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[12/09/2003;United States District Court for the District of Massachusetts;First Instance]
Danaipour v. McLarey

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

I. DANAIPOUR, Petitioner, v. K. McLAREY, Respondent

MEMORANDUM AND ORDER

September 12, 2003

CIVIL ACTION NO. 01-11528-DPW

The judicial officers who earlier addressed this case have accurately described it as a "sad and serious" matter, Danaipour v. McLarey, 183 F. Supp.2d 311, 312 (D. Mass. 2002) ("D. I") that presents the federal courts with one of their most "difficult and heart-rending tasks": whether to order return of abducted children to their home country when one parent claims the children will face a grave risk of physical or psychological harm or an intolerable situation if returned. D. v. M., 286 F.3d 1, 4 (1st Cir.2002) ("D. II"). The case, brought under the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 et seq., (1994), pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, is now before me on remand from the United States Court of Appeals for the First Circuit. At issue are allegations of incestuous child abuse made against the petitioner during the course of the parties' marital dissolution.

The respondent, who took her two daughters, A.D. and C.D., to this country from their habitual residence in Sweden in violation of Swedish court orders and in derogation of representations she made to the Swedish court, resists the petition of the children's father for their return. Her opposition is premised upon an exception to the general rule established by the Hague Convention favoring return of wrongfully removed children. The exception, set forth in Article 13(b) of the Hague Convention, arises when the return of the children is found to pose a grave risk of harm to, or creates an intolerable situation for, them. The First Circuit's remand called for further fact finding, with the specific direction that "the district court must adjudicate the issue of whether sexual abuse occurred, ordering further evaluations if necessary in order to determine whether the children are at a grave risk of physical or psychological harm, or of otherwise being placed in an intolerable situation if returned." D. II, 286 F.3d at 26.

In my findings of fact, I determine the evidence clear and convincing that sexual abuse of the younger child by the father occurred. My conclusions of law include the holding that under the law governing me I may not order the children's return because of the consequent grave risk of harm and intolerable situation posed to them by their return. Before presenting the findings and conclusions, however, I must address certain threshold matters at the outset of this memorandum. These are the course of proceedings which brought the case before me, the materials and issues I have considered in reaching my decision, and the burdens of proof against which the evidence has been evaluated to arrive at the determination that an order of return under the Hague Convention is not appropriate in this case.

I.

THE COURSE OF PROCEEDINGS

A. The Initial Proceeding in the District Court

Judge Wolf, to whom this case was originally assigned, heard live testimony before rendering a detailed opinion in D. I. In that opinion, he found that there was "no credible evidence that [the older child] A. D. has been sexually abused by her father in any way." D. I, 183 F. Supp.2d at 321. He further found that "the credible evidence does not prove that [the younger child] C.D. has been sexually abused physically." Id. While Judge Wolf found that "in this case sexual abuse has not been proven," he nevertheless observed that "the evidence indicates that there is good reason for a forensic evaluation to be conducted to determine if sexual abuse occurred." Id. at 325.

For purposes of determining whether or not the exception to the presumption of return provided by Article 13(b) was available, he developed conditions pursuant to which the children could be returned to Sweden for a full sexual abuse evaluation. Following that evaluation, he concluded, "the Swedish courts, which have taken this dispute seriously in the past, will be capable of fairly deciding its implications for the future custody of A.D. and C.D." Id. at 323.

Judge Wolf accordingly granted the petition for the return of A.D. and C.D., contingent upon a series of conditions which he concluded were adequately guaranteed by undertakings of the parties and the prospect of parallel orders of enforcement in the Swedish courts.

B. Review in the Court of Appeals

The United States Court of Appeals for the First Circuit initially stayed Judge Wolf's order of return pending appeal. In its decision thereafter reversing on the merits, the Court of Appeals observed that Judge Wolf had "struggled conscientiously" with the issues presented by this case. D. II, 286 F.3d at 5. It concluded, however, that he had not definitively found whether sexual abuse occurred. Noting Judge Wolf's findings that testimony by the younger child's therapist concerning statements made to her by A.D. were credible and that "[t]hose statements provide good reason to be concerned that" a form of sexual abuse occurred, id. at 11 (citing D. I, 183 F. Supp.2d at 321), the Court of Appeals reversed the order for return of the children. The Court held that "[g]iven the significant evidence of sexual abuse presented here, we believe that it is only after the district court has resolved the sexual abuse issue that the court will be in a position to proceed intelligently down the next avenue of inquiry--whether the children can be returned safely to the country of habitual residence." Id. At 15. Accordingly, the Court of Appeals opinion called for a remand of the case. Id. at 26.

C. Remand

After denying petitioner's motion for rehearing and a petition for rehearing en banc, the First Circuit entered an unpublished mandate directing "that the case be assigned to a new judge." The case was then reassigned to my docket by random draw.

The Court of Appeals mandate implicitly supervened Local Rule 40.1(K) of this Court which generally governs cases returned for, as the subheading to the Local Rule indicates, "Proceedings After Appeal."

Local Rule 40.1(K)(1) provides that:

When an appellate court remands a case to this court for a new trial, the case shall be reassigned to a judge other than the judge before whom the first trial was held.

Subparagraph (2) of the rule provides that:

In all other cases in which the mandate of the appellate court requires further proceedings in this court, such proceedings shall not be conducted before the judge before whom the prior proceedings were conducted unless the terms of the remand require that further proceedings be conducted before the original judge or unless the judge determines that there will result a substantial saving in the time of the whole court and that there is no reason why, in the interest of justice, further proceedings should be conducted before another judge. If the judge before whom the prior proceedings were conducted does not retain the case for further proceedings, that judge shall return it to the clerk for reassignment.

Given the summary character of proceedings under the Hague Convention, there is arguably an issue whether the decision of the Court of Appeals should be construed to constitute remand for a new trial under Local Rule 40.1(K)(1) or remand for further proceedings under Local Rule 40.1(K)(2). That is an issue which, under the practice of this Court pursuant to Local Rule 40.1(K) is presented in the first

instance to the judge who originally conducted the proceedings subject to appeal. However, the mandate entered by the Court of Appeals directing reassignment to a new judge pretermitted any evaluation of the applicability of Local Rule 40.1 by Judge Wolf.

The question of reassignment was neither raised nor briefed by the parties either in the District Court or the Court of Appeals. Because the mandate's direction implicates the assignment system established under this Court's Local Rules (which are themselves subject to review, modification, or abrogation by the Circuit Council of the First Circuit, a majority of whose members are Circuit Judges, see 28 U.S.C. §§ 332(d)(4), 2071(c)(1)), it is appropriate to address the decision of the First Circuit panel to direct reassignment sua sponte.

The power of an appellate panel in litigation to direct reassignment of a case from one district judge to another has been recognized in dicta by the Supreme Court, Liteky v. United States, 510 U.S. 540, 554 (1994), and in practice by the First Circuit. See generally Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822, 832-33 (1st Cir. 1987). The First Circuit has established a set of standards against which the decision to reassign is to be measured.[FN1] Those standards were not expressly discussed in the First Circuit in this case. The mandate is brief and conclusory. It is unclear - especially given the court's well founded characterization of Judge Wolf's efforts as "conscientious" and the lack of objection by the parties to his continuing to preside in this case - that explicit application of the standards for appellate reassignment the First Circuit has developed would necessarily lead to reassignment of this case.

There is a further problematic dimension to unilateral appellate reassignment in cases such as this. As noted, the reassignment was sua sponte and not upon the request of either party. Yet, there are two statutory provisions by which parties may seek the recusal of a judge, 28 U.S.C. §§ 144, 455. The parties were not here constrained from pressing either of those statutes but neither chose to do so. Sua sponte reassignment by the Court of Appeals has the effect of side-stepping the statutory standards for disqualification and repudiating the implicit decision of the parties that proceeding in accordance with the Local Rules is a satisfactory method of assignment of district judges to hear cases. When the Court of Appeals on its own, and not at the instance of a party, chooses to direct reassignment, it effectively disturbs the settled expectations of the parties and avoids the carefully calibrated procedures which Congress has fashioned for modifying ordinary assignment of cases to particular judges.

Ultimately, however, I find that a fair reading of D. Mass. R. 40.1 indicates the case would have been reassigned in any event under paragraph K(1). The prior proceeding before Judge Wolf involved fact finding that resulted in a final judgment for a proceeding dependent upon credibility determinations concerning live witnesses. This is the type of proceeding that D. Mass. R. 40.1(K)(1) contemplates as a trial. Cf. In re Dedham Water Co., 901 F.2d 3 (1st Cir. 1990) (construing D. Mass. R. 8(i), an earlier version of Local Rule 40.1(K)(1), and requiring reassignment, in part because "new" evidence would be taken on remand)). Thus, the sua sponte reassignment direction by the Court of Appeals in this case appears to have been supererogatory.

II. MATERIALS AND ISSUES CONSIDERED

Given the character of the remand and my own separate determination that the case was returned essentially for a new trial under Local Rule 40.1(K), albeit in a summary proceeding, cf. March v. Levine, 249 F.3d 462, 473-75 (6th Cir. 2001), cert. denied, Levine v. March, 534 U.S. 1080 (2002), I decided that the evidentiary materials--including live testimony--should be presented to me afresh, rather than as a review of the record presented to Judge Wolf and to the First Circuit on appeal.

In connection with the new fact finding, the parties, as they had before Judge Wolf, chose not to present testimony of the two young children who are the subject of this petition. That appears to have been a humane and prudent decision in the best interests of the children, but it posed potential conflict with strict observance of the hearsay rules. While I concluded the summary character of Hague Convention proceedings does not require application of the Federal Rules of Evidence concerning hearsay,[FN2] I believed it necessary to discipline my evaluation of such testimony. Accordingly, I informed the parties that I would consider for the truth of the matter reports of statements by the children provided, not only in medical records [FN3] or other written documents,[FN4] but also in live testimony subject to cross-examination by witnesses--whether health care providers or not- -who purported to have themselves heard the statements.[FN5] As will appear in the record, the relevant statements of these young children, particularly C.D., require considerable interpretation in any event. In my consideration of this

evidence, I have been guided by the experts offered by the parties and by conventions of the psychological profession for evaluating the statements of children. See generally, SANDRA K. HEWITT, ASSESSING ALLEGATIONS OF SEXUAL ABUSE IN PRESCHOOL CHILDREN: UNDERSTANDING SMALL VOICES (1999).

Although the parties offered evidence regarding the past conduct of, and future prospects for, proceedings in Sweden, I have not made normative findings concerning the relative quality of Swedish processes for determining whether sexual abuse by a custodial parent has occurred. The issue of relative institutional capacity is irrelevant to the question on remand. The Court of Appeals has made clear that the subsidiary and ultimate findings with respect to sexual abuse are matters to be determined by this Court under Article 13(b). D. II, 286 F.3d at 18-19. I have, nevertheless, considered the products of the Swedish proceedings for the evidence they provide relevant to my determination. Similarly, I have not addressed what custodial arrangements for the children might be best. This also is plainly a question beyond my jurisdiction under the Hague Convention. D. II, 286 F.3d at 18 (citing Friedrich v. Friedrich, 78 F.3d 1060, 1063 (6th Cir. 1996). In particular, I have not attached weight to the statements of the subject children regarding their custodial preferences, except as they may be evidentiary concerning the question of sexual abuse and its consequences.[FN6]

When shaping the case for trial on remand, I was somewhat surprised to find that the parties and the guardian ad litem (the "GAL") were no longer interested in having a full sexual abuse evaluation conducted as part of the remand. Recognizing that there had been contention during the prior stages of this proceeding over the issue of whether, when, and where such an evaluation should take place , see generally D. II, 286 F.3d at 8-9, I was to some degree concerned that this resistance may have been generated by a jockeying for advantage or by cost considerations. Nevertheless, I initially deferred to the view of the parties and the GAL. After further reflection, however, I determined to press the need for a full sexual abuse evaluation as necessary to my fact finding. Through the offices of the GAL, Dr. Claudette B. Pierre of the Tufts University Medical School New England Medical Center Departments of Psychiatry and Pediatrics, undertook such an evaluation. As will become clear in my findings of fact, I found her work to be of the highest professional quality, and I have relied heavily upon it.

What I was not sufficiently attuned to in pressing the issue of a full sexual abuse evaluation as part of the remand, however, was the considerable concern among professionals in the field about the potential for disruptive effects upon the ongoing adjustment - and, in this case, productive - therapy of young children when a belated inquiry of this type is undertaken by a stranger. For example, I initially thought what appeared to be resistance to the evaluation by the girl's therapist evidenced an unduly proprietary approach to the various ways in which their well- being could be secured. But through her report and her testimony at trial, I learned that Dr. Pierre herself had serious misgivings about conducting an evaluation nearly two years after the alleged abuse would most probably have taken place and that she had conscientiously consulted colleagues and carefully considered whether she should continue with the engagement. Due in large part to her skill and professional empathy and the cooperation she received from the girls' therapist and the parties, Dr. Pierre's evaluation was, I believe, a successful forensic intervention of great value to me in my fact finding and minimally disruptive to the children's ongoing psychological treatment. In short, the process benefitted from the careful manner in which a judicial direction, made without full understanding of its implications, was implemented by thoughtful persons who at all times kept the child's best interests-broadly conceived-in mind.

At the level of guidance concerning the meaning of the Hague Convention in this setting, I have considered myself bound by the mandate rule, not to revisit any fully considered legal determinations of the Court of Appeals about which I might otherwise have reservations. See, e.g., United States v. Vigneau, 337 F.3d 62, 67-68 (1st Cir. 2003); Ellis v. United States, 313 F.3d 636, 646 (1st Cir. 2002); United States v. Ticchiarelli, 171 F.3d 24, 28-29 (1st Cir. 1999). In particular, I rejected the request of the petitioner to solicit an amicus curiae submission from the Department of State. Apparently as a result of time pressures at the State Department at the time, no such briefing was provided to the Court of Appeals. In any event, the only conceivable relevance of such briefing at this stage of the proceedings, in light of the extensive consideration by the Court of Appeals of State Department publications, would be to suggest that the Court of Appeals had somehow misconceived State Department guidance. In the absence of any showing that the Court of Appeals was not directed toward, or did not have occasion to explore, the appropriate publicly-available State Department guidance in this area, I chose not to expand the record for purposes of legal argument by inviting State Department participation in this case.

III. BURDENS OF PROOF

The Court of Appeals accepted Judge Wolf's holding that while the party opposing return under the Hague Convention bears the ultimate burden of showing the applicability of the Article 13(b) exception by clear and convincing evidence, the subsidiary facts may be proved by only a preponderance of the evidence. D. II, 286 F.3d at 13 (citing D. I, 183 F. Supp. at 314-315.[FN7] But this characterization of the burden of proof poses special problems in this case where what is arguably a subsidiary question – whether sexual abuse by the father occurred - could, as a result of the First Circuit's characterization of the issues, be the functional equivalent of the ultimate question - whether Article 13(b) is applicable. In order to guide review of the evidence in light of the manner in which the Court of Appeals has framed the remand, the findings of fact set forth in Section IV, infra, are made by no less than clear and convincing evidence, unless I explicitly indicate otherwise in the text.

IV. FINDINGS OF FACT

I will present the findings of fact in two parts. The first is a broad chronological overview including ultimate findings. The second is a more detailed and specific discussion of the fact finding process which has brought me to the ultimate finding that C.D. has been sexually abused by her father and that, apart from an awareness of the allegations concerning C.D., A.D. has not been sexually abused.

A. Overview

The petitioner I.D. and the respondent K.M. were married in 1994. He is a clinical psychologist; she has been a teacher of special needs children. Their two daughters are A.D., born April 18, 1994, and C.D., born June 3, 1998. There is no dispute that Sweden was, for purposes of the Hague Convention, the habitual residence of the children.[FN8] The parents and the children, however, regularly visited their mother's family in the United States for summer vacations and Christmas.

While both parties have alleged some form of psychological or emotional instability on the part of the other predating the breakdown of their marriage, I do not find sufficient evidentiary basis or materiality for any fact finding as to those contentions.

By the summer of 1999, when the couple and their children were visiting the United States, the marriage had deteriorated to such a degree that divorce was seriously discussed and contemplated. Six months later, during another visit to the United States in January 2000, M. had developed an intimate relationship with D.M., an American friend from her childhood who lived in Massachusetts. D. and M. at this point stopped wearing their wedding rings. A month later in February they filed for divorce.

Despite the emotional tensions and strain the arrangement created and although they were no longer intimate, D. and M. continued to live together in their one-bedroom condominium through the first half of 2000 out of perceived necessity because of the housing shortage in the area of Sweden where they lived. Considerable conflict developed between the parties during this period. I find the conflict involved overbearing and threatening conduct by D. and centered to some degree upon his unhappiness about M.'s relationship with D.M.

In June 2000, M. took the children on a pre-planned summer trip to visit her family in the United States. She called D. from the United States and told him she would not return to the condominium so long as he remained there because she considered it an unsafe environment for herself and their children. D. refused to move from the apartment.

D. came to the United States in early July 2000 and visited from time to time with his children alone. After returning to Sweden by himself, D. obtained orders from a Swedish court providing him with sole custody of the children and possession of the couples' condominium. M. then returned to Sweden with the children to petition for joint custody. During the four weeks before the Swedish court authorized joint custody, M. lived in a women's shelter; the children lived with D. but were permitted to visit their mother on several occasions.

When, in October 2000, the Swedish courts ordered joint custody of the children, alternating between the parents on a weekly basis, and also granted M. possession of the condominium, D. moved to his girlfriend's apartment where his weekly custody periods for the girls took place.

Although evidence was offered about complaints of vaginal redness by C.D. and sexualized behavior by both girls prior to the period of alternating custody in Sweden, I do not find on this record that sexual abuse by the father occurred before the initial joint custody period. With commencement of the alternating visitation schedule, however, M. consistently identified C.D. as experiencing vaginal redness when the girls returned from their visits with their father.

On grounds more fully set forth below, I find by clear and convincing evidence that sexual abuse of C.D., who was slightly younger than two and one-half years old at the time, involving more than one occasion of masturbation by and of D. in the presence of and involving C.D. took place during this period of alternating supervision in the fall of 2000. I find further that this abuse stopped once a police investigation began at the end of November 2000. At least one act of abuse involved C.D. touching her father's erect penis and led to her touching his ejaculant. At least one other such act involved digital masturbation of C.D. by D.

I do not find that A.D., who was slightly older than 6 and onehalf years old at this time, was the subject of any sexual abuse, nor do I find that she was present during or directly observed the sexual abuse of her sister. She did, however, later learn of alleged abuse of her sister as a result of her conversations with her mother and her sister.

In the fall of 2000, M. contacted a pediatric nurse who referred her to Dr. Ann Barback, a child psychologist.

M. sought advice regarding behaviors she found the children displaying: C.D.'s vaginal redness and the girls' symptoms of anxiety, such as nightmares C.D. was experiencing and the headaches and stomachaches A.D. was having. The girls did not accompany M. to her meetings with Barback. Following M.'s second meeting with Barback, C.D. complained that her "pee-pee" was sore. After observing redness in the girl's vaginal area, M. asked C.D. what made her "pee-pee so red." C.D. responded that "Baba [the term the girls used for their father] do like this" and made a hand gesture M. identified as similar to a male masturbatory movement. On further questioning from M., C.D. did not respond and withdrew from conversation.

M. then questioned the older girl, A.D., who had also come to her mother complaining her "pee-pee" was sore. A.D. denied anybody had touched her in a way to make her sore. But after a minute's reflection, A.D. asked her mother, "[w]hat would you say if I told you they had?" When M. said she would question her more specifically about "who had done it and what happened and how you felt about it," A.D. said, "But nobody has." On November 21, 2000, after M. told her of the conversations with the girls, Dr. Barback issued a report of suspected child sexual abuse and referred the matter to the Swedish social services administration which in turn referred the matter to the Swedish police to investigate possible criminal charges. D. was notified of the police investigation. On November 30, 2000, the Swedish police interviewed the two girls. The older girl, A.D., spoke with officers for about an hour but disclosed no abuse; the younger girl, C.D., declined to speak with the police in an interview that lasted about five minutes. As part of the investigation, C.D. received a medical examination on January 11, 2001. The examination showed no physical evidence of abuse and the police terminated their investigation on January 22, 2001, finding that "the crime cannot be confirmed."

In late January 2001, D.M. left his college teaching position in the United States to join M. in Sweden where he began teaching middle and high school students. D.M. and M. intended at that point to live in Sweden with the girls in a manner consistent with the Swedish court's custody order. Conflict between D. and M., however, continued and M. became frustrated about the lack of a more fully developed child sexual abuse evaluation for the girls.

In early 2001, the Swedish social services administration conducted a separate investigation regarding the "need for protection and support" for the children. The social services administration, however, deferred to the police concerning the question of sexual abuse. M. also sought a sexual abuse evaluation by the Swedish child and youth psychiatric unit (BUP) in a non-criminal investigation setting. The BUP declined to undertake such an evaluation without D.'s approval and he declined to provide it. In February 2001, the social service inquiry was concluded. During a further custody inquiry that spring, M. was told that no sexual abuse evaluation would be undertaken without the approval of the father. The evaluators declined to meet with the girls alone.

Meanwhile, during late 2000 and early 2001, C.D. talked from time to time in the presence of her mother; her grandmother, M.M.; and D.M. about her father, Baba, "hammer[ing]" her "peepee." At one time during this period, C.D. asked D.M. to "play with my pee pee." When D.M. declined, C.D. became upset. M. videotaped an occasion on March 11, 2001 when she questioned C.D. a few minutes after such a disclosure. On the video, M. asked C.D. "about what happened to make [your pee-pee] ouchy", to which C.D. did not respond verbally but made a hand movement appearing to be a male masturbatory gesture. She then hid her face from her mother.

On March 29, 2001, M. sought a court order for a full sexual abuse investigation to be conducted by BUP. Faced with D.'s opposition to the evaluation, the Swedish court on June 13, 2001, denied M.'s motion on grounds it was against the will of the father. M. thereupon fled Sweden with the children to her family in Massachusetts.

In late June 2001, shortly after arriving in the United States, M. brought the girls to the Massachusetts Society for the Prevention of Cruelty to Children for a sexual abuse evaluation. In a one-page memo provided to M., Satya Rao-Kelter, the evaluator, reported that "the results of the evaluation at this time are inconclusive for sexual abuse." Rao-Kelter went on to advise:

However, there is clear evidence of trauma due to exposure to domestic violence. Thus, based on the concerns about the trauma experienced, it is my recommendation that the children receive long-term therapy. It is further recommended that the children have only supervised visits with their father until the long-term therapist can determine that unsupervised visits with father would not further traumatize these children.

A full report was not provided to the parties or the courts until it was produced as the result of a subpoena directed to the MSPCC in connection with the trial of this matter before me.

In the full report's discussion with respect to sexual abuse regarding A.D., Rao-Kelter's conclusion was that "[t]he results of this evaluation are inclusive." Rao-Kelter suggested that the inclusiveness was "possibly due to the inconsistency between what was observed during the evaluation process and what mother said was going on."

With respect to C.D., Rao-Kelter stated in the full report that "[t]he results of this evaluation are inconclusive for sexual abuse possibly due to several factors," including the fact that "unknowingly mother told [C.D.] that she was going to meet a woman to talk about what dad did to her." The evaluator concluded that evaluation was "inconclusive because [C.D.] did not disclose sexual abuse directly to this evaluator and did not exhibit any sexualized behaviors or traumatic play commonly associated with a sexually abused child."

[NOTE THAT SEVERAL PARAGRAPHS HAVE BEEN REMOVED FROM THIS COPY OF THE JUDICIAL DECISION]

In her report summary, Dr. Pierre concluded that the question "whether or not [A.D.] has been sexually abused be considered answered as not having happened."

With respect to C.D., Dr. Pierre concluded that "it is very possible that something has happened, however, based on the contents of this disclosure evaluation it is difficult to determine the exact nature of what that is. Therefore the results of this evaluation [as to C.D.] would have to be considered inconclusive." At trial, Dr. Pierre testified she was certain something happened to C.D. that was abusive. She characterized this something as "traumatic" and "sexual" but said she was "unclear what that has been."

Neither party has sought to present updated information or evidence since the trial was completed.

B. Reaching Ultimate Findings Concerning Sexual Abuse

The problem of making findings regarding incestuous sexual abuse in this case, turning as it does principally upon reflections concerning historical events made by a very young child, is not simply one of determining credibility. There is the additional and more fundamental dimension of interpreting a child's comments and nonverbal expressions. Necessarily this is a contextual undertaking.

In approaching this task, I found particularly pertinent the cautionary observations made in a paper cited by D.'s expert, Dr. Howard Munson. In that paper, Drs. Ehrenberg and Elterman noted that in the context of a divorce with joint alternating custody, the custodial parent may "misinterpret" and "misperceive" certain behavior and symptoms after the child is returned from a visit with the non-custodial parent; in particular [t]he child may exhibit physical symptoms upon return from a visit, such as constipation (change in diet during visits) or redness in the genital area (inexperienced bathing or toileting) and these signs and normal caretaking practices may be misinterpreted. Post-visit interrogations may ensue . . . to confirm the parent's suspicions. The child's fears of being abandoned by the custodial parent . . . strengthen their tendency to assimilate the parent's suggestions as fact. Normal sexual behaviors and sexual exploration in developing children may also be misinterpreted as signs of sexual abuse.

Marion F. Ehrenberg & Michael F. Elterman, Evaluating Allegations of Sexual Abuse in the Context of Divorce, Child Custody, and Access Disputes in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 209, 217 (Tara Ney ed. 1995) (internal citations omitted). With those cautionary concerns in mind, I turn to a more detailed consideration of the various indicia of sexual abuse found in the evidence.

A. Disclosures by the Children

Because the allegations of sexual abuse came to the fore in connection with the process of marital dissolution, I have been especially concerned that the reports of commentary by the children may have been overstated or manipulated. I have, however, concluded that the principal and initial reports, those of the mother, are credible. While there is some evidence that M.'s understandable concern with her children's well-being may have caused her to frame questions and develop discussions in a fashion that could have influenced the reconstruction and expression of memory by both children, I find that she did not materially reshape the children's reports. I also credit generally the reports of expressions by the children given at trial by D.M. and the children's grandmother, both of whom were live witnesses who were available for cross examination.

On the basis of those reports I have found that C.D. was subject to sexual abuse by her father and that A.D. was not.

I credit A.D.'s assertions that she did not participate or otherwise observe the sexual abuse of her sister. In this connection, I find that C.D.'s report to Dr. Luxenberg on May 17, 2001 that A.D. was present when stiff milk came out of Baba's pee-pee was more likely than not a reference to A.D.'s presence in the vicinity as part of alternating custody but not actual presence during, observation of, or participation in the act. I find A.D.'s knowledge of her sister's experiences came about primarily through conversations with their mother and secondarily with C.D. There is no question that such purported knowledge, even by hearsay, may itself be psychologically challenging for A.D., but it is the occurrence of sexual abuse of C.D. which provides grounds for denying return of the children under the Hague Convention.[FN9]

C.D. was particularly cautious in making disclosures to persons outside her immediate domestic setting, and her disclosures themselves were followed by withdrawal from continued conversation and a desire to avoid exploring the issues further. Her failure to be forthcoming with the Swedish police and her non-disclosure to the MSPCC evaluator are not evidence that no abuse occurred but rather are consistent with the guarded interactions she initially has with those who question her about events whose propriety is uncertain for her. This guardedness seems understandable in light of her apprehension that she may have done something wrong and that her disclosures would cause anger or otherwise lead to problems or difficulties for or between her parents.

From a slightly different perspective, I have considered whether the additional attention her expressions regarding "hammering" and related matters received from persons whose attention she welcomed and with whom she felt comfortable - like her mother, her grandmother, Dr. Luxenberg and D.M. - would cause repetition and elaboration of a contrived story subject to misinterpretation. Carefully analyzing the successive forms of disclosure, satisfies me that this potential played no material part in the unfolding revelations of sexual abuse C.D. provided.

This analysis of the forms of disclosure has been greatly assisted by the outline of indicia of credibility with respect to sexual abuse by children, referenced by Dr. Carole Jenny, a distinguished expert in the field who testified on behalf of M. That analysis has led me to concur in Dr. Jenny's opinion that "D. involved C.D. in masturbatory activity as both a witness and participant with him, and that on at least one occasion he ejaculated in her presence."

I have found highly persuasive the corroborative disclosures made to Dr. Luxenberg and Dr. Pierre, both of whom were skilled professionals able to develop a degree of trust with C.D. Dr. Luxenberg's therapy in particular was able, without inappropriate direction or suggestions, to provide C.D. with an established setting in which memories she might be inclined to suppress could be expressed. Those expressions provided over time a set of disclosures that were consistent with the mother's reports, without bearing indicia of following a suggested script.

The disclosures to Dr. Luxenberg are relatively unambiguous in demonstrating that C.D. associated the word "hammer" with the arm movements involved in masturbation. Her alternate references to "hammering" and being herself "hammered" satisfy me that there were multiple occasions involving her participation in masturbation of D. and his masturbation of her. In this connection, while I cannot find C.D.'s drawing of "Baba's pee-pee" on October 12, 2001 to be clear and convincing evidence of a pictorial expression of ejaculation, I find it more likely to be so than not. The drawing is thus among the expressions by C.D. that I rely upon in finding masturbatory sexual abuse of her by her father.

I have carefully considered Dr. Munson's contentions that the inquiries of C.D. - by M., in particular, but also subsequently by Dr. Luxenberg - may have tainted C.D.'s recollections. I do not, however, find C.D.'s expressions of recollection to have been materially tainted or otherwise the product of suggestion. While not obtained in the equivalent of an antiseptic setting, they nevertheless appear to be reliable products of the difficult process of bringing forward, in the language of a very young child, past experiences that were unsettling. In particular, I find no cultural bias distorting interpretation of those disclosures when made in English by a concededly multilingual child addressing circumstances that would be objectionable under any conceivable cultural construct.

I have also considered Dr. Munson's contention that C.D.'s disclosures through play should be interpreted as involving nothing more than her working through themes from the "The Land Beyond Time" animation series to which she had been exposed. It is clear that the characters and themes from the series were integrated into her play during therapy with Dr. Luxenberg, but I am satisfied that what she expresses through that play is more than simple reenactment of, or variations on, "The Land Before Time" themes. Rather, I find, after extensive review of videos from the series, that "The Land Before Time" characters and themes are being used by C.D. as a means to express and disclose the abusive circumstances to which she has been exposed and her reactions to those circumstances.

Neither party has sought leave after trial to comment further on Dr. Pierre's report and testimony. I find her evidence to support my general findings concerning the lack of sexual abuse of A.D. and the existence of sexual abuse of C.D. by her father. Given the time constraints on the evaluation she conducted, Dr. Pierre's capacity to obtain a degree of corroborative disclosure from C.D. is both a testament to her professional skill and, more importantly for present purposes, the basis for significant additional assurance that arguably ambiguous verbal and nonverbal expressions by C.D. constitute disclosure of sexual abuse as I have found it.

B. Medical Evidence

I have not relied upon the reports of vaginal redness in making my findings of sexual abuse. I credit the observations of this condition by M. and M.'s mother. But given the lack of corroboration upon examination by medical professionals and some further medical expert testimony regarding the likely cause, I have no basis to say that the observed redness was associated with the abuse I have found. I recognize that the lack of medical corroboration in child sexual abuse cases does not rule out a finding of sexual abuse. Moreover, I have no doubt that the observed condition prompted M. to become more suspicious of the possibility of abuse. But on the state of this record, I am unwilling to attach significance to the vaginal redness except as a precipitating factor in the mother's complaints regarding the possibility of sexual abuse.

C. Sexualized Behavior

I do not consider the reports of sexualized behavior by A.D., in particular those concerning her forceful kissing of her mother on the mouth and her unusual interest in breasts, to provide a basis for finding sexual abuse of A.D. In light of the other circumstances concerning A.D., particularly the lack of disclosure by her of such abuse and the lack of sufficient particularized expert testimony related specifically to A.D. regarding what may be considered unique behavior generated by sexual abuse, I decline to rely on these reports of sexual interest as evidence of sexual abuse of her. By contrast, I consider reports of sexualized behavior by C.D. to be corroborative of her own expressive disclosures of abuse. C.D. has shown an inordinate interest in genitals and her invitation to D.M. to touch her is evidence of an awareness of sexuality not otherwise to be expected of a very young girl who has not been exposed to sexual activities. Her expressions of mixed feelings regarding being touched, ranging from awareness of pleasure to attempts to avoid further discussion because the subject makes her uncomfortable, are meaningful evidence of a young girl exposed to sexuality under circumstances and at a time before she could adequately process the experience.

4. Other Symptoms

While I credit reports of the symptoms of anxiety in both A.D. and C.D., I do not consider these reports, as provided to me on this record, to present symptoms sufficiently distinct from symptoms experienced by other young children to be of material significance to my findings. They are not inconsistent with findings of sexual abuse but I cannot say that they otherwise provide a basis for determining sexual abuse in this case.

5. Hypothesis Testing

Dr. Munson's suggestion that the testing of contrary hypotheses is a useful way to evaluate the force of the evidence in this case seems to me well-founded and I have followed it. However, I find no other hypothesis as compelling as that C.D. was sexually abused by her father. In particular, the hypothesis that the disclosures were misinterpreted and were merely the elaboration or acting out of "The Land Before Time" narratives does not begin to account for all the relevant subsidiary findings. Similarly, I find the hypothesis that the disclosures stemmed from C.D.'s inadvertent observation of her father during sexual arousal or otherwise in a state of undress inadequate to account for the relevant subsidiary findings.

V. CONCLUSIONS OF LAW

As the Court of Appeals held, "the proper focus" in determining whether the type of sexual abuse found justifies a declination to return a child under Article 13(b) of the Hague Convention is "on the effect on the child and whether there is 'grave risk of physical or psychological harm or otherwise intolerable situation' to which the child would be exposed on return." D. II, 286 F.3d at 17. The sexual abuse of C.D. by her father I have found in this case by clear and convincing evidence satisfies me that the terms of Article 13(b) have been met by the respondent in opposing the return of her children. I must conclude by clear and convincing evidence that return of the children to Sweden creates a grave risk of psychological harm and an intolerable situation for the children. Consequently, I decline to do so.

I have not found by clear and convincing evidence a grave risk of physical harm to the children from return. This is because I have concluded that the interventions of the Swedish authorities in the Fall of 2000 were adequate to cause D. not to engage in any further acts of sexual abuse involving C.D. It is at this point that the difference in standards of proof become material. I do find that the risk of physical harm, as evidenced by D.'s past actions before the spotlight of investigation was focused on him, to have been established by a fair preponderance. But for the ultimate finding under Article 13(b), a finding by a fair preponderance is not sufficient. By contrast, the showing as to psychological harm and an intolerable situation upon return is sufficient.

The type of sexual abuse I have found as to C.D. involved an intentional engagement by a father of a very young child in acts of masturbation. While I find that it did not continue, following the initiation of the police investigations in Sweden, this was abuse of the most severe sort short of physical injury. And while I recognize that the acts occurred during a time of extraordinary stress as a result of the dissolution of the parents' marriage, this was no mere momentary straying across an uncertain boundary or the awkward or clumsy touching of a daughter by her father under circumstances that

could be misinterpreted. Rather, what I have found here was a fundamental breach of the duties any adult, not to mention a parent, owes to a very young child.

The failure of the petitioner even to acknowledge responsibility and his continued contention that the accusation of abuse is the result of subtle coaching and prompting of C.D. poses an additional impediment to return. The first step in reducing risk of harm or defusing an intolerable situation in this circumstance would involve, as Dr. Pierre outlined in her report, "[D.] offering [C.D.] an apology during his first contact with her. This apology does not have be one admitting guilt but rather one that acknowledges there have been some things that have happened that have caused her great worry and for that he is sorry." D. has, despite the passage of time since the receipt of Dr. Pierre's report and the opportunity to reflect upon it, expressed no inclination or desire to take this first step.

I credit the subsidiary conclusions of Dr. van der Kolk that it is important to the psychological well being of C.D. that what she has disclosed be believed and not appear to lead as a consequence to her return to the place of her trauma. Given the fragility of her post-traumatic psychological condition, there is a grave risk that return will fracture irremediably her sense of safety, justice and the value of truth telling. Such a situation would be intolerable.

I find no occasion to enter the controversy over whether the label Post Traumatic Stress Disorder should properly be applied to those who have suffered sexual abuse as children. It is apparent that the scope of PTSD as a diagnosis for the effects of various forms of trauma is the subject of active controversy. See generally Felicia R. Lee, Is Trauma Being Trivialized?, N.Y. Times, Sept. 6, 2003, at B9. I do not find the label PTSD fits comfortably in this case but the insights regarding psychological impact from considering the applicability of PTSD criteria are helpful in assessing the severity of the psychological risk and the tolerability of the situation if return of the children were ordered. In particular I credit the observation of both Dr. van der Kolk and Dr. Luxenberg that return to the place of trauma and location of her victimizer can have profoundly disturbing effects upon those like C.D., who have been sexually abused. A similar, although derivative, effect can be expected for A.D. That is a grave risk and constitutes an intolerable situation, which I am convinced would be the consequence of ordering return of the children under the Hague Convention in this case.[FN10]

VI

The question presented on remand is one of haunting difficulty. "Accusations that a parent sexually abused a young child in private are difficult to prove. They are also difficult to disprove." D. II, 286 F.3d at 26. Any finding necessarily further rends the bonds of parent and child and holds one or the other parent up to shame and disrepute. In approaching the task directed by the Court of Appeals, I have read and reread the record in this case, repeatedly reviewing the transcript, the affidavits, the exhibits, the videos and the expert reports. I have consulted the various authorities relied upon by the experts the parties have called. Based upon this extended review I am fully satisfied that the respondent has met by clear and convincing evidence her burden under Article 13(b) of demonstrating (1) grave risk of psychological harm to the children, and (2) the creation of an intolerable situation, if they were ordered returned to Sweden.

Accordingly, the petition for return is hereby DENIED and the clerk is directed to enter judgment dismissing this case.

/s/ Douglas P. Woodlock

UNITED STATES DISTRICT JUDGE

FOOTNOTES

[FN1] As set forth in Maldonado Santiago v. Velazquez Garcia, 821 F.2d 822 (1st Cir. 1987), "[a] three-stage inquiry is used to determine whether such reassignment is advisable: (1)whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,

(2) whether reassignment is advisable to preserve the appearance of justice, and

(3)whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."

Id. at 833.

[FN2] Fed. R. Evid. 1101(b) provides that the rules "apply generally to civil actions and proceedings . . . except those in which the court may act summarily". Cf. Fed. R. Evid. 1101(d)(3) ("the rules (other than with respect to privileges) do not apply to . . . [p]roceedings for extradition and rendition"). In this I take a somewhat different view than my colleague Chief Judge Young. In re Walsh, 31 F. Supp.2d 200, 202 n.1 (D. Mass. 1998) rev'd on other grounds, Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000).

[FN3] M. contended that the medical records exception to the hearsay rule could be read broadly enough to permit introduction under Fed. R. Evid. 803(4) of statements made by the children to care providers. See. e.g., United States v. Norman T., 129 F.3d 1099, 1105 (10th Cir. 1997); United States v. Balfany, 965 F.2d 575, 579-80 (8th Cir. 1992); United States v, George, 960 F.2d 97, 99 (9th Cir. 1992).

In addition, she contended that exceptions to the hearsay rule were available to provide an exception for statements made by family members to care givers on behalf of children. See Lovejoy v. United States, 92 F.3d 628, 632 (8th Cir, 1996); United States v. Yazzie, 59 F.3d 803, 813 (9th Cir. 1995).

[FN4] The International Child Abduction Remedies Act, 42 U.S.C. § 11605 permits introduction of certain documents without authentication. In re Walsh, 31 F. Supp.2d at 202 n.1. Other courts have taken the position that relaxation of authentication rules in Hague Convention cases can justify admission of virtually all documents in such proceedings. See, e.g., March v. Levine, 249 F.3d 462, 473-75 (6th Cir. 2001), cert. denied, Levine v March, 538 U.S. 1080 (2002); Dalmasso v. Dalmasso, 9 P.3d 551, 560 (Kan. 2000).

[FN5] In this way I sought to parallel the procedures for notice and the concern for guarantees of trustworthiness which are found in Fed. R. Evid. 807, the residual hearsay exception frequently used when courts receive out of court statements by children in child abuse case outside the Hague Convention context. See, e.g., United States v. NB, 59 F.3d 771, 776 (8th Cir. 1995); Doe v. United States, 976 F.2d 1071, 1081 (7th Cir. 1992); Dana v. Dept. of Corrections, 958 F.2d 237, 239 (8th Cir. 1992); United States v. Ellis, 935 F.2d 385, 394 n.7 (1st Cir. 1990); United States v. Dorian, 803 F.2d 1439, 1445 (8th Cir. 1986).

[FN6] Moreover, unlike the courts in the Blondin litigation, I do not find in the record before me a sufficient basis to conclude that either A.D. or C.D. has as yet reached the age or degree of maturity to have determinative views on the subject of return. Compare Blondin v. DuBois, 238 F.3d 153, 165-68 (2d Cir. 2001).

[FN7] In making this ruling Judge Wolf quoted approvingly, D. I, 183 F. Supp.2d at 315, from an opinion of the District of Columbia Court of Appeals that "there may be twenty facts, each proved by a preponderance of the evidence, that in the aggregate create clear and convincing evidence." S.S. v. D.M., 597 A.2d 870, 882 n.32 (D.C. 1991).

[FN8] Both the petitioner and the respondent have also had substantial relationships with other countries. I.D. was born and raised in Iran but came to Sweden during his college years and received political asylum in 1986. K.M., who holds dual citizenship in Sweden and the United States, was born in Sweden of an American mother and a Swedish father; she was raised and attended college in the United States. The couple met in Sweden in 1989, while M. was on an overseas college program. M. moved to Sweden in 1990 after graduating from college and then began living with D. and working as a teacher.

[FN9] The parties have proceeded on the assumption that the children should not be separated and that any order under the Hague Convention will apply to both. D. II, 286 F.3d at 11 n.9 (citing D. I, 183 F.Supp.2d at 324 n.8). However, it is only upon proof of sexual abuse that I will in this case deny an order of return. A.D.'s anxiety about what she may erroneously have believed happened to C.D. would be insufficient on its own to justify declining to order return. Conversely, A.D.'s independent anxiety about a well founded belief C.D. had been sexually abused by their father in Sweden would be an additional factor in the grave risk/intolerable situation calculus under Article 13(b).

[FN10] I do not attach determinative significance to the apparently settled character of the children's living arrangements in close proximity to their American family and supported by a trusting and seemingly productive therapeutic relationship with Dr. Luxenberg, Cf. Blondin v. DuBois, 238 F.3d at 164-65 (2d Cir. 2001). Neverthless, I note that circumstance by way of contrast with the potential for grave psychological risk and an intolerable situation that an order of return to the place of trauma would entail.

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