
DOMESTIC VIOLENCE HARMS THE CHILD! THE SEVENTH CIRCUIT PUTS CHILDREN FIRST IN INTERNATIONAL CUSTODY DISPUTES

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INTRODUCTION

A woman, who is a United States citizen, lives abroad with her children and husband who is a foreign national. Her husband constantly beats her, strangles her, and verbally assaults her alone and in front of the children. Her husband has also started spanking the oldest child on a nightly basis. Because she is not familiar with the foreign legal system, she does not seek help or understand what she needs to do in order to get help. To protect herself and her children, she takes the children to the United States.

Traditionally, under the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter “Hague Convention” or “Convention”), enacted in 1980, (also referred to as the International Child Abduction Remedies Act, the name of the United States’ implementing statute) a court could return the children to the foreign

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country if the husband petitions a federal court.¹ While the Hague Convention does provide defenses to this remedy of returning the children to the country of the petitioning parent, these do not explicitly include a defense for cases of domestic violence.² The most commonly used defense in cases of domestic violence is Article 13(b) that states the “remedy of return” is negated when there is a “grave risk of harm to child.”³ Although this defense would seem adequate to cover cases of domestic violence, the U.S. Courts of Appeals have traditionally either rejected it altogether or altered what the Hague Convention requires by interpreting it narrowly.⁴ In the past, circuit courts have given the grave risk of harm defense an extremely narrow interpretation.⁵ First, some circuit courts do not think that domestic violence between parents constitutes a grave risk of harm to the child.⁶ Second, some circuit courts have reasoned that if the laws of the child’s country of habitual residence will adequately protect the child, courts should return the child, despite any domestic violence.⁷ Third, some courts have reasoned that courts should attach conditions, such as a restraining order, which will adequately protect the child when the court returns the child to the country of habitual residence, mitigating

¹ See Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 42 U.S.C. § 11601 et al., 1343 U.N.T.S. 89 [hereinafter Hague Convention]; see also *Nunez-Escudero v. Tice Menley*, 58 F.3d 374, 377 (8th Cir. 1995); *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *13 (N.D. Ill. Feb. 10, 2000).

² Hague Convention, *supra* note 1, Article 13(b).

³ Merle Weiner, *International Child Abduction and the Escape From Domestic Violence*, 69 *FORDHAM L. REV.* 593, 651 (2000). [hereinafter Weiner I]

⁴ See, e.g., *Miller v. Miller*, 240 F.3d 392, 402-03 (4th Cir. 2001); *Blondin v. DuBois*, 238 F.3d 153, 160-61 (2d Cir. 2001); *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Nunez-Escudero*, 58 F.3d at 377.

⁵ Jeremy D. Morley, *Hague International Child Abduction Cases: The Future of the Grave Risk of Harm Defense*, *THE MATRIMONIAL STRATEGIST*, February, 2007 at 1.

⁶ See, e.g., *March*, 249 F.3d at 472; *Nunez-Escudero*, 58 F.3d at 377; *Tabacchi*, 2000 WL 190576, at *13.

⁷ *Miller*, 240 F.3d at 402-03; *Friedrich*, 78 F.3d at 1069.

the grave risk of harm.⁸ Such conditions, or “undertakings,” are arrangements or conditions placed upon the parties that make it feasible to return the child to the country of habitual residence.⁹ Undertakings typically include restraining orders, payments of housing and transportation costs, temporary custody arrangements, and other safety requests.¹⁰ Using this legal analysis, the circuit courts have narrowed the scope of the grave risk of harm defense, favoring to an impermissible degree the integrity of the Hague Convention over protection of individual children.¹¹ Circuit courts have also violated notions of international comity by specifically undermining the laws of foreign countries when they evaluate the adequacy of those laws or issue undertakings.¹² “International comity encompasses the idea that countries should interpret an international Convention that applies to both of them so as not to undermine the other country’s law and structure.”¹³

In December 2005, the Seventh Circuit Court of Appeals recognized in *Van de Sande v. Van de Sande* that spousal abuse and child abuse constitute a grave risk of harm to the child.¹⁴ Despite the historically narrow interpretation of the grave risk of harm defense in the United States, *Van de Sande* represents the growing trend among some circuit courts to expand this defense.¹⁵ Specifically, the Seventh Circuit recognized that nowhere does the Hague Convention indicate that courts should analyze the laws of the country of the petitioning

⁸ See, e.g., *Blondin*, 238 F.3d at 163; *Friedrich*, 78 F.3d at 1069.

⁹ Roxanne Hoegger, *What If She Leaves? Domestic Violence Cases Under the Hague Convention and the Insufficiency of the Undertakings Remedy*, 18 BERKELEY WOMEN’S L.J. 181, 188 (2003).

¹⁰ *Id.* at 189.

¹¹ Morley, *supra* note 5, at 1.

¹² *Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002); see Hoegger, *supra* note 9, at 202-03.

¹³ Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 689 (2001).

¹⁴ See generally *Van de Sande v. Van de Sande*, 431 F.3d 567 (7th Cir. 2005).

¹⁵ Morley, *supra* note 5, at 1.

parent to determine whether or not they provide adequate protection for children in cases of domestic violence.¹⁶ Also, the Seventh Circuit noted that undertakings might not be appropriate in cases of domestic violence.¹⁷

This Comment contends that the Seventh Circuit correctly analyzed and expanded the grave risk of harm defense in the context of domestic violence. Section I will explain the provisions of the Hague Convention and International Child Abduction Remedies Act. Section II will discuss some of the problems with the remedy of return under Hague Convention in cases of domestic violence. Section III will address how several circuit courts have analyzed the grave risk of harm defense. Section IV will explain the Seventh Circuit's decision in *Van de Sande v. Van de Sande*. Section V will further discuss why the Seventh Circuit correctly interpreted the Hague Convention and expanded the grave risk of harm defense in cases of domestic violence.

I. THE INTERNATIONAL CHILD ABDUCTION REMEDIES ACT

The International Child Abduction Remedies Act is the United States statute which implements the international treaty entitled the Hague Convention on the Civil Aspects of International Child Abduction.¹⁸ The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of wrongfully removed or retained children, and secures the exercise of visitation rights.¹⁹ For example, the Hague Convention entitles a parent whose child has been abducted from a foreign country to the United States (typically by a parent) to petition in federal court for the return of the child.²⁰ Specifically:

¹⁶ *Van de Sande*, 431 F.3d at 571.

¹⁷ *Id.*

¹⁸ *Id.* at 568.

¹⁹ 42 U.S.C. §11601(a)(4) (2002).

²⁰ *Van De Sande*, 431 F.3d at 568.

The Hague Convention was created to discourage abductions by parents who either lost, or would lose, a custody contest. . . . The Convention drafters adopted a ‘remedy of return’ . . . to discourage abductions, reconnect children with their primary caretakers, and locate each custody contest in the forum where most of the relevant evidence existed.²¹

Framers of the Convention formulated it with the idea that custody issues should be decided by the country of the child’s habitual residence, not the country to which a parent has abducted the child.²² Courts are to promptly return children, whose parent wrongfully removed or retained them within the meaning of the Convention, unless one of the narrow defenses under the Convention applies.²³ According to the remedy of return (also known as the ‘return principle’), the receiving country should promptly return the child to the country of habitual residence for adjudication of the custody matter.²⁴ The remedy of return is the preferred response to international child abductions.²⁵ Also, a Hague Convention proceeding is not meant to be used as a trial to determine custody, but instead to merely determine which country would have jurisdiction over any pending custody disputes.²⁶

Two defenses to the remedy of return are Articles 12 and 13(b), both of which must be established using clear and convincing evidence.²⁷ Under Article 12 of the Convention, for example, a court need not return a child if one year has elapsed since the wrongful

²¹ *Id.* (citing Merle H. Weiner, *Navigating the Road Between Uniformity and Progress: The Need for Purposive Analysis of the Hague Convention on the Civil Aspects of International Child Abduction*, 33 COLUM. HUMAN RTS. L. REV. 275, 278-79 (2002)) [hereinafter Weiner II].

²² Morley, *supra* note 5, at 1.

²³ 42 U.S.C. §11601(a)(4).

²⁴ Hoegger, *supra* note 9, at 186.

²⁵ *Id.*

²⁶ Morley, *supra* note 5, at 2.

²⁷ 42 U.S.C. §11603 (e)(2)(A) (2002).

removal or retention and the child is now settled in his or her new environment.²⁸ In addition, a country is not required to return the child if the person seeking the child's return "was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention."²⁹ Article 13(b) of the Convention states:

Notwithstanding 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 (b) there is a grave risk of harm that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.³⁰

II. HOW THE HAGUE CONVENTION FALLS SHORT IN DOMESTIC ABUSE CASES

The structure of the Hague Convention and the preference for the principle of return have led to inadequate protections for victims of domestic violence.³¹ The Hague Convention provides no explicit defense that allows abduction if it occurs to escape from domestic violence.³² Further, courts have generally not interpreted the Convention's current defenses (particularly the grave risk of harm defense) to prevent the remedy of return in the case of a mother's flight from domestic violence.³³ Also, the court of the country where the child is abducted to retains discretion to return the child to the

²⁸ Weiner I, *supra* note 3, at 650.

²⁹ *Id.*

³⁰ Hague Convention, *supra* note 1, Art. 13(b).

³¹ *See generally* Weiner I, *supra* note 3.

³² *Id.* at 599.

³³ *Id.* at 651.

country of habitual residence, even when one of the defenses under the convention is asserted.³⁴

First, the Explanatory Report of the Convention, which courts are to give weight to when interpreting the Convention, asserts that defenses to the remedy of return, including the grave risk of harm defense, should be narrowly interpreted to prevent the “collapse of the entire structure of the convention.”³⁵ Specifically, Paragraph 34 of the Explanatory Report states:

[T]he three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further . . . [A] systematic invocation of the said 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.³⁶

The U.S. Department of State, in a report prepared for the Senate Committee on Foreign Relations, also confirms that courts should narrowly interpret the grave risk of harm defense.³⁷ The report states, “any exceptions had to be drawn narrowly lest their application undermine the express purposes of the Convention—to affect the prompt return of abducted children.”³⁸ The report also states, “it was generally believed that courts would understand and fulfill the objectives of the Convention by narrowly interpreting the

³⁴ See *Feders v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995); see also *Antunez-Fernandes v. Connors-Fernandes*, 259 F. Supp. 2d 800 (N.D. Iowa Civ. 2003).

³⁵ Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986); Morley, *supra* note 5, at 2.

³⁶ Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986).

³⁷ *Id.*

³⁸ *Id.*

exceptions.”³⁹ Finally, the State Department cautioned courts that the grave risk of harm defense “was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child’s best interests.”⁴⁰

Second, the Convention itself seems to have a particular stereotype of the kinds of international kidnappings that occur.⁴¹ In particular, the drafters of the Hague Convention assumed that international child abduction almost always harmed to children.⁴² The drafters assumed that the abductors were non-custodial parents, sometimes abusive, who kidnapped the child because they thought they were going to lose custody.⁴³ During the 1986 proceedings for the ratification of the Hague Convention in the United States, Congressmen told many real-life stories to illustrate the danger of international child abduction.⁴⁴ All of the cases cited involved abductions by male non-custodial parents and a “deprived parent in the United States.”⁴⁵ An identical stereotype also helped secure the passing of the International Child Abduction Remedies Act, the implementing legislation of the Hague Convention in the United States, in 1988.⁴⁶

While the remedy of return works well if the abductor is a non-custodial parent, it is ineffective and inappropriate when the abductor is the primary caretaker who flees because of domestic violence.⁴⁷ In such a case “the remedy of return puts the victim’s most precious possession, her child, in close proximity to her batterer either without

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Weiner I, *supra* note 3, at 603.

⁴² *Id.* at 616.

⁴³ *Id.* at 617.

⁴⁴ *Id.* at 602. (Senator Dixon told the story of Patricia Rousch whose two daughters were kidnapped by their father, a Saudi national, even though she had legal custody of the children. Senator Gore spoke of Holly Planells, a woman whose son was taken by her ex-husband to Jordan, even though she had full legal custody and the judge had imposed restrictions on the father’s weekend visitation).

⁴⁵ *Id.* at 603.

⁴⁶ *Id.*

⁴⁷ Weiner II, *supra* note 21, at 278-79.

her protection (assuming she does not return with the child), or with her protection, thereby exposing her to further violence.”⁴⁸

III. UNITED STATES COURT OF APPEALS DECISIONS WITH REGARD TO DOMESTIC VIOLENCE UNDER THE HAGUE CONVENTION

While the United States Supreme Court has yet to decide a case on the implications of domestic violence under the International Child Abductions Remedies Act, the United States Court of Appeals have taken several different approaches to the issue.⁴⁹ The circuit courts, until approximately 2000, traditionally followed the approach advocating courts narrowly interpret the grave risk of harm defense, often holding that domestic violence does not constitute a grave risk of harm.⁵⁰ Specifically, some circuit courts have narrowed the grave risk of harm defense by requiring courts to evaluate the custody laws of the country of habitual residence and requiring courts to analyze whether undertakings can mitigate any grave risk of harm.⁵¹ Some circuits have also limited the grave risk of harm defense to a very narrow set of facts, such as circumstances in which the children suffer from post-traumatic stress disorder.⁵²

The Eighth Circuit Court of Appeals, in *Nunez-Escudero v. Tice-Menley*, held that there was not a grave risk of harm to the child, although the mother alleged that she had been “physically, sexually and verbally abused” and that she was “treated as a prisoner” by her

⁴⁸ *Id.*

⁴⁹ *See, e.g.,* *Blondin v. DuBois*, 238 F.3d 153 (2d Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995).

⁵⁰ *See, e.g.,* *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001); *Nunez-Escudero*, 58 F.3d at 377; *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *13 (N.D. Ill. Feb. 10, 2000).

⁵¹ *See, e.g.,* *Blondin*, 238 F.3d at 163; *Miller v. Miller*, 240 F.3d 392, 403 (4th Cir. 2001); *Friedrich*, 78 F.3d at 1069; *Nunez-Escudero*, 58 F.3d at 377-78; *Tabacchi*, 2000 WL 190576, at *15.

⁵² *See generally* *Blondin*, 238 F.3d at 153.

husband and father-in-law.⁵³ The mother (“Tice-Menley”) also stated that she feared for her baby’s safety because her husband and husband’s family objected to her nursing the baby, and the husband refused to buy a baby seat for the car.⁵⁴ The court noted that most of the evidence presented concerned problems between Tice-Menley and her husband and father-in-law; thus, the evidence was not specific enough for the court to rule that there was a grave risk of harm to the child.⁵⁵ The Eighth Circuit remanded the case to the district court in order to consider “information relating to the social background of the child,” specifically the environment in which the child would reside upon returning to his habitual residence.⁵⁶ The court, however, instructed the district court not to “consider evidence relevant to the custody or the best interests of the child.”⁵⁷ The court also noted that Tice-Menley must prove by clear and convincing evidence that return of the child to Mexico, the habitual residence, would subject him to a “grave risk of harm or otherwise place him in an intolerable situation.”⁵⁸

Ultimately, the Eighth Circuit seemed to reject the notion that domestic violence directed towards a spouse constitutes a grave risk of harm to the child; thus, the grave risk of harm defense would fail in situations of spousal abuse.⁵⁹ The Eighth Circuit also espoused the notion that courts should look to the laws in the country of habitual residence and what social institutions are in place, if the court returns the child to his/her habitual residence.⁶⁰ Accordingly, if a country has proper laws and social institutions in place, these laws and institutions

⁵³ *Nunez-Escudero*, 58 F.3d 374 at 376.

⁵⁴ *Id.*

⁵⁵ *Id.* at 377.

⁵⁶ *Id.* at 378.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 377.

⁶⁰ *Id.*

mitigate the grave risk of harm to the child due to abuse of the mother or child.⁶¹

The Sixth Circuit Court of Appeals has noted that the grave risk of harm defense only exists in two very narrow circumstances.⁶² First, there is a grave risk of harm when return puts the child in imminent danger prior to the resolution of the custody dispute, such as returning the child to a “zone of war, famine, or disease.”⁶³ Second, there is a grave risk of harm 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.”⁶⁴ The Sixth Circuit decided in the case of *Friedrich v. Friedrich* that there was not a grave risk of harm to the child because the mother’s only claim was that the child would have adjustment problems if returned to the habitual residence.⁶⁵ The mother did not allege abuse on the part of her husband.⁶⁶ Several circuit courts have commonly utilized the Sixth Circuit’s reasoning in *Friedrich* regarding what constitutes grave risk of harm to the child.⁶⁷ Specifically, U.S. courts traditionally tended to look at the child protection and spousal protection laws of the country of habitual residence to determine if those laws provide adequate protection to the child, thereby negating any grave risk of harm.⁶⁸

The Second Circuit Court of Appeals actually held in the case of *Blondin v. DuBois* that there was a grave risk of harm to the child, but it seemed to limit its holding solely to the facts of the case at hand.⁶⁹ In

⁶¹ *Id.*

⁶² *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1067.

⁶⁶ *Id.*

⁶⁷ *See, e.g., Blondin v. DuBois*, 238 F.3d 153, 162-63 (2d Cir. 2001); *Miller v. Miller*, 240 F.3d 392, 403 (4th Cir. 2001); *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001).

⁶⁸ *See, e.g., Blondin*, 238 F.3d at 162-63; *Miller*, 240 F.3d at 403; *March*, 249 F.3d at 472.

⁶⁹ *Blondin*, 238 F.3d at 163.

Blondin, the father had repeatedly abused the wife and the children, so the wife took the two children from their habitual residence in France to the United States.⁷⁰ When the father learned that the mother had taken the children, he instituted proceedings in the district court seeking return of the children to France under the Hague Convention.⁷¹ During the first proceeding in the district court, the mother prevailed on her grave risk of harm defense.⁷² However, the Second Circuit vacated the judgment of the district court and remanded the cause for further proceedings.⁷³ The court did not question the trial court's findings regarding the history of abuse, but held that further proceedings were required to determine whether "any arrangements might be made that would mitigate the risk of harm to the children, thereby enabling them safely to return to France."⁷⁴ On remand, the district court found that there was still a grave risk of harm to the children even though the father and French government had agreed to certain undertakings.⁷⁵ Specifically, the father agreed to assist the mother and children financially in moving back to France and agreed not to make contact with them prior to the judicial determination on custodial rights, and the French government agreed that it would not prosecute the mother for abduction.⁷⁶ Specifically, the district court found that any arrangements would fail to mitigate the grave risk of harm to the children because returning the children to France under any circumstances would cause them psychological harm, as France was the scene of their trauma.⁷⁷ During trial, an uncontested expert testified that the children would suffer from post-

⁷⁰ *Id.* at 156.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 157.

traumatic stress disorder just from the act of returning to live in France.⁷⁸

Finally, the First Circuit Court of Appeals in 2000 recognized a grave risk of harm defense in cases of domestic violence.⁷⁹ In *Walsh v. Walsh*, the court held that there was a valid grave risk of harm defense due to an abusive and violent husband; thus, the court would not return the children to Ireland.⁸⁰ The circuit court reversed the decision of the district court because of several “fundamental errors.”⁸¹ First, the court reasoned that the district court “inappropriately discounted the grave risk of physical and psychological harm to children in cases of spousal abuse.”⁸² The circuit court also noted that the district court failed to take into account the husband’s “generalized pattern of violence,” (including violence that had been directed towards his children from a previous relationship) and the husband’s “chronic disobedience of court orders.”⁸³ The court reasoned that spousal abuse causes physical and psychological harm to the children as recognized by social science literature, and state and federal law.⁸⁴ The court also noted although Ireland had adequate protection laws, those laws would not prevent abuse because it was unlikely that the husband would follow them.⁸⁵ Finally, the court looked at the possibility of undertakings as a way to mitigate the grave risk of harm, yet reasoned that undertakings would also be ineffective because of the unlikelihood that the husband would adhere to them.⁸⁶

The court finally noted that they did not come to “this conclusion lightly.”⁸⁷ The court recognized that international child abduction is a

⁷⁸ *Id.*

⁷⁹ *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).

⁸⁰ *Id.* at 221.

⁸¹ *Id.* at 219.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 220.

⁸⁵ *Id.*

⁸⁶ *Id.* at 221.

⁸⁷ *Id.*

serious problem and that in most cases Hague Convention petitions result in the return of the children to the country of habitual residence.⁸⁸ However, the Hague Convention provides for certain “limited exceptions [defenses]” to the general principle of returning the child to the country of habitual residence and the court reasoned the *Walsh* case demonstrated such a defense.⁸⁹ Specifically, the grave risk of harm defense applied to the *Walsh* case because of the husband’s flight after an indictment for threatening to kill another person and a long and documented history of violence and disregard of court orders, which, as the court stated, went “well beyond what one usually encounters even in bitter divorce and custody contexts.”⁹⁰

IV. SEVENTH CIRCUIT’S ANALYSIS IN *VAN DE SANDE V. VAN DE SANDE*

A. Introduction to Seventh Circuit’s decision

The case of *Van de Sande v. Van de Sande* is a perfect example of when the remedy of return is inappropriate, and the Seventh Circuit Court of Appeals properly recognized this limitation within the International Child Abduction Remedies Act.⁹¹ Also, the Seventh Circuit deviated from the reasoning of the Eighth and Sixth Circuits and is more willing to accept the notion that domestic violence constitutes a grave risk of harm to the child.⁹² Specifically, the Seventh Circuit rejected the jurisprudence courts should analyze the child protection laws of the habitual residence to determine if there is a grave risk of harm to child.⁹³ The Seventh Circuit also questioned the remedy of undertakings, conditions placed on the alleged abusive

⁸⁸ *Id.* at 222.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Van de Sande v. Van de Sande*, 431 F.3d 567, 572 (7th Cir. 2005); Weiner II, *supra* note 21, at 278-79.

⁹² See *Van de Sande*, 431 F.3d at 570; see also *Blondin v. DuBois*, 238 F.3d 153, 153 (2d Cir. 2005); *Friedrich v. Friedrich*, 78 F.3d 1060, 1060 (6th Cir. 1996); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 374 (8th Cir. 1995).

⁹³ *Van de Sande*, 431 F.3d at 571.

parent that would still enable the court to return the child to the habitual residence despite a finding of grave risk of harm.⁹⁴ The Seventh Circuit's decision represents a shift in American jurisprudence under the Hague Convention whereby courts more broadly interpret the grave risk of harm defense.⁹⁵

B. The facts and district court decision

Jennifer and Davy Van de Sande had two children, and were a married but estranged couple, and habitual residents of Belgium, Davy's native country.⁹⁶ A Belgian court awarded Davy custody of his two children through an *ex parte* decree.⁹⁷ Jennifer, who was living with the children in the United States, refused to send them back to Belgium.⁹⁸ Davy filed a lawsuit under the Hague Convention in order to have the two children returned to Belgium.⁹⁹ Before the district court, Jennifer raised a grave risk of harm to the children defense.¹⁰⁰ In support of this defense, Jennifer presented six affidavits, all claiming that Davy abused Jennifer and their older daughter.¹⁰¹ According to the affidavits, Davy began beating Jennifer in 1999.¹⁰² The beatings typically consisted of choking Jennifer, throwing her against a wall, and kicking her shins.¹⁰³ The abuse occurred several times a week throughout the marriage, including when Jennifer was pregnant, and before and after their move to Belgium.¹⁰⁴ Also, according to the affidavits, Davy's mother joined in the beatings of her daughter-in-

⁹⁴ *Id.* at 571-72.

⁹⁵ Morley, *supra* note 5, at 1.

⁹⁶ *Van de Sande*, 431 F.3d at 569.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

law.¹⁰⁵ Jennifer complained to the Belgian police, but they said they could not do anything unless she went to a doctor to verify her injuries—which she did not do.¹⁰⁶ Davy often beat Jennifer in the presence of the two children, causing them to cry.¹⁰⁷ Davy also verbally abused Jennifer in the children’s presence, calling her a “cunt,” “whore,” “lazy fucking bitch,” and “lazy fat bitch.”¹⁰⁸ Davy told the daughter “fuck mommy” and “Tell [sic] Mommy [sic] she’s a cunt.”¹⁰⁹

Davy also began physically abusing his daughter when she started wetting her bed.¹¹⁰ He would spank her, and he struck her in the side of her head on one occasion.¹¹¹ Davy’s mother also struck the daughter in the head at least twice.¹¹² In 2004, during a visit to Jennifer’s parents in the United States, Jennifer told Davy that she and the children would not be returning to Belgium.¹¹³ In response, Davy threatened to kill both her and the children.¹¹⁴ Jennifer told her father about Davy’s threats, the police were called, and an officer escorted Davy from Jennifer’s parents’ house.¹¹⁵

Despite these affidavits, the district court granted summary judgment for Davy primarily on the ground that there was no indication that the Belgian legal system could not or would not protect the children.¹¹⁶ The court was also influenced by the fact that most of the physical and verbal abuse was directed at Jennifer, rather than the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

children.¹¹⁷ Specifically, there was no accusations the Davy beat the younger boy, and the girl, although spanked and hit repeatedly, was not injured.¹¹⁸ Also, no expert evidence of the psychological effect of Davy's conduct on either child was presented.¹¹⁹ The district court ordered the return of the children to Belgium.¹²⁰ The only undertaking the judge inserted into the order was that Davy was to pay for their airfare to Belgium.¹²¹ The Seventh Circuit Court, however, reversed the district court's decision and remanded the case for further hearings.¹²²

C. The Seventh Circuit's decision

In its decision, the Seventh Circuit explicitly recognized that the remedy of return under the Hague Convention is problematic in cases where the abductor is the primary caretaker and a victim of domestic violence.¹²³ The court reasoned that, assuming the affidavits submitted by Jennifer were accurate (which the court must assume because Davy filed the Motion for Summary Judgment), Jennifer satisfied the statutory requirement that evidence of risk of harm to the children be clear and convincing.¹²⁴

The Seventh Circuit then rejected the district court's analysis that the Hague Convention is just a venue statute, designed to deter parents from international forum shopping in custody cases.¹²⁵ The Seventh Circuit also rejected the district court's reasoning that courts should look to whether the child's habitual residence has adequate child

¹¹⁷ *Id.* at 570.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 569.

¹²¹ *Id.*

¹²² *Id.* at 572.

¹²³ *Id.* at 569.

¹²⁴ *Id.* at 570.

¹²⁵ *Id.*

protection laws.¹²⁶ The court rejected this interpretation of the Hague Convention for several reasons.¹²⁷ First, the court noted that there is a difference between “the law on the books and law as it is actually applied.”¹²⁸ In particular, in domestic relations cases, abuse of children can often go undetected.¹²⁹ The court argued that “to give a father custody of children who are at a great risk of harm from him, on the ground that they will be protected by the police of the father’s country, would be to act on an unrealistic premise.”¹³⁰ Also, the court reasoned that nowhere in the Hague Convention or the language of the implementing statutes does it mention analyzing whether the laws of the petitioning parent’s country are good or whether such laws are zealously enforced; therefore, courts are going beyond the express language of the Convention.¹³¹

Further, the court analyzed whether return with undertakings would be a more appropriate order.¹³² The court, however, had several concerns regarding the ordering of undertakings.¹³³ First, the court was concerned that because the custody case was still pending in Belgium, the Belgian court would place the children in the care of a third party (or foster care) until the issue of custody was resolved by the Belgian courts.¹³⁴ Instead of remaining in their mother’s custody in the United States, the Belgian court might place the children in a foster care institution, even though there was no suggestion that their mother was abusive, neglectful, or an otherwise unfit parent.¹³⁵ The Seventh Circuit recognized that “return plus conditions (undertakings) could in many cases “properly accommodate the interest in the child’s welfare

¹²⁶ *Id.*

¹²⁷ *Id.* at 571.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 571-72.

¹³⁴ *Id.* at 571.

¹³⁵ *Id.*

to the interests of the country of the child's habitual residence."¹³⁶ Further, courts and parents can more easily find evidence concerning a grave risk of harm in the country of habitual residence.¹³⁷ The court also recognized that it may be more difficult and costly for the non-abductor parent to prepare and present a court case in the country to which the abductor has fled.¹³⁸ The court, however, did not seem persuaded by these arguments.¹³⁹ The Court noted that in the case of child abuse, "the balance may shift against [the] return plus conditions [remedy]."¹⁴⁰ According to the Seventh Circuit, the problem with extensive undertakings is that such a practice would embroil the court in the merits of the underlying custody issues—something the Hague Convention specifically states that courts should not do.¹⁴¹ Also, the court reasoned that undertakings are effective to preserve the status quo, but that is not the goal when there is evidence that the status quo is an abusive situation.¹⁴²

Finally, the court noted that while concern with comity among nations argues for narrow interpretation of the grave risk of harm defense, "the safety of children is paramount."¹⁴³ The court then ordered that the district court conduct an evidentiary hearing, since Jennifer had presented sufficient evidence of a grave risk of harm to her children.¹⁴⁴

¹³⁶ *Id.* at 571-72.

¹³⁷ *Id.*

¹³⁸ *Id.* at 572.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

V. THE SEVENTH CIRCUIT EXPANDS THE GRAVE RISK OF HARM DEFENSE

The Seventh Circuit has grasped what the Sixth and Eighth circuit courts have failed to—“while concern with comity among nations argues for narrow interpretation of the grave risk of harm defense . . . *the safety of children is paramount.*”¹⁴⁵ Other circuit courts have created barriers to the grave risk of harm defense to the remedy of return in the case of domestic violence, while the Seventh Circuit is more willing to accept such a defense.¹⁴⁶ Further, the Seventh Circuit recognizes the problems that have developed with regard to the remedy of return in cases of spousal abuse under the Hague Convention.¹⁴⁷ Also, the court went further than other circuit courts in finding a valid grave risk of harm defense specifically by rejecting jurisprudence advocating courts analyze the laws of the country of habitual residence and issue undertakings to mitigate any grave risk of harm.¹⁴⁸ The Seventh Circuit’s decision represents a general shift in Hague Convention jurisprudence by expanding the grave risk of harm defense to include cases of spousal abuse.¹⁴⁹ The Seventh Circuit also preserved notions of international comity by rejecting the legal jurisprudence of courts analyzing of foreign country’s child protection laws and issuing undertakings.¹⁵⁰

By expanding the scope of the grave risk of harm defense, American courts may have to focus more on the child’s physical and psychological well-being in Hague Convention cases, which some

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ *See, e.g.,* *Blondin v. DuBois*, 238 F.3d 153 (2d Cir. 20005); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995); *but see Van de Sande*, 431 F.3d at 572.

¹⁴⁷ *See generally Van de Sande*, 431 F.3d 567.

¹⁴⁸ *See generally id.*; *see also Blondin*, 238 F.3d at 153; *Friedrich*, 78 F.3d at 1060; *Nunez-Escudero*, 58 F.3d at 374.

¹⁴⁹ *Morley*, *supra* note 5, at 1.

¹⁵⁰ *See Hoegger*, *supra* note 9, at 202; *see also Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002).

circuit courts view as an impermissible custody evaluation.¹⁵¹ As one commentator noted, “[There is a] notion that the integrity of the Convention as a whole requires that the well-being of individual children in hard cases must be sacrificed for the greater good of maintaining the integrity of the Hague Convention process.”¹⁵² The Seventh Circuit has rejected that notion.¹⁵³

A. Spousal abuse constitutes a grave risk of harm to the child.

First, the Seventh Circuit accepted the notion that spousal abuse harms the child.¹⁵⁴ Unlike, the Eighth Circuit that rejected the notion that spousal abuse could lead to a grave risk of harm to the child, the Seventh Circuit accepted that although there may not be evidence that a spouse-abuser abused the children, there is still a grave risk of harm.¹⁵⁵ Specifically, the Eighth Circuit seems to think that spouse-on-spouse violence has no effect on the children, considering its holding that there was no grave risk of harm to the children when the father and father-in-law abused the mother.¹⁵⁶ However, as the First Circuit noted “credible social science literature establishes that serial spousal abusers are also likely to be child abusers.”¹⁵⁷ The First Circuit also noted that both state and federal law have recognized that children are at increased risk of physical and psychological injury then they are in

¹⁵¹ Hoegger, *supra* note 9, at 202.

¹⁵² *Id.*

¹⁵³ See generally *Van de Sande*, 431 F.3d 567.

¹⁵⁴ *Id.* at 570.

¹⁵⁵ See generally *Van de Sande*, 431 F.3d 567; see also *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995).

¹⁵⁶ See *Nunez-Escudero*, 58 F.3d at 377; see also, *Tabacchi v. Harrison*, No. 99 C 4130, 2000 WL 190576, at *13 (N.D. Ill. Feb. 10, 2000) (where although the husband abused his wife there was no grave risk of harm to the child); *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001) (where the court found that there was no grave risk of harm to the children although there was a default judgment in a wrongful death action against the husband after the disappearance of the wife because there was only a “tenuous inference” that he might hurt the children).

¹⁵⁷ *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Cir. 2000).

contact with a spousal abuser.¹⁵⁸ Specifically, in a congressional resolution passed in 1990, the House of Representatives found that: “Whereas the effects of physical abuse of a spouse on children include . . . the potential for future harm where contact with the batterer continues; whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent.”¹⁵⁹ The Seventh Circuit has agreed with the analysis of the First Circuit in *Walsh*; spousal abuse likely causes physical and psychological harm to the children.¹⁶⁰ By recognizing that spousal abuse harms the child, the Seventh Circuit expanded the grave risk of harm defense.¹⁶¹

B. Courts should not analyze the laws of foreign countries.

The Seventh Circuit also rejected the legal jurisprudence instructing courts to look at the laws of the country of habitual residence and the enforcement of those laws to determine if there is a grave risk of harm to the child.¹⁶² The Sixth, Eighth, and Second Circuits have held that even in cases of spousal or child abuse, a valid grave risk of harm defense can be mitigated and the remedy of return still applied if the laws of the country of habitual residence are adequate to protect the child.¹⁶³ The Seventh Circuit, however, extended the reasoning in *Walsh* that courts should not look to the

¹⁵⁸ *Id.*

¹⁵⁹ H.R. CON. RES. 172, 101st Cong. (1990) (enacted).

¹⁶⁰ *See Van de Sande*, 431 F.3d at 570-71; *see also Walsh*, 221 F.3d at 220.

¹⁶¹ *See Van de Sande*, 431 F.3d at 570-71; Morley, *supra* note 5, at 6-7.

¹⁶² *Van de Sande*, 431 F.3d at 571.

¹⁶³ *See, e.g., Blondin v. DuBois*, 238 F.3d 153, 156-57 (2d Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377-78 (8th Cir. 1995); *see also Miller v. Miller*, 240 F.3d 392, 403 (4th Cir. 2001) (where the court noted that it was confident that if the mother truly posed a danger to the children, the Ontario courts would adequately protect them); *Tabacchi*, 2000 WL 190576, at *15 (where the court noted that the mother failed to demonstrate that the Italian authorities would not adequately protect her and the child).

adequacy of the laws of the petitioning parent's country.¹⁶⁴ In *Walsh*, the court implied that it was irrelevant whether the laws of the petitioning parent's country were adequate.¹⁶⁵ The court specifically stated, "[w]e have no doubt that the Irish courts would issue appropriate protective orders. That is not the issue. The issue is John's [the husband] history of violating orders issued by any court, Irish or American."¹⁶⁶

The Seventh Circuit extended this reasoning to conclude that courts should not look to the adequacy of a foreign country's laws.¹⁶⁷ The Seventh Circuit correctly noted that nowhere in the Hague Convention does it state that courts should analyze the laws of different countries to determine their adequacy.¹⁶⁸ Further, just because a country may have adequate laws or even adequately enforce those laws does not mean that the grave risk of harm to the child will be mitigated.¹⁶⁹ Most importantly, having United States courts evaluate the laws of other countries in Hague proceedings completely undermines the notion of comity, one of the primary goals of the Convention.¹⁷⁰

First, countries may have adequate law-on-the-books, but ineffective law enforcement or inadequate implementation of the laws.¹⁷¹ It is extremely difficult to measure to what extent law enforcement may or may not enforce particular laws or what common practices are in foreign countries.¹⁷² Also, because the abused spouse is not from the children's country of habitual residence she may not be able to access the legal remedies available to her because she is

¹⁶⁴ *Van de Sande*, 431 F.3d at 571; *Walsh*, 221 F.3d at 221.

¹⁶⁵ *See Walsh*, 221 F.3d at 221.

¹⁶⁶ *Id.*

¹⁶⁷ *Van de Sande*, 431 F.3d at 571.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Hoegger, *supra* note 9, at 202.

¹⁷¹ Weiner I, *supra* note 3, at 624-25.

¹⁷² *See id.*

unfamiliar with the foreign legal system or because she may not speak the language.¹⁷³

Second, although a country may have adequate laws that may be adequately enforced, it does not follow that an abusive parent or spouse will follow those laws.¹⁷⁴ If a court finds there is a grave risk of harm, the harm cannot be mitigated even if a foreign country has adequate laws to protect the child or punish the abuser.¹⁷⁵ Just because a parent may be adequately punished for domestic violence does not mean that the grave risk of harm to the child is mitigated, because if returned to the country of habitual residence a child will still be physically or psychologically harmed.¹⁷⁶ The harm cannot be negated by adequate punishment after-the-fact.¹⁷⁷

Finally, when American courts conduct an analysis of another country's laws or enforcement of those laws it goes against notions of international comity.¹⁷⁸ Specifically, if an American court determines that there is grave risk of harm to the child after analyzing the habitual country's child custody laws, the American courts are sending the message that the laws of the country of habitual residence are "bad."¹⁷⁹ To preserve notions of international comity under the Hague Convention, courts should not pass judgment on the structure of foreign country's family policy because to do so would undermine the laws of those countries.¹⁸⁰ If courts ignore notions of comity, there is also a danger that courts will become "culturally imperialist."¹⁸¹ For example, judges may send children and battered women back to countries that have similar cultural customs concerning the treatment

¹⁷³ *Id.* at 625.

¹⁷⁴ *Van de Sande*, 431 F.3d at 571.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Hoegger, *supra* note 9, at 202.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 203.

of women and children, but refuse to implement the remedy of return when the country of habitual residence is culturally dissimilar.¹⁸²

The Seventh Circuit rejected the Sixth, Second, and Eighth circuits' reasoning that in order to determine whether or not there is a grave risk of harm to the child courts need to look at the adequacy of the laws of the country of habitual residence.¹⁸³ By rejecting the jurisprudence that courts should analyze a foreign country's laws, the Seventh Circuit essentially expanded the grave risk of harm defense by removing an extra barrier to that defense.¹⁸⁴ Previously, under American jurisprudence not only would an abductor parent have to prove a grave risk of harm to the child, but also that the child could not be adequately protected by the laws in the country of habitual residence.¹⁸⁵ By eliminating this extra step, the Seventh Circuit has broadened the scope of the grave risk of harm defense.¹⁸⁶

C. Undertakings are inappropriate in cases of domestic violence.

Unlike the Sixth and Second Circuit's analysis, the Seventh Circuit reasoned that undertakings may not be appropriate in cases of domestic violence.¹⁸⁷ The First Circuit also held that undertakings would not mitigate the grave risk of harm to the children in *Walsh* because there was no guarantee that the husband would adhere to them.¹⁸⁸ The Seventh Circuit again agreed with the First Circuit and further explained, "in cases of child abuse the balance may shift against return plus conditions."¹⁸⁹ While some circuit courts seem to

¹⁸² *Id.*

¹⁸³ *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

¹⁸⁴ *See id.*; *see also Morley*, *supra* note 5, at 1.

¹⁸⁵ *See, e.g., Blondin v. DuBois*, 238 F.3d 153, 156-57 (2d Cir. 2001); *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377-78 (8th Cir. 1995).

¹⁸⁶ *See Morley*, *supra* note 5, at 1.

¹⁸⁷ *Van de Sande*, 431 F.3d at 571-72; *see also Danaipour v. McLarey*, 286 F.3d 1, 25 (1st Cir. 2002).

¹⁸⁸ *Walsh v. Walsh*, 221 F.3d 204, 221 (1st Cir. 2000).

¹⁸⁹ *Van de Sande*, 431 F.3d at 572.

accept undertakings as a valid remedy, the Convention does not state anything about undertakings or that they may be appropriate in order to effectuate a remedy of return.¹⁹⁰ However, there is some argument that, although undertakings are absent in the Convention, they have become part of customary international law, as evidenced by the court rulings that apply them, thereby making them legally valid remedies.¹⁹¹

Undertakings, however may be ineffective and have international enforcement problems.¹⁹² First, there is little evidence undertakings will deter spousal and child abusers.¹⁹³ Studies on the dynamics of battering show that court orders have little deterrent effect.¹⁹⁴ A court order or undertaking does not guarantee the safety of the victims for the same reasons that adequate laws do not – abusers do not always follow laws or court orders, and punishment after-the-fact does not negate the grave risk of harm to the children.¹⁹⁵ In addition to problems in effectiveness, undertakings also have international enforcement problems.¹⁹⁶ Once an abuser leaves the country that issued the undertakings, the undertakings will not be enforced unless the abuser travels to a country that specifically accepts them.¹⁹⁷ Because undertakings are not in the language of the Hague Convention, not every country recognizes them.¹⁹⁸ Also, there is no central agency that is commissioned to monitor the enforcement of

¹⁹⁰ See Hoegger, *supra* note 9, at 195-96; see also *Danaipour*, 286 F.3d at 21 (“the concept of ‘undertakings’ is based neither in the Convention nor in the implementing legislation of any nation”).

¹⁹¹ Hoegger, *supra* note 9, at 195. (Customary International law is a type of law with two characteristics 1) where it is practiced over time as evidenced by court rulings applying accepted treaties and legislations and 2) where there is evidence of *opinio juris* “the idea that such state practice is legally mandated”).

¹⁹² *Id.* at 196.

¹⁹³ *Id.* at 198.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; see *Danaipour v. McLarey*, 286 F.3d 1, 23 (1st Cir. 2002).

¹⁹⁷ Hoegger, *supra* note 9, at 198.

¹⁹⁸ *Id.* at 198-99; see *Danaipour*, 286 F.3d at 23.

undertakings or to monitor children altogether after they are returned to the country of habitual residence.¹⁹⁹ Essentially, issuing undertakings and analyzing the adequacy of a foreign countries and laws are similarly problematic—neither ensure that a child will be protected *before* the child is abused.²⁰⁰

Undertakings, like analyzing a foreign country’s laws, also undermine notions of international comity.²⁰¹ By issuing undertakings, an American court will directly be telling another country how to structure its family law policy.²⁰² Even more so than simply evaluating a foreign country’s laws, undertakings usurp the laws of the country of habitual residence by telling the country specific legal steps it needs to take upon return of the child.²⁰³

The Seventh Circuit, in particular, seemed concerned with the fact that to adequately protect a child from potential abuse, courts would have to adopt *extensive* undertakings.²⁰⁴ The Seventh Circuit specifically noted that extensive undertakings would entangle the court in the merits of the underlying custody dispute, while the Hague Convention prohibits such an entanglement.²⁰⁵ Second, extensive undertakings would “dilute the force of the Article 13(b) exception.”²⁰⁶ Allowing the remedy of return when there is a grave risk of harm defense, so long as there are adequate undertakings, goes against the intent of having defenses to the remedy of return.²⁰⁷

By rejecting the notion that undertakings are appropriate in cases of domestic violence, the Seventh Circuit again expanded the grave

¹⁹⁹ Hoegger, *supra* note 9, at 199.

²⁰⁰ *See id.* at 198, *see also* Weiner I, *supra* note 3, at 679.

²⁰¹ *See* Danaipour, 286 F.3d at 23; Hoegger, *supra* note 9, at 202.

²⁰² Hoegger, *supra* note 9, at 202; *see* Danaipour, 286 F.3d at 25 (where the court reasoned that notions of International comity were violated where the district court issued undertakings with the expectation that the “Swedish court would simply copy and enforce them”).

²⁰³ Hoegger, *supra* note 9, at 202; *see* Danaipour, 286 F.3d at 25.

²⁰⁴ *Van de Sande v. Van de Sande*, 431 F.3d 567, 571-72 (7th Cir. 2005).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See* Hoegger, *supra* note 9, at 195.

risk of harm defense under the Hague Convention by eliminating another barrier.²⁰⁸ The Seventh Circuit also promoted the notion of preserving comity among countries, by suggesting that extensive undertakings are inappropriate because they undermine and usurp the laws of foreign countries.²⁰⁹

D. The Second Circuit set the bar too high for a grave risk of harm defense.

While the Second Circuit in *Blondin*, did find that there was a valid grave risk of harm defense, the court's ruling was too narrow.²¹⁰ Specifically, the court found that there was a grave risk of harm only because the children would suffer from post-traumatic stress disorder from merely returning to the country of France and the court limited its holding to the facts of the case at hand.²¹¹ The Second Circuit still held that it was valid to look at the adequacy of the child protection laws in the petitioning parent's country and to look at the possibility of "extensive undertakings."²¹² The Seventh Circuit's holding in *Van de Sande*, on the other hand, properly recognizes that the grave risk of harm defense extends to many circumstances (including domestic violence), not just the narrow situation of post-traumatic stress disorder.²¹³

As the First Circuit noted in *Walsh*, the Hague Convention provides for defenses to the remedy of return.²¹⁴ The Second Circuit, however, limited the defense to a unique fact pattern.²¹⁵ Further, the

²⁰⁸ See Morley, *supra* note 5, at 7.

²⁰⁹ See Hoegger, *supra* note 9, at 202; Danaipour, 286 F.3d at 25.

²¹⁰ See Hoegger, *supra* note 9, at 189; see also Weiner I, *supra* note 3, at 660-61.

²¹¹ *Blondin v. DuBois*, 238 F.3d 153, 162 (2d Cir. 2001).

²¹² *Id.* at 163.

²¹³ Compare *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005), with *Blondin*, 238 F.3d at 163.

²¹⁴ *Walsh v. Walsh*, 221 F.3d 204, 222 (1st Cir. 2000).

²¹⁵ See *Blondin*, 238 F.3d at 163.

Second Circuit still considered possible undertakings.²¹⁶ The Seventh Circuit takes a more reasonable approach to the grave risk of harm defense, instead of improperly limiting it to such a narrow set of circumstances.²¹⁷ While the grave risk of harm defense is a limited defense, the Seventh Circuit correctly held that the limited defense includes cases of domestic violence.²¹⁸

E. Criticisms of expanding the grave risk of harm defense

Some courts and scholars are concerned that by expanding the grave risk of harm defense, although benefiting individual children, may undermine some of the important policy considerations underlying the Hague Convention.²¹⁹ For example, expanding the grave risk of harm defense will ultimately mean that a child's physical and psychological well-being will be raised in Hague Convention proceedings.²²⁰ Courts are concerned that by analyzing a child's physical and psychological welfare they will in effect be making a custody determination.²²¹ However, a Hague Convention proceeding is not supposed to be used for the court to make any determination of future custody of the child—it is merely supposed to determine which country has jurisdiction to make the custody determination.²²² Looking at whether there is a grave risk of harm to the child, however, does not necessarily mean that courts will be making a custody determination.²²³ The Convention specifically allows for the grave risk of harm defense; therefore, under the narrow circumstance of this

²¹⁶ *See id.*

²¹⁷ *See Van de Sande*, 431 F.3d at 570; Hoegger, *supra* note 9, at 189; *see also* Weiner I, *supra* note 3, at 660-61.

²¹⁸ *See Van de Sande*, 431 F.3d at 570; *Walsh*, 221 F.3d at 220.

²¹⁹ *See Morley*, *supra* note 5, at 1.

²²⁰ *Id.* at 1-2.

²²¹ *Id.* at 1-2.

²²² *Id.* at 1.

²²³ *See generally* Weiner I, *supra* note 3.

defense courts must look to the well-being of the child.²²⁴ Thus, courts can and should look at the well-being of children within the context of this defense, which does not constitute a custody determination.²²⁵

Some other concerns that courts have with expanding the grave risk of harm defense is that it may take more time to litigate Hague Convention proceedings and there is more possibility for abuses of the defense.²²⁶ First, if parents see that a grave risk of harm defense is successful in negating the remedy of return, they may raise it in all Hague Convention proceedings, regardless of whether domestic violence has actually occurred.²²⁷ Also, Hague Convention proceedings will be lengthened if courts are required to delve into facts regarding domestic violence and potential harm to the child.²²⁸ While expediency is important in Hague Convention proceedings, ensuring children are not exposed to harm should outweigh concerns that proceedings will take more time.²²⁹

Finally, courts are concerned that expanding the grave risk of harm defense will violate notions of international comity because it will appear as if American courts are making judgment calls about a foreign country's ability to protect children in cases of domestic violence.²³⁰ If a court determines that there is a grave risk of harm to the child and refuses to return the child to the country of habitual residence, it still sends the message that the country of habitual residence has not and will not adequately protect the child.²³¹ Specifically the Explanatory Report on the Hague Convention noted that if the defenses to the Convention are regularly invoked, the entire

²²⁴ See *Walsh v. Walsh*, 221 F.3d 204, 221-22 (1st Cir. 2000).

²²⁵ See generally *Van de Sande v. Van de Sande*, 431 F.3d 567 (7th Cir. 2005); see also *Hoegger*, *supra* note 9, at 187-88.

²²⁶ See *Weiner I*, *supra* note 3, at 697-98.

²²⁷ See *id.*

²²⁸ See *id.* at 694.

²²⁹ See *id.* at 698.

²³⁰ See *Van de Sande*, 431 F.3d at 572.

²³¹ See *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494 (Mar. 26, 1986).

structure of the Convention would collapse because it would be deprived of the “spirit of mutual confidence.”²³² However, courts violate notions of international comity more by analyzing a foreign country’s laws and by issuing extensive undertakings.²³³ When a court analyzes a foreign country’s laws it is directly critiquing those laws—a gross violation of international comity.²³⁴ Also, when a court issues undertakings it is directly usurping a foreign country’s laws, substituting its own judgment for that of the foreign country.²³⁵ These types of analysis violate comity more than merely looking at the harm to the child and denying the remedy of return.²³⁶

Finally, expanding the grave risk of harm defense is arguably in direct contrast to the theory that courts are to narrowly interpret the defenses under the Hague Convention.²³⁷ According to the U.S. State Department the express purpose of the Convention is to return abducted children to the country of habitual residence, thus, any expansion of the grave risk of harm defense arguably undermines this purpose.²³⁸ However, the Convention explicitly allows courts to suspend the remedy of return in cases where there is a grave risk of harm to the child.²³⁹ Some circuit courts narrowed the defense so much that it would be nearly impossible to prove a grave risk of harm to the child (i.e. only in cases of “war, famine, or disease”).²⁴⁰ Also, circuit courts narrowed the defense by adding extra factors to prove a

²³² *Id.*

²³³ See Hoegger, *supra* note 9, at 202; see also Danaipour v. McLarey, 286 F.3d 1, 25 (1st Cir. 2002)

²³⁴ See Hoegger, *supra* note 9, at 202; see also Danaipour, 286 F.3d at 25.

²³⁵ See Hoegger, *supra* note 9, at 202; see also Danaipour, 286 F.3d at 25.

²³⁶ See Hoegger, *supra* note 9, at 202; see also Danaipour, 286 F.3d at 25.

²³⁷ Feders v. Evans-Feder, 63 F.3d 217, 226 (where the court noted that “exceptions are to be narrowly drawn, lest their application undermines the express purposes of the Convention”).

²³⁸ See *id.*; Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986).

²³⁹ See Walsh v. Walsh, 221 F.3d 204, 221-22 (1st Cir. 2000).

²⁴⁰ See, e.g., Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996).

grave risk of harm that are absent in the Convention.²⁴¹ Specifically, a parent would have to prove that the laws of the country of habitual residence were inadequate and that undertakings would be ineffective.²⁴² By narrowing the defense to this extent, circuit courts went well beyond the express language of the Convention.²⁴³ In *Van de Sande*, the Seventh Circuit, although expanding the defense in American jurisprudence, recognizes the proper scope of the grave risk of harm defense in the context of the Hague Convention.²⁴⁴

CONCLUSION

The Seventh Circuit's decision in *Van de Sande* represents a growing trend in American jurisprudence to expand the grave risk of harm defense under the Hague Convention.²⁴⁵ Specifically, the Seventh Circuit has rejected the legal doctrines of courts evaluating the law of the country of habitual residence and issuing undertakings.²⁴⁶ By eliminating these types of legal analysis, abductor parents in Hague Convention proceedings only need to prove a grave risk of harm to the child, not the inadequacy of a foreign country's laws or the inadequacy of undertakings.²⁴⁷ The Seventh Circuit has also made a grave risk of harm defense possible in cases of spousal abuse by recognizing that spousal abuse can harm a child psychologically and potentially physically because of the greater likelihood that a spousal abuser will also abuse the child.²⁴⁸

²⁴¹ See Morley, *supra* note 5, at 1; see also Walsh, 221 F.3d at 218.

²⁴² See, e.g., Blondin v. DuBois, 238 F.3d 153, 163 (2d Cir. 2001); Friedrich, 78 F.3d at 1069; Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 377-78 (8th Cir. 1995).

²⁴³ See *Van de Sande v. Van de Sande*, 431 F.3d 567, 571 (7th Cir. 2005); see also Hoegger, *supra* note 9, at 195.

²⁴⁴ See Morley, *supra* note 5, at 1; see also Walsh, 221 F.3d at 218.

²⁴⁵ See Morley, *supra* note 5, at 1.

²⁴⁶ *Van de Sande*, 431 F.3d at 571-72.

²⁴⁷ See generally *id.*

²⁴⁸ *Id.* at 570.

The Seventh Circuit has also properly preserved comity among nations in Hague proceedings.²⁴⁹ When courts analyze the laws of the country of habitual residence or issue undertakings, they are undermining a foreign country's laws.²⁵⁰ One of the fundamental purposes of the Hague Convention is to prevent this; thus, the Seventh Circuit is promoting interests of international comity.²⁵¹

In the past, the circuit courts placed the policy considerations of narrowly interpreting the Hague Convention over the well-being of individual children by overly limiting the grave risk of harm defense through such barriers as evaluating the laws of the country of habitual residence and issuing undertakings.²⁵² In *Van de Sande* the Seventh Circuit properly placed children first by restoring the grave risk of harm defense to its proper scope under the Hague Convention.²⁵³

²⁴⁹ See *id.* at 571-72; see also Hoegger, *supra* note 9, at 202.

²⁵⁰ See Hoegger, *supra* note 9, at 202.

²⁵¹ Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494 (Mar. 26, 1986); Hoegger, *supra* note 9, at 202.

²⁵² See Morley, *supra* note 5, at 1.

²⁵³ See *Van de Sande*, 431 F.3d at 571-72; see also Morley, *supra* note 5, at 1.