

# Commentary: Appellate Court Cases

**Rubio v. Castro, No. 19-3740, 2020 U.S. App. LEXIS 14905 (2d Cir. May 11, 2020)**

## Other Second Circuit Cases

**Eidem v. Eidem,**  
No. 19-1417, 2019 U.S. App. LEXIS  
36488 (2d Cir. Dec. 10, 2019)

**Saada v. Golan,**  
930 F.3d 533 (2nd Cir. 2019)

**Marks v. Hochhauser,**  
876 F.3d 416 (2d Cir. 2017)

**Tann v. Bennett,**  
648 F. App'x 146 (2d Cir. 2016)

**Ermini v. Vittori,**  
758 F.3d 153 (2d Cir. 2014)

**Hollis v. O'Driscoll,**  
739 F.3d 108 (2d Cir. 2014)

**Souratgar v. Lee,**  
720 F.3d 96 (2d Cir. 2013)

**Guzzo v. Cristofano,**  
719 F.3d 100 (2d Cir. 2013)

**Hofmann v. Sender,**  
716 F.3d 282 (2d Cir. 2013)

**Ozaltin v. Ozaltin,**  
708 F.3d 355 (2d Cir. 2013)

**Mota v. Castillo,**  
692 F.3d 108 (2d Cir. 2012)

**Duran v. Beaumont,**  
622 F.3d 97 (2d Cir. 2012)

**Gitter v. Gitter,**  
396 F.3d 124 (2d Cir. 2005)

**Grieve v. Tamerin,**  
269 F.3d 149 (2d Cir. 2001)

**Blondin v. Dubois (*Blondin II*),**  
238 F.3d 153 (2d Cir. 2001)

**Diorinou v. Mezitis,**  
237 F.3d 133 (2d Cir. 2001)

## Parent's Refusal to Return | Child's Objection to Return | Grave Risk & Ameliorative Measures

A father petitioned for the return of his child to Ecuador. Although grave risk was established, the court ordered that the child be returned because sufficient ameliorative measures were put in place.

### Holdings

By summary order, the Second Circuit affirmed the district court's order for the return of the child.<sup>1</sup>

### Facts

A son was born to an unmarried couple. After the couple's separation in 2011, the mother and child lived together in one city in Ecuador, and the father lived in another. There was no formal custody agreement, but the child spent time with the father on weekends and holidays. The father owned a shop selling firearms and accessories. In 2015, the mother secured an order from Ecuadorian courts compelling the father to pay child support. After she sought child support, the father initiated an action in Ecuadorian family court accusing the mother of physically abusing the child. The Ecuadorian court found her innocent of the allegation, but it issued an order for family therapy. The mother produced records showing her participation. Although records failed to show the father's participation, it was unclear whether the order for therapy applied to him. Over his objection, the mother obtained orders from the Ecuadorian family court authorizing her to take the nine-year-old child to the United States for a one-month trip in

1. Summary orders do not have precedential effect. The order may be cited consistent with Federal Rule of Appellate Procedure 32.1 and local order 32.1.1.

**Other Second Circuit Cases** (*cont'd.*)

**Blondin v. Dubois** (*Blondin I*),  
189 F.3d 240 (2d Cir. 1999)

April 2018. She failed to return the child to Ecuador on May 2, 2018, as required by the court order. Following this, the father petitioned for the return of his son to Ecuador.

The child was interviewed by the district court judge in the presence of counsel and a court reporter. His parents were not present. The child primarily opposed return to Ecuador because he believed that his father hated him. He disclosed that he lived with his mother and visited his father about once a week, except when he declined to. The child indicated that he declined to see his father on occasion because his father called him names, struck him, and locked him up in the house with the child's older half-sister. The child testified that he was struck with a belt and a stick. Sometimes he was struck over the top of his clothing and at other times on his bare skin. The child also described an incident where the father handed him a loaded firearm, and he accidentally discharged the firearm into a computer.

The mother testified that she would not return to Ecuador if the child was returned. Her refusal was based on her fear for her personal safety due to the father's abuse and his gun business. The trial court found, based on clear and convincing evidence, that the child suffered physical and emotional abuse by his father and his father's relatives, and that the child faced a grave risk of physical and psychological harm if returned to the custody of his father in Ecuador. The court also found that the boy was mature enough and old enough for the court to consider his objections to return.

## Discussion

**Grave Risk Pursuant to Article 13(b).** The district court gave detailed consideration to the issues bearing on grave risk. It found several factors supporting the conclusion that return of the child to Ecuador would constitute a grave risk, including sporadic instances of emotional and physical abuse and placing a loaded weapon in the child's hands resulting in an accidental discharge. Following Second Circuit precedent<sup>2</sup> and the dictates of Article 13(b), the court determined that if the child was returned, he would be subject to grave risk of physical or psychological harm. However, the court found that the other arguments raised by the mother's counsel did not support grave risk.

**Child's Own Objections to Return.** Although the child's age and maturity were sufficient to require consideration of his objections to return, the court found that these objections were insufficient to prevent return.

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2. *Blondin v. Dubois* (*Blondin II*), 189 F.3d 240, 246 (2d Cir. 1999); *Souratgar v. Lee*, 720 F.3d 96, 102 (2d Cir. 2013); *Davies v. Davies*, 717 F. App'x 43, 48–49 (2d Cir. 2017). The district court referenced four decisions made in the *Blondin* litigation:

There are four *Blondin* decisions relevant to this Order: (1) *Blondin v. Dubois*, 19 F. Supp. 2d 123, 124–26 (S.D.N.Y. 1998) ("*Blondin I*") (finding grave risk of harm exception applied); (2) *Blondin v. Dubois*, 189 F.3d 240, 242–44 (2d Cir. 1999) ("*Blondin II*") (affirming finding of grave risk but remanding for district court to determine whether ameliorative measures could mitigate risk of harm); (3) *Blondin v. Dubois*, 78 F. Supp. 2d 283, 288–93 (S.D.N.Y. 2000) ("*Blondin III*") (finding that no ameliorative measures would overcome grave risk of harm due to relapse of children's traumatic stress disorder); and (4) *Blondin v. Dubois*, 238 F.3d 153, 157 (2d Cir. 2001) ("*Blondin IV*") (affirming finding below and approving district court's consideration of child's well-settlement and expressed wishes to remain in the United States under Article 13(b)).

*Rubio v. Castro*, No. 19-CV-2524(KAM)(ST), 2019 U.S. Dist. LEXIS 178261, at \*54 n. 14 (E.D.N.Y. Oct. 15, 2019).

**Domestic Violence Toward the Mother.** The court found the father’s abusive and demeaning conduct toward the child’s mother was unacceptable but did not create a grave risk of harm to the child.

**Child Well Settled.** The court considered the argument that the child was so settled in his life in New York that repatriation to Ecuador would be disruptive and constitute grave risk. The court found that unlike the unique factual situation in *Blondin*, this case presented no exceptional facts establishing that repatriation would result in risk of harm.<sup>3</sup>

**Ameliorative Measures.** The court proceeded to analyze the directives of the *Blondin* line of cases that require a court to look to a “full range of options” that might allow the child’s safe return.<sup>4</sup> It considered whether the authorities in Ecuador could mitigate any risk that repatriation might trigger.<sup>5</sup> The mother alleged that if the child was ordered back to Ecuador, no ameliorative measures could protect the child for the following reasons: (1) the fact that she would not return with the child, which foreclosed any chance that she might be awarded custody of the child in Ecuador; (2) her experience with past instances of the father’s threats of physical harm and death; and (3) the father’s likely refusal to abide by court orders, even if she prevailed in a custody case. The court rejected these objections, finding that the mother’s refusal to return to Ecuador with her child should not be rewarded, as her actions effectively blocked any possibility of ameliorative measures.

The district court found that there was not sufficient evidence to show that Ecuador’s courts were unable or unwilling to provide adequate protection for the child. Both the mother and the father had made use of the Ecuadorian court system, and there was no evidence that the mother had been denied assistance by the police or justice system regarding her claims of physical abuse. Accordingly, the court found no reason to employ undertakings to ensure the safety of the child.

**Joint Status Update.** In its order for return, the district court required the parties to meet and confer regarding the details of the child’s return to Ecuador, including “any ameliorative measures, enforceable by the courts in Ecuador, to protect [the child] from harm pending the Ecuadorian court’s custody determination.”<sup>6</sup> The parties subsequently filed a joint status update setting forth the agreed-upon ameliorative measures.

**The Second Circuit Affirms.** The mother contended that because she would not be returning to Ecuador, the efficacy of ameliorative measures needed to be assessed in light of her absence. The Second Circuit agreed with her contention. Quoting the district court’s order,<sup>7</sup> the Second Circuit found that the district court “too quickly discounted” the mother’s argument that she would not return to Ecuador with the child. The appellate panel referred to its previous holdings regarding ameliorative measures, noting that a trial court

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3. *Rubio*, 2019 U.S. Dist. LEXIS 178261, at \*80 (E.D.N.Y. Oct. 15, 2019).

4. *Id.* at \*102–103.

5. *Id.* (quoting *Souratgar*, 720 F.3d 96 at 103).

6. *Id.* at \*113.

7. *Rubio v. Castro*, No. 19-3740, 2020 U.S. App. LEXIS 14905, at \*7 (2d Cir. May 11, 2020) (“[W]here an ameliorative measure would include court-ordered custodial arrangements to protect the child, a respondent should not be rewarded for declining to ameliorate the risk by refusing to return with a child to the habitual residence, and thus risk losing custody.”).

must assess the efficacy of protective measures in light of the abducting parent's refusal to return with the child:

This Court has instructed that “[i]n cases of serious abuse, before a court may deny repatriation on the ground that a grave risk of harm exists under Article 13(b) [of the Hague Convention], it must examine the full range of options that might make possible the safe return of a child to the home country.” Such ameliorative conditions “balanc[e] our commitment to ensuring that children are not exposed to a grave risk of harm with our general obligation under the Hague Convention to allow courts in the country of habitual residence to address the merits of custody disputes.” Thus, where repatriation would return a child to the sole physical custody of their abuser, a district court does not properly weigh the safety of the child if it fails to examine the full range of ameliorative measures, including those that are enforceable when the respondent parent has chosen not to return.<sup>8</sup>

But the failure of the district court to specifically examine the enforceability of the ameliorative measures in light of the mother's refusal to return to Ecuador did not require a remand. Instead, the Second Circuit took notice of the joint status update (JSU) that the parties filed in response to the district court's order. The JSU set forth the ameliorative measures that the parties had agreed to. It provided measures for

- weekly visits between the child and the mother's family
- daily conversations by video or telephone between the mother and the child
- restriction on the child's access to firearms
- a prohibition on firearms in child's residence

In light of the measures contained in the JSU, the Second Circuit concluded that the ameliorative measures actually in place were sufficient to mitigate the risk of harm to the child. The district court's decision and return order were affirmed.

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8. *Id.* at \*7-\*8 (citations omitted).