

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BELINDA DUPUY, JEFF DUPUY, PEARCE)	Appeal from the United
KONOLD, G.A., A.H., L.D., V.A., R.S., W.S.,)	States District Court for the
N.G., and P.K, on behalf of themselves and all)	Northern District of Illinois,
others similarly situated,)	Eastern Division
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 97 C 4199
)	
ERWIN McEWEN, Acting Director, Illinois)	
Department of Children and Family Services,)	
in his official capacity,)	The Honorable
)	REBECCA PALLMEYER,
Defendant-Appellee.)	Judge Presiding.

**DEFENDANT-APPELLEE'S RESPONSE IN OPPOSITION
TO PLAINTIFFS' PETITION FOR REHEARING EN BANC**

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STATEMENT IN OPPOSITION TO REHEARING EN BANC

Rehearing en banc of the panel's decision is not necessary to secure and maintain uniformity of decision or to resolve a question of exceptional importance.

The Class's opening brief in this appeal attacked Dupuy v. Samuels, 465 F.3d 757 (7th Cir. 2006) (Dupuy II.A), as "manifestly erroneous," ignoring the judgment after remand, and its petition simply dresses up that brief in en banc clothing, ignoring the subsequent decision in Dupuy II.B. But the Class chose not to petition for en banc review in Dupuy II.A, and it told the Dupuy II.B panel that the law of the case doctrine controlled the outcome absent manifest error. Even if the law of the case doctrine were inapplicable, a different result in Dupuy II.B could have implicated the doctrine of stare decisis and perhaps created an intracircuit conflict.

Even if the Class's petition is considered on the merits, it fails to persuade. It asserts that Dupuy II.A held that all safety plans are always voluntary, but Dupuy II.A merely rejected the district court's finding (and the Class's argument) that threats of protective custody, standing alone, render all safety plans involuntary, regardless of other circumstances, and held that the Class could not succeed absent evidence of systemic misrepresentation "or other improper means." Dupuy II.A thus recognized that the Class could have prevailed with evidence of other types of coercion, so it (unlike the Class's per se rule) created no conflict with opinions by the Supreme Court, this Court, or other Circuits. Lastly, the Class's interest in familial relations, like the State's interest in protecting children, is significant, but those interests alone do not mandate en banc review for this case, the only one of its kind.

finding, the district court declined to address the Class's other coercion arguments (id. at 893), and it later entered a preliminary injunction (Doc. 790).

Dissatisfied with the scope of the injunction, the Class appealed, based "in significant measure" on the district court's refusal to apply the evidentiary standard required for protective custody to safety plans as well. Doc. 941 at 21. On appeal, it argued that the Class should not have been limited to those who agree to safety plans due to threats of protective custody, a definition that was too subjective, and challenged the lack of an injunctive remedy against threats of protective custody and of a meaningful opportunity to contest safety plans. See AT Brf. in Dupuy II.A.

In Dupuy II.A., this Court affirmed the preliminary injunction, adding that only the lack of a cross-appeal by the Director prevented reversal and observing that a safety plan "seems a sensible, perhaps indeed an unavoidable, partial solution to the agonizingly difficult problem of balancing the right of parents to the custody and control of their children with the children's right to be protected against abuse and neglect." 465 F.3d at 759, 763.

Like the district court, Dupuy II.A. held that the decision to agree to a safety plan is optional with the parents and analogizing to agreements such as guilty pleas and civil settlements, explaining that "it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration." Id. at 761-63 (quoting United States v. Spilmon, 454 F.3d 657, 658-59 (7th Cir.), cert. denied, 127 S. Ct. 842 (2006), and citing United States v. Miller, 450 F.3d 270, 272-73 (7th Cir.), cert. denied, 127 S. Ct. 842 (2006)). Accordingly,

Dupuy II.A reasoned, the Class (and the district court) erred in reasoning that threats of protective custody alone render safety plans involuntary as a matter of law, adding that unless the Department had sufficient evidence to take a child into protective custody, it could not do so if parents refused a safety plan. Id. at 761-62. Dupuy II.A found significant that the record did not suggest the Department lacked such evidence when offering safety plans, but that if the Department were to remove a child without such evidence upon refusal of a safety plan, Illinois law already provided a prompt legal remedy.¹ Id. at 762.

Stressing that coercion becomes unlawful “when illegal means are used to obtain a benefit,” Dupuy II.A held that the record before it contained no such evidence and that the safety plan consent form informs parents of the possibility of protective custody and even requires them to state in writing that they understand that refusal of (or noncompliance with) a safety plan may lead to lawful measures, including protective custody. Id. at 762. Nevertheless, Dupuy II.A cautioned, the Class could succeed on their coercion claim at trial by presenting evidence that the Department “really does coerce agreement to its safety plans wrongfully by misrepresentations or other improper means.” Id. at 762, 763 (emphasis added). Having rejected the Class’s argument that a threat of protective custody alone means that safety plans deprive class members of the right to familial autonomy, Dupuy II.A rejected the claim that every safety plan requires a hearing. Id. at 761.

¹ Dupuy II.A also rejected the Class’s argument that this hearing (705 ILCS 405/2-9 (2006)) did not satisfy due process because it would address only the question of custody and not the safety plan offer. 465 F.3d at 761.

