

Hague Convention Cases Involving Allegations of Domestic Violence: Testimony of Professor Jeffrey L. Edleson, U.S. Department of State, March 4, 2011

by Jeffrey L. Edleson, Ph.D.*

Author's Note: Transnational relationships have become more common in the past 30 years, and negotiating the dissolution of these relationships is increasingly complicated. The Convention on the Civil Aspects of International Child Abduction was finalized at The Hague in 1980 and was adopted by the United States in 1988. Child abduction, under the auspices of the Hague Convention, was defined as the wrongful removal of a child in violation of the custody rights of another parent or retention of a child in a country other than that deemed to be the child's "habitual residence." The Convention requires that adopting nations respect the rights of custody and visitation between parents, and therefore, requires the "prompt return" of any child who was taken to another country without permission of both custodial parents. Parents who take their children out of the country without the permission of the other custodial parent can be taken to civil court to have the children removed and returned to the child's habitual residence.

I am Jeffrey Edleson, a professor at the University of Minnesota. I was recently appointed by US Attorney General Eric Holder to the National Advisory Committee on Violence Against Women and have served on several National Academy of Sciences panels and committees focused on violence.

My colleagues and I have recently completed a four year National Institute of Justice funded study of participants in Hague Convention cases heard in US courts. We interviewed battered mothers who had been faced with court actions in the US under the Hague

Convention. We also interviewed their attorneys, and the attorneys representing the fathers in these cases; we also examined published judicial decisions in Hague Convention cases involving allegations of domestic violence. Our 400-page final report to NIJ is available on our project website (<http://www.haguedv.org>) and I am submitting the Executive Summary of that study; an article we have written for *The Judges' Newsletter* of the Hague Conference on Private International Law also summarizes these findings.

Despite What Some Believe, There Is Domestic Violence Being Committed in Families Engaged in Hague Litigation

On February 2, 2010, a reporter from *Asahi Shimbun*, a national newspaper in Japan, asked US Assistant Secretary of State Kurt M. Campbell about allegations of domestic violence in Japan-US Hague Convention cases. I quote Mr. Campbell's response from his interview published on *America.gov*:

Assistant Secretary Campbell: "I have to say, I've heard this on a number of occasions from Japanese friends, and I think that there is the view that this is a very widespread phenomenon. ... We can find almost no cases of alleged or actual substantiated claims of violence and where those apply, we of course, understand and support that. ... I think that this allegation is used very loosely and often-times inappropriately without any supporting criteria whatsoever. ... I would say that there is a substantial misconception on this issue in Japan that the cases that we are dealing with are primarily those of domestic abuse. Our judgment would be that that is not the case."

Over 30 years of research on domestic and international abductions reveals a situation quite contrary to the Assistant Secretary's statement. Beginning with Agopian's 1981 book

on family abductions, family violence has been front and center. Agopian devoted an entire chapter in his book to family violence. Grief and Hegar's 1993 study of 398 parents and three grandparents involved in domestic and international abductions identified five categories of abductions, three of which were focused on parent-to-parent violence. Johnston, Sagatun-Edwards, and their colleagues 2001 study of 634 California abductions found that "mothers who abducted were more likely to take the children when they or the children were victims of abuse, and fathers who abducted were more likely to take the children when they were the abusers" (pp. 2-3). Their study included some international abductions. Finally, Chiancone, Girdner, and Hoff in 2001 found that 87% of the families they studied reported violence or threats of violence.

The mothers we interviewed who were respondents to Hague Convention petitions in US courts were subjected to extensive violence at the hands of their intimate partners. Here are two quotes from mothers we interviewed in our study:

[T]here were some events that stuck in my mind. About a year after we were in Europe, things got even worse than the usual hitting and ways he would use to make me feel bad. One night, he put a weapon to my head. I saw it on my right temple. I saw from the corner of my eye, how he was pulling the trigger. When he put it to my head, I asked him not to play around like that, please. I tried not to move an inch because I thought that if I moved, he would shoot me. I closed my eyes and heard the "click." Then he took the weapon away from my temple and laughed. He said, "You're so dumb. You're an ass. It's not even loaded." I went up to my room crying, and for days

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after that I kept thinking what if the weapon would have had only one bullet?

* * *

[T]here was one moment I remember that was the breaking point—when he attacked me in front of both kids. He physically shoved me down in the bathtub, and he had his hands around my neck, and was hitting my head against the bathtub screaming, “I’m going to kill you,” along with all the usual curse words that people use for women, and both kids were watching. They were crying, and my daughter was yelling at him to stop.

Many mothers reported being blocked from receiving help in the other countries. Some were denied entry into shelters because they were non-citizens, were not permitted to speak in court or received jarring messages from law enforcement as this quote shows:

One time the neighbors heard the fighting, and they called the police. Even though I didn’t speak the language, I could definitely understand it. So, I clearly understood when the European male officer told my husband that he had to guard our son’s legal papers because I was an American, and couldn’t be trusted. And after that, I knew, knew my situation. It was sealed. My husband was reassured, so he became even more violent. Sought help in the other country but [my efforts] were denied or blocked.

How Does Domestic Violence Play Out in Hague Convention Cases?

Habitual Residence. US judicial rulings have often ignored the deception, coercion, and violence that was used to keep mothers and their children in the other country and deeply affected the determination of a child’s habitual residence.

Forty percent of the US citizen mothers in our study were tricked into relocating, immediately prevented from returning when they arrived in the other country, or forced by potentially life-endangering threats to accompany their husband to the other country. In each of these women’s situations there is a clear absence of a

voluntary decision to go and remain in the other country. A pattern of coercion and physical threats associated with domestic violence were factors in each of these cases. I quote two mothers from our interviews:

We lay in my parent’s house while my son slept and he said to me, “You’re going back to [my country]. I don’t want to stay in the United States. Me and my son and you are going back.” And I told him I didn’t want to go. I wanted to stay here and that is when he said to me, “You will go back or I’ll kill you.” ... And so I was scared to death. From that day on, I just cried ... because I knew what I was headed for. ... [H]e was willing to kill me because he saw his son as a possession ... And he saw me as a possession, and that’s all that I was. So, out of fear of death, ... I went back to [his country]. Not because I wanted to, but because I was told that I would die if I didn’t. And coming from a man who looks you straight in the face and says, “I’ve killed seven people before, and it won’t mean anything to me to kill one more.”

* * *

I moved with my husband and my two children to [his country] ... and the day after we arrived there, I realized that I had made a mistake. Our marriage had been falling apart, and literally the day after we arrived, I told him that I had made a mistake and I wanted to go home, and I wanted a divorce. What I didn’t know was that before we had moved, he had set it up so that I couldn’t go home. He had ... in [his country], there’s such a thing as a restraining order so that somebody can’t leave the country. ... He had set up, with his family, a meeting with an attorney, which he did immediately, got a restraining order against me, and I could not leave the country. I was trapped.

The US should encourage adoption of protocols that instruct judges to consider the presence of deception, coercion, and/or violence as factors in the determination of a child’s habitual residence.

Grave Risk to Children. US courts overwhelmingly return children who have been exposed to violence against their mothers. These children

frequently end up in the custody of their fathers. In interviews with mothers in our NIJ funded study, eight out of ten children who were judged to have been physically abused were not returned to the other country. But eight out of ten children who were alleged to have been exposed to domestic violence but not directly abused were returned to the other country and often to their father’s custody.

Judging child exposure to domestic violence as less of a risk to children than direct physical abuse is contrary to the findings of two decades of social science literature. Many studies show that exposure to domestic violence poses the same risks to a child’s development as does direct abuse.

Many mothers face the choice of abandoning their children or returning with them and then either returning to life with the abuser or struggling to work or support themselves in a country where many are neither citizens nor speak the local language.

Decisions separating children from their non-abusive parent reflect poorly on our judiciary and put children in harm’s way. Separating a child from his or her primary caregiver may have long-term negative impacts on a child’s ability to develop secure attachments—a key developmental milestone for healthy development.

These decisions are also contrary to best practices promoted by major national associations such as the National Council of Juvenile and Family Court Judges. For over 15 years the Council, in its best practice guidelines, has repeatedly endorsed the goal of a child remaining with the non-abusive parent.

Undertakings, Mirror Orders, and Mediation Agreements. We found that voluntary agreements, called undertakings, and mirror orders aimed at ensuring child and mother safety were *never implemented* after the return of the child, and that some mothers and children faced renewed violence against them after being sent back by US courts.

Our findings are consistent with Reunite International’s UK study in which two-thirds of undertakings were reported as not implemented. *None* of the undertakings aimed at child safety were carried out upon return.

See HAGUE CONVENTION, page 77

MEN'S GROUPS, from page 76

6. In M.T. Hannah & B. Goldstein, (2010). *Domestic Violence Abuse and Child Custody: Legal Strategies and Policy Issues*. Civic Research Institute: Kingston, NJ.

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Precautions should be fulfilled prior to the return of a child to the other country. We also must examine with great skepticism the likelihood of mediation agreements being implemented in another country.

In Conclusion

Finally, the data on the impact of return on children's well-being is woefully inadequate. Our study and Reunite International's are both small scale and are the only studies to seek information on child well-being after a return ordered by the court. The outcomes of these two studies are distressing. There is a dire need for the US State Department to conduct a systematic follow-up of child well-being after return with independent verification separate from left-behind parent reports.

Some taking mothers take their children back to her country of citizenship where she has informal supports of family and friends. This

13. Paul Elam (June 10 2010). "Men's studies: The complete freak show." Available at <http://mensnewsdaily.com/2010/06/10/mens-studies-the-complete-freak-show/>

14. Glenn Sacks (January 10, 2011). "Misguided DV groups back battered mothers

may be considered an act of protection for herself and her children.

When I speak on domestic violence around the world I am often asked about battered women "why does she stay?" and there is implicit blame of these women when they do not leave an abusive relationship. Ironically, in Hague Convention cases the judiciary asks "why did you leave?" and punishes battered mothers for taking safety steps by leaving and finding support among family and friends.

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was discredited),¹² but we learned of another major influence in discrediting mothers and incest allegations: Douglas J. Besharov.

Douglas Besharov is a lawyer who became the first director of the National Center on Child Abuse and Neglect (NCCAN), a program in the US Department of Health and Human Services, and served in that capacity from 1975–1979. We learned that in the 1970s he taught that incest is extremely rare, that child sexual abuse is seldom harmful to children, that incest seldom happens more than once, and that incest is especially unlikely to be repeated once anyone else learns about it. We were told he sought to have incest decriminalized or at least downgraded to a misdemeanor or relatively trivial crime in every state, and worked to get child protection

agencies not to screen for it, particularly when there was a custody dispute. He believed that mothers in custody disputes often make false allegations of incest for tactical advantage.¹³ Unlike Gardner, who primarily worked to influence the court culture, Besharov worked, and was extremely successful, in changing child protection practices, and our incest laws in every state by 1986.¹⁴ Undoubtedly with the help of others, like child abuse perpetrators and their defense attorneys, both men greatly influenced the social sciences and mental health professions in discrediting and decriminalizing child sexual abuse and promoting marriage and keeping families (particularly, the parents) together; over time he came to advocate using the criminal courts to frighten abusive parents in particularly severe instances of abuse (most likely not sexual abuse) into accepting services.¹⁵ For 20

years—from the time I began practicing law in the early 1970s in Boston—I heard all of these myths expounded by numerous mental health practitioners, child abuse agency workers, and judges involved with incest cases,¹⁶ although it is also true that "child sexual abuse is often exceedingly difficult to prove."¹⁷ Clearly, by 1986 Besharov had accomplished his goal of getting child protection agencies and the family and juvenile courts to largely ignore incest cases, particularly when they arose during custody disputes. In child abuse and neglect cases, while the abused child might be separated from the rest of the family, often the father was kept at home and, at most, sent to counseling.

As time went on and I became involved with programs all over the country, it was clear that increasingly fewer fathers lost

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