STATE OF MICHIGAN

COURT OF APPEALS

GUILLERMO EDUARDO ENRIQUE BONILLA-RUIZ, Petitioner-Appellant, v JENNIFER JEANNE TUTTLE BONILLA, Respondent-Appellee.[1]	UNPUBLISHED December 14, 2004 No. 255772 Shiawassee Circuit Court LC No. 03-000395-DZ

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's order denying his petition for the return of his child to Mexico under the Hague Convention. On appeal, petitioner argues that respondent failed to establish by clear and convincing evidence that the child should not be returned to Mexico when his child had been wrongfully abducted in violation of petitioner's custodial rights. We affirm.

This Court reviews a circuit court's factual determinations regarding a petition for return of children under the Hague Convention for clear error. *Harkness v Harkness*, 227 Mich App 581, 586; 577 NW2d 116 (1998). "The circuit court's interpretation of and conclusions about American, foreign, and international law are reviewed de novo." *Id.* The law governing petitions for removal of children under the Hague Convention has been succinctly outlined in *March v Levine*, 249 F3d 462, 465-466 (CA 6, 2001), in which the Sixth Circuit explained that custody disputes such as those found in the present case require application of

> the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § § 11601-11610 (2000), which is a codification of the Hague Convention on the Civil Aspects of International Child Abduction, opened for signature, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,493, 10,498 (app. B) (March 26, 1986) (hereinafter "Hague Convention"). The Hague Convention was adopted by the signatory nations "to protect children internationally from the

[1] Respondent did not file a brief on appeal.

> harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, pmbl.
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> Under the ICARA, a petitioner must establish by a preponderance of the evidence that his children were wrongfully removed or retained in breach of his custody rights under the laws of the Contracting State in which the children habitually resided before they were removed or retained. Hague Convention, arts. 3, 12; 42 U.S.C. § 11603(e)(1)(A). Once wrongful removal is shown, the children must be returned. Hague Convention, art. 12. However, a court is not bound to order return of the children if the respondents establish certain exceptions under the treaty. Hague Convention, art. 13.

A court is not bound to return a child if the respondent establishes that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Hague Convention, art. 13(b). The court may also refuse to return the child "if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[2] Hague Convention, art 13. The ICARA requires that a respondent establish the "grave risk of harm" exception by clear and convincing evidence. 42 USC 11603(e)(2)(A); *March*, *supra* at 466. But respondent only needed to establish the "mature opinion of the child" by a preponderance of the evidence. 42 USC 11603(e)(2)(B).

There was no dispute that respondent wrongfully removed the child from Mexico in breach of petitioner's custody rights, which rights petitioner was exercising at the time of the child's removal, and that Mexico was the child's habitual residence at the time of her removal. Respondent's own testimony was that the child had lived in Mexico for the last six of the eight years of her life with both respondent and petitioner, that the child was petitioner's daughter, and that respondent took the child to Michigan without petitioner's approval. The question is whether respondent established, by clear and convincing evidence that the "grave risk of harm" exception or by a preponderance of the evidence, that the "mature opinion of the child" exception applied to allow the court to deny the petition to return the child to Mexico.

Discussing the grave harm exception, the United States Court of Appeals for the Sixth Circuit explained that the "grave harm to the child" exception requires far more than evidence that the child would experience adjustment problems attendant to a relocation back to the habitual residence. *Friedrich v Friedrich*, 78 F3d 1060, 1067 (CA 6, 1996). A respondent must not be allowed to abduct a child and then complain that the child has grown used to his or her

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[2] The trial court may also refuse to return the child if the proceeding to return the child was commenced more than a year from the date of the wrongful removal and the child is settled in the new environment. Hague Convention, Art. 12. Although this exception was asserted by respondent below as a reason to deny the petition, the trial court correctly noted that this exception is inapplicable to the facts of the case where petitioner filed a petition to return the child in November 2003, three months after her removal from Mexico in August 2003.

new surroundings and must not be returned. *Id.* at 1068. The court went on to cite international precedent which supported a restrictive reading of the grave harm exception:

> In *Thomson v Thomson*, 119 D.L.R. 4th 253 (Can. 1994), the Supreme Court of Canada held that the exception applies only to harm "that also amounts to an intolerable situation." *Id.* at 286. The Court of Appeal of the United Kingdom has held that the harm required is "something greater than would normally be expected on taking a child away from one parent and passing him to another." *In re A.*, 1 F.L.R. 365, 372 (Eng. C.A. 1988). And other circuit courts in America have followed this reasoning in cases decided since *Friedrich I. See Nunez-Escudero*, 58 F.3d at 377 (citing *Thomson*, 119 D.L.R. 4th at 286, and *In re A.*, 1 F.L.R. at 372); *Rydder*, 49 F.3d at 373 (affirming district court order for return of child over abducting parent's objection that return would cause grave harm). [*Friedrich*, *supra* at 1068.]

The court concluded by stating, in dicta:

> [W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute – *e.g.*, returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. [*Id.* at 1069.][3]

A review of the evidence indicates that the trial court erred in finding that the child's return to Mexico would pose a grave risk of psychological harm so as to excuse the court's duty from returning the child to her country of habitual residence under the Hague Convention. The trial court cited the fact that the child wished to remain in Michigan and found that to return her against her wishes to petitioner would result in psychological harm. The court based its finding of psychological harm on the effect of petitioner's obsessive and controlling behavior on the child. First, testimony that Angela was adjusted to her life in Michigan and would suffer from being relocated is insufficient evidence to establish grave risk of harm under Article 13(b) of the Hague Convention. *Friedrich*, *supra* at 1067. Also, there was no evidence that the child would be required to live with petitioner upon her return to Mexico. A petition under the Hague Convention for a child's return does not mean, necessarily, that the child is to be turned over to the other parent, just that the child would be returned to the country of habitual residence. See *Nunez-Escudero*, 58 F3d 374, 378 n 3 (CA 8, 1995). For the court to find that petitioner's obsessive behavior posed a grave risk of harm to the child upon her return, there must be testimony that she would be forced to reside with petitioner upon her return. There was no testimony taken on this topic. The trial court could have honored the purpose of the Hague

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[3] This dicta was cited with approval in *March*, *supra* at 471, and *Freier v Freier*, 969 F Supp 436, 442 (Ed Mich, 1996).

Convention and still protected the child from petitioner's controlling behavior by returning the child to Mexico in respondent's custody and, if necessary, petitioner could be ordered to contribute to the child's and respondent's living expenses, in separate quarters, for the duration of custody proceedings there. See *id.*

Notwithstanding the fact that respondent failed to establish grave risk of psychological harm within the meaning of the Hague Convention, the trial court did not err in denying the petition to return the child to Mexico where the child expressed a clear preference to remain in the United States. As explained, the Hague Convention excuses a court from returning a child to the child's country of habitual residence if the respondent proves, by a preponderance of the evidence, that the child is of sufficient maturity and objects to repatriation and, in its discretion, the court chooses to honor the child's wishes. *Blondin v DuBois*, 238 F3d 153, 166 (CA 2, 2001); *Raijmakers-Eghaghe v Haro*, 131 F Supp 2d 953, 957 (ED Mich, 2001). In *Raijmakers-Eghaghe*, the petitioner, the children's mother, lived in the Netherlands and respondent lived in the United States. *Id.* at 954. The children, ages eight and six, were visiting respondent in the United States and, when it came time for them to return to the Netherlands, the eight-year old, refused to board the plane and had an emotional outburst to the extent that the airline employees refused to let him or his six-year-old brother on the plane. *Id.* at 954-955. After discovering troubling information about the children's life in the Netherlands, the respondent filed for custody of the children. *Id.* at 955. The petitioner filed a petition under the Hague Convention for the return of the children and moved for summary judgment. *Id*. The district court denied the motion with regard to the eight-year-old child, ordered that psychological reports be prepared, and stated that it would conduct an *in camera* examination of the child. *Id*. at 958-959. The court pointed out that the Hague Convention did not establish a minimum age at which a child was old enough and mature enough to cause the provision to apply and stated that an eight-year-old child's views could be taken into account under the maturity exception. *Id.* at 957-958.

Here, the trial judge found that the child was intelligent and mature. He indicated that he spoke to her in chambers and he found her to be articulate both there and in her testimony on the stand. The testimony at the hearing amply supported the trial court's finding. The child's aunt testified that the child was very bright, poised and self-possessed. The child's teacher testified that she excelled academically and that she displayed no social, emotional or disciplinary problems. At the hearing, the child testified that she understood the difference between the truth and a lie. She demonstrated her intelligence by translating an email from petitioner to herself from Spanish into English for the court.

The child's emotional maturity was also apparent in her ability to articulate the fact that petitioner made her uncomfortable when he spoke to her about the legal proceedings. And, the child was very clear in testifying that email sent to her by petitioner made her feel "not very good because I don't like it when he talks bad about [respondent]." She also, very astutely, noted that in the email, petitioner was "just talking about himself. Like the other day he was talking about what he feels and I started to talk about what I did at school and he said just a minute I'm talking about what I feel right now." Finally, the child indicated that she understood the nature of the proceedings. She testified that she assumed she was going to be asked if she wanted to return to Mexico. She informed the court that she did not want to return to Mexico. She stated that she had a lot of friends and cousins in Michigan and she liked her school. She said that what was best for her was to stay in the United States and visit petitioner. When asked how she decided

she wanted to stay in the United States, she responded, "I said to myself do I like it here, do I like my friends and my cousins and what I do with my cousins and stuff." Respondent established by a preponderance of the evidence that the child was sufficiently intelligent and mature to express a preference and that her preference was to remain in Michigan.

The trial court did not err in taking Angela's opinion into account in deciding to deny the petition to return Angela to Mexico. As noted in *Raijmakers-Eghaghe*, the Hague Convention does not establish a minimum age at which a child's opinion could be taken into account. *Id*. at 957-958. And, although only eight years old, Angela demonstrated an understanding of the nature of the proceedings and consistently expressed her desire to stay in Michigan, both in chambers and on the stand in open court. For these reasons, the trial court did not err in denying the petition to return Angela to Mexico under the authority of Article 13 of the Hague Convention.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio