
In The
United States Court of Appeals
for the
Third Circuit

Case No. 07-3233

ARIEL ADAN,

Appellee,

v.

ELENA ESTHER AVANS,

Appellant.

*Appeal from an Order entered from the
United States District Court for the District of New Jersey*

AMICUS BRIEF IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Amici state that they have no parent corporations, and no publicly held companies hold more than 10 percent of the stock in the Amici.

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

The Minnesota Center Against Violence and Abuse, the National Center on Domestic and Sexual Violence, the New Jersey Coalition for Battered Women, the ASISTA Immigration Technical Assistance Project, Minnesota Program Development, Inc., and the Seton Hall Law School Center for Social Justice respectfully seek leave to file this brief as *amici curiae* in support of the Appellant Elena Esther Avans pursuant to Federal Rule of Appellate Procedure 29(b).

Amici are organizations devoted to ending domestic violence and protecting victims of domestic violence through research, education, training and advocacy. The lead organization, the Minnesota Center Against Violence and Abuse, established in 1994 by the Minnesota State Legislature with a charge to improve the quality of higher education related to violence, is a leader in innovative violence-related education, research and publishing, including research on the harm caused to children exposed to domestic violence.

This case presents the Third Circuit with an important opportunity to establish needed legal precedent in the situation where a child's welfare is at risk at the hands of an abusive father who seeks the custody over and the return of the child to a foreign jurisdiction. Too often, our laws force

battered mothers into an unthinkable dilemma – flee with their children in order to protect them only to risk losing them in a custody matter, or stay with or near the abuser and risk further physical and emotional harm to their children and themselves. *Amici curiae* are concerned that courts sitting in review of these matters often do not appreciate the complicated, serious and long term risks faced by the children in these situations. As discussed in *amici's* brief, well established clinical evidence demonstrates that children exposed to domestic violence are at grave risk of physical violence, psychological intimidation and manipulation and developmental disruption both intellectually and socially.

Amici's brief herein demonstrates that: (1) Children who witness domestic violence are at "grave risk" of psychological harm under Article 13b of the Hague Convention on the Civil Aspects of Child Abduction (the "Hague Convention"); and (2) pursuant to Article 20 of the Hague Convention, "fundamental principles" do not permit the return of a child to a jurisdiction where the mother and child will be at risk of continued abuse and harm.

SUMMARY OF ARGUMENT

The District Court improperly interpreted Article 13b of the International Child Abduction Convention (the “Convention”) when it ordered that Arianna Adan (“Arianna”) must be returned to Argentina. Under Article 13b of the Convention, district courts should refuse to order the return of a child to a foreign jurisdiction if the party opposing the return establishes that “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.”

In ordering Arianna to return to Argentina, where her abusive father resides, the District Court failed to consider the well-established clinical evidence of significant and long-lasting psychological harm to children who witness domestic violence. Such harm is only compounded by separating the child from her primary caregiver and placing the child in the custody of government programs like foster care. The District Court failed to consider the totality of the circumstances, misconstrued case law, and ignored the prospect of additional psychological and physical harm to Arianna.

Additionally, Article 20 of the Convention authorizes district courts to refuse to order the return of a child to a foreign jurisdiction if the return “would not be permitted by the fundamental principles of the requested State

relating to the protection of human rights and fundamental freedoms.” Congress and most states, including the states within this Circuit, have adopted policies, including a statutory rebuttable presumption, that the parent who commits domestic violence should not have custody of his children. In ordering the return of Arianna, the District Court made it more likely that Arianna will be re-exposed to Ariel Adan’s (“Adan”) violence and that Adan will eventually gain custody of Arianna. In light of the clinical evidence and the totality of Arianna’s situation, the District Court failed to consider the applicability of Article 20 and its order contravened American public policy.

ARGUMENT

I. RETURNING ARIANNA TO ARGENTINA PUTS HER AT GRAVE RISK OF PSYCHOLOGICAL HARM UNDER THE CONVENTION

District courts have the authority to refuse to order the return of a child to a foreign jurisdiction if the party opposing the return establishes that “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 Art. 13b. In this case, Adan has repeatedly carried out brutal acts of domestic violence against Elena Esther Avans (“Avans”) that were witnessed by Arianna.

Well-established, broadly accepted clinical evidence demonstrates that a child's exposure to domestic violence causes serious psychological harm carrying long-term and often life-long consequences. The effect of such harm is compounded when the child is removed from her primary caregiver and made a ward of the state or returned to the abusive parent. Removing Arianna from her mother's care would create an intolerable situation by preventing Arianna's healing process and exposing her to additional physical and psychological harm. Arianna should remain with her mother, the only caregiver she has ever known, who can provide the continuity and safety Arianna needs. As discussed *infra*, accepted clinical evidence establishes that Arianna is at grave risk of psychological harm if she is returned to Argentina.

A. A Child's Exposure to Domestic Violence Can Cause Serious Psychological Harm with Long Term Consequences

A series of problems are associated with a child's exposure to domestic violence. Child witnesses of domestic violence exhibit behavioral and emotional problems as well as diminished cognitive functioning and more aggressive attitudes toward others. This psychological harm is intensified when the child is both a victim and a witness of domestic violence. The effect of this harm is felt not only by the individual child, but also society.

Children exposed to domestic violence suffer behavioral, emotional, cognitive, and social adjustment problems at much higher frequencies than children from homes without violence. *See* Jeffrey L. Edleson. *et al.*, *Assessing Child Exposure to Adult Domestic Violence*, 29 *Children & Youth Servs. Rev.* 961, 971 (2007). Children from violent homes are more aggressive, antisocial, and display fearful and inhibited behaviors more often than other children. *See* Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 *J. of Interpersonal Violence* 839, 846 (1999). They show lower social competence and are more likely to suffer anxiety and depression and exhibit other trauma symptoms. *Id.* These children also abnormally associate violence with intimate relationships and come to interpret the use of violence as an expression of love. *See e.g.*, Peter Jaffe, *et al.*, *Children of Battered Women*(1990).

Psychological harm experienced by children from abusive homes is intensified when a child both witnesses and becomes a victim of domestic violence. H.M. Hughes, *et al.*, *Witnessing Spouse Abuse & Experiencing Physical Abuse: A Double Whammy?*, 4 *J. of Family Violence* 197 (1989). This intensified effect is known as the “double whammy” because the harmful effects of witnessing and suffering domestic violence combine to cause greater harm to the child. *Id.* Children who both witness and

experience domestic violence often develop the most severe behavioral problems. See David Finkelhor, *et al.*, *Poly-victimization: A Neglected Component in Child Victimization*, 31 *Child Abuse & Neglect* 7 (2007); Mary A. Kernic, *et al.*, *Behavioral Problems Among Children Whose Mothers Are Abused By An Intimate Partner*, 27 *Child Abuse & Neglect* 1231 (2003).

Worse, younger children exhibit more harm than older children. See H.M. Hughes, *Psychological & Behavioral Correlates of Family in Child Witnesses & Victims*, 58 *Am. J. of Orthopsychiatry* 77 (1988). Older children develop stronger coping mechanisms, giving them more resilience in the face of traumatic events. See Abigail H. Gewirtz & Jeffrey L. Edleson, *Young Children's Exposure to Intimate Partner Violence: Towards a Developmental Risk & Resilience Framework for Research & Intervention*, 22 *J. of Family Violence* 151 (2007). Younger children, by contrast, are not so well-equipped, making them more vulnerable to the psychological harm resulting from their experience. See, e.g., G. Anne Bogat, *et al.*, *Trauma Symptoms Among Infants Exposed to Intimate Partner Violence*, 30 *Abuse & Neglect* 109 (2006).

Exposure to adult domestic violence is a significant factor in predicting a child's future violent behavior. *Id.* (discussing M.I. Singer, *et*

al., *The Mental Health Consequences of Children's Exposure to Violence* (1998) (on file with Case Western Reserve Univ.)). Children repeatedly exposed to violence have a diminished ability to feel empathy and often generate attitudes justifying their own use of violence. P.G. Jaffe, *et al.*, *Children of Battered Women* (1990); Cheryl L. Currie, *Animal Cruelty by Children Exposed to Domestic Violence*, 30 *Child Abuse & Neglect* 425 (2006). The destructive behavior patterns and negative associations made by children from abusive homes can be seen early on through abnormally aggressive play with other children. *See* Edleson, 14 *J. of Interpersonal Violence* at 839, 846. Over time, however, the aggression can escalate and lead to violent and destructive behavior targeting not only themselves, but also others. *See e.g.*, Cheryl L. Currie, 30 *Child Abuse & Neglect* at 430 (finding that children witnessing violence at home are more likely to harm family pets and other animals).

As a result of Adan's violent behavior, Arianna was exposed to violence and instability at a very early age. The effects of living in a violent home and witnessing and experiencing abuse are likely to remain with her well into adulthood. In order for Arianna to have a chance at healing the psychological wounds she has already sustained, she must be protected from additional abusive situations. Forcing Arianna to return to Argentina to

await an Argentinean court's custody decision, will place her in a situation that will cause her additional psychological damage.

B. Removing a Child from Her Primary Caregiver Compounds the Harm Resulting From Exposure to Violence

In order for a child to recover from prolonged exposure to domestic violence, the child must be placed in a safe environment which can nurture the development of positive behavior and associations. Maxine L. Weinreb & Amy Bamforth, *Wounded Bystanders: Children Who Witness Violence*, The Source Reprint 52 (Nat'l Abandoned Infants Assistance Res. Ctr. Winter 1997). "Safe" homes must be stable, free from physical violence, and comfortable to the child. *Id.* Returning a child to the care of a parent who has repeatedly used violence against his spouse or placing a child in the custody of a governmental agency does not provide a physically or psychologically safe environment for the child.

Perpetrators of physical abuse against a spouse are more likely to abuse children. National Committee to Prevent Child Abuse, *Domestic Violence and Child Abuse Linked*, Memorandum (National Committee to Prevent Child Abuse) (1996) ("Since domestic violence is a pattern of behavior, not a single event, episodes may become more severe and more

frequent over time, resulting in an increased likelihood that the children eventually become victims.”).

Here, the District Court found Avans’ claims of abuse credible, but failed to seriously consider the psychological impacts on Arianna and completely ignored the likelihood that Adan’s violence will continue to escalate. Throughout this process, Adan has demonstrated his violent nature. Most notably, he attempted to break into a locked witness protection room in a courthouse to gain access to Avans and Arianna. Despite the restraining order against him, the setting of a courthouse, and the presence of officers, Adan could not control his anger or violent nature. This violent nature, which has been showcased on several other occasions, poses a serious threat to Arianna’s physical health and is a barrier to her psychological healing.

Although being placed in the care of a governmental organization might provide a physically secure environment, it cannot provide the type of stability required for Arianna to recover from the psychological harm she has suffered. Children form strong bonds with their primary caregivers and breaking this attachment by removing a child from her primary caregiver causes serious psychological harm. Gewirtz & Edleson, 22 J. Fam. Violence 151 (“Decades of research on attachment . . . have revealed the importance

of a secure attachment relationship with primary caregiver, usually the child's mother, for later healthy functioning.”). In this case, because Arianna has formed a bond with her mother, the only caregiver Arianna has known, removing her from the care of Avans will not only prevent her healing, it will cause further psychological harm compounded by the uncertain environment of temporary government care in a foreign country. *See e.g.,* Sandra Bass, *et al., Children, Families, and Foster Care: Analysis and Recommendations*, 14 *The Future of Children* 1 (“[T]he journey through foster care is characterized by further trauma and abuse; and even in the best situations, foster care is inherently fraught with uncertainty, instability and impermanence.”); John W. Fantuzzo, *et al., Effects of Interparental Violence on the Psychological Adjustment and Competencies of Young Children*, 59 *J. of Consulting & Clinical Psychology* 258 (1991) (describing results of study on interparental violence and stating “[T]emporary shelter residence is associated with a distinct set of reported emotional and social problems.”).

II. FUNDAMENTAL PRINCIPLES OF HUMAN RIGHTS AND FREEDOMS DO NOT PERMIT RETURNING ARIANNA TO ARGENTINA

Under Article 20 a court may refuse to return a child to a foreign jurisdiction when doing so would contradict “fundamental principles . . . relating to the protection of human rights and fundamental freedoms.”

Convention Art. 20. Congress, state legislatures, and international law all adhere to the principle that a child should not be returned to an abusive parent. Returning Arianna to Argentina in this case would contradict that fundamental principle. The District Court, however, failed to consider the application of Article 20 when considering whether to return Arianna to Argentina.

A. Congress Has Announced a National Policy Against Returning a Child to an Abusive Parent

On at least two occasions, Congress has announced policies to protect the victims of abuse and their children from abusers. First, Congress excuses a parent “fleeing an incidence or pattern of domestic violence” from criminal liability under the International Parental Kidnapping Act. 18 U.S.C. § 1204(c)(2) (2006). Second, the House of Representatives calls on the states to enact a statutory presumption against granting custody of a child to an abusive spouse. H. Con. Res. 172, 101st Cong. (1990). These legislative actions enunciate a clear national policy favoring the protection of children from the abusive parent.

The House determined that granting any custody rights over a child to a spousal abuser creates unacceptable risks of physical and psychological harm to the child and the abused spouse. The risks to the child include all of the types of harm discussed in section I *supra*, and the risk to the spouse is

that the abuse will resume. Granting custody rights to the abuser would inherently grant the abuser a measure of access and control over the abused. Sense of Congress Respecting Child Custody Determinations, H.R. Rep. No. 101-737 (1990).

B. States Have Enacted Statutory Presumptions Against Returning a Child to an Abusive Parent

An overwhelming majority of states now consider the presence of domestic violence in awarding custody of a child, and many states have created the rebuttable presumption against awarding custody to a perpetrator of domestic violence. See Kathleen T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5 (2002).

Forty-six states have adopted some form of the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), which provides a framework for dealing with interstate custody disputes, but purposefully does so in a manner that includes measures to prevent domestic violence. *Hector G. v. Josephina P.*, 771 N.Y.S.2d 316 (N.Y. Sup. Ct. 2003) (applying the UCCJEA to retain jurisdiction in a matter involving international child abduction to escape spousal abuse). Included among the measures are several that are instructive:

- Section 204(a) provides emergency jurisdiction to the state

where the child is found if necessary “to protect the child because the child, or a sibling **or parent** of the child, is subjected to or threatened with mistreatment or abuse” (emphasis added);

- Section 207 requires the court to the presence of domestic violence when determining the most appropriate jurisdiction;
- Section 210 allows the Court to fashion orders necessary to protect the child or other party in cases where domestic violence is an issue; and
- Section 208, and the accompanying commentary, provides that a party seeking refuge from domestic abuse should not be penalized as though they were forum shopping “even if their conduct is technically illegal. . . . An inquiry must be made into whether the flight was justified under the circumstances of the case.”

The reasons for denying a spousal abuser custody of a child are not controversial. Abusing a child’s primary caregiver displays a callous indifference to the best interests of the child; children are often used by an abuser to maintain access and control over the abused spouse after a separation; and the custody process itself is often used as a way to punish the

abused spouse. *See* Howard Davidson, *The Impact of Domestic Violence on Children*, 1994 A.B.A. Sec. Pub. 13.

International law reinforces this fundamental principle against giving custody of a child to a spousal abuser. The goal of the Convention – the prompt return of abducted children to the state of their habitual residence – rests on an assumption that the prompt return is in the best interests of the child. *See* Preamble to the Convention. But returning a child to the jurisdiction where the mother or child may be subjected to further abuse does not serve those goals.

Returning a child under the Act has one of two outcomes for a mother: either the mother will return with her child or the mother will not return and not participate in the adjudication of custody. Not returning is hardly an option for a mother attempting to protect her child from abuse, and it is certainly counter to the notion that both parents should participate in the child custody determination. *See* Report of the Third Special Comm'n Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997). On the other hand, most mothers faced with their child's return under the Convention also return with their child, and they are subsequently re-victimized, which, for the reasons already discussed, poses a grave risk of harm and constitutes an

intolerable situation. *See* REUNITE, Int'l Child Abduction Centre, *The Outcomes for Children Returned Following Abduction* 17, at 31, 38 (Sept. 2003).

Apart from meeting the goals of the Convention, U.S. courts have recognized that even a temporary separation of parent from child forced by the State may violate fundamental liberty principles of family integrity under the U.S. Constitution and a variety of international rights conventions including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. *See Nicholson v. Williams*, 203 F.2d 153, 233-35 (E.D.N.Y. 2002).

Under Article 20, a District Court must consider whether the jurisdiction to which the child's return is sought respects the same fundamental principles of human rights found in the United States. Acts and statements of Congress, state legislatures, the American Bar Association, federal and state courts, and international rights conventions all demonstrate that there is a fundamental principle of human rights that obligates the state to prevent further violence against an abused parent by her partner and the subsequent harm such abuse does to the parent and child.

In this case, however, the District Court failed to consider such fundamental principles. As the District Court's order demonstrates, the Convention becomes meaningless if its goals and purposes are undermined by an overly technical, mechanistic analysis that fails to evaluate psychological harm and fundamental American public policy principles. The Convention cannot become another tool of abuse. When a victimized mother seeks refuge in the United States to protect her child, the Convention and American public policy must permit her to do so without the fear of re-victimization by her abuser in Argentina.

CONCLUSION

Arianna faces a grave risk of physical and psychological harm if she is returned to Argentina. The record clearly reflects Adan's sustained violent nature. Well-established clinical evidence demonstrates that Arianna is likely to suffer significant, long-lasting psychological harm as a result of Adan's behavior. Forcing Arianna to return to Argentina will only cause further psychological harm and damage any chance she has for healing. The harm Arianna has already suffered will be further exacerbated by removing her from her mother and primary caregiver.

The District Court's order completely disregards the psychological harm Arianna has endured, which she will continue to suffer from, as a

result of her exposure to Adan's domestic violence. The District Court also ignored fundamental principles of American public policy, which seek to protect child victims from exposure to their abusers.

Accordingly, the District Court's order should be reversed.

Respectfully submitted,

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APPENDIX A

Minnesota Center Against Violence and Abuse

The Minnesota Center Against Violence and Abuse (“MINCAVA”) was established in 1994 by the Minnesota State Legislature with a charge to improve the quality of higher education related to violence, is a leader in innovative violence-related education, research and publishing. Under the direction of Jeffrey L. Edleson, Ph.D, MINCAVA has undertaken numerous projects that have served to improve awareness of violence related issues by providing access to information on violence and its effects and by producing original research. Responding to a lack of awareness of the harmful effects of exposure to violence on children, a recent project undertaken by MINCAVA is the Child Exposure to Domestic Violence Scale, an evaluation tool to be used by practitioners and children to measure the exposure of children to violence so that appropriate measures may be taken.

ASISTA Immigration Technical Assistance Project

The ASISTA Immigration Technical Assistance Project (“ASISTA”), founded in 2004, is a collaboration of four prominent legal organizations that have provided comprehensive, cutting-edge technical assistance regarding immigration

and domestic violence law for the past decade. ASISTA staff have co-chaired the National Network to End Violence Against Immigrant Women since 1992, significantly contributed to the passage of the 1994 Violence Against Women Act and have since continued to enhance the legal remedies available to immigrant survivors in the United States. In addition to serving as a clearinghouse for immigration law technical assistance, ASISTA staff train civil and criminal judges and system personnel in best practices for working with immigrant survivors of violence, works with federal agencies to ensure they correctly implement the law and coordinates litigation to correct misapplication of the law.

Battered Women's Justice Project

The Battered Women's Justice Project ("BWJP") is a program of Minnesota Program Development, Inc. ("MPDI"). MPDI is a federally-funded, non-profit organization that provides direct services to victims of domestic violence and their children. MDPI and its associated programs, such as Duluth Domestic Abuse Intervention Project and the BWJP, engage in training and policy-making efforts on the local, state, and national levels for the benefit of battered women and their children. BWJP, specifically, receives federal funding through the U.S. Department of Justice and U.S. Department of Health and Human Services to

provide training and technical assistance nationwide to communities developing organized responses to domestic violence.

National Center on Domestic and Sexual Violence

National Center on Domestic and Sexual Violence (“NCDSV”), a nonprofit organization founded in 1978 and incorporated in the state of Texas designs, provides and customizes training and consultation; influences policy; promotes collaboration; and enhances diversity with the goal of ending domestic and sexual violence. The NCDSV in their training and consultation roles are often called upon to provide technical assistance to local community based agencies providing direct services to victims. The NCDSV consults with law enforcement agencies, which are often concerned with the safety of children and uncertain how to best protect them and their mother from further abuse. The NCDSV trains and consults with Red Nacional de Refugios, the National Network of Mexico’s battered women’s shelters, who also recognize the problems of mothers who seek to protect their children from continuing violence.

New Jersey Coalition for Battered Women

The New Jersey Coalition for Battered Women (“NJCBW”) is a statewide coalition of domestic violence service programs and concerned individuals whose

purpose and mission is to end violence in the lives of women. Incorporated in 1979, the NJCBW is a private non-profit corporation whose members include 23 domestic violence programs in the state of New Jersey. The NJCBW advocates for battered women with state level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence.

Seton Hall Law School Center for Social Justice, Family Law Clinic

Seton Hall Law School is one of the major educational institutions in the state of New Jersey. The Law School's Center for Social Justice is a pro bono legal clinic which provides free legal representation to disadvantaged and under-represented clients. The Center for Social Justice has been providing pro bono legal services since 1970 in a variety of cases. The Family Law Clinic at the Center for Social Justice specializes in representation in family law cases, including on behalf of clients who are victims of family violence, clients who engage in custody litigation, clients who seek to relocate to avoid violence, and clients who are involved in international child custody disputes.

CERTIFICATION OF ADMISSION TO BAR

I, Leonard O. Evans, III. certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Leonard O. Evans, III

Date: October 30, 2007

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I, _____, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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