B229324
(Related Appeal: B229288)

In the Court of Appeal of the State of California
Second Appellate District
Division 1

MAURIZIO RIGAMONTI
Appellant

vs.

LURA CALDER
Respondent

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of the State of California
County Los Angeles County
Hon. Marjorie Steinberg

BH 006827

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STATEMENT OF NATURE OF ACTION

This is an appeal from the trial court's denial of a petition for the return of a five-year-old child to Italy pursuant to the Hague Convention on the Civil Aspects of Child Abduction of October 25, 1980 (T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11) (the "Hague Convention" or "Convention"). The Convention is a multilateral treaty between 84 countries, including the United States and Italy, which requires the immediate return of a child under the age of 16 who has been wrongfully removed from his or her country of habitual residence in violation of a parent's right of custody. There is a narrow exception when clear and convincing evidence shows that the return of the child would pose a grave risk to the child or otherwise place the child in an intolerable situation. The trial court denied the petition based on the grave risk exception.

INTRODUCTION

On February 16, 2010, Lura decided to end her marriage to Maurizio and secretly left the family home in Parma, Italy with their five-year-old son, Leo, without telling Maurizio. When Lura arrived in Los Angeles, she sent an email to Maurizio, telling him that she just needed a break and reassuring him that she would return to Italy with Leo by March 3, 2010. Unbeknownst to Maurizio, she had no intention of coming back.

Leo was born in Italy and lived there essentially his entire life. Instead of asking the court in Italy to make a custody determination regarding Leo, Lura took the law into her own hands. She concocted a story that she had to escape Italy to protect herself and Leo from Maurizio. She filed for custody in the Los Angeles Superior Court on March 2, 2010.

Maurizio filed a petition under the Convention for Leo's immediate return to Italy. Lura opposed the petition, claiming that Leo would be exposed to a grave risk of harm if he were returned to Italy. In support of her claim, Lura made false allegations that Maurizio had sexually abused Leo and that Maurizio had physically abused her. The trial court found only evidence of relatively minor emotional abuse by Maurizio against Lura. Maurizio never abused Leo.

Lura told the court that she would never return to Italy because she was facing criminal charges in Italy for having abducted Leo, and she believed that she would not be treated fairly by the courts in Italy. The trial court did not want to return Leo to Italy in the custody of Maurizio, since it found that Leo was fearful and anxious about his father and was exhibiting symptoms of post-traumatic stress disorder. The court could not determine the source of those symptoms. The court appointed a child custody evaluator, who was not sure if the symptoms were caused by something Maurizio did or if Lura was alienating Leo against his father.

In either event, the court did not want to return Leo to Italy without his mother and Lura refused to go back to Italy. To resolve that conflict, the court decided that it would return Leo to Italy only if Maurizio met several conditions. He had to prove that the prosecutor in Italy dismissed all criminal charges against Lura and that she would not be under any threat of arrest or prosecution if she returned to Italy. Maurizio had to obtain an order from the court in Italy granting sole physical and legal custody of Leo to Lura, with supervised visitation to Maurizio. He had to obtain a restraining order against himself for Lura's protection in Italy. Finally, Maurizio had to obtain an order in Italy requiring him to pay for the living

expenses of Lura and Leo in Italy, including housing and weekly therapy for Leo.

Maurizio obtained all of the required orders from the court in Italy, but the trial court found that he failed to prove that Lura was free from any threat of arrest or prosecution in Italy. Maurizio produced a document showing that he had asked the prosecutor to withdraw all charges against Lura. The trial court found that this was insufficient proof and denied Maurizio's request for more time to provide documentation that the charges had been dismissed. The court denied the petition under the Convention and entered a custody order granting Lura sole physical and legal custody of Leo in California, with visitation to Maurizio in Lura's discretion.

The trial court treated the petition as a custody case, rather than ordering the immediate return of Leo to Italy as the Convention mandates. Its determination that Leo would be better off in California with his mother, than in Italy with his father, was little more than a custody decision. The grave risk exception is narrowly-drawn and only applies in extreme cases where the country of habitual residence cannot protect the child pending its custody determination. Cases of grave risk typically involve sexual abuse of the child or where the country of habitual residence is a war zone.

The purpose of the Convention is to deter international abductions by preventing the abducting parent from obtaining a custody order in a forum outside the child's country of habitual residence. However, the trial court rewarded Lura for her wrongful conduct by granting a custody order to Lura in California. To the extent Lura committed a crime in Italy by removing Leo, she cannot use her own wrongdoing as a defense to Leo's return to

Italy. She cannot dictate where custody will be determined just because she would prefer to litigate here rather than there.

The trial court acted in excess of its jurisdiction in denying the petition, in contravention to our country's treaty obligations under the Convention. Maurizio respectfully requests that this Court reverse the trial court's decision, with directions to grant the petition and order the immediate return of Leo to Italy without conditions.

STATEMENT OF APPEALABILITY

The petition under the Hague Convention was denied in an Order After Hearing entered November 10, 2010. (3 AA 650.) The order disposes of all causes of action in this proceeding. The order is substantially the same as a final judgment for purposes of an appeal. (See Code Civ. Proc., § 904.1, subd. (a)(1).)

The appealed order is also analogous to an order made under the Uniform Child Custody Jurisdiction Enforcement Act (the "UCCJEA"). (Fam. Code, § 3400 et seq.) "An appeal may be taken from a final order in a proceeding under [the UCCJEA] in accordance with expedited appellate procedures in other civil cases." (Id., § 3454; Code Civ. Proc., § 904.1, subd. (a)(10) (appeal may be taken from order made appealable by the Family Code.)

STATEMENT OF FACTS

Lura[1] is an American citizen. (1 AA 196.) Maurizio is a citizen of Italy. (*Ibid.*) They met while Lura was traveling in Italy in 2002. (1 AA 45:2-28) They continued their relationship after Lura returned home to Los Angeles, California. (*Ibid.*) Six months later, Lura moved to Italy and the parties began living together. In February 2003, they married in Las Vegas, Nevada, and returned together to live in Italy. (*Ibid.*)

The parties have one child together, Leonardo Takado Rigamonti, who was born August 8, 2005, in Parma, Italy. (1 AA 46:1-3) Leo lived his entire life in Italy aside from vacations. (*Ibid.*) The parties started to experience marital problems in early 2010, but neither party filed any legal action in Italy to end the marriage. (*Id.*, p. 46:4-5) On February 16, 2010, Lura took Leo to Los Angeles without Maurizio's knowledge or consent. (*Id.*, p. 46:6-9.) Maurizio learned of their departure after the fact, in an email from Lura which stated that she needed a break, saying that she would return to Italy with Leo on March 3, 2010. (*Ibid.*; 1 AA 455-457 [email exchange].)

Instead of returning Leo to Italy, Lura filed a petition for legal separation in the Los Angeles Superior Court on March 2, 2010, asking for custody of Leo with monitored visitation to Maurizio. (Related Appeal[2], AA 1-2.) On March 4, 2010, Lura filed a request for protective order

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As is customary, Appellant will refer to the parties by their first names.

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Citations are made to the record in the related appeal (B229288) involving Lura's action for legal separation. A motion for judicial notice is pending.

against Maurizio under the Domestic Violence Prevention Act. (Related Appeal, AA 8-44.) She requested permission to take Leo to psychotherapy. (*Id.*, p. 11.) She stated that she was concerned that Maurizio would take Leo back to Italy, so she requested an order that Maurizio have monitored visitation, not to travel with Leo, to post a $10,000 bond, and surrender his passport. (*Id.,* at pp. 13-18.) In Lura's application for a restraining order, she declared that Maurizio "consented to Leo being in California with me." (*Id.,* at pp. 21:4-5.)

A hearing was held on the restraining order application on March 4, 2010, after one day's notice to Maurizio. Maurizio appeared through an attorney to contest personal jurisdiction. (Related Appeal, RT 1:21-25.) Lura's attorney told the court that Lura has no intention of returning to Italy, explaining:

> Her family is here. Her mom and dad are here and she intends to stay here. This is the only family she has. Other than the husband, respondent, she has no family in Italy. And she is seeking – I don't want to call it asylum, but she's seeking the safety net which is afforded here through her family. [¶] [T]his is a woman who has been physically and emotionally abused for a long, long time. She had to escape Italy any way she could, and she did it under the guise of coming here to visit her parents.

(*Id.,* at p. 4:17-27; 5:27-6:2.)

The court issued a temporary restraining order based on Lura's request. (*Id.,* at pp. 46-57.)

On March 25, 2010, Maurizio filed a petition under the Convention for Leo's return to Italy (1 AA 1.) By the time the court held a hearing on the petition, Lura admitted that Italy is the habitual residence of Leo, and that she wrongfully removed Leo from Italy in violation of Maurizio's

custodial rights. (2 AA 437.) The only defense Lura raised to the return of Leo under the Convention was the grave risk exception. (*Ibid.*) In support of her claim, Lura alleged she had to "escape" Italy because Leo "was repeatedly sexually abused by [Maurizio]." (1 AA 195:2-5.) Lura also alleged that Leo was exposed to domestic violence perpetrated against her by Maurizio. (*Id.*, at p. 201:4-5.)

An investigation into the child sex abuse allegations was conducted by the Department of Children and Family Services (DCFS. (2 AA 464-480.) DCFS determined that the allegations of child sex abuse were "unfounded." (*Id.*, at p. 472.) When interviewed by a DCFS investigator, Leo "denied witnessing father hitting mother." (*Id.*, at pp. 465-466.) Leo also denied being hit by anyone. (*Id.*, at p. 466.)

DCFS also interviewed one of the monitors who had supervised some of the visits between Leo and Maurizio. The monitor stated that he had "not seen anything of concern" in the interaction between Leo and Maurizio during the monitored visits. (*Id.*, t p. 470.) The monitor noted: "It's unfortunate that the boy is caught in the middle." (*Ibid.*) The monitors who observed the visitation between Leo and Maurizio testified (2 RT 322-359) and their reports were admitted into evidence (2 AA 438-453). One of the monitors testified that Leo showed no fear of Maurizio during the visits. (2 RT 325:2-9.)

The trial court found that Lura failed to prove her allegations that Maurizio sexually abused Leo. (4 RT 968:1-16 & 984:8-12.) The trial court also found that Lura failed to prove her allegations that Maurizio physically abused her. (4 RT 984:19-21.) The court stated that there was "[n]o real

violence. Nobody hit anybody. Somebody hit a wall, perhaps, but nobody hit anybody." (*Ibid.*) The court did find that "[Maurizio] perpetrated domestic abuse against [Lura]," referring to emotional abuse. (3 AA 543:6-7; 4 RT 983:17-28.)

The trial court found that Leo "suffers from symptoms of post-traumatic stress disorder" (3 AA 543:8-9), but the court could not tell the cause of those symptoms. (4 RT 984:12-13 & 983:17-28.) The court noted: "There is a lot going on in this family, including a mother with an alcohol abuse problem that she's admitted to. We have certainly emotional and psychological abuse by [Maurizio] of [Lura]. Whether it was the extent she described, I cannot say." (4 RT 983:17-28.) The evidence showed that there might be more sources for Leo's symptoms than simply Maurizio's conduct. (4 RT 966:27-967:4.) For example, the child custody evaluator appointed by the court expressed concern that Lura could be trying to alienate Leo against Maurizio. (1 RT 124:27-125:8 & 151:27-152:4; 2 RT 255:3-11.)

Lura reaffirmed that she would not return to Italy, and argued that any order requiring her to return to Italy would violate her constitutional rights. (3 AA 554:24-555:3.) Lura stated that she was concerned about being arrested or prosecuted in Italy for having removed Leo from Italy. (*Id.*, at p. 559:13-15.) Lura said: "I do not believe that the Italian courts will treat me fairly. . . ." (*Id.*, at p. 559:15-17.) She felt that she would be "ostracized and isolated" if she went back to Italy. (*Id.*, at p. 558:11-12.)

The court did not want to return Leo to Italy in Maurizio's custody because of the "great deal of fear and anxiety" Leo has about his father. (4

RT 967:11-18.) The court stated: "It's plain to me if the child were able to go back to Italy in the custody of his mother and remain there for some period of time, until the court there had a chance to review all of this, that the risk of harm defense would fail." (4 RT 968: 21-25.)

To facilitate Leo's return to Italy with Lura (assuming she was willing to go back to Italy), the court stated that it would grant the petition contingent on Maurizio satisfying several conditions. (3 AA 542-544.) First, he had to prove that Lura could return to Italy without the "threat of being arrested or prosecuted" for her act of removing of Leo from Italy. (*Id.,* at p. 543:18-20.) Second, Maurizio also had to obtain a restraining order against himself in Italy protecting Lura pending further custody proceedings in Italy. (*Id.,* at p. 543:21-22.) Third, Maurizio had to obtain an order from the court in Italy granting Lura sole physical and legal custody of Leo, with Maurizio having monitored visitation, pending further custody proceedings in Italy. (*Id.,* at p. 543:23-26.) Fourth, Maurizio had to obtain an order or provide an undertaking to pay for housing for Lura and Leo in Parma, Italy, the living expenses of Lura and Leo, and weekly therapy for Leo, pending further custody proceedings in Italy. (*Id.,* at p. 543:27-544:3.) The court scheduled a further hearing for Maurizio to prove that the conditions had been satisfied. (*Id.,* at p. 544:7-9.)

On October 29, 2010, seven months after the petition was filed, the court held a hearing as to whether the conditions had been satisfied. (3 AA 650.) Maurizio presented evidence that he had informed the prosecutor in Italy that he did not want Lura to be prosecuted for abducting Leo. (3 AA 621-622.) He produced an English translation of a document entitled "Minutes of Lawsuit Remission" from the Public Prosecutor's Office of the

Court of Parma, indicating that on August 25, 2010, Maurizio withdrew his report of the abduction which he had made on March 8, 2010. (*Ibid.*) Maurizio also showed the order he obtained from the court in Parma, Italy granting temporary physical custody of Leo to Lura, with monitored visitation to Maurizio, and requiring Maurizio to temporarily pay for the living expenses of Lura and Leo plus psychotherapy sessions for Leo. (3 AA 627-632.) The Parma court also issued the restraining order, indicating that it added a stay-away order which had not been requested by the Los Angeles Superior Court as the Parma court believed that a stay-away order would "better protect the minor's interests" based on the allegations being made by Lura. (*Id.*, at p. 628.) The Parma court set spousal support at 2,000 Euros per month, and added a requirement that Maurizio pay 50% of Leo's uninsured healthcare costs and school expenses. (*Ibid.*) The Parma court noted that Lura had objected to the issuance of these orders due to the pending action in California. (*Id.*, at p. 627.) The Parma court reserved jurisdiction to make additional temporary orders to protect Leo "to fulfill the terms imposed by the foreign Legal Authority for the minor's contingent return to Italy." (*Ibid.*)

Lura filed a declaration of her lawyer in Italy stating that the Minutes of Lawsuit Remission was not sufficient to dismiss the criminal charges against Lura. (3 RT 562:21-27.) In response, Maurizio testified: "I did what your honor asked. That's what we do in Italy. I can't do more than that. It is what we do. I drop the charge." (4 RT 1001:23-25.) The court said: "Okay. But I really don't know that. If I were Ms. Calder, I wouldn't get on a plane to Rome based on this." (*Id.*, at p.1001:26-28.)

Maurizio's attorney requested a continuance so additional evidence that the criminal charges had been dropped could be presented to the court. (*Id.*, at p. 1002:22-27.) The court denied the request, stating:

> [T]he reason I set these deadlines the way I did was to give Mr. Rigamonti ample time to obtain the orders that I thought would be necessary in order to assure the safety of Ms. Calder if she returned to Italy. Not only safety in terms of him, but safety from criminal prosecution. But I didn't set it out longer because the longer this child is here, the harder it is for him to be moved or uprooted and sent back to Italy even in the company of his mother.

(*Id.*, at p. 1003-4-12.)

In its final remarks, the court observed: "[The custody case is] either going to proceed here or in Italy. If it proceeds here, someone wants a child custody evaluation. If it proceeds here, Mr. Rigamonti you'll have a chance to participate in these proceedings. Just as Ms. Calder would have an opportunity to participate in Italy." (4 RT 1008:10-14.) "We are going to keep the jurisdiction here in California. And there is an open case, as you know, Mr. Rigamonti. And that case you can seek a custody visitation order." (*Id.*, at p. 1010:20-23.)

The Court immediately granted sole physical and legal custody to Lura in California, with reasonable visitation to Maurizio "at the discretion of [Lura]." (4 RT 1014:23-25.) Lura withdrew her request for a restraining order under the Domestic Violence Protection Act. (Related Appeal, AA 160.) The court made a non-CLETS[3] restraining order that Maurizio is to stay at least 50 yards away from Lura if he returns to the United States. (*Ibid.*; 4 RT 1016:1-5.)

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[3] California Law Enforcement Telecommunications System.

During the pendency of this appeal, Maurizio made an application for visitation with Leo in the legal separation case, since Lura refused to permit Maurizio to speak to Leo since the Hague Convention petition was denied. (Related Appeal, AA 166-174.) The court denied any visitation to Maurizio. (Related Appeal, RT 148:18-20.) Maurizio has not been able to see or speak to Leo since August 7, 2010. (Related Appeal, AA 174.)

DISCUSSION

This case is significant because the right of a five-year-old boy to live in his home country and have a relationship with his father hangs in the balance. If that were not enough, the case has implications far beyond that of this particular family. If we do not enforce our treaty obligations under the Convention by promptly returning children who have been abducted to our country, we cannot expect other countries to return our children.

I.

STANDARD OF REVIEW

In an action under the Hague Convention, a lower court's legal conclusions are reviewed de novo. (*Escobar v. Flores* (2010) 183 Cal.App.4th 737, 748 [107 Cal.Rptr.3d 596].) Deference is given to the trial court's factual findings, but there is no consensus whether those findings are reviewed for clear error[4] (the federal standard) or substantial evidence (the state standard). (*Ibid.*, citing *In re Marriage of Witherspoon* (2007) 155 Cal.App.4th 963, 971 [66 Cal.Rptr.3d 586] (clear error) and *In*

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[4] Under the federal standard, " ' "[a] finding is 'clearly erroneous' [only] when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." ' [Citation.]" (*Escobar v. Flores, supra*.)

re Marriage of Forrest & Eaddy (2006) 144 Cal.App.4th 1202, 1213 [51 Cal.Rptr.3d 172] (substantial evidence).)

Although the trial court's factual findings are entitled to deference, the proper application of the Convention to those facts is a legal conclusion which is reviewed de novo, as with any other issue which presents a mixed question of fact and law. (*Blondin v. Dubois* (2nd Cir. 2001) 238 F.3d 153, 158 (*Blondin III*); *In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at p. 1211.) Specifically, de novo review applies to a trial court's determination that the return of child would pose a grave risk of harm. (*In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at p. 1211; *Cuellar v. Joyce* (9th Cir. 2010) 596 F.3d 505, 508.)

Accordingly, deference is to be given to the factual findings made by the trial court in this case, but the court's legal conclusion that the return of Leo would pose a grave risk of harm is reviewed de novo.

II.

THE HAGUE CONVENTION

The Hague Convention is an international treaty implemented by the United States through the enactment of the International Child Abduction Remedies Act ("ICARA") (42 U.S.C. § 11601 et seq). Italy is a signatory to the Convention. (*US v. Ventre* (9th Cir. 2003) 338 F.3d 1047, 1049.)

"The Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes. The Convention seeks 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State,' and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in

the other Contracting States.' [Citation.]" (*Abbott v. Abbott* (2010) 560 U.S. __, __, [130 S.Ct. 1983, 1989].)

Congress made the following findings when adopting the Convention:

> (1) The international abduction or wrongful retention of children is harmful to their well-being.
> (2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
> (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.
> (4) [ ] Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(42 U.S.C. § 11601, subd. (a).)

"The Convention and [Title 42, Chapter 121 of the United States Code] empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims." (42 U.S.C. § 11601, subd. (b)(4).) As the United States Supreme Court recently stated in *Abbott v. Abbott, supra:*

> Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. This judicial neutrality is presumed from the mandate of the Convention, which affirms that the contracting states are '[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody.' Convention Preamble, Treaty Doc., at 7. International law

> serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.

(*Abbott v. Abbott, supra,* 130 S.Ct. at p. 1996.)

"The Convention rests on the principle that a child's country of 'habitual residence' is best placed to decide upon questions of custody and access. [Citation.]" (*Croll v. Croll* (2nd Cir.2000) 229 F.3d 133, 137, fn. omitted.) "A fundamental purpose of the Hague Convention is to protect children from wrongful international removals or retentions by persons bent on obtaining their physical and/or legal custody. [Citation.]" (*Wipranik v. Superior Court (Wipranik)* (1998) 63 Cal.App.4th 315, 321 [73 Cal.Rptr.2d 734].)

The goal of the Convention is "to deter a parent from fleeing to another jurisdiction in search of a more favorable decision. [Citations.]" (*In re Guardianship of Ariana K.* (2004) 120 Cal.App.4th 690, 705 [15 Cal.Rptr.3d 817].) "The Convention seeks to deter those who would undertake such abductions by eliminating their primary motivation for doing so. Since the goal of the abductor generally is 'to obtain a right of custody from the authorities of the country to which the child has been taken,' [citation] the signatories to the Convention have agreed to 'deprive his actions of any practical or juridical consequences.' [Citation.] (*Mozes v. Mozes* (9th Cir. 2001) 239 F. 3d 1067, 1070.) "This policy of deterrence gives way to concern for the welfare of the child only in extreme cases." (*Cuellar v. Joyce, supra,* 596 F. 3d at p. 508.)

"The Convention's central operating feature is the return remedy. When a child under the age of 16 has been wrongfully removed or retained,

the country to which the child has been brought must 'order the return of the child forthwith,' unless certain exceptions apply." (*Abbott v. Abbott*, *supra*, 130 S.Ct. at p. 1989.) "If the court determines the child has been wrongfully removed or retained, the court must order the child's return subject to some narrowly construed exceptions, including when the return of the child would expose the child to a grave risk of physical or emotional harm, or otherwise place the child in an intolerable situation. [Citations.]" (*Bardales v. Duarte* (2010) 181 Cal.App.4th 1262, 1270 [104 Cal.Rptr.3d 899]; 42 U.S.C. § 11601, subd. (a)(4).)

III.

A PRIMA FACIE CASE WAS MADE FOR LEO'S RETURN UNDER THE CONVENTION

The petitioner in an action for the return of a child under the Convention "shall establish by a preponderance of the evidence . . . that the child has been wrongfully removed or retained within the meaning of the Convention." (42 U.S.C. § 11603, subd. (e)(1)(A).) "The removal or the retention of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." (Convention, art. 3.) "The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years." (*Id.*, art. 4.) The child shall be

returned "forthwith" if an action for the return of the child is commenced within one year of the wrongful removal or retention. (*Id.*, art. 12.)

Lura admitted that Italy is the country of habitual residence of Leo and that she wrongfully removed Leo from Italy in violation of Maurizio's rights of custody. Leo is under the age of 16, and both the United States and Italy are signatories to the Convention. The petition was filed one month after the wrongful removal occurred. Therefore, Maurizio met his burden of proof under the Convention for the immediate return of Leo to Italy. Under these facts, the trial court was mandated by the treaty obligations of the United States under the Convention to order the immediate return of Leo to Italy, unless Laura proved by clear and convincing evidence the facts necessary to establish the grave risk exception to the Convention. (See *Bardales v. Duarte, supra,* 181 Cal.App.4th at p. 1270; 42 U.S.C. § 11601, subd. (a)(4).)

IV.

LURA FAILED TO MEET HER BURDEN OF ESTABLISHING THE GRAVE RISK EXCEPTION

A respondent who opposes the return of the child has the burden of establishing "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies." (42 U.S.C. § 11603, subd. (e)(2)(A); *In re Marriage of Witherspoon, supra,* 155 Cal.App.4th at p. 974.) Article 13b of the Convention relieves a country from its obligation to return the child if the respondent establishes that "there is a grave risk that his or her return would expose the child to

physical or psychological harm or otherwise place the child in an intolerable situation." (Convention, art. 13b.) Article 20 allows a country to refuse the return of the child if returning the child "would not be permitted by the fundamental principles of [that state] relating to the protection of human rights and fundamental freedoms." (*Id.*, art. 20.)

The trial court denied the petition for the return of Leo under the Article 13b grave risk exception in the Convention.[5] For the grave risk exception to apply, Lura was required to prove by clear and convincing evidence that there is "a grave risk that [Leo's] return would expose [him] to physical or psychological harm or otherwise place [him] in an intolerable situation." (See Convention, art. 13b.)

A. The Grave Risk Exception is Narrowly Construed in Favor of Returning the Child

The grave risk exception is narrowly drawn to avoid frustrating the purpose of the Convention, which is to assure the prompt return of abducted children to their place of habitual residence. (*In re Marriage of Witherspoon, supra*, 155 Cal.App.4th at p. 974; *Asvesta v. Petroutsas* (9th Cir. 2009) 580 F.3d 1000, 1004-1005.) Exceptions to the Convention must be narrowly interpreted "lest they swallow the rule of return." (*Asvesta v. Petroutsas, supra*, 580 F.3d at p. 1004.)

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5 The Article 20 exception is not applicable here, so it will not be discussed.

"In keeping with the strong presumption that the child subject to proceedings under the Convention should be returned to her country of habitual residence, the grave risk exception is narrow and does not give 'license for a court in the abducted-to country to speculate on where the child would be happiest.' [Citations.]" (*In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at p. 1211.) This view is supported by the Department of State in its report concerning the meaning of Convention:

> [In drafting Articles 13 and 20], it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the exceptions and allowing their use only in clearly meritorious cases, and only when the person opposing return had met the burden of proof. Importantly, a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies.

(Department of State: Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10494, 10509 (Mar. 26, 1986)[6].)

The fact that courts have discretion to order a child's return even in cases where the return would pose a grave risk to the child (*id.*), demonstrates an intention for children to be returned under the Convention except in the most extreme cases. Therefore, in making a de novo determination whether the grave risk exception should be applied here, this Court should narrowly construe the grave risk exception in favor of finding

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The Department of State acts as the Central Authority for the United States under the Convention. (42 U.S.C. § 11606.) The meaning attributed to treaty provisions by agencies charged with their enforcement is entitled to great weight. (*Sumitomo Shoji Am., Inc. v. Avagliano* (1982) 457 U.S. 176, 184-85 [102 S.Ct. 2374].)

that Leo should be returned to Italy immediately for a custody determination in that country.

B. Grave Risk Falls into Two Categories

A grave risk of harm can exist in two situations: First, when the return of the child puts the child in imminent danger prior to the resolution of the custody dispute, such as returning the child to a zone of war, famine, or disease. Second, when the return of the child will subject the child to serious abuse or neglect and the country of habitual residence, for whatever reason, is incapable or unwilling to give the child adequate protection prior to making a custody determination. (*Friedrich v. Friedrich* (6th Cir. 1996) 78 F.3d 1060, 1069.) "Absent extreme circumstances in the country of habitual residence (such as war or famine), the grave risk of harm exception is established only if there is clear and convincing evidence that the child would suffer 'serious abuse' as a result of being returned. [Citations.]" (*In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at p. 1211.)

Here, Lura is making a claim on both bases. She alleges that Leo would be subjected to abuse by Maurizio if Leo were returned to Italy. Lura also alleges that she would be treated unfairly and ostracized if she returned to Italy, so she has decided not to return there, which would result in further harm to Leo because she would be absent from him. (3 AA 559:15-17; 558:11-12.)

As to the claim that conditions in Italy pose a grave risk to Leo because Lura could be prosecuted there, the valid exercise of prosecutorial authority by a country against a parent who abducted a child cannot form the basis of a "grave risk" to the child under the Convention. There is no

evidence to suggest that Italy would treat her unfairly. Nothing about Italy poses a grave risk of harm to Leo, or to Lura for that matter. For conditions in Italy to qualify as a grave risk under the Convention, it would have to be an active war zone, disease-ridden, or in a state of famine. (See, e.g., *Silverman v. Silverman* (8th Cir. 2003) 338 F.3d 886, 900-901 [Israel not a war zone for purposes of grave risk exception despite evidence of regional violence and suicide bombers].) Lura's claim that she will not be treated fairly in Italy is unfounded. Her claim that she will ostracized or isolated by all Italians, even if true, is not sufficient for the court to deny the return of Leo there pursuant to the Convention.

The only "risk" to Leo would occur if Lura were incarcerated. The court had to speculate that Lura would be convicted and incarcerated for abduction. Otherwise, there would be no risk of detachment between herself and Leo in Italy. Speculation is not clear and convincing evidence.

Lura simply perceives that California is a friendlier forum to her than Italy, and is trying to get advantage over Maurizio by having custody litigated 6,000 miles away. This is not a valid defense under the Convention. As the court explained in *Cuellar v. Joyce, supra,* in dispensing with a similar argument:

> It's unsurprising that [the respondent] thinks he'll get a better shake in the courts of his home country; parents who abduct their children across international boundaries are generally driven by the same hope. But the animating idea behind the Hague Convention is to eliminate 'any tactical advantages gained by absconding with a child.' *Holder v. Holder*, 392 F.3d 1009, 1013 (9th Cir. 2004). The time to take such considerations into account is before undertaking the volitional acts that lead to conception. Once the child is born,

> the remote parent must accept the country where the child is habitually resident and its legal system as given.

(*Cuellar v. Joyce, supra,* 596 F.3d at p. 510.)

The other category of risk – abuse by a parent – was not established either. Before discussing the evidence presented in this case concerning grave risk, examples from case law will be used to illustrate when a risk is truly "grave" for purposes of the Convention. The other factors a court must consider in making a risk assessment will also be discussed.

C. The Degree of Risk Required is a "Grave" Risk

"The risk must be 'grave, not merely serious,' [citation]. . . ."

(*Gaudin v. Remis* (9th Cir. 2005) 415 F.3d 1028, 1037.)

> Not any harm will do nor may the level of risk of harm be low. The risk must be 'grave,' and when determining whether a grave risk of harm exists, courts must be attentive to the purposes of the Convention. See Hague Convention, art. 1. For example, the harm must be 'something greater than would normally be expected on taking a child away from one parent and passing him to another'; otherwise, the goals of the Convention could be easily circumvented. [Citations.] Courts are not to engage in a custody determination, so '[i]t is not relevant . . . who is the better parent in the long run, or whether [the absconding parent] had good reason to leave her home ... and terminate her marriage.' [Citations.]

(*Walsh v. Walsh* (1st Cir. 2000) 221 F.3d 204, 218-219.)

1. Examples of "Grave Risk"

Although it is difficult to characterize abuse in terms of degree, "there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect." (*Simcox v. Simcox* (6th Cir. 2007) 511 F.3d 594, 607-608.) Sexual abuse of the child by the parent who is seeking the child's return is a clear example of grave risk. (*In*

re Marriage of Witherspoon, supra, 155 Cal.App.4th at p. 974.) The type of abuse which typically qualifies as "grave" would be repeated acts of violence directed against the child who is the subject of the Hague petition. (See *Simcox v. Simcox, supra,* 511 F.3d at p. 608.)

The facts in the following cases were sufficient to support a finding of grave risk:

- "The nature of abuse . . . was both physical (repeated beatings, hair pulling, ear pulling, and belt-whipping) and psychological ([the father's] profane outbursts and abuse of the children's mother in their presence). Importantly, these were not isolated or sporadic incidents." (*Simcox v. Simcox, supra,* 511 F.3d at p. 608.)
- The father repeatedly beat the mother over a seven-year period, during and after her pregnancy with his children. The father also beat the children and threatened their lives. The mother and children spent eight or nine months in shelters because of the abuse. The father twisted a piece of electrical cord around the mother's neck, threatening to kill both the mother and one of their children who she was holding at the time. The mother sought medical attention for her injuries on at least two occasions. (*Blondin v. Dubois* (2nd Cir. 1999) 189 F.3d 240, 243 (*Blondin II*).)[7]
- The husband "beat his wife severely and repeatedly in [the children's] presence," and also threatened to kill them. (*Van De Sande v. Van De Sande* (7th Cir. 2005) 431 F.3d 567, 569.) The wife

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[7] As will be discussed, the trial court in this case found that the evidence here did not approach the conduct in *Blondin*. (4 RT 968:1-7.)

suffered "frequent and serious" beatings, including while she was seven months pregnant. The assaults on the wife occurred several times per week. Their son was not hit at all. The daughter was "spanked and hit repeatedly, but not injured." (*Id,* at p. 570.) The husband struck the daughter sharply in the side of the head. When the wife tried to stop the husband from hitting their daughter, he grabbed the wife by the throat and threw her out of the room. "[G]iven Davy's propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence, it would be irresponsible to think the risk to the children less than grave." (*Ibid.*)

- The father beat the children's mother in their presence over many years in "bloody and severe" assaults. The father hit his daughter and spit in her face. The assaults continued even after restraining orders were issued. The father broke into and ransacked the family residence twice in violation of restraining orders. (*Walsh v. Walsh, supra,* 221 F.3d at 210-211 & 219-220.)
- The father masturbated in front of the child and had the child masturbate him. (*Danaipour v. McLarey* (1st Cir. 2002) 286 F. 3d 1, 7 & 17.)

2. Cases Where "Grave Risk" Did Not Exist

"[T]here are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a '*grave* risk' or otherwise place the child in an '*intolerable* situation' under Article 13b." (*Simcox v. Simcox, supra,* 511 F.3d at p. 607 (emphasis in original).) An abusive situation is less likely to

be considered "grave" where the abuse involves "isolated or sporadic incidents." (See *Id.* at p. 608.) Abuse directed solely against a parent, rather than the child, is generally not enough to pose a grave risk to the child. (See, e.g., *Whallon v. Lynn* (1st Cir. 2000) 230 F.3d 450, 460.)

For example, the facts in the following cases were not sufficient to qualify as a grave risk:

- A husband's verbal abuse and an incident of shoving directed towards his wife, "while regrettable, was insufficient to establish a grave risk of harm to the child." (*Whallon v. Lynn, supra,* 230 F.3d at p. 460.) Those allegations, even if true, "are distinct from the 'clear and long history of spousal abuse' presented in *Walsh* [*v. Walsh, supra,* 221 F.3d at p. 220]. (*Whallon v. Lynn, supra,* 230 F.3d at p. 460.) There was no evidence of physical or psychological abuse of the child, nor any evidence that the husband would disregard court orders. (*Ibid.*)
- An allegation that the father had killed the mother was insufficient to establish a grave risk that the return of the children to their father in Mexico would expose them to harm despite outstanding criminal complaints against the father in Mexico, since there was no evidence that the father had ever abused the children. (*March v. Levine* (6th Cir. 2001) 249 F.3d 462, cert. denied, 534 U.S. 1080 (2002).)
- "[A]djustment problems that would attend the relocation of most children," do not meet the grave risk exception when there is no evidence of abuse against the child. (*Friedrich v. Friedrich, supra,* 78 F.3d at p. 1067 (emphasis removed).) A psychologist testified "that returning [the child] to Germany would be traumatic

and difficult for the child, who was currently happy and healthy in America with his mother." (*Ibid.*) The court remarked: "If we are to take the international obligations of American courts with any degree of seriousness, the exception to the Hague Convention for grave harm to the child requires far more than the evidence that [the mother] provides." (*Ibid.*)

- Evidence that the wife had been physically, sexually, and verbally abused by her husband was not sufficient to pose a grave risk to child when there was no evidence of abuse against the child. The wife testified that she was not allowed to leave the family home without her husband or father-in-law. She feared for her baby's safety. The court held: "The evidence is general and concerns the problems between [the wife], her husband and father-in-law. . . . The district court incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation." (*Nunez-Escudero v. Tice-Menley* (8th Cir. 1995) 58 F.3d 374, 376-377.)
- Two incidents of a mother striking two of her four children and a generally chaotic home environment did not establish a "sustained pattern of physical abuse" necessary for the grave risk exception to apply. (*McManus v. McManus* (D. Mass. 2005) 354 F.Supp.2d 62, 69-70).
- A father's verbal abuse of his children did not qualify as a grave risk when there was "no credible evidence that [the father] has ever physically harmed either of the two children." (*In re D.D.* (M. D. Fla. 2006) 440 F.Supp.2d 1283, 1299.)

3. A Grave Risk Does Not Exist if the Country of Habitual Residence Can Protect the Child Pending its Custody Determination, or Alternate Remedies Are Available to Reduce the Risk That Would Otherwise Be Posed by Returning the Child

In making the risk assessment, the inquiry is whether a grave risk of harm exists from the time the child is returned to his or her country of habitual residence until the time that country can make a custody determination. (*Gaudin v. Remis, supra,* (9th Cir. 2005) 415 F.3d at p. 1037; *Cuellar v. Joyce, supra,* (9th Cir. 2005) 596 F.3d at p. 510.) The question is not whether the child would be at risk of harm over the course of his or her childhood if returned. (*Gaudin v. Remis, supra*, 415 F.3d at p. 1037.) The Sixth Circuit Court of Appeals interpreted the grave risk exception in the same manner in *Simcox v. Simcox, supra*. In *Simcox*, the court highlighted the need for courts to limit the grave risk inquiry, lest they delve into matters of custody:

> [I]n considering whether a 'grave risk' exists and whether any undertakings can ameliorate it, a court should primarily focus on the time period between repatriation and the determination of custody by the courts in the child's homeland. . . . [A]n inquiry that focuses on too lengthy a period of time runs the risk of turning into a 'child's best interests' analysis, which is not the proper standard under the Convention. [Citations.]

(*Simcox v. Simcox, supra,* 511 F.3d at p. 607.)

Therefore, the following rule has been developed: Even in cases of serious abuse or neglect, a court may not deny a petition for the return of a child under the Convention unless it is shown that (1) the country of habitual residence cannot or will not adequately protect the child against the risk posed to the child, and (2) there are no alternative remedies or conditions which can be imposed to avoid or reduce the risk that would

otherwise exist by returning the child. (*In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at pp. 1211-1213, citing *Friedrich v. Friedrich, supra,* 78 F.3d. at p. 1069 and *Blondin III, supra,* 238 F.3d at p. 163, fn. 11.)

D. The Facts of this Case Do Not Amount to Clear and Convincing Evidence of Grave Risk

1. There is No Finding That Maurizio Abused Leo

Lura made the most awful allegations of child sexual abuse imaginable against Maurizio, as if she was trying to tailor her case to the appellate decisions in *Blondin* (189 F.3d 240) and *Danaipour* (286 F. 3d 1). The trial court made the following findings regarding those claims:

> The conduct that has been alleged in this case does not come near the conduct that was alleged in either then *Blondin* or *Danaipour* case. The conduct that is alleged here even if I were to believe all of what Ms. Calder said, still falls short of the kind of systematic abuse that the children in *Blondin* suffered. And with respect to sexual abuse, I do not have a finding by our [Evidence Code section] 730 evaluator that there was sexual abuse. We have a big question mark about that, and that has not been established by clear and convincing evidence at all. All that has been established by clear and convincing evidence is this child is suffering from a sufficient number of P.T.S.D. symptoms that we cannot return him to his father's custody at this time.

(4 RT 968:1-16; see also 4 RT 984:8-12 (sexual abuse was not shown by clear and convincing evidence.)

The conduct described in *Blondin* and *Danaipour* is exactly the type of evidence which is needed to support the grave risk exception. Since that conduct is not present here, it must be concluded that there is no grave risk to Leo.

2. The Finding of Emotional Abuse by Maurizio Against Lura is Not Sufficient to Constitute a Grave Risk to Leo

No court has held that emotional abuse against a parent, in the absence of violence against the child or against the parent in the presence of the child, can satisfy the grave risk exception. There are cases where abuse against a parent will suffice under the grave risk exception, but only when there were repeated acts of violence against the parent in the presence of the child. (See, e.g., *Simcox v. Simcox, supra*, 511 F.3d at p. 608; *Whallon v. Lynn* (1st Cir. 2000) 230 F.3d 450, 460.)

In this case, there was no evidence of violence between the parties. When asked by Maurizio's counsel whether the court was making a finding of abuse, the court responded: "No real violence. Nobody hit anybody. Somebody hit a wall, perhaps, but nobody hit anybody." (4 RT 984:19-21.) Since there was no evidence of violence by Maurizio against Lura in Leo's presence, the court was required to find that there was no grave risk to Leo.

3. Any Risk of Harm in Returning Leo to Italy Without Lura is Not a Grave Risk

The only risk to Leo that the court found was the potential psychological harm that could be caused to Leo if he were returned to Italy without Lura. The court found that Leo "has undergone, or suffered, or had experiences that have created in him a great deal of fear and anxiety about his father. And the court would not order this child returned to Italy in his father's custody." (4 RT 967:11-18.) The court found that the risk would be eliminated if Lura went back to Italy with Leo. (4 RT 967:19-26) The court stated: "It's plain to me if the child were able to go back to Italy in the custody of his mother and remain there for some period of time, until

the court there had a chance to review all of this, that the risk of harm defense would fail." (4 RT 968: 21-25.)

The court did not make a proper risk assessment under the grave risk exception. The evidence that Leo suffers from post-traumatic stress disorder is not sufficient to be a "grave risk" to Leo, especially when the court could not say that Maurizio is the cause of those symptoms. Furthermore, the court speculated that Lura would be convicted and incarcerated in Italy for her wrongful removal of Leo from Italy. Even if there were a real chance of charges being pursued against Lura, she cannot use her own wrongdoing as a defense to Leo's return. It is Lura's decision whether to return to Italy to litigate the issue of custody there. Lura cannot create a "grave risk" by refusing to return to Italy.

The court, in effect, found that Leo would be better off in California with Lura, than in Italy with Maurizio. This is not a custody case. The court made a serious error by effectively using a "best interests of the child" standard to determine this case. Each of these points is discussed below.

a. There is No Finding That Maurizio is the Cause of Leo's Post-Traumatic Stress Disorder Symptoms

"All that has been established by clear and convincing evidence is this child is suffering from a sufficient number of P.T.S.D. symptoms that we cannot return him to his father's custody at this time." (4 RT 968:12-16.) "But, again, we don't know what is behind the P.T.S.D. symptoms." (4 RT 984:12-13.) The court noted that the testimony of the child custody evaluator it had appointed to evaluate Leo was a "bit equivocal" as to the source of the post-traumatic stress disorder symptoms Leo was exhibiting.

(4 RT 966:24-26.) The court further stated that the evaluator, Terri Asanovich, M.F.T., "saw that there might be more sources for Leo's problems than simply the conduct of the Petitioner, although she did identify that as perhaps the main source." (4 RT 966:27-967:4.)

Petitioner's counsel asked if the court was making a finding of where the psychological harm is coming from in this case. (4 RT 983:17-18.) The court responded as follows:

> I can't make that finding based on the evidence I've got. There is a lot going on in this family, including a mother with an alcohol abuse problem that she's admitted to. We have certainly emotional and psychological abuse by the Petitioner of the Respondent. Whether it was to the extent she described, I cannot say. Both parties seem to be putting themselves in the best light here. But like Terri Asanovich, I have some question marks about what it is. But it's very plain this is a very vulnerable and damaged child.

(4 RT 983:19-28.)

Since there is no causal connection between Leo's symptoms and any abuse perpetrated by Maurizio, those symptoms are not relevant in assessing whether returning Leo to Italy would pose a grave risk of harm to Leo. A similar issue was involved in the case of *In re Marriage of Forrest & Eaddy, supra*. The court held that evidence of the child's self-mutilation and suicidal ideation were not sufficient to establish a grave risk of harm because there was no clear and convincing evidence linking the source of that behavior to the parent who was seeking the child's return. (*In re Marriage of Forrest & Eaddy, supra,* 144 Cal.App.4th at p. 1212.) The court explained:

> Although there was some evidence suggesting that Ashlee had engaged in self-mutilation and once contemplated suicide while she was living in Australia, . . . no evidence was

> presented to establish that any such conduct on Ashlee's part resulted from the fact that she was living in Australia rather than California or, put another way, that she would have refrained from engaging in similar conduct if she had been in her father's care.

(*Ibid.*)

The entire point of the grave risk exception in cases of abuse is to protect the child from being further victimized by an abusive parent who is seeking the child's return. (Department of State: Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10494, 10510 (Mar. 26, 1986).) For example, in *Blondin* there was a grave risk of harm to the children because of the abuse they suffered at the hand of their father, and the violence they witnessed against their mother, over many years in France. The evidence showed that returning the children to France would cause a recurrence of their post-traumatic stress disorder. In affirming the district court's denial of the Hague Convention petition under the grave risk exception, the Second District Court of Appeal noted:

> Our interpretation of Article 13(b) by no means implies that a court must refuse to send a child back to its home country in any case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm. Rather, we reach our conclusion on the basis of the specific facts presented in this case and, in particular, on the absence of testimony contradicting Dr. Solnit's conclusions.

(*Blondin III, supra,* 238 F.3d at p. 163, fn. 12.)

Here, there is no finding that Maurizio ever abused Leo. The court noted that the facts of this case "do not come near" those in *Blondin.* (4 RT 968:1-16.) The children's post-traumatic stress disorder in *Blondin* was relevant because they had been subjected to severe abuse over many years. While the court in this case found that Maurizio committed emotional abuse against Lura, there was no violence here and the court could not say

whether Leo's symptoms were caused by any events Leo witnessed in Italy at the hand of Maurizio.

It is equally likely that Leo is suffering these symptoms as a result of being separated from his father. As the United States Supreme Court recently stated in *Abbott v. Abbott, supra*:

> An abduction can have devastating consequences for a child. 'Some child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse.' [Citations.] A child abducted by one parent is separated from the second parent and the child's support system. Studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues. [Citation.] A child abducted at an early age can experience loss of community and stability, leading to loneliness, anger, and fear of abandonment. [Citation.] Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature. [Citation.]

(*Abbott v. Abbott, supra,* 130 S.Ct. at p. 1996.)

Leo's symptoms could very well have been caused by Lura's wrongful removal of him from Italy. In fact, there was evidence from the child custody evaluator that "there may be alienation occurring of the child to the father by either Lura or some of her family members, or at the very least, the case is being discussed with him." (Ex. A., Solution Focused Evaluation, Terri Asanovich, M.F.T. (July 26, 2010) 3:21-4:-6; 1 RT 124:27-125:8 & 151:27-152:4; 2 RT 255:3-11.)

If Lura is the cause of Leo's symptoms, she cannot be allowed to benefit by causing emotional upset to Leo, then using those symptoms as an excuse to litigate custody in California.

b. The Court Speculated That Lura Might Be Incarcerated in Italy

The court found that Lura could not return to Italy because she "faces criminal charges. She cannot return. So until the criminal charges have been withdrawn or dismissed, and that's proven to the satisfaction of this court, the child will not go back because Ms. Calder cannot go back." (4 RT 968:27-969:3.) "I need to see satisfactory evidence with respect to all of this, that is, the criminal charges are gone; Ms. Calder won't face any more criminal charges. She can't go back if she's under threat of being arrested or prosecuted." (4 RT 974:24-25.) "If I were Ms. Calder, I wouldn't get on a plane to Rome based on [the documentation provided by Maurizio that he had withdrawn the charges]." (*Id.*, at p.1001:26-28.)

The possibility that charges will be pursued against Lura in Italy in the future is not clear and convincing evidence of a grave risk of harm to Leo. There is no way of knowing whether Lura would be convicted. Nor can it be known if Lura would ever serve a day in custody. The trial court's concern, therefore, is based on multiple levels of speculation: (1) that Lura would be convicted on charges of abducting Leo from Italy; (2) that Lura would be remanded into custody on those charges; and (3) that the court in Italy would not make appropriate custody orders on Leo's behalf during any period Lura was incarcerated. There is no evidence that any of those events will occur.

Speculation cannot support a finding under the clear and convincing evidence standard. Proof is clear and convincing when it is "[c]lear, explicit, and unequivocal; [s]o clear as to leave no substantial doubt; or [s]ufficiently strong to demand the unhesitating assent of every mind.

[Citations]." (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th Ed. 2010) Burdens of Proof and of Producing Evidence, §47.4, p. 1076; *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 846 [52 Cal.Rptr.2d 831].)

The trial court erred in denying the return of Leo to Italy based on the mere possibility that Lura could someday by imprisoned for her act of removing Leo from Italy. The court applied the grave risk exception broadly to include any risk at all, when it was required to narrowly construe the exception and use it only in an extreme case where a grave risk existed.

c. The Risk That Lura Could Be Prosecuted in Italy is Not a Valid Consideration

Lura cannot block the return of Leo under the Convention simply because she might be held accountable for her actions in the country from which she wrongfully removed Leo. The possibility that a parent may be prosecuted for kidnapping is not a defense to the return of a child under the Convention. "[N]either the Convention nor the [International Parental Kidnapping Crime Act of 1993, 18 U.S.C. §1204, (IPKCA)] prohibits criminal prosecution of an individual once a child is returned pursuant to Hague proceedings. In fact, prosecution under the IPKCA furthers the goal of the IPKCA, to deter international kidnapping." (*U.S. v. Ventre* (9th Cir. 2003) 338 F.3d 1047, 1054, cert. denied 540 U.S. 1085.)

In *Ventre*, the mother, a U.S. citizen, and the father, an Italian citizen, had a custody dispute over their daughter after their relationship ended. When the father took the child to Italy in violation of a California custody order, the Italian court returned the child to California pursuant to the Convention. A federal grand jury indicted the father for kidnapping in

violation of the IPKCA. The father was convicted. He appealed for lack of jurisdiction, claiming that the Convention was the exclusive remedy for the return of an abducted child which foreclosed criminal prosecution under IPKCA. The Court of Appeal disagreed, holding that the Convention does not "preclude prosecution of the kidnapper." (*Ibid.*)

Just as prosecution for kidnaping furthers the goal of the IPKCA to deter international kidnapping, it would likewise further the goal of the Convention, which shares the same goal of deterrence. (See *In re Guardianship of Ariana K., supra,* 120 Cal.App.4th at p. 705.) Parents would not be deterred if they could avoid the return of a child under the Convention anytime there was a risk that they could be prosecuted for kidnapping. If this were the law, every kidnapper would have a built-in defense under the Convention. Parents could circumvent the Convention by admitting that their conduct was in violation of the criminal laws of the country from which they wrongfully removed the child. "No one can take advantage of his own wrong." (Civ. Code, § 3517.)

Maurizio has no control over whether Italian prosecutors decide to pursue criminal charges against Lura. The power to prosecute is vested solely in the state. Maurizio asked the authorities in Italy not to prosecute Lura, which was all he could do. The court made a prophetic remark when it imposed the condition: "Maybe he'll never get Leo back because the conditions can't be met by Petitioner." (4 RT 978:21-22.)

By declining to return Leo to Italy on the basis that Lura might be prosecuted there for abducting Leo, the trial court rewarded Lura for her conduct. This frustrates the purposes of the Convention. Instead of

fulfilling the mandate of the Convention to immediately return an abducted child, the trial court created its own exception to the Convention. A court cannot interpret a treaty in a way that alters its meaning. (*In re Guardianship of Ariana K., supra,* 120 Cal.App.4th at p. 706.) As the court warned in *Walsh v. Walsh, supra,* "a court's interpretation of a treaty will have consequences not only for the family immediately involved but also for the way in which other courts – both here and abroad – interpret the treaty. [Citations.]" (*Walsh v. Walsh, supra,* 221 F.3d at pp. 221-222.)

The trial court's interpretation of the grave risk exception in this case is so broad that it swallows the rule requiring the return of abducted children. It ignores the requirement to narrowly construe the grave risk exception. It contravenes the purposes of the Convention to deter international abductions and to ensure the prompt return of abducted children. It places the interests of a parent who wrongfully removed a child from his place of habitual residence above the interests of the child to be returned to that place.

d. The Court Violated Principles of International Comity by Imposing the Anti-Prosecution Condition

The return of a child cannot be made conditional upon a decision or other determination being made by the court of the country of habitual residence. (*Danaipour v. McLarey, supra,* 286 F. 3d at p. 22.) "When considering possible undertakings, American courts must be sensitive to the need for comity under the Convention between the courts of different nations." (*Ibid.*)

> Conditioning a return order on a foreign court's entry of an order . . . raises serious comity concerns. The Department of

> State has stated that it 'does not support conditioning the issuance of a return order on the acquisition of [an] order from a court in the requesting state,' presumably because such a practice would smack of coercion of the foreign court. [Citations.]

(*Ibid.*)

Here, the court believed that Lura should not be prosecuted in Italy, so it would not order Leo to be returned to Italy unless Maurizio proved that Lura would never be prosecuted there. The court overstepped its bounds by making Leo's return conditional on the government in Italy agreeing not to prosecute Lura.

e. Lura's Decision Not to Return to Italy Cannot Be Used to Bolster Her Grave Risk Argument

It is Lura's decision whether to return to Italy. She cannot use her refusal to return to Italy to bootstrap her argument that Leo would be subjected to a grave risk if he were returned to Italy without her. She is basically arguing that Leo needs to be protected in Italy but she won't go there with him, so the court has to deny the petition. This type of claim should not be heard.

f. Parental Attachment May Not Be Considered in Making a Grave Risk Assessment

The effect returning a child would have on the parent-child attachment "is a determination pertinent only to the merits of the underlying custody dispute which must be resolved not by a Hague court, but rather the courts of the child's habitual residence." (*Asvesta v. Petroutsas, supra,* 580 F.3d at p. 1020.) In *Asvesta,* a one-year-old child had been twice spirited

between the United States and Greece. Both parents filed petitions under the Convention for the return of the child. A conflict arose between the courts of both counties. The court in the United States held that the court in Greece erred when it refused to return the child to the United States on the bases that there was "a severe danger that [his] return to the USA to [sic] expose him to mental tribulation, since he will be deprived of his mother's presence, affection, love and care at the delicate age of 12 months, he will be deprived of the security and stability that he feels near his mother and his mental bond with her will be broken." (*Ibid*.)

The *Asvesta* court held that "the Greek court stepped out of its role as a Hague Convention tribunal by inquiring into the best interests of the child." (*Id.*, at p. 1020.) "[T]he Greek court's decision departed from the fundamental premises of the Hague Convention, both its underlying goal of returning children to their habitual residence and its spirit of mutual cooperation and trust among contracting nations." (*Id.*, at p. 1021.) The U.S. District Court noted that "allowing an exception to return in cases involving young children wrongfully removed or retained by their mothers would swallow the Convention's rule of return." (*Ibid.*) Similarly, the court held in *Friedrich v. Friedrich, supra,* that "a parent cannot 'be allowed to abduct a child and then – when brought to court – complain that the child has grown used to the surroundings to which [she was] abducted". (*Friedrich v. Friedrich, supra,* 78 F.3d at p. 1068.) "

Here, the court's decision not to return Leo to Italy without his mother appears to be little more than an assessment of the child's best interests. This is contrary to the Convention.

g. There is No Evidence That Italy is Unwilling or Unable to Protect Leo

Lura was required to show by clear and convincing evidence that Leo would be at grave risk of harm if he were returned to Italy before the court in Italy could enter an order for his protection. No such risk exists because the court in Italy has already acted. At the California court's insistence, the Parma court made an order granting Lura temporary physical custody of Leo in Italy with monitored visitation to Maurizio and issued a restraining order protecting Lura. These orders were in place at the time the California court denied the petition for Leo's return to Italy. Lura failed to show that the court in Italy was unwilling to make whatever further orders were necessary to protect Leo upon his arrival in Italy.

In fact, the Parma court went further than the conditions which the California court imposed. It issued a stay-away order even though that was not one of the conditions imposed by the California court. (3 AA 627-628.) The Parma court also reserved jurisdiction to make further orders necessary to protect Leo. (*Id.*, at p. 627.) The irony is that the court in Italy acted even in the face of Lura's attempt to block it from taking any action based on her objection to Italy's jurisdiction. (*Ibid.*) The California court imposed the orders expressly for the protection of Lura and Leo. By trying to stop the court in Italy from making the orders, Lura made it clear that she is more concerned about obtaining custody jurisdiction in California, by any means possible, than about any risk posed to Leo.

Likewise, Lura's actions reveal that she used the domestic violence allegations as nothing more than a tactic to keep Leo here and to bias the court against Maurizio. Immediately after the court granted her custody of

Leo in California, Lura withdrew the restraining order application and consented to a non-CLETS order. (4 RT 1016:1-5; Related Appeal, AA 160.) If Lura were truly concerned about her safety, it is doubtful she would not have agreed to a non-CLETS stay away order.[8]

Adequate protections are in place for Leo's safe return to Italy. There is no grave risk of harm to Leo. Lura would have sole physical custody and Maurizio's contact with Leo would be monitored. Lura would have the right to petition the court in Italy for permission to relocate Leo to California, as she should have done in the first place rather than wrongfully removing him. Custody decisions are to be made in the country of habitual residence, not by a court ruling on a petition under the Convention.

Under the facts of this case, it cannot be said that Leo's return to Italy poses a grave risk to him because orders are in place to protect him from the time he returns to Italy until the time the court in Italy can make a final custody determination.

E. Leo Should Be Returned to Italy Unconditionally

As the court noted in *Simcox v. Simcox*, *supra*, the imposition of conditions on the return of a child which do not further the purposes of the Convention are questionable, "particularly when they address in great detail issues of custody, visitation, and maintenance." (*Simcox v. Simcox, supra*, 511 F.3d at p. 606.) The court in *Simcox* classified abusive situations into

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A non-CLETS order is disfavored because it is not registered with the Department of Justice in the Domestic Violence Restraining Order System, which facilitates statewide enforcement. (See Fam. Code, § 6380 et seq.)

three broad categories and explained how conditions should, or should not be, imposed in each case.

> First, there are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a 'grave risk' or otherwise place the child in an 'intolerable situation' under Article 13b. In these cases, undertakings designed to protect the child are largely irrelevant; since the Article 13b threshold has not been met, the court has no discretion to refuse to order return, with or without undertakings. [9]
>
> Second, at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect. [Citation.] In these cases, undertakings will likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign court's orders. [ ]
>
> Third, there are those cases that fall somewhere in the middle, where the abuse is substantially more than minor, but is less obviously intolerable. Whether, in these cases, the return of the child would subject it to a 'grave risk' of harm or otherwise place it in an 'intolerable situation' is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.

(*Simcox v. Simcox, supra,* 511 F.3d at pp. 608-609.)

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9 We do not mean to suggest, however, that a court is powerless to deal with ordinary logistical considerations that frequently accompany the return of any child, such as deciding which parent will pay for the child's return airfare. [ ]

This case falls into the first category. The court found only relatively minor abuse between Lura and Maurizio. The evidence here does not rise to a grave risk, so the trial court had no discretion to refuse the return of Leo to Italy, with or without conditions.

F. Leo Should Be Returned to Italy Forthwith

The child shall be returned "forthwith" if an action for the return of the child is commenced under the Convention within one year of the wrongful removal or retention. (Convention, art. 12.) Maurizio filed his petition within one month of the wrongful removal (1 AA 1), so this Court should order the return of Leo forthwith to Italy. It has already been more than one year since Leo was taken from Italy. The longer the delay, the more harm to Leo.

V.

THE ORDER DENYING THE PETITION SHOULD BE REVERSED WITH DIRECTIONS

This Court should reverse the trial court's denial of the petition under the Convention and direct the trial court to grant the petition and order the return of Leo to Italy forthwith without conditions. Reversal with directions is appropriate because this Court is making a de novo review whether the evidence supports the grave risk exception. There is no need for further evidentiary hearings in the trial court, since this Court can determine the ultimate rights of the parties from the record. (See *Paterno v. State of Calif.* (1999) 74 Cal.App.4th 68, 76 [87 CR2d 754].) This procedure is especially appropriate because this case involves a minor child. (See *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060, fn. 4 [43 Cal.Rptr.2d 445, 455].)

VI.

CONCLUSION

The trial court's factual findings do not support its legal conclusion. There is no clear and convincing evidence that the return of Leo to Italy would pose a grave risk to Leo. The court acted in excess of its jurisdiction in denying the petition for his return. This Court should reverse with directions to grant the petition and order Leo's return to Italy forthwith without conditions.

STATEMENT AS TO LENGTH OF BRIEF

This brief contains 13,524 words according to the program used to create this document.

Dated: March 10, 2011

Respectfully submitted,

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