

App. Nos. 02-1065, 02-1070

United States Court of Appeals
For the First Circuit

Iraj Danaipour,
Plaintiff, Appellee

v.

Kristina Thermaenius McLarey
Defendant, Appellant.

**BRIEF OF AMICI CURIAE LEADERSHIP COUNCIL FOR
MENTAL HEALTH, JUSTICE, & THE MEDIA, THE
MASSACHUSETTS SOCIETY FOR THE PREVENTION OF
CRUELTY TO CHILDREN, THE COMMUNITY LEGAL
SERVICES AND COUNSELING CENTER, AND GLOUCESTER
MEN AGAINST ABUSE IN SUPPORT OF APPELLANT
AND REVERSAL OF THE JUDGMENT BELOW**

On Appeal From the United States District Court
for the District of Massachusetts
(Honorable Mark L. Wolf)

Respectfully submitted,

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**STATEMENT OF INTERESTS OF AMICI CURIAE
AND THEIR AUTHORITY TO FILE**

Leadership Council for Mental Health, Justice, & the Media (the “Leadership Council”) is a non-profit independent scientific organization composed of respected scientists, clinicians, educators, legal scholars, journalists, and public policy analysts. The Leadership Council operates under a charter issued by the Secretary of the Commonwealth on _____, which authorizes it to promote the ethical application of psychological science to human welfare. It is committed to providing professionals and laypersons with accurate, research-based information about a variety of mental health issues and to preserving society's commitment to protect its most vulnerable members, especially children who are victims of crime. The Leadership Council regularly provides Amicus Briefs, hosts conferences and contributes to the scientific literature.

Massachusetts Society for the Prevention of Cruelty to Children (“MSPCC”) is a private, non-profit society dedicated to leadership in protecting and promoting the rights and well-being of children and families. MSPCC operates under a charter issued by the Secretary of the Commonwealth on April 23, 1878, which authorized formation of MSPCC as a corporation for the purpose of, among other things, “awakening interest in the abuses to which children are exposed by the intemperance, cruelty, or cupidity of parents and guardians, and to help the

enforcement of existing laws on the subject, [and] produce needed legislation

” MSPCC has previously submitted amicus briefs in matters related to its mission.

Community Legal Services and Counseling Center (“CLSACC”) provides pro bono legal services and affordable psychological counseling services in the Greater Boston area. CLSACC operates under a charter issued by the Secretary of the Commonwealth on _____, which authorizes its operation as a non-profit pro bono organization providing assistance with legal and psychological counseling matters in the Commonwealth, and is authorized thereunder to provide amicus briefs in matter related to its mission.

Gloucester Men Against Domestic Abuse (“Men Against Abuse”) is an organization of more than 480 members devoted to the protection of spouses and children from domestic violence. Men Against Abuse operates as a non-profit organization pursuant to _____ and

Summary of Argument

This matter presents issues of public importance related to the missions of each of the Amici, and that affect the rights of abused children generally to receive continuous therapeutic care to minimize long-term psychological harm. The Amici join the Appellants in arguing that the District Court erred in its interpretation of Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”). Article 13(b) prevents the return of a child under the Convention to another jurisdiction when “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.” Amici argue that when the District Court ordered A.D. and C.D. returned to Sweden, it failed to consider adequately the extensive clinical evidence regarding the risk of *long-term* psychological harm flowing from exposure to sexual abuse without adequate and continuous treatment. The District Court focused improperly on only the *immediate* impact on the children, rather than fully considering the long-term effects likely to follow a disruption of the professional and productive therapeutic care they have been receiving in the United States.

In addition, Amici argue that, notwithstanding the thorough forensic evidence before it, the District Court failed to engage in an adequate and individualized inquiry regarding the harms at issue in this case, in particular those

still faced by C.D. Rather, the District Court employed too generic an approach, engaging in little more than a superficial analysis of C.D.'s actual condition. Consistent with the rights of children under international law to have their best interests considered in all judicial proceedings affecting them, the District Court owed the children an adequate and individualized inquiry, as well as detailed findings, before ordering them returned to the site in which the abuse occurred.

Argument

I. Courts Should Not Tolerate The Sexual Abuse of Children, Which Causes Significant Long-Term Psychological Issues.

The District Court found “that there is good reason to be concerned that [Appellee] may have masturbated in the presence of C.D. once or twice and may have caused her to touch his penis on one of those occasions.” Danaipour v. McLarey, slip op., C.A. No. 01-11528, pp. 3, 22-23 & n. 6 (D. Mass. January 2, 2002). In addition, the District Court found that C.D.'s treating psychologist “reasonably interpreted” and was “credible in her report of C.D.'s” disclosures regarding her father's aroused genitals. Id. at 22-23. In addition, the District Court found that Appellee consistently “declined to agree to a forensic evaluation,” in both the United States and Sweden, id. at 15, 17-18, 19-20. The District Court concluded that Appellee should not have any contact with C.D. See id. at 37.

Rather than draw certain natural inferences from these findings, the District Court has ordered the completion of yet another sexual abuse evaluation, requiring the participation of both parents. See id. at 3, 36. In its written opinion, the lower court did not state its exact definition of “sexual abuse,” limiting its findings to purely exhibitionist and masturbatory acts by the Appellee with his young daughter, C.D. The District Court was unduly concerned with proof of *physical* harm: “The evidence in this case, however, does not prove that Danaipour did anything that would have injured or irritated A.D. or C.D.’s vagina.” Id. at 13 & n. 4. Likewise, the lower court left unresolved the “particular form of sexual abuse” that actually occurred, pending a sexual abuse evaluation in Sweden. Id. at 35.

As for the psychological effect of the return of the children to Sweden for this forensic evaluation, the District Court focused only on the *immediate* impact and on whether one particular diagnostic category of mental disorder, Post-Traumatic Stress Disorder, was sufficiently supported by the record. Id. at 21. Nowhere in its opinion does the lower court analyze other long-term psychological effects likely to flow from the sexual abuse inflicted on C.D. and the disruption of a trusting relationship that C.D. has formed with her treating psychologist.

Article 13(b) of the Convention gives a United States court authority to refuse to order the return of a child to another jurisdiction when “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.” The United States Department of State has provided a definitive interpretation of the Article 13(b) defense, which recognizes the significant harm that flows inherently from sexual abuse and promotes a zero-tolerance policy:

A review of deliberations on the Convention reveals that “intolerable situation” was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. ***An example of an “intolerable situation” is one in which a custodial parent sexually abuses a 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.***

51 Fed. Reg. at 10510 (emphasis added). Courts have applied similar reasoning to prevent the return of children to settings in which abuse or violence has triggered potential *long-term* psychological problems in a child. See Walsh v. Walsh, 221 F.3d 200, 218-21 (1st Cir. 2000) (“The Convention does not require that the risk [of harm] be ‘immediate’; only that it be grave.”); Blondin v. DuBois, 238 F.3d 153, 163 (2d Cir. 2001) (Article 13(b), “even construed narrowly, undoubtedly encompasses an ‘almost certain[]’ recurrence of traumatic stress disorder.”).

Literally hundreds of research studies have conclusively shown that the sexual abuse of a child can affect her long-term mental, emotional, physical and social development. E.g. V.J. Felletti, *Long-Term Medical Consequences of*

Incest, Rape, and Molestation, 1991 SOUTHERN MED. J. 84, 328-31 (1991). One study of more than 400 college students revealed that a history of childhood sexual abuse predicted depression, chronic self-destructiveness, self-harm ideation, acts of self-harm, suicide ideation, and suicide attempts. See A. Boudewyn, et al., *Childhood Sexual Abuse as a Precursor to Depression and Self-Destructive Behavior in Adulthood*, 8 J. TRAUMATIC STRESS 445-59 (1995). Another study found victims of childhood sexual abuse three times more likely than their peers to attempt suicide during high school years. See S. Riggs, et al., *Health Risk Behaviors and Attempted Suicide in Adolescents who Report Prior Maltreatment*, 116 J. Pediatrics 815-21 (1990). Similarly, the results of the Commonwealth Fund Adolescent Health Survey, based on a nationally representative cross-section sample of 3,015 girls in grades 5 through 12, revealed that, when compared to non-abused peers, girls reporting prior sexual abuse were more likely, without adequate treatment, to experience depressive symptoms and high levels of stress, and many times more likely to report regular smoking, drinking, drug use, and other disorders.

The risk of long-term psychological harm from sexual abuse is far greater for children than for adults. See Carolyn Ainscough, et al., SURVIVING CHILDHOOD SEXUAL ABUSE 6 (FISHER 2000) (“blocking their memories and feelings . . . is one of the few ways in which children are able to cope” with sexual abuse, but this strategy “doesn’t last”). In addition to the development of dangerous coping

mechanisms, at least one study concluded that children under the age of eleven are three times more likely to suffer psychological harm as an after-effect of trauma than are adults who witness the same event. James Garbarino, et al., *CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE* 13 (1992).

Clinical studies of children exposed to psychic trauma belie the popular myth that children are more resilient than adults. In July 1976, 25 children were kidnapped from their Chowchilla, California, school bus after being driven at gunpoint for 11 hours in two blackened vans and buried alive for 16 hours in a truck-trailer. Unlike situations where children experience physical harm, this event presented researchers with a unique opportunity to assess the long-term effects of psychic trauma on children. Lenore C. Terr, M.D., *Chowchilla Revisited: The Effects of Psychic Trauma Four Years After a School-Bus Kidnapping*, 140 *AM. J. PSYCHIATRY* 1543, 1543 (1983). In a four year follow-up study, researchers found that every child, including one who narrowly missed the experience, exhibited post-traumatic effects. *Id.* at 1550. Most notably, the researchers found that certain symptoms and signs became more evident as time progressed. They included mortification, or intense shame; thought suppression; denial and repression of post-traumatic symptoms; unlinking of some memories from affect; the sense of a foreshortened future; death dreams; and the dangerous nature, contagion, and endless repetition of post-traumatic play and reenactment. *Id.* From this study, Terr concluded that significant trauma long continues to exert an

influence on the everyday life, personality development, and future expectations of previously normal children. Id.

One researcher suggests that abusive acts within the family are particularly damaging because they represent the visible crest of a pervasive wave of terror. The dread of abuse can disrupt psychosocial development more than the event itself; the ways children cope with this persistent fear might lead to locked-in patterns of coping in their adult lives. Laura A. McCloskey, et al., *The Effects of Systemic Family Violence on Children's Mental Health*, 66 CHILD DEV. 1239, 1258 (1995). Such children must attempt to survive a “domestic climate of tyranny.” Id.

A clinical diagnosis of PTSD is *not* the only psychological consequence of children's exposure to abuse and violence. As a harsh reality, “[t]he results of research studies vary but it is generally believed that at least one in 10 people has been sexually abused as a child.” Ainscough, supra, at 1. For this vast collection of victims and offenses, PTSD offers a limited conceptual and diagnostic formulation for practitioners who evaluate and treat victims and the complex responses to sexual abuse and trauma. See Mary W. Armsworth, *The Effects of Psychological Trauma on Children and Adolescents*, 72(1) J. COUNSEL & DEVT. 49-56 (Sept./Oct. 1993). One leading research model sets forth four basic ways in which sexual abuse causes long-term harm to victims: (1) traumatic sexualization, (2) stigmatization, (3) betrayal, and (4) powerlessness. See id. 32-35.

Specific long-term effects of sexual abuse of children include: heightened fears, anxiety, phobias, nervousness, nightmares, sleep problems, depression, shame, guilt, feeling like a victim, lack of self-confidence, feeling different from others, feeling self-conscious, feeling dirty, feeling unable to act or change situations, obsessed with cleaning or washing, constant worry, suicide attempts, self-harming, blackouts, fits, not remembering what has happened for hours or days, binge eating, self-induced vomiting, compulsive eating, anorexia nervosa, no interest in sex, fear of sex, obsessed with sex, avoiding specific sexual activities, feeling unable to say “No” to sex, aggressive sexual behavior, flashbacks, hearing the abuser’s voice when he is not there, seeing the abuser’s face when he is not there, confusion about sexual orientation, confusion about sexual identity, unable to get close to people, unable to love or show affection to others, excessive fear for children, alcohol problems, drug problems, employment problems, being re-victimized, criminal involvement, needing to be in control, delinquency, bullying, clinging and being extremely dependent, abusing others, aggressive behavior, anger, hostility, problems communicating, distrusting people, working too hard, and difficulty in judging people’s trustworthiness. Ainscough, supra, at 37.

Hence, some children may not have immediate and specific reactions that meet the clinical definition of PTSD, yet these children can still be impacted by long-term psychological, personality and somatic disorders. *See Exposure to Violence Distresses Children, May Lead to Their Becoming Violent*, PSYCHIATRIC

NEWS, Jan. 6, 1995, at 15. Whatever the clinical diagnosis, “[e]xposure to violent incidents can have a significant influence on immediate *and subsequent* developmental processes. . . . They may radically change their views about the safety and security of human relationships and about their own futures.” Robert S. Pynoos, M.D., MPH & Kathi Nader, DSW, *Children’s Exposure to Violence and Traumatic Death*, 20 PSYCHIATRIC ANNALS 342 (1990) (emphasis added).

There are no therapeutic shortcuts to successful recovery for victims of childhood sexual abuse. See Sally N. Merry, et al., *Psychiatric Status of Sexually Abused Children 12 Months After Disclosure of Abuse*, 33(7) J. AMER. ACADEMY. OF CHILD & ADOLESCENT PSYCHIATRY 939-44 (Sept. 1994) (consistent long-term therapy tailored to individual presentation is crucial to recovery); Ainscough, supra, at 4-6 (“It is possible to break free from the damaging effects of sexual abuse, but it can take time.”). The initial focus of treatment for victims of childhood sexual abuse involves both overcoming trust issues and the negotiation of interpersonal safety needs. See Bessel van der Kolk, *Psychology and Psychobiology of Childhood Trauma* (in German), 47(1) PRAX KINDERPSYCHOL KINDERPSYCHIATR 19-35 (Jan. 1998). Because distrust and a lack of social safety flow from childhood sexual abuse, the consistency, structure and predictability of a victim’s environment and treatment are essential to recovery. See id. Negative court experiences have delayed recovery in children. See Kathleen A. Kendall-Tackett, et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*,

113(1) PSYCHOLOGICAL BULLETIN 164-80 (Jan. 1993). Accordingly, courts should not only avoid remedies that may seem like punishment for disclosures by children, but should seek to encourage each child in her disclosure and recovery process.

Judicial tolerance of sexual abuse and incest can inappropriately teach children early and powerfully that abuse and violence are tolerable parts of intimate relationships, and acceptable ways to control other people. They can learn that the perpetrator of abuse and violence in family relationships often goes unpunished. They can learn that abuse and violence are tolerable means by which to express love. See Betsy M. Groves, *Children Without Refuge: Young Witnesses to Domestic Violence*, 16 ZERO TO THREE: BULLETIN OF ZERO TO THREE/THE NATIONAL CENTER 29, 30 (1996).

Courts should not teach A.D. and C.D. the wrong lessons. As recognized by the Department of State's clear interpretation of Article 13(b), a history of sexual abuse presents an "intolerable situation." The District Court should have engaged in a more thorough and comprehensive analysis of the *long-term* psychological harm faced by each child. Under a proper analysis, courts should not minimize, condone or tolerate even purely exhibitionist or masturbatory acts by the Appellee with his young daughter. Hence, this Court should find that the District Court erred in its interpretation of Article 13(b).

II. The District Court Failed to Make an Adequate and Individualized Inquiry into the Harm Each Child Has Suffered and Still Faces.

The District Court improperly relinquished its obligation to engage in an adequate and individualized inquiry into each child, instead favoring a generic approach toward children, abuse and trauma. Danaipour, supra, at 24-25. The lower court (1) noted that PTSD is “generally difficult to apply to young children,” (2) considered only one factor (“performance in school”) related to psychological harm, and (3) determined that C.D. somehow qualifies for a category of “many children who are sexually abused [yet] function very well in other aspects of their lives.” Id. at 24-25. Although it made brief mention that C.D. “now exhibits signs of stress,” id. at 25, the lower court otherwise ignored the remaining “aspects of their lives” in which children like C.D. do not “function very well.”

Aside from brief mention of past success in school, the lower court failed to articulate a factual basis when placing C.D. into its generic category of so-called “resilient” children. See id. at 34. Obviously, the lower court did not cure this deficiency by qualifying a substantial portion of its analysis with a vague and conclusory statement that it was based on “reasons that are too numerous to explicate fully” Id. at 24. A.D. and C.D. are entitled to more substance and individualized attention from a court deciding their fate in this matter.

Under the Convention, courts, countries and parents “should be motivated by the best interests of the children.” Blondin v. DuBois, 78 F. Supp. 2d 283, 299

(S.D.N.Y.), aff'd, 238 F.3d 153 (2d Cir. 2001). “Indeed, the drafters of the [Hague] Convention undoubtedly sought to do what was in the best interests of children.” Id. On appeal, the Second Circuit in Blondin explained:

The Hague Convention is not designed to resolve underlying custody disputes. This fact, however, does not render irrelevant any countervailing interests the child might have. According to the Explanatory Report of the Convention,

The dispositive part of the Convention contains no explicit reference to the interests of the child However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be firmly convinced that the interests of the children are of paramount importance in matters relating to their custody

Elisa Perez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session 426 (1980).

Blondin, 238 F.3d at 161 (citations omitted). The International Child Abduction Remedies Act similarly focuses on the interests of children, providing courts with statutory authority to take actions consistent with such interests during the pendency of a Convention matter. See 42 U.S.C. § 11604(a) (a court may take measures “to protect the well-being of the child involved . . . before the final disposition of the petition”).

Likewise, Article 3 of the Convention on the Rights of the Child (the “Children’s Convention”) provides that “[i]n all actions concerning children,

whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” As the Second Circuit has explained: “When child abuse is asserted, the child’s welfare predominates over other interests of her parents and the State.” Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999). “Given its widespread acceptance,” the best interests standard in the Children’s Convention “should be read as customary international law.” Beharry v. Reno, slip op., 98 cv 5381 (E.D.N.Y. January 22, 2002).

While litigation under the Convention does not entail full-blown custody battles, nothing in the Convention purports to override each child’s right to have an adequate and individualized inquiry into her interests in matters so affecting her. See Blondin, 238 F.3d at 161. Here, the District Court failed to afford A.D. and C.D. an adequate and individualized consideration of their interests in avoiding long-term psychological harm. Indeed, the lower court expressly overstated dicta from this Court’s Walsh opinion when holding that the Convention does not permit a party “to litigate the child’s best interest.” Danaipour at 7. The “bests interests of children” and government decisions affecting their welfare should not be so separated. See Children’s Convention, Art. 3; Tenenbaum, 193 F.3d at 595.

In addition to the lack of an adequate and individualized inquiry into the full scope of psychological harm faced by each child, four specific findings by the

lower court undercut its ultimate ruling: (1) a likelihood that Appellee included his daughter multiple times in masturbatory acts, Danaipour at 3, 22; (2) C.D.’s treating psychologist “reasonably interpreted” and “was credible in her report” of C.D.’s disclosures regarding her father’s aroused penis, id. at 22-23; (3) the determination that Appellee should have no contact with C.D., id. at 37; and (4) the Appellee’s consistent refusal in the past to participate in a forensic evaluation, id. at 15, 17-18, 19-20. The Appellee should have to suffer, at the very least, an adverse inference (or burden-shifting) because of his repeated refusal to participate in forensic evaluations. See Marquis Theatre Corp. v. Condado Mini Cinema, 846 F.2d 86, (1st Cir. 1988) (“keeping from the court information which it requires . . . is sufficient by itself to support an adverse inference”).

Under these circumstances, to err (if at all) on the side of safeguarding C.D. (and children generally), Appellant should be deemed to have met her burden under Article 13(b). Given, in particular, Appellee’s repeated refusal to participate in forensic evaluations, *he should have been forced to bear the burden* of establishing that undertakings would adequately protect each child from psychological harm. The record is bare in this regard because nowhere has the lower court or the Appellee indicated how the undertakings could protect C.D. from disruption of therapy and long-term psychological consequences likely to flow from a return to the site of abuse. By allowing the Appellee to benefit from his repeated refusals in the past to participate in a forensic evaluation, the District

Court's approach improperly encourages parents to forego participation in a process that can help children. Accordingly, this Court should reverse the lower court because of its failure to conduct an adequate and individualized inquiry into the full scope of long-term harms faced by C.D.

Conclusion

The District Court erred by deferring to future forensic evaluations in Sweden, without giving adequate and individualized attention to the full scope of harm faced by each child upon relocation and the concomitant disruption of their treatment. Amici join the Appellants in asking this Court to reverse the District Court's decision and to order the dismissal of Appellee's petition.

Dated: February 22, 2002

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