

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

IN THE MATTER OF THE MARRIAGE OF
ELIZABETH GERALDINE DALMASSO AND
JEAN-LUC DALMASSO

Case No. 99 D 768

**BRIEF OF PETITIONER ON APPLICATION OF THE
1980 HAGUE CONVENTION ON THE CIVIL ASPECTS
OF INTERNATIONAL CHILD ABDUCTION**

COMES NOW petitioner and shows the following matters in regard to the application of the Hague Convention in the instant case:

1. This was not an abduction. Petitioner left France with three of her four children under the auspices of the American Embassy in Nice, France, on or about January 5, 1999, following an attempt by respondent to commit suicide and as a result of the manifest hostility towards petitioner by respondent's parents, leaving petitioner no place to live;

2. No force was employed to "establish artificial jurisdictional links on an international level, with a view to obtain custody, of a child," as is condemned by the Convention;

3. The children have not been taken out of the "family and social environment" in which their lives have developed. These children are not among strangers and are not being subjected to "the traumatic loss of contact with the parent who has been in charge of [their] upbringing"; and they are not being required "to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives", as is one rationale contained in the "explanatory report by Elisa Perez-Vera" for the forced return of children to a petitioner.

These children are among their American relatives with whom they are well acquainted and with whom they most recently spent three months from April 1, 1998, through June 29, 1998;

4. The Convention recognizes that there are certain exceptions to the stated objective of the "prompt return of children wrongfully removed to or retained in any Contracting State", which are derived from consideration of the best interests of a child. The Kansas Supreme Court has recently recognized in *Sampson v. Sampson*, Docket No. 80,981 (opinion filed April 16, 1999), an exception to the immediate return of the child comes when "the return of the child would expose the child to physical or psychological harm." In light of testimony to be offered by Mrs. Dalmasso concerning respondent's recently attempted suicide and other erratic behaviour, the Court should require respondent to produce records from the hospital where he was taken by ambulance in full view of his children just before petitioner consulted with the American Embassy in Nice, France, and was assisted in removing herself and three of her children from the place of psychological danger.

5. The Convention does not require the return of children when return would violate fundamental principles of the United States relating to the protection of human rights. This Court must ask this question: If the respondent were before this Court with allegations of recently attempted suicide against him, would this Court readily require the return of three small children to his custody? The existence of the Hague Convention does not force this Court to discard the basic principles and the common sense that it applies evenhandedly to similar situations between locals, as set forth in the *Shawnee Court Domestic Relations*

Guidelines.

6. By the law of this state, which must be considered pursuant to the terms of the Convention, each parent is presumed to have equal rights of custody. This is the modern, enlightened perspective on child rearing. This Court need not defer to a French court, which unilaterally pronounces that the residence of the father is automatically the residence of the child. To follow this rule will be to throw Mrs. Dalmasso and her children back to the ancient jurisprudence of male domination of the family and to disregard entirely the advances that women and mothers have made before the law in the United States.

7. The due process rights of petitioner were not respected by the French court in connection with its purported decision of January 29, 1999, an extract thereof being attached to the letter faxed to the Court on May 6, 1999, by respondent. **Petitioner was given no notice of the French legal proceedings and given no opportunity to present her views.** Hence, she was denied fundamental rights of due process, an inalienable right under our American Constitution and common law. (See Federal Register 2 "wrongful removal or retention" defined (c) i.) *In re Marriage of Nasica*, 12 Kan. App. 794, 797, 758 P.2d 240 (1988), states that ". . . Kansas courts will recognize and enforce custody decrees entered in other countries if they are rendered by appropriate authorities which afford reasonable notice and opportunity for hearing." Respondent and the French court did not afford Mrs. Dalmasso notice and an opportunity to be heard – as she and this Court have afforded respondent and his French counsel.

8. Petitioner further shows that the neuro-psychiatrist Dr. Paul Houillon violated her rights of confidentiality, when he transmitted his purported letter of March 10, 1999, to respondent enclosed with respondent's letter to this Court. Interestingly, respondent has not seen fit to provide this Court with medical records concerning his recently attempted suicide.

9. Respondent's claim that he knew not the whereabouts of Mrs. Dalmasso and his three children is disingenuous. He knew very well that Mrs. Dalmasso was returning to her family home, being St. Mary's, Kansas, where he, himself, had spent some time teaching French at the local college. This is where he and Mrs. Dalmasso met. Respondent is well acquainted with St. Mary's, Kansas, and with petitioner's family.

In summary, petitioner shows that there is no absolute duty imposed upon this Court to return the children to respondent. These children have spent more of the past twelve months in the State of Kansas, than they have in France. They were here from April 1 through June 29, 1998, and have been here since January 12, 1999; and they are American citizens. Finally, petitioner shows that respondent has not complied with Article 8 of the Convention regarding the application, which mandates what the application shall contain; and that he has not supplied the Court with an authenticated copy of the French court decision of January 29, 1999.

WHEREFORE petitioner prays that the Court find that respondent has not complied with the Convention; and find that respondent's rights of custody are not superior to those of petitioner and are not being violated; and, further, find that there is grave risk in returning the children to respondent, as he would expose the children to physical or psychological harm or

otherwise place them in an intolerable situation.

Frank D. Taff
Kansas Supreme Court
Registration No. 09620
3601 SW 29th Street
Topeka, Kansas 66614
785.272.4108
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I faxed the foregoing matter to M^c: Yves De Morhery, Avocats Associés, 19, Rue De L'Horloge, 22105 Dinan Cedex, France; fax number 011 33 2 96 85 50 51, this ____ day of May, 1999.

Frank D. Taff