

No. 99-83895-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ELIZABETH GERALDINE DALMASSO,
Appellant

vs.

JEAN-LUC DALMASSO,
Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County
Honorable Richard D. Anderson
District Court Case No. 99 D 768

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STATEMENT OF NATURE OF CASE

Mrs. Dalmasso appeals from an adverse final order and ruling on a petition filed by her husband, a French citizen and resident of France, pursuant to the Convention on the Civil Aspects of International Child Abduction, 51 Fed. Reg. 10498, *et seq.*, and the International Child Abduction Remedies Act, 42 U.S.C. 11601, *et seq.*, following her filing of a petition for divorce. She was ordered to return three of the couple's four children to France and to pay his attorney's fees, costs and reimburse the transportation expenses for the three children.

STATEMENT OF ISSUES

A. Did Mr. Dalmasso prove by a preponderance of the evidence that the removal of the three children from France was wrongful in light of all the proven facts and circumstances?

B. Do the proven facts and circumstances support an Article 13b exception to the return of the children?

C. Did the Court err in considering hearsay over the objection of Mrs. Dalmasso?

D. Did the Court err in considering documents that were not offered into evidence?

E. Did the Court err in assessing attorney's fees and transportation costs in light of the facts and circumstances?

STATEMENT OF FACTS

Jean-Luc Dalmasso has threatened suicide for years. **Vol 2 Trans p 21, 24, 25, 34, 45, 53, 54.** He readily admits this. **Vol 2 Trans p 80 line 5-7** He often strikes his wife and the children with his hands and sundry other objects, as his emotions move him. **Vol 2 Trans p 24, 25, 26, 75-76** In mid-December, 1998, Mr. & Mrs. Dalmasso and their four children board a train for the home of his parents to spend the Christmas holiday. **Vol 2 Trans p 23, 29** On the journey, Mr. Dalmasso continues to physically abuse his wife. **Vol 2 Trans p 24** Once at his parents' chateau in the south of France, Mr. Dalmasso flies into a rage over some dissatisfaction and attempts suicide in front of Mrs. Dalmasso and other family members. **Vol 2 Trans p 32, 76, 77-79** He is carried off by a medical team in an ambulance and held overnight. **Vol 2 Trans p 32-34, 77** Upon his release from the neuro-psychiatric ward of Plouguernevel Hospital, Mr. Dalmasso seizes the youngest of the four children, the infant Anne Sophie, and without the consent of Mrs. Dalmasso spirits the child off to rural western France, where the parties had resided for a couple of years. **Vol 2 Trans p 38-39**

The in-laws turn on Mrs. Dalmasso and order her to leave their home. **Vol 2 Trans p 34, 37** Mrs. Dalmasso, who speaks no French, contacts the American Embassy in desperation and is given advice and aid by Embassy personnel. She is told to depart France immediately, if she is to have hope of getting her children out of the country. Embassy personnel give her monetary assistance in purchasing air fare for herself and the three older children so as to return to St. Mary's, Kansas, where she and Mr. Dalmasso met and were married and where her family yet lives. **Vol 2 Trans**

p 36, 39, 40-42 Mrs. Dalmasso departs France January 11, 1999. **Vol 2 Trans p 41** She files for divorce a few months after her return to Kansas, where both she and Mr. Dalmasso had lived prior to their marriage. In the meanwhile and unbeknowneth to her, Mr. Dalmasso goes to the French courts and, without providing any due process notice to Mrs. Dalmasso, procures some kind of court adjudication that the children are to be in his custody. **Vol 2 Trans p 49-50** Mr. Dalmasso then files a petition for return of the three older children pursuant to the Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act, 42 U.S.C. 11601, *et seq.* Mrs. Dalmasso resists on the grounds that her removal of the three older children was not wrongful and that an Article 13b exception exists for the return of these children to France. **Vol 2 Trans p 53-54** The trial court rules in favor of Mr. Dalmasso and orders the children returned to France at the end of 30 days and orders Mrs. Dalmasso to pay his attorney's fees and reimburse the transportation expenses to be advanced by him. **Vol 1 p 65** She appeals from those orders to this Court.

ARGUMENT AND AUTHORITIES

Standard of Appellate Review.

According to *Sampson v. Sampson*, 267 Kan. 175, 181, ___ P.2d ___ (1999), recently decided under the International Child Abduction Remedies Act, 42 U.S.C. 11601, *et seq.*, (hereinafter ICARA), once the trial court has made findings of fact and conclusions of law:

. . . the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. Substantial

evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.

A. Did Mr. Dalmaso prove by a preponderance of the evidence that the removal of these three children from France was wrongful in light of all the proven facts and circumstances?

The International Child Abduction Remedies Act, 42 U.S.C. 11601, *et seq.*, enacted by Congress in 1988, implements the Convention on the Civil Aspects of International Child Abduction done at The Hague on October 25, 1980. (See the March 26, 1986, Federal Register, Vol. 51, No. 58., pp. 10498-10502, for the English text of the Convention, consisting of 45 numbered Articles.) The stated purpose of the enactment is to foster uniform international procedures for dealing with the "international abduction and wrongful retention of children." Congress noted that this law "empowers courts of the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." See 42 U.S.C. 11601. See, generally, Construction and Application of International Child Abduction Remedies Act (42 USCA sec. 11601, *et seq.*), 125 A.L.R. Fed. 217, for an exposition of the rights and remedies envisioned by the framers of the treaty.

Mr. Dalmaso is the petitioner and Mrs. Dalmaso is the respondent in this proceeding under the Convention. They were conversely designated in the trial court, because the proceedings under the Convention arose in a divorce case which Mrs. Dalmaso had initiated. Once notified of the divorce proceedings, Mr. Dalmaso filed a petition pursuant to the rules of the Convention. Mrs. Dalmaso is now the appellant. Some of Mrs. Dalmaso's argument relates to ICARA and some to the Convention, itself.

There was one hearing on the record in this case, that being on August 2, 1999.

An earlier unrecorded hearing was conducted by telephone between the Judge and this lawyer and French counsel for Mr. Dalmasso, Yves de Morhery, who turned the representation over to Mr. Polier, after Judge Anderson advised the parties that Mr. Morhery could not represent Mr. Dalmasso without engaging local counsel. **Vol 1 p 25** Mr. Dalmasso then contacted Mr. Polier, who retained Mr. Hazlett.

Judge Anderson stated at the outset of the August 2 hearing that he had considered the pleadings and would make a prima facie finding that the removal of these children was wrongful. **Vol 2 p 7-8** The evidence upon which the Judge ultimately made his findings was largely hearsay attached to a motion for summary judgment filed by Mr. Hazlett and never argued. **Vol 1 p 33-62** See pages 6 and 10 of the memorandum and order filed August 10, 1999. **Vol 1 p 65**

This counsel objected to the Court considering hearsay evidence; but, his objection was overruled. Judge Anderson ruled that hearsay objections are not cognizable under the Convention. **Vol 2 p 40** Appellant believes this to be an incorrect interpretation of the law; and she shows that there is no admissible evidence in the record upon which Judge Anderson could make his prima facie finding of wrongful removal. Thus, substantial evidence to support the finding is absent.

A Kansas court is not required to ignore the statutory or common law of this State, when applying the procedure set by ICARA. See 42 U.S.C. 11604(b), which cautions:

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a

person having physical control of the child unless the applicable requirements of State law are satisfied.

This would include the rules of evidence. Mr. Dalmasso did not meet the rules of evidence applicable in this case. Thus, there is no substantial competent evidence in the record to support the prima facie finding, which resulted in the shifting of the burden of proof on the "wrongful removal" issue to her. 42 U.S.C. 11603 states:

(e) BURDENS OF PROOF.-(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence- (A) in the case of an action for the return of a child, that the child had been wrongfully removed or retained within the meaning of the Convention;

Judge Anderson's finding shifted the burden of going forward with the evidence to Mrs. Dalmasso. The burden of proof was improperly placed upon her to prove that she had not wrongfully removed the children from the presence of her suicidal husband.

The French court order dated January 29, 1999, does not in and of itself establish that a "wrongful removal" of these children occurred on January 11, 1999. **VOL 1 p 14** Article 180-2 of the French civil code, according to the provided translation of the French court order, establishes that:

a non-emancipated minor is domiciled at the house of his father and mother. If the father and the mother have different domiciles, the child is domiciled at the home of the parent with whom he resides, on condition that this residence is not the result of an act of violence. **Vol 1 p 14**

Based upon an objective reading and the plain meaning of the words, Mrs. Dalmasso had as much right to take the three children with her as did Mr. Dalmasso to take the fourth child back to rural, western France with him. This being the case,

there could have been no wrongful removal. The better argument for Mr. Dalmasso to have made is that there was a "wrongful retention" of the children, once the French court had entered its January 25 preliminary order -- without prior notice to her, some 14 days after Mrs. Dalmasso departed France. However, he did not raise that argument before the trial court.

The Convention is a civil law construct; and this Court need not feel bound by decisions from any other nation. Prior decisions in civil law countries have little precedential value, even in those countries. Civil law courts decide cases after a review of the statutes and consideration of the facts, following their own investigation. See *Seffen F. v. Severina P.*, 966 F. Supp. 922, 927 (D. Ariz. 1997).

B. Do the proven facts and circumstances support an exception under Article 13b of the Convention to the return of these children?

In order to establish an Article 13b exception under the Convention to the return of her children, Mrs. Dalmasso must prove her facts by clear and convincing evidence.

See 42 U.S.C. 11603(e)(2)(A). She must prove that their return to Mr. Dalmasso would "expose [them] to physical or psychological harm or that [their return] would not be permitted under fundamental principles relating to the protection of human rights and fundamental freedoms." See Article 13b of the Convention. Please see *Sampson v. Sampson*, supra at page 179, discussing ICARA at length.

Mrs. Dalmasso testified forthrightly and at length about the bizarre, self-destructive behavior that her husband has displayed for years. She testified at length about his threats to murder her and his physical abuse of her. She testified — and he admitted — that he beats the children. **Vol 2 Trans p 75-76** Mr. Dalmasso

admitted that he has threatened suicide many times and that he has attempted it once in the presence of, "my parents, my wife and our baby." **Vol 3 Exhibit 1 p 13-14; Vol 2 Trans p 79-80** This is clear and convincing evidence.

Rodriguez v. Rodriguez, 33 F. Supp. 2d 4456 (D. Md. 1999), arose from facts and testimony very similar to that herein. The mother took her children and fled from Venezuela leaving behind a physically abusive husband. The American court denied his request for the return of the children to Venezuela when he filed a petition under the Convention. The court ruled, at page 462, based upon facts not dissimilar to those in this file, that returning the children to Venezuela "would expose them to both physical and psychological harm and would place them in an intolerable situation." *Supra*, p. 462. Please see *Nunez-Escudero v. Tice-Menley*, 58 F. 3d 374 (8th Cir. 1995), which explains:

In brief, although the word "grave" modified "risk" and not "harm," this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.

Steffen F. v. Severina P., *supra* page 928, found that grave risk of harm may exist simply when a child "has attached and bonded to his mother and is likely to suffer detachment and unbonding should he be removed from her." The instant facts fall well within the parameters set by these court cases. The evidence presented by Mrs. Dalmasso is clear and convincing and meets the requirements of the Article 13b exception to the return of these children.

C. Did the Court err in considering certain hearsay documentation over the objection of Mrs. Dalmasso?

Judge Anderson placed substantial reliance upon hearsay in reaching his decision. See page 6 of his order where he refers to "medical certificates and letters of

reference" provided by Mr. Dalmasso, and pages 10 and 11, where he takes account of and relies upon an affidavit filed by Mr. Polier, "French counsel for Mr. Dalmasso." **Vol 1 p 84-90; Vol 2 Trans p 5** Polier is not shown to be licensed in Kansas, nor to have been admitted before the Court *pro hac vice*. Neither was he called as an expert witness and made subject to cross-examination. At no time did this lawyer consent to consideration by the Court of hearsay from Mr. Polier, whose true qualifications are unknown. **Vol 2 Trans p 40**

This lawyer has found nothing in ICARA that allows reliance on hearsay as a matter of course. True, 42 U.S.C. 11605 does eliminate the requirements of authentication of documents filed by a petitioner; but, it does not abrogate the hearsay rule of evidence. This lawyer has found no American case holding that adoption of ICARA carries with it derogation of the ancient bar against hearsay evidence that has been an honored feature of the American legal system for over 200 years. There is no evidence that Congress intended to sanction the use of hearsay evidence in American courtrooms by the enactment of 42 U.S.C. 11601, *et seq.*

D. Did the Court err in considering certain documents that were not offered into evidence?

The documents referred to by Judge Anderson at pages 6 and 10 of his order of August 10, 1999, were never offered into evidence by Mr. Hazlett -- they were simply affixed to a motion for summary judgment that was never argued. So, no formal objection could have been made on the record. **Vol 1 p 33-62** Procedural due process would seem to require that a party be given the opportunity to object on the record to the admission of or to the consideration *in camera* of such documents. Again, Kansas

evidentiary and procedural law was ignored in violation of 42 U.S.C. 11604.

E. Did the Court err in assessing attorney's fees and costs and transportation costs to Mrs. Dalmasso in light of all the proven facts and circumstances?

The only evidence in this case concerning the respective income and assets of the parties is that Mr. Dalmasso comes from wealth and has much at his disposal; and that Mrs. Dalmasso is impecunious, largely as the result of his refusing to allow her any funds for her own use -- even taking money from her. **Vol 2 Trans p 28, 41, 42** Given this evidence, the undisputed facts of abuse and the fact that the parties are still married renders it "clearly inappropriate" to order Mrs. Dalmasso to pay Mr.

Dalmasso's attorney's fees and the like. Please see 42 U.S.C. 11607(b)(3). Kansas law was once again ignored in derogation of 42 U.S.C. 11604. An impecunious parent would not be assessed attorney's fees and related costs, if equitable principles that are the bed rock of Kansas domestic relations law were applied. See *Burnworth v. Hughes*, 234 Kan. 69, 74-75, 670 P. 2d 917 (1983); and *Price v. Price*, 187 Kan. 292, 356 P.2d 1013 (1960), which held:

The court is dealing with a matter equitable in nature where the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to due consideration.

Rydder v. Rydder, 49 F. 3d 369 (8th Cir. 1995), stands for the proposition that equity plays a role in determining responsibility for attorney's fees and costs in ICARA proceedings. In *Rydder v. Rydder*, 79 F. 3d 1151 (8th Cir. 1996), the Court took into account the respondent's "straitened financial circumstances" in awarding fees and

expenses.

Conclusion.

The Court is called upon to address a difficult issue involving unfortunate facts. First, it must determine whether Mr. Dalmaso has supported by substantial competent evidence his claims that these children were wrongfully removed from France. Second, it must determine whether the findings made by Judge Anderson are sufficient to support his conclusions of law. Third, it must apply the developing case law to the plain language of the Convention in light of the undisputed testimony of Mrs. Dalmaso and the admissions of Mr. Dalmaso. This lawyer believes an objective consideration of the law and the facts will lead inexorably to the conclusion that an Article 13b exception has been established by clear and convincing evidence to the return of these three children to France.

WHEREFORE Mrs. Dalmasso prays that the order requiring her to return these children to the custody of her husband be reversed and that the order requiring her to pay her husband's attorney's fees and related costs be set aside.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed five conformed copies of the foregoing brief to Allen D. Hazlett, 1608 SW Mulvane, Topeka, Kansas 66604, postage prepaid, this ____ day of December, 1999.

Frank D. Taff