 2d 123 (S.D.N.Y. 1998) ("Blondin I") Judge Denny Chin found "grave risk" to and denied the return of two children, ages 7 and 2, to France from where their mother fled on a fact pattern involving strong evidence the father repeatedly beat and threatened the mother, often in front of the children, causing the mother to flee to a series of battered women's shelters; frequently hit the older child; and one time choked that child with an electrical cord. On appeal the Second Circuit reversed and remanded the case back to the District Court. See Blondin v. Dubois, 189 F.3d 240 (2nd Cir. 1999.) ("Blondin" II).

The Second Circuit discussed the framework of the convention, emphasizing at length the reasons and authority (see above) for narrowly interpreting the return exceptions. It noted that a court considering Hague Convention petitions "should make every effort to honor simultaneously the Convention's commitments (1) to the return of wrongfully abducted children to their home countries, for custody adjudication by courts there with proper jurisdiction, and (2) to safeguarding the children from "grave risk" of harm. (emphasis added). Although noting that the trial record supported a conclusion that the children would face a risk of physical abuse if returned to the father's custody, ordinarily a basis for an Article 13(b) exception, nonetheless because the Convention depends on the "institutions of the abducted-to-state generally deferring to the forum of the child's home state" (id. at 248, citing the Perez-Vera Report, supra at 1119) it is therefore important that a court considering an exception under Article 13(b) take into account any ameliorative measures by the parents and by the authorities of the state having jurisdiction over the question of custody that can reduce whatever risk might otherwise be associated with a child's repatriation. In the exercise of comity that is the heart of the Convention (an international agreement) ..., we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it." (Id. at 248).

The Court suggested that on remand the District Court further develop its record and consider a "range of remedies" to allow a safe return to France, pending further custody proceedings in France, including a return "in the temporary custody of some appropriate and suitable third party, with adequate guarantees of child protection". (Id. at 249.) (The Convention requires a return to the country of habitual residence, not to a particular individual.) The Court also encouraged the District Court to make inquiries of the French government concerning the availability of ameliorative placement options in France.

On remand the District Court heard additional testimony (not proffered at the original hearing) from a child psychiatrist who diagnosed the children as continuing to suffer from a posttraumatic stress disorder due to the abusive situation in France, particularly the older child who had nightmares, interrupted sleeping (symptoms previously noted in the Blondin I opinion), eating

difficulties, and fearfulness. The Doctor stated that a return to France under any conditions (whether cared for by a third party or even by their mother) would expose the children to a grave risk of psychological harm by removing them from a secure environment to the scene of their original trauma and uncertainty about their future, which would harm their future development. Notwithstanding expert testimony concerning the legal and social support services and safeguards available to the mother and children upon a return to France, Judge Chin agreed that any return "no matter how carefully managed by the French courts" could not protect the children from grave risk of further psychological harm, even though the risk of physical abuse could be so protected. Interestingly, at the close of his opinion Judge Chin wrote that, in his view, the appellate interpretations of "grave risk" in Article 13b are "unduly narrow", explicitly in Friedrich, supra, and implicitly by the Second Circuit in Blondin II (by remanding the case despite the Blondin I findings of serious abuse by the father). Blondin v. Dubois, 98 Civ. 4274 (S.D.N.Y. 2000) (Blondin III).

See also Rodriguez v. Rodriguez, 33 F. Supp. 2d 456 (U.S.D.C., D. Md. 1999) (finding grave risk involving severe physical abuse of child and domestic violence, with diagnosis of posttraumatic disorder, and citing Blondin I); But see In re Walsh, 31 F. Supp. 2d 200 (U.S.D.C., D.Mass. 1998) ("deplorable" domestic violence, spanking/slapping of children, "poisonous atmosphere", and diagnosis of posttraumatic stress disorder; but insufficient to constitute grave risk so children ordered returned to Ireland, with conditions [including separation from father which will "mitigate" psychological harm].)

IV. Application of The Convention

Respondent's argument is threefold: First, that the oldest child J, at age 15, has a right to stay in the United States pursuant to the Article 13 "age and maturity" exception. Second, given J's right to remain, the two younger children, to whom she is closely bonded, have a right to remain because it would be "intolerable" to split up the children. Third, that the Article 13(b) "grave risk" exception clearly has been proven with respect to all three children. Respondent was joined by the child's law guardian in these arguments. [FN5]

The first two arguments are more easily addressed. The Convention is inapplicable once a child attains the age of 16. Convention, Article 4. Although there may be differences of opinion as to how old a child must be for a court to give weight to its views about a return, in view of the age 16 "cutoff" it is obvious that the closer a child is to age 16, absent unusual circumstances, the more controlling its views will become, and case law reflects this point. As Perez-Vera has noted, "... [I]t would be very difficult to accept that a child of, for example, fifteen years of age should be returned against its will "Perez-Vera Report, S. 30. Accordingly, and also consistent with its in camera interview, the Court finds that pursuant to Article 13, J has attained an age and degree of maturity at which it is appropriate to take into account her view that she does not want to return to the Netherlands, and to give that view virtually conclusive weight. Accordingly the Court will not order her return to the Netherlands, although it nonetheless has the discretion to do so.

If J chooses to remain in the United States (or, alternatively, go to the Dominican Republic or elsewhere) that is not automatically determinative of the locale of her half siblings. For example, if the younger children are returned to the Netherlands, J will have a choice to make, or even a range of choices, and it will become her choice whether or not there is a sibling split, a decision that may be difficult for her but not "intolerable". [FN6] That is, because J has the age and maturity to decide not to return to the Netherlands, she also has the age and maturity to decide to return, weighing all the variables involved (including not just her ties to her half-siblings, but also, for example, her ties to the Dominican Republic where she has family and from which she has always felt uprooted). As a practical matter, the "split sibling" problem is likely to be resolved by J's clearly expressed intent at the in camera, regardless of other factors, to remain with her mother and half siblings, wherever they are located. See Hadjittofi v. Hadjittofi, No. V-2008/9 (Fam. Ct., Monroe Cty., N.Y. 1996). [FN7]

As the "Blondin" cases, supra, aptly illustrate, applying the "grave risk" exception to a record involving domestic violence, excessive corporal punishment, and claimed posttraumatic stress, is not

an easy judicial task. It involves, of necessity, an assessment of risk levels in the context of furthering the aims of an important international treaty.

Giving weight to the Second Circuit's admonition in Blondin II to avoid an "overly broad construction" in considering the grant of Article 13(b) exception (supra at 246), and to see if "ameliorative measures" can be implemented to reduce the risks of repatriation (supra at 246 and 248), this Court concludes that respondent has failed to prove by clear and convincing evidence that a return of the subject children would expose any one of them to grave risk within the meaning of Convention Article 13(b). In this conclusion the Court reaches a different result, on a record with some similarities, than did the District Court in Blondin III.

The primary "ameliorative measure" is the clear commitment of the Dutch government to institute an intensive investigation of the abuse allegations within the auspices of the Dutch judicial system, during which child protection officials will oversee a foster care placement with restricted parental access [FN8]. Such "safe harbor" type arrangements have become an accepted method of facilitating the return of abducted children when Article 13(b) "grave risk" claims have been made. See Beaumont & McEleavy, supra at pp. 157-172; Convention Article 7. Moreover, evidence was presented and it is undisputed that the Netherlands has a well-established child protection system, not dissimilar in nature to those in most jurisdictions in the United States. Implicit in a return to the country of habitual residence is the concept that ordinarily it is the more convenient forum to address the custody issues. See Perez-Vera Report ¶34, supra. Thus, the Dutch child protective authorities have better access to information and can develop a sounder and more complete investigative record. Further, the Dutch courts have a full array of dispositional alternatives upon completion of a child protective investigation and consideration of the merits of the underlying custody dispute, including, but not limited, to a return of the children to the mother, even with the option of residing in the United States. See Friedrich, supra at 1068 ("And if Germany really is a poor place for [the child] to grow up ... we can expect the German courts to recognize that and award [the mother] custody in America. When we trust the court system in the abducted-from country, the vast majority of claims of harm - those that do not rise to the level of gravity required by the Convention - evaporate.).

Although the Dutch government plan will certainly ensure the childrens' physical safety, the question remains whether it will be sufficient to avoid grave risk of psychological harm. The resolution of this issue turns on the weight to be given the psychiatric testimony arguing that a diagnosis of posttraumatic stress disorder creates grave risk upon a return per se to the foreign jurisdiction. Judge Chin in Blondin III found this type of testimony conclusive of grave risk; on this record the Court finds similar testimony less than persuasive.

A careful scrutiny of the testimony of the psychiatrist, Dr. Paris (summarized above), leads to a conclusion of risk but not grave risk. First, the actual symptomotology described (sleep disturbances, intrusive thoughts, concentration problems, and blunting of emotion) are troublesome but not uniquely serious. This conclusion is buttressed by the doctor's acknowledgment that what she was describing were symptoms essentially equivalent to a generalized anxiety disorder. See Renovales v. Roosa, No. 91-0392232-S, 1991 Conn. Super. WL 204483 (Conn. Super. Ct., 1991) Second, none of the children, despite having already experienced trauma, had ever been previously psychiatrically hospitalized or medicated, nor did they currently require such treatment. Third, the doctor's prognosis of future risk on a return tended toward the hyperbolic, for example, her odd claim that C (because of a lack of emotional display in the interview; a child another doctor characterized as "cheerful") had a high probability of developing an admittedly very rare psychiatric disorder. Fourth, Dr. Paris placed inordinate, almost metaphorical, weight on the distance from Holland ("surrounded by [the ocean]") in protecting the children from psychological harm. Yet, in the ordinary reality of child protection, children are frequently removed from abusive or neglectful situations, routinely to new caretakers in the same locale; [FN9] distant relocation is not the ordinary sine qua non of child protection.

In short, the problem with most "posttraumatic stress" claims of psychological harm in a Convention Article 13(b) context is that the claim is too broad. Familial domestic violence and excessive corporal punishment are not infrequent, and are commonly accompanied by associated

psychological disturbances in the affected children. Were all such claims to be routinely granted Article 13(b) exception status - particularly when the country of habitual residence is made aware of the claims and is willing to use an established child protection apparatus to address them - exception will begin to swallow the rule.

To be clear about what the Court is saying and is not saying: The Court is not suggesting that there is no risk to the children associated with a return. An exacerbation of psychological disturbance, of unknown degree, may be possible. But although the risk may even be considered serious it does not appear warranted in this context to label it "grave". The distinction is important because, as noted, "the person opposing the child's return must show that the risk to the child is grave, not merely serious". Fed. Reg., supra at 10510; "... [I]t is not merely a grave risk of 'any' physical or psychological harm which should satisfy the provision. The harm must be of a substantial or weighty kind". Brown v. Brown (Fam. Ct. Aust. No. SY9391, 1992). Nor is the Court trivializing acts of domestic violence and excessive corporal punishment; all instances are reprehensible and cannot be condoned. But the Convention requires that distinctions be drawn in terms of severity of risk, even in these regrettable contexts. Finally, a return of the children to Holland is not to sacrifice them at the altar of abstract internationalist doctrine. Rather, pragmatically "[T]he careful and thorough fulfillment of our treaty obligations stands not only to protect children abducted to the United States, but also to protect American children abducted to other nations -- whose courts, under the legal regime created by this treaty, are expected to offer reciprocal protection". Blondin II, supra at 242. Were any of the numerous children in New York City who are victims of the type of domestic violence/excessive corporal punishment, and its related consequences, delineated in this record, to be abducted to a foreign signatory of the Convention, their return to the United States would be similarly expected.

Accordingly, the petitions for return of the children C and O are granted, subject to the conditions detailed in the letter dated February 7, 2000 from the Ministry of Justice of the Netherlands. The petition for the return of the child J is denied.

It is further ordered that the New York City ACS contact the government of the Netherlands Central Authority, provide a copy of this Decision and order to them, and make arrangements with the Central Authority for the orderly return of C and O. If the respondent and the child J choose to return to the Netherlands, ACS, in consultation with the Netherlands Central Authority, shall make every effort to facilitate their return as well, in a manner consistent with the best interests of the subject children.

So ordered.

NOTES

(1) A psychiatrist who examined the mother during these proceedings stated in his report (in evidence): "Ms. S denies ever having psychiatric problems, hospitalizations, prescription of psychotropic medication, psychotherapy, psychiatric evaluations or any symptoms of depression, anxiety, hallucinations, delusions, dissociation or any other symptomology."

Directly contradicting the mother's denials to the psychiatrist were the documentation of the 1994 psychiatric hospitalization, which was for five weeks; the 1995 clinic consultation record which involved substantial symptoms of depression; and the later prescription of the anti-depressant, Zoloft.

(2) In fact, the medical records indicate that after the hospital interview Dr. Paris' diagnosis of all three children was "adjustment disorder with anxiety, rule out PTSD secondary to physical abuse." The mood of J and O was described as "euthymic" [normal; not depressed], and that of C as "hesitant".

(3) Under the Convention, each signatory designates a Central Authority (in the United States, the State Department) to, inter alia "initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child." Convention, Articles 6 and 7.

(4) The parties stipulated to other predicates triggering the application of the Convention, to which both the United States and the Netherlands are signatories.

(5) They also argued that the father was not actually exercising his custody rights with respect to J at the time of removal, a Convention Article 13 defense. The factual record does not support this claim and interpretation. See Friedrich, supra at 1064-1066.

(6) The Article 13 right to choose embodies a determination that children of J's age and maturity can indeed tolerate and resolve the conflicts inherent in such a decision.

(7) The law guardian further argues that if J chooses not to return to the Netherlands but C and O do return, that the two younger children would undergo an "intolerable" separation from their half-sibling. In the unlikely event that J made such a choice involving possible separation, this argument would inordinately expand the definition of "intolerable" to give the 15 year old the power to determine the outcome of the entire litigation, a result unlikely to be intended by the Convention.

(8) This is similar to the children's current status in that they have been in foster care during the pendency of these proceedings while ACS completed its investigation and the divergent cross allegations were preliminarily addressed at this hearing.

(9) In the year ending 1998, 5,804 child protective proceedings were filed in New York City; approximately 75 percent of the children were removed from their home (most to locations within the City.) Report of the Chief Administrator of the Courts (Family Court Statistics).

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