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Re: Authority for Appointment of Attorney for the Children
Lomanto v. Agbelusi, No. 22-cv-07349 (JPO)

The Honorable J. Paul Oetken
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Dear Judge Oetken:

We are *pro bono* counsel to the Respondent, Anthonia Agbelusi, in this matter. As directed by the Court at the October 25, 2022 Status Conference, we write to provide authority in support of appointing counsel for the minor children.

I. The Court is empowered to appoint an attorney to represent the minor children, which is a familiar judicial tool and common practice for Hague Convention cases.

There is extensive authority establishing the propriety of appointing an attorney to represent minor children in Hague Convention cases.[1] See, e.g., Johnson v. Johnson, No. 11 CIV. 37 RMB, 2011 WL 569876, at *2 (S.D.N.Y. Feb. 10, 2011) ("[A]ppointing an attorney for the child [is] consistent with [procedures] adopted by district courts in Hague Convention cases.") (quoting Matovski v. Matovski, No. 06 Civ. 4259, 2007 WL 2600862, at *1 n.2 (S.D.N.Y. Aug. 31, 2007)); Onrust v. Larson, No. 15 CIV. 122 PAE, 2015 WL 6971472, at *1 (S.D.N.Y. Nov. 10, 2015); O.A. v. D.B., 52 Misc. 3d 1208(A), 41 N.Y.S.3d 720 (N.Y. Fam. Ct. 2016); see also Fed. R. Civ. P. 17(c)(2) (providing that when a minor is a party to an action, "[t]he court must appoint a guardian ad litem—*or issue another appropriate order*—to protect a minor . . . who is unrepresented in an action") (emphasis added). Appointing attorneys for children in cases involving custody disputes is similarly the "strongly preferred practice" in NY state courts. Ames v. Ames, 97 A.D.3d 914, 916, 947 N.Y.S.2d 836 (N.Y. App. Div. 3d Dept. 2012). "Granting the children representation in appropriate situations is consistent with the Supreme Court's view that 'courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children—through familiar judicial tools[.]'" Sanchez v. R.G.L., 761 F.3d 495, 508 (5th Cir. 2014) (quoting Chafin v. Chafin, 568 U.S. 165, 178 (2013)). And the Court may make such appointment over the objection of one of the parties. See Taveras v. Morales, 22 F. Supp. 3d 219, 229 (S.D.N.Y. 2014) (appointing an attorney to represent the child "over Petitioner's objection[,] but consistent with the procedures of other courts that have adjudicated Hague Convention cases").

The need for an attorney for the children or guardian *ad litem* is especially strong in this case, where there are assertions of potential grave risk of harm to the children if returned to Spain. See Kufner v. Kufner, 519 F.3d 33, 37 (1st Cir. 2008) (appointing an attorney and guardian *ad litem* for children in a Hague Convention case under Fed. R. Civ. P. 17(c) in light of allegations of child abuse and child sexual abuse);

[1] Although Ms. Phillips is serving only as attorney for the children, the Court also would have authority to appoint a guardian *ad litem* if it were so inclined. See, e.g., Souratgar v. Lee, 720 F.3d 96, 101 (2d Cir. 2013); Olguin v. Santana, No. 03 CV 6299 (JG), 2004 WL 1752444, at *6 (E.D.N.Y. Aug. 5, 2004) (appointing a *pro bono* guardian *ad litem* "to represent the best interests of the children throughout the upcoming . . . proceedings" because respondent "must be given an opportunity to prove one or more of the [Hague] Convention's affirmative defenses.").

Lieberman v. Tabachnik, No. 07-CV-02415-W, 2007 WL 4548570, at *2 (D. Colo. Dec. 19, 2007) (appointing a guardian *ad litem* to protect the interests of the children "[b]ecause there are fundamental and significant differences in the positions of the parties concerning how the children have been treated and how they may be impacted if [the court] order[ed] their return" and "because it [would] be difficult for [the court] to determine the ultimate facts absent the assistance of a qualified Guardian *Ad Litem*").

Petitioner's argument that the appointment of an attorney to represent the children would "create undue delay" is without merit. (See 10/25/2022 Status Conf. Tr. 10.) To the contrary, courts in this District have recognized that the appointment of an attorney to represent the needs of the children may in fact expedite Hague Convention proceedings. See, e.g., Burton v. Oyekan, No. 95 CIV. 5849 (LMM), 1996 WL 63066, at *3 (S.D.N.Y. Feb. 14, 1996) (noting that the lack of representation for the various interested parties, including the children, prevents the Court from resolving the matter in an expedited manner).

II. A mere referral—particularly for a *pro bono* representation—does not create a conflict of interest or undermine the independence of counsel for the minor children.

Davis Polk's act of merely reaching out to Simpson Thacher & Bartlett LLP to see if they could represent the children in this Hague proceeding does not create a conflict of interest. See N.Y. City Bar Formal Op. 2016-1 (opining that, in case of a conflict, attorneys are "ethically permitted to refer [a] prospective client to another attorney or list of attorneys who are competent in the field"). This is especially true where both Respondent's counsel and counsel for the minor children are assisting *pro bono*, and therefore not engaged in any sort of fee sharing or referral fee arrangements. *Id.* (noting that an attorney may refer a case to another attorney in case of conflict, even if the parties engage in fee sharing, provided the attorney follows the rules governing fee sharing and referral relationships). As Ms. Sheinfeld explained during the conference, Simpson Thacher is known in the *pro bono* community to have "counsel that used to represent children" at the Children's Law Center who therefore has experience with this unique role. (See 10/25/2022 Status Conf. Tr. 37.) Whether the positions of the mother and children are aligned or divergent, Simpson Thacher's ethical obligations will be to their clients, and Davis Polk's to Respondent. See, e.g., N.Y. R. Prof'l Conduct 5.4(c) (requiring a lawyer not permit "a person who recommends . . . the lawyer" to "direct or regulate the lawyer's professional judgment"); id. R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); see also L. Civ. R. 1.5(b)(5).

III. Respondent's counsel inadvertently underestimated the time required for trial.

Finally, Respondent's counsel would like to correct statements made regarding the anticipated length of trial in this matter. (See 10/25/2022 Status Conf. Tr. 30.) Upon further consideration of the defenses, we believe that this matter could potentially occupy the entirety of the week of January 9, 2023, and therefore request that the entire week be reserved for trial.

We are happy to provide additional briefing on any issues, as requested by the Court.

Respectfully submitted,

Meredith Manning

cc: All parties and counsel of record (by ECF)

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