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Refusing to Debate Wheaties Versus Milchreis: Blondin v. Dubois and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception

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Refusing to Debate Wheaties Versus Milchreis[1]: *Blondin v. Dubois* and the Second Circuit's Interpretation of the Hague Abduction Convention's Grave Risk Exception

I. Introduction

> "[He] made it perfectly clear that he would abduct the child if I divorced him . . . [h]is payback was to take the thing I love most, which was my daughter."[2]

International child abductions have increased by fifty-seven percent in recent years, and the abductor is usually not a stranger but a parent, one who professes to love the child.[3] In response to this international problem, a community of nations convened almost two decades ago to draft the Hague Convention on the Civil Aspects of International Child Abduction.[4] Today forty-seven countries have ratified, acceded to, or signed the Hague

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[1] *See* Friedrich v. Friedrich, 78 F.3d 1060, 1068 (6th Cir. 1996) (noting that, in considering whether to order an abducted child returned from the United States to Germany, the court in the "abducted-to country" is "not to debate the relevant virtues of Batman and *Max und Moritz*, Wheaties and *Milchreis*"). *Max und Moritz* is the title of a juvenile book written by Wilhelm Busch, a nineteenth-century German painter and poet. *See* Gabriele Kahn, *Wilhelm Busch* (visited Feb. 7, 2000) <http://www.rivertext.com/busch.shtml>. *Milchreis* is a type of German rice pudding. *See* HARRAP'S CONCISE ENGLISH-GERMAN DICTIONARY 348 (Robin Sawers ed., 1990).

[2] Timothy W. Maier, *Kids Held Hostage*, INSIGHT MAGAZINE, March 8, 1999, *available in* 1999 WL 8673728 (quoting Maureen Dabbagh, whose husband kidnapped her daughter to Syria in 1993).

[3] *See* Vicky Allan, *The Child is Mine*, SCOTLAND ON SUNDAY, Aug. 8, 1999, at S19, *available in* 1999 WL 23212542.

[4] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S. 98, *reprinted in* 51 Fed. Reg. 10,494 (1986) [hereinafter Hague Abduction Convention]. The United States enacted legislation implementing the Hague Abduction Convention in The International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601-11610 (1988)) [hereinafter ICARA].

Abduction Convention.[5] The United States enacted the Hague Abduction Convention with the hopes of "[sparing] children the detrimental emotional effects associated with transnational parental kidnapping."[6] Since fifty percent of all marriages in the United States alone end in divorce,[7] this treaty attempts to address an international crisis.

Nevertheless, while the Hague Abduction Convention is "a good law, the problem is patchy implementation."[8] Only fifty-two percent of the child abductions involving U.S. citizens that were reported to the U.S. State Department between May 1997 and early March 1999 were resolved during that twenty-two month period.[9] Even when international child abduction cases are resolved, the Hague Abduction Convention raises serious questions about the propriety of returning these abducted children.

This Note will explore the facts and holding of *Blondin v. Dubois*[10] in Part II.[11] Part III will examine the background law,[12]

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[5] *See* OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, *Party Countries and Effective Dates with U.S.* (visited Feb. 12, 1999) <http://travel.state.gov/hague_list.html>. Signatory nations include: Argentina, Australia, Austria, Bahamas, Belize, Bosnia & Herzogovina, Burkino Faso, Canada, Chile, China (Hong Kong Special Administrative Region only), Colombia, Croatia, Czech Republic, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal (including Macau), Romania, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, United Kingdom (including Bermuda, Cayman Islands, Falkland Islands, Isle of Man, and Montserrat), Venezuela, and Zimbabwe. *See id.*

[6] Letter of Submittal from George P. Shultz, Secretary of State, to President Ronald Reagan (Oct. 4, 1985), *reprinted in* 51 Fed. Reg. 10,495 (1986).

[7] *See* Symposium, *The Rise of the International Trust Roundtable Discussion*, 32 VAND. J. TRANSNAT'L L. 779, 806 (1999).

[8] Shailagh Murray, *Money Talks; United Europe Is Still Split Over Divorce; Diverse National Laws Can Make Breaking Up Pretty Hard To Do; Location, Location, Location*, WALL ST. J. EUR., June 14, 1999, at R5, *available in* 1999 WL-WSJE 18406627 (quoting Mary Banotti, an Irish delegate to the European Parliament and the European Union's official mediator for transnational abductions).

[9] *See* Mary A. Ryan, *Correspondence*, INSIGHT MAGAZINE, Apr. 19, 1999, *available in* 1999 WL 8673805. Ms. Ryan is the Assistant Secretary for Consular Affairs with the United States Department of State. *See id.*

[10] Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999) (hereinafter *Blondin II*).

[11] *See infra* notes 15-90 and accompanying text.

[12] *See infra* notes 91-203 and accompanying text.

and Part IV will analyze the court's opinion.[13] Finally, this Note concludes that the Second Circuit Court of Appeals' interpretation of the grave risk exception to the Hague Abduction Convention's requirement that wrongfully removed children be returned to their habitual residence is consistent with the purpose of the treaty and with the majority of United States and foreign case law.[14]

II. Statement of the Case

A. Facts

Felix Blondin and Marthe Dubois met in 1990 while visiting Guadaloupe.[15] After returning to France, the couple lived together but did not marry.[16] In 1991, Blondin began physically abusing Dubois at approximately the same time their daughter Marie-Eline was born.[17] Blondin occasionally struck Dubois while she was holding Marie-Eline, thereby hitting the child.[18] Blondin allegedly once wrapped electrical cord around the child's neck and threatened to kill both Dubois and his daughter.[19] Dubois and Marie-Eline fled to homes for battered women for periods totaling approximately nine months, returning to live with Blondin intermittently.[20]

In 1993, Blondin sought custody of Marie-Eline in a French court, but the case was resolved when the couple reconciled and agreed to live together with their daughter at Blondin's residence.[21] Dubois became pregnant again during the couple's reconciliation.[22] Meanwhile, Blondin continued to batter Dubois, causing her to

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[13] *See infra* notes 204-41 and accompanying text.

[14] *See infra* notes 242-44 and accompanying text.

[15] *See* Blondin v. Dubois, 19 F. Supp.2d 123, 124 (S.D.N.Y. 1998) (hereinafter *Blondin I*).

[16] *See Blondin II*, 189 F.3d at 242.

[17] *See id.* at 242-43.

[18] *See id.* at 243.

[19] *See id.*

[20] *See id.*

[21] *See id.* The court's order stated that "'the parental rights over the child will be exercised in common by both parents' and that 'the child will have its usual residence at the fathers.'" *Id.*

[22] *See Blondin I*, 19 F. Supp.2d at 125.

seek medical treatment in March and June of 1995.[23] The beatings continued after a son, Francois, was born in August 1995 and they often occurred in the children's presence.[24] Blondin also threatened to "kill everyone" and to throw Francois out the window.[25]

In August 1997, Dubois left Blondin again and fled with the children to the United States.[26] Dubois did not obtain Blondin's consent and forged his signature on documents needed to obtain passports for the children.[27] In the United States, Dubois and the children lived with and were supported by Dubois' family in Brooklyn, New York.[28] Blondin, apparently unaware that Dubois and the children had left France, soon obtained a French court preliminary order that the children could not leave "the metropolitan area without the previous authorization of the father."[29]

B. United States District Court for the Southern District of New York

Blondin eventually discovered that the children were residing in the United States and in June 1998, filed a petition seeking an arrest warrant of the two children with the United States District Court for the Southern District of New York.[30] Judge Denny Chin

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[23] *See id.* In June, Dubois was treated for "a cutaneous excoriation near her right eye, hematomas on the left arm and forearm, and hematomas on both breasts." *Id.* In March, Dubois was treated for a "localized edema of the lower right maxilla and . . . headaches." *Id.*

[24] *See id.*

[25] *Id.*

[26] *See Blondin II*, 189 F.3d at 243.

[27] *See id.*

[28] *See Blondin I*, 19 F. Supp.2d at 125.

[29] *Blondin II*, 189 F.3d at 243.

[30] *See Blondin I*, 19 F. Supp.2d at 126. Blondin asked the court to take the children into custody until the court ruled on Blondin's petition. *See id.* In the United States, a petition may be filed either with the State Department or "in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." ICARA, *supra* note 4, 42 U.S.C. § 11603(b). However, "[a] decision under [the Hague Abduction Convention] concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Abduction Convention, *supra* note 4, T.I.A.S. No. 11,670, at 9, 1343 U.N.T.S at 101.

denied the petition but issued an order to show cause.[31] The court served Dubois with its order, appointed her counsel, and five days later, held an evidentiary hearing on Blondin's request to have the children returned to France under the Hague Abduction Convention.[32]

The district court found that Marie-Eline had adjusted well to living in the United States where she attended public school.[33] Marie-Eline testified that she did not like living in France because Blondin "used to scream, and once . . . he hit me up [sic] and because he always hit me. If I don't say what he want me to say, he hit me."[34] Marie-Eline also testified that she did not wish to return to France because "I don't want my daddy to hit me" and that she, her mother, and her brother came to the United States because "my daddy was too—too trouble for us."[35]

The district court's opinion reviewed the rules of the Hague Abduction Convention and its application to the facts before the court.[36] Judge Chin noted that the Hague Abduction Convention seeks to protect children "from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence" so that nation's courts can resolve the custody dispute.[37] Dubois, the defendant, conceded that Blondin satisfied his initial burden under the Convention.[38] Dubois asserted, however, that the petition should be denied under Article 13b of the Hague Abduction Convention which allows a court to refuse repatriation if "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."[39] The question before the court,

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[31] *See Blondin I*, 19 F. Supp.2d at 126.

[32] *See id.*

[33] *See id.* at 125.

[34] *Id.*

[35] *Id.*

[36] *See id.* at 126-29.

[37] *Id.* at 126 (citing Hague Abduction Convention, *supra* note 4, Preamble, T.I.A.S. No. 11670, at 4, 1343 U.N.T.S. at 98).

[38] *See id.* For a discussion of the petitioner's burden of proof, see *infra* notes 112-15 and accompanying text.

[39] *Id.* Article 13b states that

therefore, was whether Dubois established by clear and convincing evidence that such a risk existed if Marie-Eline and Francois were returned to France.[40]

Courts must narrowly construe Article 13b's exception and cannot adjudicate the merits of the underlying custody dispute nor assess which parent should receive custody of the children.[41] The district court noted that the court's purpose was to determine "whether returning the child would present a 'grave risk' of physical or psychological harm or an intolerable situation."[42] However, the court added that this narrow inquiry is modified by three additional considerations. First, the court must undertake "'some evaluation of the people and circumstances awaiting [the] child in the country of . . . habitual residence.'"[43] Second, the court must consider that, in drafting Article 13b, the signatories to the Convention were of the view that:

> the interest of the child in not being removed from [his or her] habitual residence without sufficient guarantees of [his or her] stability in the new environment [ ] gives way before the

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> [n]otwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution, or other body which opposes its return establishes that there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Hague Abduction Convention, *supra* note 4, art. 13b, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S at 101.

[40] *See* ICARA, *supra* note 4, 42 U.S.C.A. § 11603(e)(2)(A). The Article 20 exception for returning children in violation of "the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" must also be proven by clear and convincing evidence. Hague Abduction Convention, *supra* note 4, art. 20, T.I.A.S. No. 11,670, at 9, 1343 U.N.T.S at 101; ICARA, *supra* note 4, 42 U.S.C. § 11603(e)(2)(A). The Article 12 exception for petitions not filed within one year of the wrongful removal and Article 13a exception for petitioners not exercising custody rights or who acquiesce to the removal must be satisfied by a preponderance of the evidence. *See* Hague Abduction Convention, *supra* note 4, arts. 12-13, T.I.A.S. No. 11,670, at 7-8, 1343 U.N.T.S at 100-01; ICARA, *supra* note 4, 42 U.S.C. § 11603(e)(2)(B).

[41] *See* ICARA, *supra* note 4, 42 U.S.C. § 11601(a)(4); Hague Abduction Convention, *supra* note 4, art. 19, T.I.A.S. No. 11,670, at 9, 1343 U.N.T.S at 101; *see also Blondin I*, 189 F. Supp.2d at 127.

[42] *Blondin I*, 19 F. Supp.2d at 127 (citing ICARA, *supra* note 4, 42 U.S.C.A. § 11601(a)(4)).

[43] *Id.* (citing Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 378 (8th Cir. 1995)).

> primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.[44]

Third, the court noted that the Hague Abduction Convention allows a judicial authority to deny an application to return a child if the child objects and that child's age and maturity indicate that the child's opinion should be considered.[45]

The district court then found three reasons why Marie-Eline and Francois would face a grave risk of physical or psychological harm or otherwise be placed in an intolerable situation if they were returned to France.[46] First, Judge Chin found that the evidence of Blondin's physical abuse of Dubois and the children was credible while Blondin "was not telling the truth. Indeed his testimony was incredible."[47] Second, the district court held that if the children were returned to France for legal proceedings, Dubois and Blondin's financial situations would force Dubois and the children to reside with Blondin, resulting in a grave risk of psychological harm or an intolerable situation.[48] Finally, the court noted that, while not dispositive, it was influenced by Marie-Eline's wish to

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[44] *Id.* (citing Elisa Perez-Vera, Explanatory Report to the Convention, ¶ 29). The case surely intended to cite to Elisa Perez-Vera, *Explanatory Report*, *in* ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 53, 75 (Permanent Bureau of the Hague Convention on Private Int'l Law ed., 1982) [hereinafter Perez-Vera Report]) *available at* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Explanatory Report on Convention #28* (last visited Mar. 28, 2000) <http://www.hcch.net/e/conventions/expl28e.html>. The Hague Conference on Private International Law recognizes the Perez-Vera report as the Hague Abduction Convention's "official history and commentary." *See* 51 Fed. Reg. 10,503 (1986).

[45] *See Blondin I*, 19 F. Supp.2d at 127.

[46] *See id.* at 127-29.

[47] *Id.* at 128. The court found that Blondin was not truthful when he testified that he did not know why Dubois left him and in his allegations that Dubois lied about being beaten in order to qualify for placement in homes for battered women. *See id.* Judge Chin also commented that Blondin's testimony varied since he first denied hitting his daughter or his wife but later acknowledged that he may have "'given [Marie-Eline] a slap on the behind'" and "that he may have slapped her 'just in the heat of a dispute.'" *Id.* Blondin also misrepresented to the district court the French court's proceedings, indicating that the French court sided with Blondin after a contested hearing when the custody award occurred after Blondin and Dubois reconciled. *See id.*

[48] *See id.*

remain in the United States because of her father's abuse.[49] The court then concluded that, because of his history of abusing his wife and children, Blondin's "rights under the Convention therefore must give way to the 'primary interest' of the children not to be exposed to 'physical or psychological danger' or the 'intolerable situation' that would surely exist if they are returned to France."[50]

C. Second Circuit Court of Appeals

Blondin appealed the district court's denial of his Hague Abduction Convention petition and the United States Court of Appeals for the Second Circuit held oral arguments on May 6, 1999.[51] At the hearing, the court ordered supplemental briefing on placement alternatives in France that would permit the children's repatriation and guarantee their safety.[52] In the interim, the court of appeals inquired, via the United States Department of State, about the possibility of the French government providing care for the children for the duration of the French custody proceedings.[53] The reply indicated that the French government would arrange for "the necessary care" if the children were returned and that the government had begun to review the "procedural means" for making the placement.[54]

On August 17, 1999, after obtaining this information and the parties' supplemental briefing, the Second Circuit reversed the district court's decision, remanding the case to the district court with instructions that the court "develop expeditiously a more complete record and . . . fashion appropriate relief" that more thoroughly considers placement alternatives in France.[55] The circuit court analyzed the district court's three rationales[56] for

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[49] *See id.* at 129.

[50] *Id.*

[51] *See Blondin II*, 189 F.3d at 242.

[52] *See id.*

[53] *See id.* The letter came from an official with the Office of Mutual Legal Assistance in Civil and Commercial Matters under the French Ministry of Justice. *See id.* This department is designated as France's central authority for Hague Abduction Convention purposes. *See id.*

[54] *Id.*

[55] *See id.* at 249.

[56] *See supra* notes 46-49 and accompanying text.

denying Blondin's petition for the return of his children and found that the court improperly considered Marie-Eline's adjustment to life and preference to remain in the United States.[57] But the circuit court noted that the district court "placed little emphasis on these two inapplicable considerations" and instead primarily considered whether Blondin's application should be denied under the Article 13b exception because the children faced a grave risk of physical or psychological harm if returned to France.[58]

The circuit court found that "ample record evidence supported the District Court's factual determination" that the children faced physical abuse if returned to their father.[59] But the circuit court determined that the lower court failed to consider the application of the Article 13b exception "while still honoring the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child's home country."[60] The Second Circuit then clarified the test for determining whether a respondent satisfies the Article 13b exception, noting that a court must "take into account any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might otherwise be associated with a child's repatriation."[61] The court agreed that the children should not be returned to the father but held the district court erred in not fully considering placing the children in the temporary custody of a third party, including the children's godmother.[62]

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[57] *See Blondin II*, 189 F.3d at 247-48. The Hague Abduction Convention allows the court to consider the child's wishes only after finding that the child "has obtained an age and degree of maturity at which it is appropriate to take account of [the child's] views." Hague Abduction Convention, *supra* note 4, art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S at 101. The district court did not make any findings about Marie-Eline's maturity or age. *See Blondin II*, 189 F.3d at 247. The Hague Abduction Convention also limits the application of the "well settled" exception to situations where the parent waits for more than one year before filing a petition for the child's return. *See* Hague Abduction Convention, *supra* note 4, at art. 12, T.I.A.S. No. 11,670, at 7-8, 1343 U.N.T.S at 100. Blondin's petition was filed with the district court ten months after Dubois took the children to the United States. *See Blondin II*, 189 F.3d at 247-48.

[58] *Blondin II*, 189 F.3d at 248.

[59] *Id.* at 247.

[60] *Id.* at 248.

[61] *Id.*

[62] *See id.* at 249.

The Second Circuit remanded the case to the district court with the instruction to "not limit itself to the single alternative placement initially suggested by Blondin" and "to make any appropriate or necessary inquiries of the government of France" and to request "the aid of the United States Department of State."[63] The circuit court concluded, however, by noting that it did "not disturb or modify the District Court's finding that returning [the children] to Blondin's custody (either expressly or *de facto*) would expose [the children] to a 'grave risk' of harm, within the meaning of Article 13b."[64] The court further noted that if the lower court could not find any "reasonable means of repatriation that would *not* effectively place the children in Blondin's immediate custody, it should deny Blondin's petition under the Convention."[65]

D. United States District Court for the Southern District of New York

On remand, the district court again denied Blondin's petition.[66] At the direction of the Second Circuit, the court undertook significant fact-finding, including obtaining information from the French Ministry of Justice and the United States Department of State, hearing testimony from a legal expert on French and international law and an expert in pediatric psychiatry, and interviewing the children.[67]

The district court held that Dubois satisfied the Article 13b exception for three reasons.[68] First, the court found that returning the children to France would cause them serious psychological harm.[69] The children still lived with Dubois and extended family and they continued to flourish in this environment.[70] The child psychiatrist testified that "any return of the children to France

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[63] *Id.*

[64] *Id.* at 250.

[65] *Id.*

[66] Blondin v. Dubois, 78 F.Supp.2d 283 (S.D.N.Y. 2000), *appeal docketed*, No. 00-6066 (2d Cir. Jan. 19, 2000) (hereinafter *Blondin III*).

[67] *See id.* at 287-88.

[68] *See id.* at 294.

[69] *See id* at 295. Dr. Albert Solnit, Sterling Professor Emeritus of Pediatrics and Psychiatry and Senior Research Scientist at the Yale University Child Study Center interviewed both children extensively at Dubois' request. *See id.*

[70] *See id.* at 291.

would 'almost certainly' trigger a post-traumatic stress disorder 'that would impair their physical, emotional, intellectual, and social development,' leading to 'long-term or even permanent harm to their physical and psychological development.'"[71]

Second, the court denied the petition because of "uncertainties surrounding the custody proceedings" in France.[72] Assurances by the French government that it would provide the children and their mother with housing, food, and other amenities throughout the child custody proceedings failed to satisfy the district court.[73] The court was troubled by what the children would encounter in France: changing housing arrangements, custody proceedings lasting between one and three months, and "extreme uncertainty about where they would live and who would take care of them."[74] Blondin's ability to gain temporary custody of Marie-Eline during the French court proceedings also concerned the court.[75]

Third, the court reasoned that Marie-Eline had attained the right under the Hague Abduction Convention to have her wishes considered.[76] Article 13 empowers a court to "refuse to order the return of 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 [his or her] views."[77] The court found that Marie-Eline wanted to remain in the United States because she expressed fear about returning to France and to her father.[78]

The district court also rejected several arguments advanced by Blondin and the governments of the United States and France.[79] First, the court disagreed with the assertion that repatriation of the children would cause only adjustment problems.[80] The court

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[71] *Id.* at 292.

[72] *Id.* at 295.

[73] *See id.*

[74] *Id.* at 295-96.

[75] *See id* at 296.

[76] *See id.*

[77] Hague Abduction Convention, *supra* note 4, art. 13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

[78] *See Blondin III*, 78 F.Supp.2d at 296.

[79] *See id.* at 296-99.

[80] *See id.* at 297. "[T]he trauma of uprooting the children from their stable home is

justified its position by distinguishing Marie-Eline and Francois' situation from numerous cases where courts refused to block repatriation petitions under Article 13b.[81]

Next the court disagreed that its Article 13b interpretation was too broad.[82] The district court interpreted the Second Circuit's instructions for remand as indicating "that it is leaning towards the extremely narrow conception of the Article 13b exception set forth by the Sixth Circuit in *Friedrich v. Friedrich*."[83] Judge Chin rebuffed the Second Circuit's implication that the grave risk exception required the satisfaction of a two-part test: that Blondin seriously abused the children, and that "no other options existed by which the children could be safely returned to France."[84] The court found support in the United States State Department's description of the "grave risk/intolerable situation" exception, which includes when a parent removes a child to protect them from continued sexual abuse.[85] The court noted that this scenario did not require that the "court in the abducted-from country [be] incapable or unwilling to protect the child."[86]

The district court then held that the restrictive *Friedrich* Article 13b interpretation was satisfied because "Blondin seriously abused the children and . . . they would suffer severe psychological harm from any return to France, no matter how

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compounded and magnified by the fact that they will be returned to the country where they were severely abused, physically and emotionally, by their father for an extended period of time." *Id.*

[81] *See id.* (citing Friedrich v. Friedrich, 78 F.3d 1060, 1067 (6th Cir. 1996) (finding no allegations of child abuse); Rydder v. Rydder, 49 F.3d 369, 373 (8th Cir. 1995) (separating child from primary caretaker insufficient alone to satisfy the Article 13b exception); Freier v. Freier, 969 F.Supp. 436, 442 (E.D.Mich. 1996) (refusing to invoke Article 13b exception in the absence of allegations of abuse); Slagenweit v. Slagenweit, 841 F.Supp. 264, 267 (N.D.Iowa 1993) (granting petition because child faced only temporary adjustment problems upon repatriation)).

[82] *See Blondin III*, 78 F.Supp.2d at 297.

[83] *Id.* (citing 78 F.3d 1060 (6th Cir. 1996) (holding that Article 13b is satisfied only when repatriation puts the child in imminent danger or returns a seriously abused or neglected child to a country that cannot adequately protect the child pending judicial proceedings)).

[84] *See id.* at 298.

[85] *See id.* (citing *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10510 (1986)).

[86] *Blondin III*, 78 F.Supp.2d at 298.

carefully managed by the French courts."[87] The court explained that "[w]hat France [cannot] do . . . is protect [the children] from the trauma of being separated from their home and family and returned to a place where they were seriously abused, amidst the uncertainties of court proceedings and being on public assistance."[88]

Finally, the court rejected the French government's allegations that it was interfering with a French custody dispute. Correspondence from France's Ministry of Justice warned that it might be forced to act "at the level of international mutual assistance in criminal matters" should the district court's interpretation of the Hague Abduction Convention not lead to a satisfactory result.[89] Judge Chin rejected "these veiled threats" and reiterated the court's adherence to the Hague Abduction Convention.[90]

III. Background Law

A. Hague Abduction Convention

The Hague Convention on the Civil Aspects of International Child Abduction was adopted in 1980 "to protect children internationally from the 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."[91] The Hague Abduction Convention achieves these purposes "by returning the child to the parent or custodian with whom the child was residing prior to the abduction, regardless of the existence of a custody or visitation decree obtained by the abducting parent."[92] The United States signed the Hague Abduction Convention on December 23, 1981,[93]

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[87] *See id.*

[88] *See id.*

[89] *Id.* at 299.

[90] *Id.*

[91] Hague Abduction Convention, *supra* note 4, Preamble, T.I.A.S. No. 11,670, at 4, 1343 U.N.T.S at 98.

[92] Stephanie Vullo, *The Hague Convention on the Civil Aspects of International Child Abduction: Commencing A Proceeding In New York for the Return of A Child Abducted From a Foreign Nation*, 14 TOURO L. REV. 199, 201 (1997).

[93] *See* Letter of Submittal, Oct. 4, 1985, *reprinted in* 51 Fed. Reg. 10,494, 10,496

ratified the treaty on October 9, 1986,[94] and enacted the ICARA[95] legislation implementing the treaty on April 29, 1988.[96]

ICARA and the Hague Abduction Convention differ from two federal statutes addressing parental kidnappings. The Parental Kidnapping Prevention Act of 1980 (PKPA)[97] applies to abductions within the United States and requires states to enforce other domestic, but not foreign, court custody decrees.[98] The International Parental Kidnapping Crime Act of 1993 (IPKA)[99] complements ICARA by outlawing international parental abductions from the United States, thereby allowing the United States to seek extradition of kidnapping parents from nations with which the United States has extradition treaties.[100] The Hague Abduction Convention is the primary avenue for relief when courts are confronted with international parental kidnappings because both the PKPA and the IPKA are U.S., not international, law and because the treaty is the "supreme Law of the Land."[101] However, IPKA is useful when the Hague Abduction Convention fails or does not apply when the child is abducted to a non-signatory nation.[102] The Hague Abduction Convention also differs from the Uniform Child Custody Jurisdiction Act (UCCJA),[103] which allows courts to control the physical custody of the child while the abducting parent seeks relief in the country of habitual residence.[104]

(1986).

[94] *See* INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS 16 (G. DeHart ed. 1989).

[95] *See* ICARA, *supra* note 4.

[96] *See id.*

[97] 28 U.S.C. § 1738A (1998).

[98] *See id.* § 1738A(a).

[99] 18 U.S.C. § 1204 (1998).

[100] *See* Jacqueline D. Golub, *The International Parental Kidnapping Crime Act of 1993: The United States' Attempt to Get Our Children Back – How Is It Working?*, 24 BROOK. J. INT'L L. 797, 799 (1999).

[101] U.S. CONST. art. VI.

[102] *See* Golub, *supra* note 100, at 797.

[103] *See* UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999).The National Conference of Commissioners on Uniform State Laws approved the UCCJA in 1968 and every state has adopted some version of this model legislation. *See id. Table of Jurisdictions & Historical Notes*, 9 U.L.A. at 261-62.

[104] *See* Fred Morganroth, *The Hague Convention: Understanding and Handling*

The Hague Abduction Convention applies to children who were habitual residents of signatory nations before their abduction.[105] Hague Abduction Convention petitions to recover abducted children may be filed with the abducted-to signatory's Central Authority or in their courts.[106] Each signatory nation must "designate a Central Authority to discharge the duties . . . imposed by the Convention . . . ."[107] The United States designated the Office of Children's Issues in the Bureau of Consular Affairs in the Department of State its Central Authority.[108] The State Department's role, however, is limited to providing assistance in locating the child[109] because the State Department cannot act "as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention" nor provide any assistance for the costs associated with filing, contesting, and enforcing a petition for a child's return.[110] While a petition may also be filed with the Central Authority of the nation where the child is a habitual resident, that Central Authority will only provide assistance in locating the child and forward the petition to

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Child Abduction and Retention Cases, 78 MICH. B. J. 28, 30 (1999).

[105] *See* Hague Abduction Convention, *supra* note 4, art. 4, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99. Elian Gonzalez, a five-year old Cuban boy rescued at sea on November 25, 1999, best exemplifies the lack of remedies for parents of children abducted from non-signatory nations. *See* Sue Anne Pressley, *Young Refugee at Center of International Dispute; Father, Cuba Want Return of Boy Rescued At Sea*, WASH. POST, Nov. 30, 1999, at A3. Gonzalez accompanied his mother and stepfather on their attempt to illegally enter the United States from Cuba by boat. *See id.* The boat capsized, killing ten passengers, but Elian was rescued after witnessing his mother drown and spending two days at sea. *See id.* Elian's father in Cuba demanded the child's return but Cuba has not ratified the Hague Abduction Convention. *See* BUS. WIRE, *Leading Family Law Organizations Praise Decisions Allowing Return of Elian Gonzalez to Father*, March 22, 2000. Organizations like the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, urged the United States to nevertheless repatriate the child because, in ratifying the Hague Abduction Convention, "the United States has clearly adopted the principles which should be applied to all international child custody disputes." *Id.*

[106] *See* Hague Abduction Convention, *supra* note 4, art. 8, T.I.A.S. No. 11,670, at 6-7, 1343 U.N.T.S. at 100.

[107] *Id.* art. 6, T.I.A.S. No. 11,670, at 5, 1343 U.N.T.S. at 99.

[108] *See* ICARA, *supra* note 4, 42 U.S.C.A. §§ 11608(a)-(c); Exec. Order No. 12648, 53 Fed. Reg. 30637 (1988).

[109] *See* Vullo, *supra* note 92, at 209.

[110] International Child Abduction, 22 C.F.R. § 94.4 (1998).

the nation to which the child was abducted.[111]

If a petitioner, in the alternative or simultaneously, applies to the courts of the nation to which the child was abducted, that court will conduct a very narrow inquiry.[112] The petitioner must first satisfy a two-part test to prove that the child's removal was "wrongful."[113] First, the petitioner must prove that the removal was "in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention."[114] Second, the petitioner must establish that, at the time of removal or retention, "those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."[115]

If a court holds that the child's removal was wrongful, the court must order the child returned unless one of four exceptions exists.[116] The exceptions are: (1) if the person petitioning for the children to be returned did not have custody rights or previously or subsequently agreed to the removal or retention;[117] (2) if the child would face grave risk of physical or psychological harm if returned;[118] (3) if the "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" would not permit the child's return;[119] or (4) if the person seeking return commenced the proceeding more than one year after the wrongful removal and the child is settled in the new environment.[120] The Hague Abduction Convention also empowers "the judicial and administrative authorities [to] take into account the information relating to the social background of the child"

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[111] *See* Hague Abduction Convention, *supra* note 4, arts. 8-9, T.I.A.S. No. 11,670, at 6-7, 1343 U.N.T.S. at 100.

[112] *See infra* notes 113-29 and accompanying text.

[113] Hague Abduction Convention, *supra* note 4, art. 3, T.I.A.S. No. 11,670, at 4-5, 1343 U.N.T.S. at 98-99.

[114] *Id.*

[115] *Id.*

[116] *See id.* arts. 12, 13, 20, T.I.A.S. No. 11,670, at 8-9, 1343 U.N.T.S. at 100-01.

[117] *See id.* art. 13a, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

[118] *See id.* art. 13b, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S. at 101.

[119] *Id.* art. 20, T.I.A.S. No. 11,670, at 9, 1343 U.N.T.S. at 101.

[120] *See id.* art. 12, T.I.A.S. No. 11,670, at 7-8, 1343 U.N.T.S. at 100.

when considering the existence of an exception under Article 13.[121]

These exceptions, however, must be narrowly construed so as not to undermine the purposes of the Hague Abduction Convention.[122] The drafters of the Hague Abduction Convention warned that "a systematic invocation of [the] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."[123] Much attention was paid at the Hague Abduction Convention's drafting session to Article 13b's grave risk exception in particular and delegates defeated numerous attempts to broaden the exception's language.[124] The Chairman of the Hague Abduction Convention's drafting commission noted that the delegates were especially wary of using a "best interests of child analysis" instead of the grave risk of harm language because the treaty's purpose was to repatriate the child so that the child's best interests could be determined in custody proceedings in the child's habitual residence.[125] Despite these efforts, however, the delegates' failure to define the phrases "grave risk" and "intolerable situation" opened the door for courts throughout the world to interpret Article 13b in various manners.[126]

In the United States, guidance on interpreting the Hague Abduction Convention, including Article 13b, can be found in the United States Department of States' explanatory materials on the Hague Abduction Convention.[127] In drafting Article 13b, the State Department notes that the Convention's drafters indicated "that 'intolerable situation' is not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State"

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[121] *Id.* art. 13, T.I.A.S. No. 11,670 at 8, 1343 U.N.T.S. at 101.

[122] *See* Perez-Vera Report, *supra* note 44, ¶ 34.

[123] *Id.*

[124] *See id.* ¶¶ 27-34.

[125] *See* A. E. Anton, *The Hague Convention on International Child Abduction*, 30 INT'L & COMP. L.Q. 537, 553 (1981).

[126] *See* Lara Cardin, Comment, *The Hague Convention on the Civil Aspects of International Child Abduction As Applied to Non-Signatory Nations: Getting to Square One*, 20 HOUS. J. INT'L L. 141, 150 (1997).

[127] *See Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494-01, 10510 (1986).

but rather where "a custodial parent sexually abuses the child."[128] The commentary adds, however, that "[i]f the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition" because such circumstances justify protecting the child from an intolerable situation and a grave risk of harm.[129]

B. United States Case Law

Although the United States ratified the Hague Abduction Convention years ago,[130] surprisingly few American courts have faced difficult interpretative questions under the Convention's grave risk of harm exception in Article 13b. This section summarizes the evolution of U.S. case law construing Article 13b, which is the most litigated of the Hague Abduction Convention's provisions.[131]

In the years immediately after the United States ratified the Hague Abduction Convention, courts unanimously rejected Article 13b claims after finding that parties asserting the affirmative defense failed to satisfy their burden of proof. For example, in *Sheikh v. Cahill*,[132] a New York state court disagreed that returning the abducted child to the mother in the United Kingdom would place the child at a grave risk for physical or psychological harm or other otherwise place the child "in an intolerable situation."[133] The court stated that the Hague Abduction Convention allowed it to consider the child's social background.[134] Then, the court interviewed the nine-year old child in camera before holding that the father failed to establish by clear and convincing evidence that the child faced a grave risk of harm upon his return.[135]

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[128] *Id.*

[129] *Id.*

[130] *See supra* notes 93-96 and accompanying text.

[131] *See* Eric S. Horstmeyer, *The Hague Convention on the Civil Aspects of Child Abduction: An Analysis of Tahan and Viragh and Their Impact on Its Efficacy*, 33 U. LOUISVILLE J. FAM. L. 125, 127 (1995).

[132] 546 N.Y.S.2d 517 (Sup. Ct. 1989).

[133] *Id.* at 521.

[134] *See* Hague Abduction Convention, *supra* note 4, art.13, T.I.A.S. No. 11,670, at 8, 1343 U.N.T.S at 101.

[135] *See Sheikh*, 546 N.Y.S.2d at 521.

Furthermore, in *Renovales v. Roosa*,[136] a Connecticut state court ordered two children returned to their father in Spain, finding that the testimony of expert psychologists produced by their mother as well as the testimony of the attorney appointed to represent the children did not satisfy the exception.[137] While the *Sheikh* court confined itself to the inquiry stated in the Hague Abduction Convention, the *Renovales* court conducted a broader inquiry that in practicality was an inquiry into the child's best interests.[138] While each of these early cases rejected parties' assertion of Article 13b, the courts' divergent methodologies foreshadowed the difficult interpretative questions to come.[139]

In 1992, a New Jersey superior court decided *Tahan v. Duquette*,[140] starting a new phase of interpretation of Article 13b. In *Tahan*, the superior court heard the second appeal involving a mother's attempt to force her former husband to return their child to Canada.[141] After remand, the lower court found that the child's father did not satisfy the grave risk exception and the appellate court affirmed.[142] The appellate court noted that courts in the United States and other countries had not addressed the scope of the grave risk exception but concluded that the inquiry involved "more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint."[143] The court then expanded the to-date narrow interpretation of the Hague Abduction Convention's authorization that courts explore the abducted child's social background, noting that this inquiry could include the "psychological make-ups,

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136 No. FA 91 0392232 S., 1991 WL 204483 (Conn. Super. Ct. Sept. 27, 1991).

137 *See id.* at *3-5.

138 *See id.; Sheikh*, 546 N.Y.S.2d at 522.

139 *See also* In re Marriage of Helen Ieroimakis, 831 P.2d 172, 194 (Wash. Ct. App. 1992) (Kennedy, J., dissenting) (stating that the testimony of psychologists proved by clear and convincing evidence that the children faced a grave risk of psychological harm or an intolerable situation if returned because of the separation from their mother); In re David S. v. Zamira S., 574 N.Y.S.2d 429, 434 (N.Y. Fam. Ct. 1991) (noting that the mother failed to produce any evidence that the children faced the situations detailed in Article 13b's exception).

140 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

141 *See id.* at 489.

142 *See id.*

143 *Id.*

ultimate determinations of parenting qualities, [and] the impact of life experiences" in determining whether a grave risk exists if the child is returned.[144]

Tahan's expansion of the Article 13b inquiry was adopted by several courts, although none found that the facts before them constituted a grave risk. In *Currier v. Currier*,[145] the court conducted the expanded *Tahan* inquiry but held that, despite the respondent's allegations about the petitioner-mother's depression and estrangement from her parents, this evidence did not raise "any serious doubt about the safety, propriety, or nurturing character of the German environment to which the children would return."[146] Also in *In re Coffield*,[147] an Ohio appellate court held that, while *Tahan* expanded the court's ability to review the conditions the abducted child would face upon repatriation, the *Tahan* test would not consider the respondent's evidence of the petitioner-mother's lifestyle and method of caring for the child prior to the child's abduction.[148]

The next evolutionary stage of Article 13b's grave risk of harm test came when the first two United States courts of appeal addressed the scope of Article 13b's language. In 1995, the Eighth Circuit Court of Appeals in *Nunez-Escudero v. Tice-Menley*[149] reversed a district court's refusal under Article 13b to return a child abducted by his mother from Mexico.[150] Four months earlier in *Rydder v. Rydder*,[151] the Eighth Circuit rejected a mother's reliance on the Article 13b exception where the mother merely cited numerous authorities stating that children separated

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[144] *Id.* While the court expanded the Article 13b inquiry, it held that in the case before it the trial court was correct in refusing to allow (1) the father to introduce a psychologist's testimony about the child's bonding with the father; (2) the father and his present wife's testimony about the child's aspirations; and (3) the child's teacher to show the effect of the court's decision on the child. *See id.* at 488. The court held that this evidence was more appropriate for the custody hearing that would occur in Canada. *See id.* at 489.

[145] 845 F.Supp. 916 (D.N.H. 1994).

[146] *Id.* at 923.

[147] 644 N.E.2d 662 (Ohio Ct. App. 1994).

[148] *See id.* at 665.

[149] 58 F.3d 374 (8th Cir. 1995).

[150] *See id.* at 375.

[151] 49 F.3d 369 (8th Cir. 1995).

from their primary caretaker were at a risk of psychological harm.[152] The Eighth Circuit held that the mother had failed to present the district court with "specific evidence of potential harm."[153]

In *Nunez-Escudero* the Eighth Circuit was presented with evidence that, while more specific than that produced in *Rydder*, still failed to satisfy the Article 13b exception.[154] The mother offered an affidavit stating that she was verbally, physically, and sexually abused by her husband, that her husband and father-in-law would not let her leave the home in Mexico without one of them, and that she was not allowed to nurse the baby nor purchase a car safety seat for the baby.[155] The mother's affidavit also detailed verbal abuse by the father-in-law and alleged that the "father-in-law hit his youngest son with a wooden plunger."[156]

The district court refused to grant the father's petition because of "the baby's age, the impact of separating the baby from his mother, and the possibility that the baby could be institutionalized during the pendency of the Mexican custody proceedings."[157] But the circuit court noted that the district court's second factor, the impact of separating mother and child, should not have been considered in evaluating whether a grave risk of physical or psychological harm existed upon repatriation.[158] The Eighth Circuit then held that the construction of Article 13b meant that a grave risk of physical or psychological harm must be as serious as the second alternative, placing the child in an intolerable situation.[159]

One year after *Nunez-Escudero*, the Sixth Circuit in *Friedrich v. Friedrich*[160] affirmed a district court's ruling granting a father's Hague Abduction Convention petition to return his son to

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[152] *See id.* at 373.

[153] *Id.*

[154] *See Nunez-Escudero*, 58 F.3d at 377.

[155] *See id.* at 376.

[156] *Id.*

[157] *Id.* at 377.

[158] *See id.*

[159] *See id.*

[160] 78 F.3d 1060 (6th Cir. 1996).

Germany, the son's habitual residence.[161] After finding that the mother wrongfully removed the son from Germany, the appellate court agreed that the mother failed to prove that the child's return should be prevented under Article 13b.[162] The mother's evidence consisted of her testimony about the son's adaptation to life in Ohio and an expert psychologist's opinion that the child would experience loss and anger that could lead to developmental or emotional troubles if he was removed from his mother and returned to Germany.[163]

The Sixth Circuit, in what it called a "restrictive reading," stated that a grave risk of harm under Article 13b exists only "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," or "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."[164] The court justified its narrow interpretation by noting that this exception "is not license for a court in the abducted-to country to speculate on where the child would be happiest" because the country of habitual residence decides that issue when resolving the ultimate custody issues between the parties.[165]

The court then rejected the mother's evidence as unsatisfactory to meet the Convention's clear and convincing evidence standard of proof, noting that the mother simply alleged that her son would experience adjustment problems.[166] The court added that it would even be irrelevant "*if* the home of Mr. Friedrich were a grim place to raise a child in comparison to the pretty, peaceful streets of" the mother's hometown because the courts of the abducted-to country do not have jurisdiction to decide where the child will be happiest.[167] Testimony by the mother and the expert psychologist, while not irrelevant per se, would be admissible under *Friedrich*

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[161] *See id.* at 1063.

[162] *See id.* at 1069.

[163] *See id.* at 1067.

[164] *Id.* at 1069.

[165] *Id.* at 1068.

[166] *See id.* at 1067.

[167] *Id.* at 1068.

only if they shed light on the existence of one of the two situations that constitute grave harm.[168]

Numerous courts have considered *Friedrich*'s restrictive analysis when interpreting Article 13b.[169] Most courts have refused to find that Article 13b was satisfied under the *Friedrich* test, despite the allegations of serious abuse committed by those petitioning for relief under the Hague Abduction Convention.[170] For example, in *Janakakis-Kostun v. Janakakis*,[171] the respondent-mother testified about abuse committed by the petitioner-father, including pushing both the mother and the child to the ground and causing the mother to be hospitalized with severe neck injuries after violently pulling her hair.[172] In *Steffen F. v. Severina P.*,[173] the only case denying a Hague Abduction Convention repatriation petition using the *Friedrich* test, the court held that the mother established with clear and convincing evidence that the child should not be returned because of compelling evidence that the abducted child's sister had been sexually abused.[174]

Several other courts articulate different interpretations of Article 13b, either because these courts considered the issue before the *Friedrich* decision or because of the court's different

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[168] *See id.* at 1069.

[169] *See, e.g.*, Freier v. Freier, 969 F.Supp. 436 (E.D. Mich. 1996); Janakakis-Kostun v. Janakakis, 1999 WL 153369 (Ky. Ct. App. 1999); Wipranik v. Superior Court of Los Angeles County, 73 Cal.Rptr.2d 734 (Cal. Ct. App. 1998); Ciotolo v. Fiocca, 684 N.E.2d 763 (Ohio Com.Pl. 1997); Caro v. Sher, 687 A.2d 354 (N.J. Super. Ct. Ch. Div. 1996).

[170] *See* Steffen F. v. Severina P., 966 F.Supp. 922, 926-27 (D. Ariz. 1997); *Janakakis-Kostun*, 1999 WL 153369, at *6. The *Friedrich* test, however, allowed other courts to easily dispose of less severe or less convincing allegations of abuse. *See Freier*, 969 F.Supp. at 442-43 (holding that children's adjustment problems and desire to be near their extended family would not prevent return to Israel under Article 13b); *Wipranik*, 73 Cal.Rptr.2d at 740 (affirming lower court ruling that father's occasional use of marijuana and raising his voice did not constitute a grave risk); *Caro*, 687 A.2d at 357 (stating that respondent-mother alleged that the child would be unable to obtain needed therapy or medication in Spain); *Ciotolo*, 684 N.E.2d at 769 (holding that wife's allegations of domestic abuse were sufficiently countered by lack of police or medical documentation of the alleged abuse and the Spanish social service agency's report that no risk of danger was presented by the family situation in Spain).

[171] 1999 WL 153369 (Ky. Ct. App. 1999).

[172] *See id.* at *6.

[173] 966 F. Supp. 922 (D. Ariz. 1997).

[174] *See id.* at 931.

interpretation of Article 13b. In *Rodriguez v. Rodriguez*,[175] a district court cited *Friedrich* favorably but then held that the abducting parent satisfied the grave risk exception because of the petitioner's repeated violent physical assaults on the couple's thirteen year-old son.[176] The court did not quote *Friedrich*'s two exceptions but rather supported its holding as an appropriate extension of the hypothetical given by the United States Department of State,[177] noting that "the Court sees no reason to conclude that being physically abused with the frequency and severity as that experienced by [the child] is any more tolerable."[178] Several other courts have simply denied the respondent's invocation of Article 13b without reciting the appropriate test because the courts found that the evidence submitted failed in all respects to establish the grave risk of harm exception by clear and convincing evidence.[179]

Several courts also consider the ability of the petitioner to improve the situation for the abducting parent and the children upon their return to the country of habitual residence. [180] For example, in *Panazatou v. Pantazatos*,[181] the state court entered an

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[175] 33 F. Supp.2d 456 (D. Md. 1999).

[176] *See id.* at 462. The record stated that the father beat the son on the legs, back, and buttocks, kicked him in back, hit him with fists, and called him derogatory names over a six-year period. *See id.* at 459-60. The father also hit his wife, choked her, and once pushed her down the stairs when she was pregnant. *See id.*

[177] *See supra* note 127 and accompanying text.

[178] *Rodriguez*, 33 F.Supp.2d at 462.

[179] *See* In re Prevot, 855 F.Supp. 915 (W.D. Tenn. 1994), *rev'd on other grounds*, 59 F.3d 556 (6th Cir. 1995) (holding that psychologist's testimony of grave risk of harm did not satisfy burden of proof where psychologist obtained most of his information from the mother); Slagenweit v. Slagenweit, 841 F.Supp. 264 (N.D. Iowa 1993), *dismissed*, 43 F.3d 1476 (8th Cir. 1994) (holding that Article 13b's exception was not established by clear and convincing evidence where the child will receive adequate medical and developmental care in Germany).

[180] *See, e.g.*, Harkness v. Harkness, 577 N.W.2d 116, 121 (Mich. Ct. App. 1998) (upholding the circuit court's finding that respondent did not satisfy burden of proof even though it disagreed with some of petitioner's methods of disciplining the child); Harliwich v. Harliwich, No. FA 9868306S, 1998 WL 867328, at *1 (Conn. Super. Ct. Dec. 3, 1998) (holding that respondent failed to allege even substantial evidence that the child faced a grave risk of harm upon its return to New Zealand); Panazatou v. Pantazatos, No. FA 960713571S, 1997 WL 614519, at *1 (Conn. Super. Ct. Sept. 24, 1997).

[181] 1997 WL 614519, at *1.

interim decision holding that the respondent had established the grave risk exception by clear and convincing evidence but noted that the risk would be minimized if the respondent-mother had a home and financial support and would not be imprisoned before the judicial consideration of custody.[182] The court then obtained guarantees from the respondent that he would provide housing and financial support for the mother and his child upon their return.[183]

In addition, in *In re Walsh*[184] the court rejected the invocation of Article 13b but secured the petitioner-father's pledge to provide transportation and an escort for the children during their return to Ireland, to provide for their housing and medical needs there, and to act as a parental figure to them.[185] The father also pledged to inform the court of how the Irish social services agency would provide for the children in the event that he could no longer do so.[186]

C. Case Law from Other Convention Signatories

Case law from other Hague Abduction Convention signatory nations generally utilizes a restrictive interpretation of Article 13b's grave risk of harm exception but not to the extent expressed by the Sixth Circuit in *Friedrich*. Other nations appear to rely on two cases in particular when examining Article 13b's grave risk of harm affirmative defense.

In the first oft-cited case, *In re A*,[187] the English Court of Appeal affirmed a lower court ruling ordering a child to be returned to Canada under the Hague Abduction Convention.[188] In response to the mother's invocation of Article 13b, the lower court reviewed evidence from psychologists and the child's principal, but stated that the Hague Abduction Convention required a risk that is "more than an ordinary risk . . . . It is recognized that such psychological harm [as indicated by the mother's evidence] may

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182 *See id.* at *3.

183 *See id.*

184 31 F.Supp.2d 200 (D. Mass. 1998).

185 *See id.* at 207.

186 *See id.*

187 [1987] 1 F.L.R. 365 (Eng. C.A.) (LEXIS, England and Wales Reported and Unreported Cases).

188 *See id.*

be expected from the implementation of an order which involves taking a child away from one parent and passing him to another, and that the grave risk of psychological harm means something more . . . ."[189]

The court of appeal agreed that the risk "must be one of substantial, and not trivial, psychological harm" and that courts are entitled to consider "the practical consequences of an order" to return an abducted child.[190] The appellate court then held that, while the mother now refused to accompany the child upon his return to Canada in order to minimize the child's psychological harm, the mother's "obstacles . . . do not extend beyond the innumerable financial and practical difficulties" inherent in such a return.[191] The court then held that it was "the parental duty of the mother to go with [the child] to Canada and thus minimize so far as is possible the further instabilities which are likely to beset" him.[192] This decision established a fairly restrictive test for abducting parents seeking to avoid returning children under the Hague Abduction Convention—a standard rarely satisfied in English courts.[193]

In 1994, the Supreme Court of Canada issued its opinion in *Thomson v. Thomson*[194] and for the first time defined Canada's parameters of Article 13b's exception. Two lower courts had granted the petitioner-father's Hague Abduction Convention petition to return the child to Scotland before the Supreme Court affirmed.[195] The respondent-mother argued that the two-year old would suffer a grave risk of harm if separated from her.[196] The

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[189] *Id.*

[190] *Id.* Before the lower court, the mother agreed to return with the child to Canada, but on appeal she cited numerous obstacles that prevented her from doing so. *See id.* The court of appeal, therefore, had to decide whether the psychological harm of the child returning alone satisfied Article 13b. *See id.*

[191] *Id.* at 11.

[192] *Id.* at 11-12.

[193] *See infra* note 171. *But see* Re M [1998] 1 F.C.R. 488 (Eng. C.A.) (denying a Hague Abduction Convention petition where children had been abducted from Greece to England several times, thereby establishing an extensive record of the psychological traumas they sustained over a period of time).

[194] [1994] 119 D.L.R.4th 253 (Can.).

[195] *See id.* at 255.

[196] *See id.* at 285. While the mother could accompany the child back to Scotland,

court first interpreted the treaty's text, holding that within the structure of Article 13b, the grave risk faced by a child must be harm that amounts to an intolerable situation.[197] The court then held that although the child would face some psychological harm upon his return and eventual separation from his mother, it did not rise to the level required by Article 13b. This was especially true in light of the father's pledges to allow the mother to retain physical custody of the child pending review by a Scottish court and to seek such review within five weeks of the child's return to Scotland.[198]

The judicial branches of several other Hague Abduction Convention signatories have interpreted the grave risk exception to the treaty to require physical or psychological harm that rises to the level of creating an intolerable situation.[199] Numerous courts also have engaged in the bargaining between parents seen in *Thomson* and have conducted broad inquiries to secure pledges of support to enable the abducting parent to accompany the child on its return to the country of habitual residence.[200] These cases appear to be in response to the feeling that "[i]f the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the

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Scottish courts had already awarded the father custody. *See id.* at 287. Therefore, by granting the father's Hague Abduction Convention petition, the court was in effect removing the child from his primary caregiver of the last thirteen months and not simply returning the child to Scotland. *See id.*

[197] *See id.* at 286. The court asserted that the text includes the grave risk language followed by the second clause pertaining to "or otherwise place the child in an intolerable situation." *Id.* The court then interpreted the text as instructing judicial bodies to find that a grave risk of physical or psychological harm exists only when that risk rises to the level of an intolerable situation. *See id.*

[198] *See id.* at 289.

[199] *See* Gsponer v. Johnstone [1988] 12 Fam. L.R. 755 (Austl); Thomson v. Thomson [1994] 119 D.L.R.4th 253 (Can.); Re A (A Minor) [1988] 1 F.L.R. 365 (Eng. C.A.).

[200] *See* B. v. B. [1992] 3 W.L.R. 865 (Eng. C.A.) (discussing arrangements with Canadian government to provide abducting parent with housing, air fare and welfare benefits if she accompanied the child back to Canada); C. v. C. [1989] 1 W.L.R. 654 (Eng. C.A.) (noting father's agreement to provide support, accommodations, travel and medical expenses for both the child and the child's mother upon their return to Australia).'

jurisdiction and refused to return."[201] Numerous other courts have simply rejected invocation of the Article 13b exception where the abducting parent's evidence did not prove by clear and convincing evidence the existence of a grave risk of harm to the child upon their return to their habitual residence.[202] Several cases allowing an abducting parent to defeat a repatriation petition using Article 13b's grave risk exception can best be described as anomalies as these courts relied on facts that the majority of signatory nations courts would likely find insufficient.[203]

IV. Analysis

The Second Circuit's decision in *Blondin II* represents a moderate interpretation of the Hague Abduction Convention's Article 13b exception. This section analyzes the appellate court's grave risk of harm test in light of the Hague Abduction Convention's purposes and precedential case law, and discusses

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[201] C. v. C., 1 W.L.R. at 660. *But see* Re G [1995] 1 F.L.R. 64 (Eng.) (holding that abducting parent satisfied grave risk exception where she refused to return with the child to the country of habitual residence because the mother's psychiatric illness made it likely that she would suffer psychotic episodes if forced to return).

[202] *See, e.g.*, Murray v. Family Services [1993] F.L.C. 92-416 (Austl.) (holding that abducting parent did not satisfy Article 13b by alleging that New Zealand's courts could not address her allegations of physical violence where New Zealand's family law system paralleled Australia's system); Re C [1999] 2 F.L.R. 478 (Eng. C.A.) (reversing the lower court's denial of Hague Abduction Convention because the lower court erred in considering the welfare of the abducting parent and half-sibling instead of the child named in the petition); Re K [1995] 2 F.L.R. 550 (Eng. C.A.) (ordering child's return to the United States because mother failed to produce any evidence that the child would be subject to a grave risk of harm); Re L [1999] 1 F.L.R. 433 (Eng.) (holding that Article 13b's exception is not satisfied where the mother faces criminal charges for kidnapping if she accompanies the child back to the United States); K. v. K. [1998] 3 F.C.R. 207 (Eng.) (granting Hague Abduction Convention petition because abducting parent's fears due to father's physical assaults of her are evidence of her risk of harm, not the children's risk of harm); Re S [1992] 2 F.L.R. 1 (Eng.) (holding that abducting parent cannot establish a grave risk of harm where she previously voluntarily returned the child to the habitual residence before re-abducting the child)"'''.

[203] *See, e.g.*, Re Ves [1996] 559SP (Ir.) (refusing to order an abducted child returned to his habitual residence where mother alleged father sexually abused the child but offered no evidence beyond her testimony); PF v. MF [1993] 1992 No. 390 (Ir.) (denying Hague Abduction Convention petition because petitioner-father had a history of irresponsibly handling the family's finances and would likely do so again to the detriment of the child if the child was returned); MacMillan v. MacMillan [1988] 1989 S.L.T. 350 (Scot.) (denying petitioner-father's Hague Abduction Convention petition because of father's history of depression and alcoholism).

Blondin II given the serious international problem of domestic violence. The section concludes by briefly comparing the Second Circuit's opinion and the *Blondin III* decision.

While the purpose of the Hague Abduction Convention is to protect children from the harmful effects of wrongful removal from their habitual residence by ensuring their prompt return, the treaty includes several exceptions.[204] Some commentators argue that the success of the Hague Abduction Convention depends on courts limiting the scope of these exceptions.[205] Other commentators assert that Article 13b alone undermines the Convention's goals by transforming judicial proceedings considering the return of abducted children into duplicative hearings on the merits of custody.[206]

The *Blondin II* decision, however, illustrates how a court can achieve the goal of repatriating abducted children while simultaneously ensuring the children's safety.[207] The Second Circuit's opinion walks this thin line by focusing on whether the abducted child faces a grave risk of harm if returned to his or her habitual residence, not to the non-abducting parent.[208] The Second Circuit's ability to distinguish these separate issues is obvious by that court's agreement with the district court's finding that the children faced a grave risk of harm if returned to the custody of Blondin.[209] Where the appellate court found error was in the district court's denial of the petition without establishing that repatriation to France, the children's habitual residence, presented a grave risk.[210] The important difference lies in the fact that when a court orders a child returned pursuant to the Hague Abduction Convention, "the [child is] not by virtue of [the] order removed from the care of one parent, or remanded to the custody of the

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[204] *See supra* notes 116-21 and accompanying text.

[205] *See* Linda Silberman, *Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis*, 28 FAM. L.Q. 9, 25 (1994).

[206] *See* Glen Skoler, *A Psychological Critique of International Child Custody and Abduction Law*, 32 FAM. L.Q. 557, 559 (1998).

[207] *See supra* notes 51-65 and accompanying text.

[208] *See supra* notes 59-62 and accompanying text.

[209] *See supra* note 59 and accompanying text.

[210] *See supra* notes 59-62 and accompanying text.

other."[211] The circuit court's instructions on contacting the French government and the United States Department of State and the circuit court's own communication with France's Central Authority point to the appellate court's differentiation of these inquiries.[212] Therefore, the Second Circuit adhered to the Convention's goal of safe repatriation of the abducted children without devolving into the many issues more appropriately considered in custody proceedings.

The Second Circuit's decision in *Blondin II* also supports the spirit of the Hague Abduction Convention, which "depend[s] on the institutions of the abducted-to state generally deferring to the forum of the child's home state."[213] In instructing the lower court to rely on any assurances from the French government about providing arrangements that enable the children to be repatriated, the appellate court noted that "we are required to place our trust in the court of the home country to issue whatever orders may be necessary to safeguard children who come before it."[214] The Second Circuit's trust in the French courts at a glance appears to be well-founded: in 1990 France became one of the first nations to allow domestic violence advocacy agencies to become a civil party in the criminal trial of a accused batterer.[215]

The efforts, and sometimes failures, of courts from signatory nations to strike this delicate balance have created various tests for analyzing Article 13b defenses.[216] Some commentators assert that U.S. courts are more likely to strictly interpret Article 13b's exception for psychological harm than the judiciaries of other signatory nations for two reasons.[217] First, United States appellate courts ordinarily focus on issues of law instead of issues of fact, making the Article 13b inquiry a novel exercise.[218] Second, courts

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[211] In re Walsh, 31 F.Supp.2d 200, 206 (D. Mass. 1998).

[212] *See supra* note 63 and accompanying text.

[213] Perez-Vera Report, *supra* note 44, para. 34.

[214] *Blondin II*, 189 F.3d 240, 248-49 (2d Cir. 1999); *see also* Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377 (8th Cir. 1995).

[215] *See* CENTER FOR SOC. DEV. AND HUMANITARIAN AFFAIRS, *Strategies for Confronting Domestic Violence: A Resource Manual* 41, U.N. Doc. ST/CSDHA/20 (1993).

[216] *See supra* notes 187-203 and accompanying text.

[217] *See* Skoler, *supra* note 206, at 596.

[218] *See id.*

of this country are more likely to believe that allegations of psychological risk are more appropriately dealt with in custody actions instead of treaty interpretations because of the decades of false allegations of abuse in nasty custody battles.[219]

In *Blondin II*, the Second Circuit was faced with many issues tackled by other courts considering Hague Abduction Convention petitions, including how to assess the conditions the child would face upon repatriation and the possibility of creating alternatives to those conditions.[220] While *Blondin II* did not expressly adopt the *Friedrich* limitations on Article 13b,[221] the court, in application, adopted *Friedrich*'s second example that a grave risk of harm exists "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."[222] For example, the Second Circuit agreed with the district court's finding of serious abuse by petitioner Blondin against respondent Dubois and their children.[223] Both courts' review of the allegations of abuse and the family's circumstances in France before the abduction mirrors the broad inquiry into the family's environment endorsed in *Tahan v. Tahan* and applied in *Currier v. Currier* and *In re Coffield*.[224]

Nevertheless, the Second Circuit found the lower court's opinion devoid of evidence that the French courts were unable to protect the children in the interim.[225] The district court's failure to consider the second aspect of the *Friedrich* example explains the circuit court's instructions that the lower court investigate the possibility of the parents and French authorities taking "any ameliorative measures . . . that can reduce whatever risk might otherwise be associated with a child's repatriation" and consider the full panoply of arrangements that would allow the children's repatriation.[226]

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219 *See id.*

220 *See supra* notes 52-54 and accompanying text.

221 *See supra* notes 51-62 and accompanying text.

222 Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

223 *See Blondin II*, 189 F.3d 240, 247 (2d Cir. 1999).

224 *See supra* notes 140-48 and accompanying text.

225 *See Blondin II*, 189 F.3d at 249.

226 *Id.* Presumably the lack of findings concerning the ability of French courts to

The *Blondin* cases also represent a factual situation where the petitioning parent is unable to make concessions that minimize the risk of harm the abducted child will face upon repatriation.[227] Numerous courts have declined to find the existence of a grave risk of harm where the petitioning parent provided funds, housing, air-fare and other means of assistance to enable the abducting parent to accompany the child upon repatriation.[228] However, Blondin asserted that he was unable to provide any assistance to the child or to Dubois because of his dire financial situation.[229] The district court then refused to order the children repatriated because it could find no other way to repatriate the children in the mother's custody.[230] For this reason, the Second Circuit remanded the case to the district court with instructions to explore the possibility of third-party placement, either with some aspect of the French government or an acquaintance of Blondin and Dubois.[231]

The Second Circuit's refusal to summarily deny Blondin's petition in light of the history of abuse suffered by Dubois and the children at the hands of Blondin may appear to some to highlight the Hague Abduction Convention's failure to adequately address the serious problem of domestic violence. In reality, the Hague Abduction Convention hampers the judiciary of the abducted-to nation from remedying the underlying problem where domestic violence occurs.[232] Courts are empowered to assess whether clear

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protect the children between the time of repatriation and the determination of custody would also have failed the tests articulated by the Eighth Circuit Court of Appeals in *Nunez-Escudero v. Tice-Menley* and *Rydder v. Rydder* where the court held that Article 13b relies on the existence of specific evidence of potential harm. *See supra* notes 149-59 and accompanying text.

227 *See supra* notes 46-50 and accompanying text.

228 *See supra* notes 180-86 and accompanying text.

229 *See Blondin II*, 189 F.3d at 247.

230 *See Blondin I*, 19 F.Supp.2d 123, 128 (S.D.N.Y. 1998). Blondin had suggested to the district court that the repatriated children temporarily resided with their godmother while the French courts resolved the custody dispute between Blondin and Dubois. *See id.*

231 *See Blondin II*, 189 F.3d at 249. The appellate court held that the district court had no basis in refusing to consider third-party temporary custody. *See id.* On remand, Dubois may argue that separating the children from her, their primary caregiver, would cause the children grave risk of harm, thereby raising a common but usually unsuccessful argument for Article 13b.

232 *See* Regan Fordice Grilli, Comment, *Domestic Violence: Is It Being Sanctioned By the Hague Convention?*, 4 SW. L.J. & TRADE AMER. 71, 84 (1997). Grilli suggests

and convincing evidence that a grave risk of psychological or physical harm or an otherwise intolerable situation exists for the abducted children, not the abducting parent.[233] However, studies show that children who witness domestic violence have significantly higher rates of behavioral problems, difficulties with learning, hearing, and speech, and are more likely themselves to commit domestic violence in later years.[234] The frustration this engenders in some courts was evident in the opinion of *In re the Application of John Walsh* when the federal district court noted that the ruling that the children did not face a grave risk as defined by Article 13b "does not in anyway diminish the deplorable conditions of domestic abuse that this Court has identified, nor should this decision be read to minimize the impact such violence has on the lives of children."[235]

The district court's reasons for denying Blondin's Hague Abduction Convention petition in *Blondin III* disregard and contradict some of the Second Circuit's remand instructions.[236]

The Second Circuit did instruct that if the district court was "unable to find any reasonable means of repatriation that would not effectively place the children in Blondin's immediate custody, it should deny" Blondin's petition.[237] However, the district court, perhaps due to its disagreement with the appeals court's narrow interpretation of Article 13b, held that no form of repatriation could prevent the children from experiencing grave psychological

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that courts interpret the treaty to include a safe-harbor exception allowing courts in the abducted-to nation to place children subjected to domestic violence in a safe environment, either in the abducted-to or abducted-from nation, pending the custody resolution in the child's habitual residence. *See id.* at 83.

[233] *See* Hague Abduction Convention, *supra* note 4, art. 13b, T.I.A.S. No. 11,670, at 8, 1243 U.N.T.S. at 101.

[234] *See* Kathryn Conroy, DSW, *Child Witness to Domestic Violence* (visited November 6, 1999) <http://www.columbia.edu/~rhm5/CHDWITDV.html>.

[235] In re Application of John Walsh, 31 F.Supp.2d 200, 208 (D.Mass. 1998).

[236] *See supra* notes 68-78 and accompanying text. The Second Circuit instructed the lower court to explore placing the children with a third party in France to minimize the risk of harm but the district court's opinion omits any reference to third-party placements. *See Blondin II*, 189 F.3d at 249. The appeals court also found it necessary to "place our trust in the court of the home country" to act to protect repatriated children during custody proceedings. *Id.* at 248-49. The district court, however, found inadequate French government assurances for protecting the children upon their return to France. *See Blondin III*, 78 F.Supp.2d 283, 295-96 (S.D.N.Y. 2000).

[237] *See Blondin II*, 189 F.3d at 250.

harm.[238] The court based this holding on its examination of the totality of circumstances affecting the children's psychological health upon repatriation to France, including the effects of leaving their new home, returning to the country where they were abused, and facing the uncertainties of custody proceedings while living on public assistance.[239] In contrast, the Second Circuit's Article 13b analysis simply focused on how to prevent Blondin from posing a grave risk of physical or psychological harm to the children upon their repatriation.[240]

Applying the district court's rationale, the Hague Abduction Convention would rarely authorize the return of a seriously abused child to the country where the abuse occurred, especially if the family lacked financial resources, because of the risk of psychological harm inherent such a situation. Blondin appealed the district court's remand decision and the Second Circuit will have the opportunity to further clarify its test for grave risk of harm under the Hague Abduction Convention.[241]

V. Conclusion

The Second Circuit Court of Appeals in its decision in *Blondin II* interpreted the grave risk exception to the Hague Abduction Convention's requirement that wrongfully removed children be returned to their habitual residence consistent with the purpose of the treaty and with the majority of United States and foreign case law.[242] The court avoided the pitfalls to which other signatory nations have fallen prey by clarifying that the Article 13b inquiry focuses on whether the child faces a grave risk of harm upon repatriation to its habitual residence[243] and instructing lower courts to actively investigate the habitual residence nation's ability to ensure the child's safety pending adjudication of custody rights.[244] *Blondin II*, therefore, serves as a model for courts faced with

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[238] *See Blondin III*, 78 F.Supp.2d at 298.

[239] *See id.*

[240] *See Blondin II*, 189 F.3d at 250.

[241] *Blondin III*, 78 F.Supp.2d 283 (S.D.N.Y. 2000), *appeal docketed*, No. 00-6066 (2d Cir. Jan. 19, 2000).

[242] *See supra* notes 204-24 and accompanying text.

[243] *See supra* notes 59-62 and accompanying text.

[244] *See supra* note 63 and accompanying text.

future Hague Abduction Convention claims involving the Article 13b defense.

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