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BLONDIN V. DUBOIS: A CLOSER STEP TO SAFEGUARDING THE WELFARE OF ABDUCTED CHILDREN?

I. INTRODUCTION

Occasionally, family disputes escalate to the point where one parent feels the best way to protect the children is to abduct them from the family residence. This situation is further complicated when the children are abducted to another country. The volume and frequency of international child abductions can be attributed to a variety of sociological factors including improvements in international transportation, greater freedom across borders, an increase in marriages between persons from different countries, and a general liberalization of access to divorce.¹ To effectuate the return of one's child to the country from which they were abducted, parents often rely on the Hague Convention on the Civil Aspects of International Child Abduction.²

Although the Hague Convention was drafted with the specific intent of effectuating the prompt return of children to the states from which they were wrongfully removed,³ it provides some defenses⁴ which, if interpreted too liberally, could frustrate the ultimate goals of the Convention. One of these exceptions, in Article 13(b), provides that if returning the abducted child would place that child at "grave risk" of harm or put the child in an otherwise "intolerable situation" the court in the country to which the child has been abducted can deny

1. See, PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 262 (1999). While the summary return of a child to a situation that may be harmful is disturbing, it has been made clear that the Convention seeks to protect the interests of children collectively and that the welfare of the individual child is not the first and paramount consideration. *Id.* at 29.

2. Hague Convention on the Civil Aspects of International Child Abduction, opened for signature, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501 (1980) [hereinafter Hague Convention or Convention].

3. *Id.* at Preamble

4. See *id.* at arts. 13 and 20.

the child's return.⁵ In *Blondin v. Dubois*,⁶ the Second Circuit ruled that if a court decided that returning a child to the petitioning parent would put the child at "grave risk," that court must further examine other possible interim custody arrangements the foreign country may be able to provide before denying the courts of that country the opportunity to decide the ultimate custody issue. By demanding that courts in the Second Circuit give additional consideration to the foreign country's ability to protect the children from the "grave risk," this decision narrows the situations in which the "grave risk" defense can be successfully argued and thus causes the return of more children to the countries from which they were abducted.

In *Blondin v. Dubois* (hereinafter "*Blondin I*"), after the mother abducted the children to New York from France in order to escape the alleged abuse of the father, she sought to prevent their return by claiming that such a return would pose a "grave risk" to the children's safety.⁷ In *Blondin I*, the mother attempted to demonstrate by clear and convincing evidence that there was a "grave risk" that returning the child to France would expose them to physical or psychological harm or otherwise place them in an intolerable situation.⁸ Although recognizing that the "grave risk" exception is intended to be narrowly construed, the district court followed the lead of the Eighth Circuit and evaluated the circumstances that await the children upon their return to their habitual residence.⁹ The mother was not in a financial situation to live independently in France if her children were forced to return and therefore indicated that she would be compelled to live with the children's father.¹⁰ Taking this into consideration, and wary of allowing the mother and children to return to the home of the father, the district court ruled that "under circumstances, requiring Dubois and the children to return to France for legal proceedings would present a grave risk of psychological harm."¹¹ The district court did not take into consideration the

5. See *id.* at art. 13.

6. 189 F.3d 240 (2d. Cir. 1999) [hereinafter "*Blondin II*"].

7. 19 F. Supp. 2d 123 (S.D.N.Y. 1998) [hereinafter "*Blondin I*"].

8. *Id.* at 127.

9. *Id.* See also *Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995).

10. *Blondin I*, 19 F. Supp. 2d at 128.

11. *Id.*

possibility of France providing an alternative custody situation for the children during the course of the custody proceedings.

In *Blondin II*,¹² the Court of Appeals for the Second Circuit vacated the district court's decision and remanded the case.¹³ On appeal the Second Circuit concluded that "the Hague Convention requires a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they were wrongfully abducted, in order to allow courts of that nation an opportunity to adjudicate custody."¹⁴ Courts in the Second Circuit must now inquire into the existence of possible options in the child's home country that will protect the child from a "grave risk" of harm upon his or her return.¹⁵ If a district court decides that placing the children in the custody of the petitioning parent would put them at a "grave risk" of harm, the court cannot deny the return of the children to that country unless it can cite legal authority for its determination that the possible custody options presented by the foreign nation would also be unacceptable.¹⁶ Further, to aid in their decision making, the district courts are now empowered to use their equitable discretion to develop a thorough record regarding the custody options of the foreign country.¹⁷

On remand the district court applied the new clarified standard adopted by the Court of Appeals.¹⁸ The court developed a thorough record by examining the arrangements the French government could provide for the children and hearing testimony on how the children could handle these arrangements psychologically.¹⁹ The court determined that Blondin seriously abused the children and that they would suffer severe psychological harm from any return to France, no matter how swift and thorough the actions of the French court sys-

12. 189 F.3d 242.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 249.

17. *Id.* In doing so the District Court should feel free to make any appropriate or necessary inquiries of the government of France-especially regarding the availability of ameliorative placement options.

18. *Blondin v. Dubois*, 78 F. Supp. 2d 283, 284 (S.D.N.Y. 2000) [hereinafter *Blondin III*].

19. *Id.* at 287, 288.

tem.²⁰ Thus, even after applying the new clarified standard announced by the Court of Appeals, the district court held that under these extreme circumstances a "grave risk" existed, and thus it denied the father's petition for the children's return.²¹

The "grave risk" exception is the defense most likely to be encountered in Hague Convention petitions.²² The issue of whether a parent will be successful in using this defense in the Second Circuit will now partially turn on the foreign country's ability to provide an adequate interim custodial arrangement for the child. This Comment will argue that while the Second Circuit's clarified standard furthers the Convention's intention of limiting the "grave risk" defense, it leaves sufficient room for courts considering "grave risk" to deny the children's return if extreme circumstances exist. This Comment will further argue that when these extreme circumstances do not exist and courts applying the clarified standard return the abducted children, these courts must take additional steps to further the goal of safeguarding the welfare of the children once they are returned.

This Comment will analyze how the Second Circuit reached its decision in *Blondin II*, and provided a new, more clarified standard for examining the "grave risk" exception. It will also analyze how the District Court applied this new standard on remand. Part II of this Comment will give a brief background of the Hague Convention and the principles underlying its enactment. To put in context the defense raised by the respondents and other defenses that may be raised under the Convention, Part III of this Comment will focus on some of the exceptions the Convention provides to allow abducted children to remain in the country to which they were abducted. Part IV will center on the clarified standard and how it was applied by the district court. This section will compare how courts in foreign countries and in other U.S. Circuits have handled the "grave risk" exception and decide where the Second Circuit's standard stands in relation to them. This analysis will determine whether these different approaches further the goals of

20. *Id.* at 298.

21. *Id.*

22. See Brian L. Webb & Diana S. Friedman, *Hague Convention on International Child Abduction*, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 15 (1993).

the Convention.

Part V comes to the conclusion that the Second Circuit's standard best implements the goals of the Convention. This section will also look at other steps courts can take to further the goals of the Convention. It will examine what measures courts should develop or adopt from foreign jurisdictions in order to assure that the children's safety and well being are secured at all stages of the abduction dispute. This section will also submit suggestions for streamlining the decision making process involved in Hague Convention petitions. Further, it will discuss alternate steps courts can take to make a more swift analysis, and what references should be made available to the court to aid in its decision making.

II. BACKGROUND - THE HAGUE CONVENTION

The Hague Convention was drafted in 1980 in order to provide a remedy for international child abductions.²³ After becoming a signatory to the Hague Convention on July 1, 1988,²⁴ the United States Congress enacted the domestic enabling legislation for the Convention entitled the "International Child Abduction Remedies Act."²⁵ In enacting this legislation, Congress recognized that the international abduction of children is harmful to their well being,²⁶ that persons should not be allowed to obtain custody of children by virtue of such

23. See Hague Convention, *supra* note 2, at art. 1. The stated objectives of the Hague Convention are:

- a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State.
- b. to ensure the rights of custody and of access under the law of one contracting state are effectively respected in other contracting states.

24. The Contracting states are: Argentina, Australia, Austria, Bahamas, Belgium, Belize, Bosnia & Herzegovina, Burkina Faso, Canada, Chile, China, Colombia, Croatia, Czech Republic, Cyprus, Denmark, Ecuador, Finland, France, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxemburg, Former Yugoslav Republic of Macedonia, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, South Africa, Spain, St. Kitts and Nevis, Sweden, Switzerland, United Kingdom, United States, Venezuela, Zimbabwe. Information obtained from the United States Central Authority, The Office of Children's Issues. *Id.*

25. International Child Abduction Remedies Act, 42 U.S.C § 11601 (1988).

26. *Id.* at § 11601(a)(1).

wrongful abduction,²⁷ and that international abductions are an increasing problem that "only concerted cooperation pursuant to an international agreement can effectively combat."²⁸ Further, Congress recognized that the Hague Convention established legal rights and procedures for the prompt return of children and that the treaty framework would help to resolve the problem of international abduction, and would help to deter it in the future.²⁹

The Hague Convention authorizes an aggrieved parent to apply for the prompt return of the child to the country from which he or she was abducted.³⁰ The Convention is unique because it is not an extradition treaty and it creates only a civil remedy.³¹ This means that the child abduction does not create criminal penalties under the treaty, but instead creates civil procedures to provide a civil remedy.³² This however does not preclude individual states from making child abduction a criminal offense. The Convention was constructed in order to compel the parent to return the child voluntarily, and it operates irrespective of the existence of custody decrees.³³ Since custody decrees are irrelevant,³⁴ courts are expected to promptly return an abducted child to his country of "habitual residence" without addressing the merits of the underlying parental claim.³⁵ By allowing the courts of the child's habitual residence to decide the custody dispute, the Convention strives to eliminate the incentive for parents to forum shop, or seek alternative rulings under what may be the more favorable laws of another country.³⁶ By requiring courts to return the child without considering the child's best interests, the Convention seeks to prevent the court from making value judgements

27. *Id.* at § 11601(a)(2).

28. *Id.* at § 11601(a)(3).

29. *Id.* at § 11601(a)(4).

30. See Hague Convention, *supra* note 2, at Preamble.

31. See *id.* at art. 12. See also Peter H. Pfund, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10505. (1986) (hereinafter *Legal Analysis*).

32. *Legal Analysis*, *supra* note 31, at 10505.

33. Hague Convention, *supra* note 2, at art. 17.

34. See *Legal Analysis*, *supra* note 31, at 10504.

35. Hague Convention, *supra* note 2, at art. 19.

36. See Lynda H. Herring, *Taking Away the Pawns: International Parental Abduction & The Hague Convention*, 20 N.C.J. Int'l L. & Com. Reg. 137, 140 (1994).

about the state and the culture from which the child had been snatched.³⁷ The aim is to restore the "factual status quo" without any inquiry into the custody situation.³⁸

For an aggrieved parent to seek the aid of the Hague Convention, the countries from and to which the child has been abducted must have implemented the Convention before the wrongful removal or retention.³⁹ Second, the child must have habitually resided in the contracting state from which he was abducted and have been wrongfully removed and retained.⁴⁰ However, once the child turns sixteen, the Convention ceases to apply even if the abduction occurred prior to the child reaching the age of sixteen.⁴¹ Further, if the aggrieved parent allows more than a year to pass from the abduction to the commencement of the legal proceedings, the court may deny the return of the child if it appears that the return may further disrupt the child's life.⁴² The varying interpretations of these procedures are outside the scope of this Comment.

III. EXCEPTIONS TO THE HAGUE CONVENTION

Although the ultimate goal of the Convention was the return of the child to the state from which he or she was wrongfully removed, some exceptions were included in the Convention to allow judges to refuse the return under certain circumstances.⁴³ These exceptions "reflect an attempt to bal-

37. E. Perez-Vera, *Explanatory Report of the Convention on the Civil Aspects of International Child Abduction*, Acts and Documents of XIVth Session, Volume III, 1982, 426 at 430-31, paras. 19, 22, 23. [hereinafter Perez-Vera Report]. Elisa Perez-Vera was the official Hague Conference Reporter for the Convention, and her explanatory report is recognized as the official history of and Commentary on the Convention.

38. See *Legal Analysis*, *supra* note 31, at 10505.

39. Hague Convention, *supra* note 2, at art. 35.

40. *Id.* at arts. 3, 4. "The removal or the retention of a child is to be considered wrongful where (a) it is in breach of rights of custody . . . under the law of the state in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised . . ." *Id.* at art. 3.

41. *Id.* at art. 4.

42. *Id.* at art. 12. See also *Legal Analysis*, *supra* note 31, at 10509. "The reason for the passage of time . . . is also relevant to the ultimate disposition of the return petition. If the alleged wrongdoer concealed the child's whereabouts from the custodian necessitating a long search for the child . . . it is highly questionable whether the respondent should be permitted to benefit from such conduct absent strong countervailing considerations." *Id.*

43. Hague Convention, *supra* note 2, at art. 12. "The Authority concerned

ance the wariness of the signatories to relinquish autonomy against their commitment to deter parental child abductions on an international level.⁴⁴ Specifically, this Comment will focus on the "Grave risk"⁴⁵ and the "Fundamental Principals"⁴⁶ exceptions.

A. *The Grave Risk Exception*

Under Article 13(b), a court in its discretion "need not order a child returned if there is a grave risk that return would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation."⁴⁷ This exception was included to reach a compromise between varying legal systems and is intended to be very narrowly construed to assure that is not used as a method to litigate the child's best interests or to determine custody.⁴⁸ The exception recognizes that in some cases the consequences of not allowing the foreign jurisdiction to hear the case may be less harmful than ordering the child's return.⁴⁹ To prevent hearings on the child's best interests "only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional

SHALL order the return of the child forthwith." *Id.* (emphasis added). See also Webb & Friedman, *supra* note 22. "Generally the return of a child pursuant to the Hague Convention is mandatory; however, under certain circumstances the court has some discretion in determining whether or not to return the child to the country of his or her habitual residence." *Id.* at 13.

44. Dana R. Rivers, *The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor*, 2 *Transnat'l Law* 589, 624 (1989). "In designing the exceptions, the Convention drafters faced the difficult problem of how to serve the interests of the individual child while promoting the broad policy interest of the treaty" . . . Their solution serves the dual purpose of promoting the interests of any given child while enabling the signatories to maintain a workable, effective compromise." *Id.*

45. Hague Convention, *supra* note 2, at art. 13.

46. *Id.* at art. 20.

47. *Legal Analysis*, *supra* note 31 at 10510. See also Webb & Friedman, *supra* note 22, at 15. "The [grave risk] provision is somewhat analogous to the 'serious and immediate question' exception to an automatic return of the child pursuant to a writ of habeas corpus. The "grave risk" standard is, however, more stringent and requires a higher burden of proof." *Id.*

48. *Legal Analysis*, *supra* note 31, at 10509.

49. See Perez-Vera Report, *supra* note 37 at 433 para. 29. "Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger of being placed in an intolerable situation." *Id.*

harm or otherwise place the child in an intolerable situation is material to the court's determination.⁵⁰ The deliberations surrounding the use of the term "intolerable situation" display that a person opposing a child's return must show that the risk is grave, not merely serious.⁵¹ The risk is considered "grave" if it "exceed[s] the level of triviality and constitute(s) an 'intolerable situation' that is of an extreme and compelling nature."⁵² Further, the party asserting the "grave risk" defense must prove it by clear and convincing evidence.⁵³ The fact that the exceptions outlined in Article 12 and 13(a) need only be established by a preponderance of the evidence, suggests that the higher evidentiary standard demanded for the "grave risk" exception was intended to limit the scope of its application.⁵⁴

In determining whether a "grave risk" of harm exists, courts have been aware that the threat of harm can be created by the country from which the child has been abducted or by the non-abducting parent.⁵⁵ This country or parent distinction is based on the fact that if the risk is posed by the non-abducting parent the court must be careful not to decide the ultimate custody issues.⁵⁶

The most narrow view of "grave risk" refers exclusively to the risk posed by the country.⁵⁷ Under this view, a "grave risk" posed by a parent will not provide a defense to a Hague Convention petition. An appreciation of a country as a possible source of a "grave risk" begins with the recognition that the Central Authority from that country filed the "application" for the return of the child and the country, rather than the peti-

50. *Id.*

51. *Id.* An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If 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. *Id.*

52. Herring, *supra* note 36, at 168 (citing *In re N*, (1991) 21 Fam. L.R. 367, 368).

53. See 42 U.S.C. 11603(e)(2)(A) (setting forth standard of proof for defenses pursuant to Articles 13(b) and 20).

54. See *id.* at 11603(e)(2)(B) (setting forth standards of proof for defenses pursuant to Articles 12 and 13).

55. See Webb and Friedman, *supra* note 22, at 16.

56. See Robert D. Arenstein, *The Anatomy of the Hague Case When a Child has been Abducted to the United States*, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 1 (1993).

57. See *Gsponer v. Johnstone*, (1988) 12 Fam. L.R. 755.

tioning parent, is therefore, "the applicant."⁵⁸ A respondent parent will generally have difficulty mounting a "grave risk" defense for there are few situations in which the child will be considered in threat of danger posed by the requesting state.⁵⁹ For example, "a grave risk would be posed by the country if the requesting country were at war on its own soil and there was a likelihood that the child might be captured, injured or killed."⁶⁰ Unless falling within these few exceptions, "no evidence will exist"⁶¹ that will prevent a child from being returned to a country because of the harm it may cause.

When a respondent parent claims that the "grave risk" is actually posed by the petitioning parent, they must meet the higher evidentiary standard and prove that the risk is "substantial, not trivial."⁶² Generally, even if evidence of "grave risk" exists, courts will be extremely reluctant to deny a petition for the return of the child, the proper assumption being that the Court of the Habitual Residence of the children would take the steps necessary to protect them. Since assessing the risk posed by a parent is much like making a prohibited custody determination, the 13(b) exception was intended to be used only in situations where there is a chance of substantial psychological or physical harm.⁶³

B. The Fundamental Principles Exception

Article 20 further limits the return obligations of Article 12. It states: "The return of the child under the provisions of

58. Webb and Friedman, *supra* note 22, at 16. Each Contracting state was required to establish a Central Authority which had the broad mandate of assisting applicants to secure the return of their children or the effective exercise of their visitation rights. The Central Authority is expressly directed by Article 10 to take all appropriate measures to obtain the voluntary return of the children. Legal Analysis, *supra* note 31 at 10511. See also Hague Convention, *supra* note 2, at arts. 1, 10, 21.

59. See Webb and Friedman, *supra* note 22, at 16.

60. *Id.* Another example where "grave risk" might exist is where a nuclear disaster occurred in the country and the children would be exposed to large doses of radiation upon their return home. *Id.*

61. *Id.*

62. Re C, 2 F.C.R. 507, 517 (C.A. 1999).

63. See Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996). "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." *Id.* at 1069.

Article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.”⁶⁴ The term “fundamental principles” does not refer to international conventions or declarations concerned with the protection of human rights, but instead is a reference to “the fundamental provisions of the law of the requested state.”⁶⁵ In other words, “fundamental principles” refers to actual domestic laws of that state, not to international notions of human rights. While the drafters intended to limit article 13 exceptions to prevent courts of one nation from making value judgements of another nation, the “fundamental principles” exception is the result of a compromise with those contracting states that believed another exception was necessary to cover extreme situations outside the scope of article 13.⁶⁶ The clause was ultimately adopted because it could only be invoked “on the rare occasion that return of the child would utterly shock the conscience of the court or offend all notions of due process.”⁶⁷

In order to invoke the “fundamental principles” exception, the respondent parent must demonstrate that the return of the child would violate an actual domestic law of that state.⁶⁸ It will be necessary for the respondent party to “show that the fundamental principles of the requested state concerning the subject matter of the Convention do not permit”⁶⁹ the return of the child. The state will not be able to deny the return of the child if the exception will simply violate a state policy or custom.⁷⁰ Further, the respondent parent cannot show “merely that (the child’s) return would be incompatible, even manifest-

64. Hague Convention, *supra* note 2, at art 20.

65. A.E. Anton, *The Hague Convention on International Child Abduction*, 30 INT’L & COMP. L.Q. 537, 551-552 (1981).

66. *Id.* See also *Legal Analysis*, *supra* note 31, at 10510.

67. *Legal Analysis*, *supra* note 31, at 10510. Although this language has no known precedent in international law to aid in its interpretation, this exception, like the others, was intended to be restrictively interpreted and applied. *Id.*

68. Perez-Vera Report, *supra* note 37, at 462, para. 118. This rule is concerned only with the principles accepted by the law of the requested state, either through general international law and treaty law, or through internal legislation. *Id.*

69. *Id.*

70. *Id.* See also, Susan L. Barone, *International Parental Child Abduction: A Global Dilemma With Limited Relief—Can Something More be Done?*, 8 N.Y. INT’L L. REV. 95, 110 (1995).

ly incompatible" with the laws of that state and instead must show that the laws of the state simply do not permit it.⁷¹ The Article 20 exception should not be used by a court simply because that state operates a system of preferred custody of one parent over the other.⁷²

As an additional limitation, the framers made clear that a country should not invoke the "fundamental principles" exception in applying the Convention any more frequently than it applies public policy exceptions in purely internal matters.⁷³ These limitations were necessary as a compromise measure, and enabled the exception to be adopted.⁷⁴ Because of these limitations, and the fact that the Article 20 exception must be proven by clear and convincing evidence,⁷⁵ the "fundamental principles" exception has been very difficult to apply.⁷⁶

IV. *BLONDIN*: A CLARIFIED STANDARD

A. *Application of the Clarified Standard*

In *Blondin I*, the district court allowed the children of Blondin and Dubois to remain in the United States because it determined that returning the children to France would put them at "grave risk" of psychological harm or in an intolerable situation.⁷⁷ This decision was based largely on evidence that showed that Mr. Blondin was abusive towards the mother and children and the court's assessment that return of the children to France, other than in Blondin's custody, was impracticable.⁷⁸ In determining the temporary state of custody for the children pending the ultimate custody decision, the court con-

71. Perez-Vera Report, *supra* note 37, at 462, para. 118.

72. See Carol Daigle, *Due Process Rights of Parents and Children in International Child Abductions: An Examination of the Hague Convention and its Exception*, 26 VAND. J. TRANSNAT'L L. 865, 878-79 (1993-94). See also *Legal Analysis*, *supra* note 27, at 10510.

73. Perez-Vera Report, *supra* note 37 at 462, para. 118. Otherwise, this provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. *Id.*

74. *Legal Analysis*, *supra* note 31, at 10510.

75. Hague Convention, *supra* note 2, at art. 20; 42 U.S.C at § 11603(e)(2)(A).

76. See Daigle, *supra* note 72, at 875. "Because the scope of public policy provisions is difficult to define and policies vary among states, public policy provisions are unusual in conventions involving private international law." *Id.*

77. See *Blondin I*, 19 F. Supp.2d at 127.

78. *Id.*

cluded that Blondin would be financially unable to support the children outside of his home.⁷⁹ Further, in a ruling from the bench, the court in *Blondin I* rejected Blondin's suggestion that the children could stay with their godmother in France pending the final custody decision by the French Courts.⁸⁰ The Second Circuit made clear in *Blondin II* that "the District Court did not offer any basis in the Convention or any other legal authority for its determination that a temporary third party placement would be unacceptable."⁸¹ Aside from rejecting the possibility of the children staying with their godmother, the district court did not explicitly consider any other alternative custodial arrangements and stated that "if I am going to send the children back, I am probably going to do it with Mrs. Dubois."⁸² However, upon further consideration the court determined that even sending the children back to France in the custody of their mother would present a grave risk, stressing that the family's financial circumstances would force Dubois to live with Blondin.⁸³

On appeal the Court of Appeals embraced a new standard which demands that all courts in the Second Circuit considering a Hague Convention petition do a more thorough analysis of "the full panoply of arrangements that might allow the children to be returned to the country from which they were abducted."⁸⁴ While the circuit court in *Blondin II* agreed with the district court's decision that the children would be at "grave risk" if returned to the custody of their father, it vacated the decision and remanded the case for a new trial based on

79. *Id.* at 128. Blondin represented to the court that "he had no more money" and could not afford the cost even of airfare to come back to the United States. *Id.* He further represented to the court that he had to take out a loan to come to the United States in the first place. *Id.*

80. See *Blondin II*, 189 F.3d at 244.

81. *Id.* at 249.

82. *Id.* See also *A Summary of Remarks by Richard Dyer on the Application of the Hague Child Abduction Convention to Questions of Access*, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (Sept. 30, 1993). Some courts, where the financial situation of the family would not allow the primary caretaker-who abducted the child-to return with the child to her habitual residence, have required "undertakings" on the part of the parent seeking return in order to allow the primary caretaker to also return. *Id.* at 2.

83. See *Blondin I*, 19 F. Supp. at 128.

84. *Blondin II*, 189 F.3d at 242.

the clarified standard.⁸⁵ The court in *Blondin II* made it clear that under this standard the courts of the child's habitual residence would be given a greater opportunity to adjudicate custody.⁸⁶ The Court of Appeals hoped that this would effectively honor the simultaneous Hague Convention commitments of returning wrongfully abducted children to their homes for a custody decision there, and safeguarding them from a "grave risk" of harm.⁸⁷ This standard allows courts the opportunity to consider whether other options are available under the foreign law whereby the children could be placed in adequate temporary care, pending resolution of the ultimate custody decision.⁸⁸ If the court is satisfied that the foreign country can provide adequate care in the interim while the custody battle is waged, then the court should return the child to that country despite the fact that a "grave risk" to that child exists at the hands of one of the parents.⁸⁹

On remand, the district court applied the clarified standard and considered whether there were remedies that would protect the children pending a final adjudication of custody in France.⁹⁰ To develop a more thorough record, the court wrote to the French Ministry of Justice and the United States Department of State seeking their assistance.⁹¹ In response, the French authorities detailed what social services and protections awaited Dubois and the children should they be returned to France.⁹² Also, the United States presented a

85. *Id.*

86. *Id.*

87. *Id.* This further alignment with treaty goals, the court hoped, stood not only to protect children abducted to the United States, but also to protect American children abducted to other nations, whose courts are expected to offer reciprocal protection. *Id.*

88. *Id.*

89. *Id.* at 249. See also Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (July 26, 1993). If the Convention is to be a success, the court must defer to the foreign nation, "regardless of the conduct of the parties' and unless there is no satisfactory alternative custody arrangement in the state of habitual residence." *Id.* at 53.

90. *Blondin III*, 78 F. Supp. 2d at 287.

91. *Id.* These are the two agencies that serve as the Central Authority "to discharge the duties which are imposed by the Convention." See Hague Convention, *supra* note 2, at art. 6.

92. *Blondin III*, 78 F. Supp. 2d at 288.

French attorney and expert on French family law.⁹³ From the response of the French Ministry of Justice and the testimony of the United State's expert, the court determined that if Dubois and the children returned to France, Dubois would have to file a request in French family court seeking a modification of the prior French order which granted joint parental authority of the children to Blondin and Dubois and established the children's principal residence with Blondin.⁹⁴ Dubois would need to seek a temporary custody order fixing the "habitual residence" of the children with her pending the completion of the new custody hearing.⁹⁵ The testimony also indicated that the French family judge would appoint a forensic expert (child psychiatrist) and a welfare officer to evaluate the children and prepare reports to the court.⁹⁶ The expert estimated that "the entire process of evaluating the children, preparing the reports, conducting a hearing, and rendering a final custody decision could take from one to three months, depending on the diligence of Dubois's attorney, the speed of the forensic expert and the welfare officer, and the willingness of both parties to participate in the inquiry."⁹⁷ A legal representative would be appointed to Dubois if she so requested.⁹⁸

The French Ministry of Justice and the United State's expert also indicated that while waiting for the custody proceedings to complete Dubois would be eligible to receive social services.⁹⁹ Dubois would receive some money each month from the government that would go towards their rent or she would be able to apply for residence in a shelter.¹⁰⁰ Further, the Office of the Public Prosecutor of Bobigny stated that it would not criminally prosecute Dubois for the abduction if she returned with the children, but that it may seek to extradite her from the United States to pursue a criminal prosecution in France if she does not return.¹⁰¹

In further developing its record, the District Court also

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Blondin III, 78 F. Supp. 2d at 289.

99. *Id.*

100. *Id.*

101. *Id.*

heard testimony from Dr. Solnit, a professor of pediatrics and psychiatry, on the psychological impact of sending the children back to France for the custody proceedings.¹⁰² After interviewing the mother and children and reviewing the court's memorandum decision, Dr. Solnit came to the conclusion that Marie-Eline "suffered from an acute, severe traumatic disorder, caused by Blondin's physical and verbal abuse of her and her mother and the problems of living in an abusive situation."¹⁰³ While Dr. Solnit testified that Marie-Eline's brother had been too young during the time of the abuse to have manifested a traumatic stress disorder, the court made clear that it had no intention of separating the children.¹⁰⁴ Dr. Solnit further testified that, while the children had recovered significantly because of their current living arrangements in a safe home with their extended family, they are "not fully recovered yet."¹⁰⁵ Based on these findings, Dr. Solnit testified that any return to France would "almost certainly" trigger a post-traumatic stress disorder" impairing their physical, emotional, intellectual, and social development and leading to "long term or even permanent harm to their physical and psychological development."¹⁰⁶ Dr. Solnit made clear that that the risk of post-traumatic stress disorder would be present in any proposed arrangement for returning the children to France "however carefully organized."¹⁰⁷

Based on this evidence, and applying the clarified standard, the District Court held that returning the children to France under any arrangement would put the children in a "grave risk" of physical or psychological harm.¹⁰⁸ First, the court determined that even temporarily removing the children from their present environment, where they have begun to recover, would "thwart" their recovery causing their traumatic

102. *Id.* at 290. Testimony was heard from Dr. Albert Solnit, Sterling Professor Emeritus of Pediatrics and Psychiatry and Senior Research scientist at the Yale University Child Study Center.

103. *Id.* at 290-291.

104. Blondin III, 78 F. Supp. 2d at 290-91. The court stated that "Children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded a substantial measure of sanctuary from unjustified interference by the State." (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618, (1984)).

105. *Id.* at 291.

106. *Id.* at 292.

107. *Id.* at 291.

108. *Id.* at 294

stress disorder to reoccur.¹⁰⁹ Second, the court held that the children's trauma would be compounded by the uncertainties of custody proceedings, and the possibility of becoming wards of the state after other temporary living arrangements were no longer available.¹¹⁰ Finally, the court concluded that Marie-Eline was mature enough for the court to take into consideration her objection to being returned to France.¹¹¹ Since no arrangement that France could provide would alleviate a recurrence of the traumatic stress disorder, the court held that a "grave risk" of harm existed and denied Blondin's petition for the return of the children to France.¹¹²

B. *The Clarified Standard v. Other Courts*

i. The Domestic Front

In order for the Hague Convention to succeed in its goal of promoting the return of children to their habitual residence, there must be a uniform interpretation of the treaty that at once promotes its goals and respects the values and sovereignty of the other signatories.¹¹³ While the opportunities for the courts of other circuits to interpret the "grave risk" and "public policy" exceptions have been relatively limited, the holding of the Second Circuit seems to solidify procedures to which other circuits alluded.

a. The Sixth Circuit Rule

In the Sixth Circuit case of *Friedrich v. Friedrich*,¹¹⁴ the court stressed a restrictive reading of the "grave risk" exception and ruled that "(I)f return to a country or to the custody of a parent in that country is dangerous, we can expect that country's courts to respond accordingly."¹¹⁵ While the court in

109. *Id.* at 295.

110. Blondin III, 78 F. Supp. 2d at 295-96. The court further noted the uncertainty surrounding the fact that there was presently a French order in force, directing that the children's principal residence was with Blondin. *Id.*

111. *Id.* at 296. The court made clear that it was "not relying exclusively or extensively on Marie-Eline's views in deciding not to send the children back." *Id.*

112. *Id.* at 298.

113. See *Air France v. Saks*, 470 U.S. 392, 403-404 (1985).

114. 78 F.3d 1060 (1996).

115. *Id.* at 1068.

Friedrich did not demand that the courts in that Circuit take an active role in determining what the petitioning country could do to care for the children, it realized that, in most situations, the children should be returned, since the petitioning country should be given the opportunity to respond.¹¹⁶ The holding of *Blondin II* is consistent with the Sixth Circuit's belief that the foreign country can handle most situations, but further allows the courts of the Second Circuit to take the procedural steps of determining what custody arrangements the foreign courts have available.

b. The Eighth Circuit Rule

The Eighth Circuit, in *Nunez-Escudero v. Tice-Menley*¹¹⁷ determined that if a 13(b) defense is raised the court must undertake some evaluation of the people and circumstances awaiting that child in his or her habitual residence.¹¹⁸ Further, the court specifically rejected the notion that a 13(b) defense is viable only if "interim situations" that can be provided by the foreign court are unacceptable.¹¹⁹ The Second Circuit followed the Eighth Circuit in mandating a further investigation into the alternative circumstances that would be awaiting the child if returned.¹²⁰ Similarly, the specific holding of *Blondin II* suggests that "grave risk" should be examined first, and only when found to apply should the court determine the ability of the child's home state to care for the children and prevent the "grave risk."¹²¹ However, while the court in *Blondin II* demanded an examination into a "grave risk" defense as is required by the Eighth Circuit, its holding limits the applicability of the defense if options exist in the foreign country to protect against the "grave risk." Thus, while both circuits favor an inquiry into the situations in the state of the child's habitual residence, the Eighth Circuit requires an investigation to determine whether a "grave risk" argument is valid while the Second Circuit requires the investigation as

116. *Id.* "We acknowledge that courts in the abducted from countries are as ready as able as we are to protect the children." *Id.* at 1068-69.

117. 58 F.3d 374 (8th Cir. 1995).

118. *Id.* at 378.

119. *Id.* at 377.

120. *See Blondin II*, 189 F.3d at 242.

121. *See id.*

part of a procedure to determine if the child can be adequately protected in the foreign country even if the "grave risk" is found to be present.

c. The New Jersey Rule

In *Tahan v. Duquette*,¹²² the Superior Court of New Jersey supported the use of investigations to determine if the foreign country can protect the child after a "grave risk" is shown. In *Tahan*, the court ruled that "Article 13(b) requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint,"¹²³ although extensive examinations into psychological profiles and parental lifestyles would intrude into the ultimate custody issue which should be left for the foreign court.¹²⁴ The court further held that courts must be "empowered to evaluate the surroundings to which the child is to be sent" and any test which precludes focus on the people involved in the care of the child is "narrow and mechanical."¹²⁵ This holding supports the Second Circuit's movement towards a procedural investigation of the surroundings to which the child may be returned. *Blondin II* appreciates that the foreign system provides a tribunal to hear the custody claim, but in line with *Tahan*, realizes that courts in the petitioned state must look further and make sure that the foreign system can protect the child from "grave risk" in the interim until a final custody decision is made. While the holding of *Tahan* advocates a thorough but non-custody like investigation into the surroundings to which the child would be returned in order to determine if a "grave risk" is present, the court in *Blondin II* advocates an investigation into the foreign system's ability to protect the children even if a "grave risk" is proven. Thus, while the court in *Blondin II* did not preclude the investigation into psychological makeups and parental lifestyles in determining the existence of an article 13(b) defense, it is a furtherance of the holding in *Tahan* for it clarifies the kind of investiga-

122. 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992).

123. *Id.* at 489.

124. *Id.*

125. *Id.*

tions courts should make into the foreign system if a 13(b) defense is established.

d. The Third Circuit Rule

In *Feder v. Evans-Feder*, the Third Circuit offered suggestions to bring U.S. courts more in line with the holdings of foreign courts and further the goals of the Convention.¹²⁶ In this case the child's mother abducted him from Australia and brought him to Pennsylvania. The district court did not examine the mother's 13(b) defenses for it found that the father failed to make the threshold showing that their child was a "habitual resident" of Australia as he would need to be in order to invoke the Convention.¹²⁷ Thus, the district court denied the father's application for the return of the child. On appeal, the Third Circuit determined that the child was in fact a habitual resident of Australia¹²⁸ and remanded the case to the district court for a determination of whether the mother could establish one of the 13(b) defenses to prevent the child's return.¹²⁹ In remanding the case, the Third Circuit made clear that courts can put the burden on the petitioning parent to complete certain "undertakings" to assure the court that the child will be free of any "grave risk" pending the ultimate custody decision of the petitioning country's courts.¹³⁰ "Undertakings" are steps or actions taken by the petitioning parent to assure the court that the child would be protected from a "grave risk" if returned to the country of their habitual residence.¹³¹ The Court of Appeals instructed the district court that even if a "grave risk" is proven, the court should still investigate whether the "undertakings" provided by the petitioning parent will prevent the child from suffering short term harm.¹³² Similar to the Second Circuit's holding, by demanding that the district court examine "undertakings" of the

126. 63 F.3rd 217 (3rd Cir. 1995).

127. *Id.* at 224.

128. *Id.* at 224.

129. *Id.* at 226.

130. *Id.*

131. *See* C. v. C., 2 All E.R. 465, 469-70 (C.A. 1989).

132. *Feder*, 63 F.3rd at 226. As in *Blondin II*, the Court of Appeals gave the district court room to investigate and develop a thorough record that would aid in its decision. It further stressed that time is still of the essence and that the court should act expeditiously. *Id.*

petitioning parent, the Third Circuit made a further suggestion on how a court can assure that a child will be adequately protected in the foreign country if a "grave risk" is proven. This guarantees that both goals of the Convention- the prompt return of the child to the country from which they were abducted, and the protection of the child, are satisfied.

ii. The International Front

a. England

The general attitude of English courts dealing with the Hague Convention has been to implement its goal of returning the children, relying on the belief that the welfare of the children will be best served by the courts of their habitual residence who must decide the children's long term future.¹³³

In the case of *Re C*,¹³⁴ the Court of Appeal overturned a lower court decision which denied the return of abducted children because of the existence of a grave risk of harm to the children.¹³⁵ The finding of "grave risk" was based on the apprehension, tension and inevitable disruption which would come from an unwelcome return to the child's habitual residence.¹³⁶ In rejecting this finding of a "grave risk," the Court of Appeal said that the severity of the "grave risk" must be measured by a higher standard and ruled that the mother who abducted the children is "the author of her own misfortune" and that the court must remember that the Convention was designed to ensure that parties do not gain adventitious advantage by taking the child to another jurisdiction and then wrongfully retaining him or her.¹³⁷ Moreover, the Court of Appeal acknowledged that the best interests of the children may be to let them remain in England, but, in maintaining the ideals of the Convention, held that Courts in England should

133. See Hague Convention, *supra* note 2.

134. 2 F.C.R. 507, 523 (C.A. 1999).

135. *Id.*

136. *Id.* at 513-14.

137. *Id.* at 520. See also *C. v. C.*, 2 All E.R. 465 (C.A. 1989). The refusal of the mother to return with the child is the cause of the "grave risk" but the court rejected this and determined that if the grave risk is to be inflicted by the abducting parent then "it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return." *Re C*, 2 F.C.R. 507, 519.

not engage in such a best interest speculation and that "the purpose of the convention is to ensure that that decision is taken by the courts where the children are habitually resident."¹³⁸

Similarly, in the case of *K v. K*,¹³⁹ the abducting mother claimed that a "grave risk" would come from the child's separation from her as well as from alleged abuse at the hands of the father.¹⁴⁰ The court held that some psychological harm to the child is inherent simply by implementing the Convention and that the primary concern of the courts in the abducted to state should be to provide the child with the maximum possible protection until the courts of the other country can determine the child's long term custody.¹⁴¹ Further, it was decided that courts in England should assume that the courts in the other country will minimize or eliminate the "grave risk" that is posed to the child upon that child's return.¹⁴² In assuming that the primary role for the courts in England was to protect the child from "grave risk" until the country of habitual residence can step in, the court demanded that the petitioning father offer undertakings to the courts of England to prove that the mother and children would be protected until the foreign court could make a custody decision.¹⁴³ The father assured the court that he would permit the mother and children the exclusive occupation of a flat, that he would not enter that building, that he would pay for the flat, and that he would not initiate further criminal proceedings against the mother based

138. Re C, 2 FCR at 522-523. See also Re L, 2 F.C.R. 604 (Fam. 1999). Even if ordering the return of the child does not serve this child's best interest "it would be an order contributing in a very small way to the welfare of those numerous other children . . . whose parents would be deterred from abducting them, reabducting them and secreting them by a growing public awareness that what would then happen would in all probability, be an order for return." *Id.* at 614.

139. 3 F.C.R. 207 (Fam. 1998).

140. *Id.*

141. *Id.* at 212 (citing *C. v. C.*, 2 All E.R. 465 (C.A. 1989)).

142. *Id.* The courts of England only should prevent the return of the child if there is compelling evidence that the courts in the other country cannot protect the child's welfare in the circumstances of this case. *Id.* See also Re M, 1 Fam. L.R. 1021, 1026 (1995), (where it was determined that a "grave risk" preventing the child from being returned would exist if it could be demonstrated that a return would result in the children actually being left homeless on the street without recourse to state benefits).

143. *K v. K*, 3 F.C.R. at 214.

upon the removal of the children.¹⁴⁴ In demanding that the petitioning parent make undertakings to it, this court displayed a genuine interest in the welfare of the children in the interim before the foreign court could seize the matter and resolve the issue, while at the same time honoring its treaty commitment to return the abducted children. The court realized that it could not enforce these undertakings in the foreign court, but relied on them anyway as an additional safeguard to the mother and child during "the only period with which this court is concerned."¹⁴⁵

As in *K v. K*, the Court of Appeal in *Re M* (Abduction: Undertakings)¹⁴⁶ ruled that undertakings promised by the petitioning parent are designed to "make the return of the child easier and to provide for the necessities, such as a roof over the head, adequate maintenance, etc., until and only until, the court of habitual residence can become seized of the proceedings brought in that jurisdiction."¹⁴⁷ The court made clear that these undertakings should not be used by the parties to "clog or fetter" or "to delay the enforcement of a paramount decision to return the child."¹⁴⁸ While a return of the children to the country of their habitual residence would be in line with the goals of the Convention, the court realized that it would also serve the best interests of all children for "it assumes that in the absence of special circumstances, it will best serve the immediate welfare of the abducted child to have its long term interests judged in the land from which it was abducted."¹⁴⁹ Further, this court determined that requiring a mother and children to live on state benefits until the court of that country can decide the custody issues, would not create an "intolerable situation" that should prevent the return of the children.¹⁵⁰ This decision reflects the limited time frame for

144. *Id.*

145. *Id.* See also *Re M*, 1 Fam. L.R. 1021, 1027 (1995). Courts in the petitioning country should "assume that the courts and welfare services of the other country will all take the same serious view of a failure to honor undertakings given to a court (of any jurisdiction)" *Id.* at 1027.

146. *Re M*, 1 Fam. L.R. 1021 (1995).

147. *Id.* at 1024-1025. See also *C. v. C.*, 2 All E.R. at 470 (C.A. 1989) (listing possible undertakings that a petitioning parent may take to secure the protection of the child if returned).

148. *Re M*, 1 Fam. L.R. 1025 (1995).

149. *Id.* at 1027.

150. *Id.* at 1026-1027. The Court was satisfied that the petitioning state had a

which the courts of England are active in protecting the child's welfare when deciding a Hague Convention petition, and further shows a very narrow interpretation of the "grave risk" defense.

Despite the English court's narrow interpretation of "grave risk", in *Re M*,¹⁵¹ the court displayed a willingness to allow the defense if it could not guarantee the welfare of the children during the interim period for which it was concerned. In this case the English mother had kept her children in England after a visit, against the wishes of the father.¹⁵² The father made a Hague Convention petition and was successful in securing their return.¹⁵³ The mother was granted contact rights which included visitation arrangements.¹⁵⁴ During the next year the mother brought the children to see various psychologists whose findings supported the mother's custody of the children.¹⁵⁵ The following year, while the children were visiting in England and after having consulted with a third psychologist, the mother retained the children beyond the time she was allowed and made an application to the English courts for custody.¹⁵⁶ The father made another petition under the Hague Convention but this time was denied.¹⁵⁷

Based on the facts of this case, the Court of Appeal held that a "grave risk" existed and thus denied returning the children. This decision was based significantly upon the fact that the children had reached an age and degree of maturity where the court could take into account their objections to being returned to Greece.¹⁵⁸ The court acknowledged that decisions such as this are best made in the country of the children's habitual residence, but it recognized that in the first Hague Convention petition by the father the children had been returned to his custody only to have their psychological problems compounded.¹⁵⁹ The court realized that since no undertakings

developed policy of state benefits and that it is not for the court of the petitioned country to suggest that such benefits would be inadequate. *Id.*

151. 2 F.C.R. 488 (C.A. 1998).

152. *Id.*

153. *Id.* at 491.

154. *Id.*

155. *Id.* One psychologist was Greek, the nationality of the father, and the other was English. *Id.*

156. *Id.*

157. *Re M*, 2 F.C.R. 488 (C.A. 1998).

158. *Id.* at 497.

159. *Id.* at 498. The court believed that "the father and his family do not ac-

were offered by the father, the children would likely be returned to this unacceptable situation.¹⁶⁰ Having already honored the Convention to no avail, the court, during the second Hague Convention petition, was convinced that in this exceptional case, the children should not be returned to their paternal family.¹⁶¹ Although this court denied the return of the children based on the 13(b) defense, the circumstances of this case make clear that this was truly an exceptional situation. In recognizing the absence of offered undertakings by the father, the court determined that there was no way the child could be returned to their habitual residence, and be free from "grave risk" in the interim. Thus, the court denied the second Hague Convention petition.

Although the clarified standard of the Second Circuit is consistent with England's application of the Convention, it allows for a finding of "grave risk" in broader circumstances. Similar to the holding of in *Re C* and *K v. K*, the Second Circuit's clarified standard recognizes that courts hearing a Convention petition should not examine the best interests of the child and that the court should assume that the abducted from county will minimize the "grave risk" that is posed.¹⁶² However, as was shown in the district court's application of the clarified standard on remand, courts in the Second Circuit may find "grave risk" to be applicable in more situations than English courts. The court in *Re M* displayed a willingness to accept the "grave risk" defense when the children's psychological problems had been compounded by an initial return of the children to their father.¹⁶³ However, the court only accepted this defense on the second Convention petition after its initially rejection of the defense lead to the children being returned to their father.¹⁶⁴ In applying the clarified standard, the district

cept that the children have any psychological problems. Consequently if the children do go back they would not receive any help in the undoubtedly difficult period of adjustment." *Id.* at 496.

160. *Id.* at 496. The court made clear that no alternative arrangements besides custody by the father had been suggested by the father leading the court to believe that it was the only option. *Id.*

161. *Id.* at 499. This holding was not a criticism of Greek courts, but was a practical decision based on the facts of this case, that the children should not be returned to the father. *Id.* at 498.

162. *Blondin II*, 189 F.3d at 248-249.

163. *Re M*, 2 F.C.R. at 496 (C.A. 1998).

164. *Id.*

court accepted the "grave risk" defense because it was confident that any return of the children to France would compound their psychological problems.¹⁶⁵ Thus, under the exceptional circumstances where any return of the abducted children would cause extreme psychological harm, the clarified standard allows for the acceptance of the "grave risk" defense, whereas in England it appears that courts will only accept the "grave risk" defense if there is evidence of extreme psychological harm after an initial attempt to return the children failed.

Also, while the Second Circuit did not expressly authorize the district court to examine the possibility of the petitioning parent making undertakings to it, as did the courts in *K v. K* and in *Re M*, the Second Circuit allowed the district courts to consider the "range of remedies that might allow both the return of the children to their home country and their protection from harm."¹⁶⁶ Thus, under this clarified standard courts in the Second Circuit can examine possible undertakings made to it by the petitioning parent as the courts in England can.

b. Australia

Similar to the courts of England, the courts of Australia have generally shut the door on the "grave risk" exception as a viable defense to preventing the return of an abducted child.¹⁶⁷ The court in *Gsponer v. Johnstone* set out the notion that petitions for the child's return are in reality directed to the other country, rather than the parent, and thus 13(b) examinations are confined to the "grave risk" posed by the country.¹⁶⁸ The court further held that it should be assumed that the country of habitual residence, if it is a signatory to the Convention, is properly equipped to make suitable arrangements for the child's welfare.¹⁶⁹ This holding puts a significant limitation on the situations in which a 13(b) defense will be successful. If the "grave risk" can only be posed by a

165. *Blondin III*, 78 F. Supp. 2d at 294.

166. *Blondin II*, 189 F.3d at 249.

167. *See Gsponer v. Johnstone*, (1988) 21 Fam. L.R. 755.

168. *See id.* at 768. The court cites the preamble to the Convention for this proposition: "prompt return of the child to the state of their habitual residence." *Id.*

169. *See id.* This assumption is justified by Australia's entry into this Convention with other countries. *Id.*

country, and since all signatory countries are assumed to be able to effectively care for the welfare of their children, the circumstances in the petitioning country will have to be truly exceptional to have the Australian courts prevent a child's return.¹⁷⁰

The Australian courts' disposition against having hearings on the welfare of the child is further seen in *Laing and The Central Authority*.¹⁷¹ In this case the petitioning father had very little association with the children and was accused of sexual misconduct.¹⁷² Despite this, the court declared that "I have a great deal of sympathy for the wife and the child, however, it must be remembered that I am not considering the welfare of the child in the sense of making a determination as to where the child should live."¹⁷³ The court further accepted that some psychological harm would come from its order, but hoped that a speedy decision by the courts in the petitioning country would rectify it.¹⁷⁴ The court recognized that it was not returning the child to the care of the father but was instead trusting the courts in the U.S. to provide an alternative custody arrangement that would protect the child's best interests.¹⁷⁵ Thus, the Australian courts have clearly decided that when they are the petitioned country and they are satisfied that the courts in the petitioning country can adequately protect the child, they will return the child to the country of its habitual residence, even if there is some evidence of physical or psychological harm.

While the Second Circuit's clarified standard is restrictive on the types of circumstances in which the "grave risk" defense can be successful, it is vastly more liberal than the approach taken by Australian courts. Even in situations where psychological harm to the child is inevitable and there are allegations of sexual misconduct, the Australian courts are unwilling to

170. See section III(A), *supra* (for a discussion of the risks that may be posed by a country that would prevent a petitioned country from returning a child).

171. (1996) 21 Fam. L.R. 24.

172. *Id.* at 33, 42.

173. *Id.* at 42-43.

174. *Id.* at 43.

175. *Id.* at 44. The court found it "inconceivable that the judicial system of the State of Georgia in the U.S. would not be able to protect the children from any significant risk of physical and/or psychological harm arising from the implementation of this court's order." *Id.*

accept the "grave risk" defense, believing that the foreign country can handle the situation.¹⁷⁶ In contrast, while the Second Circuit wanted courts to examine other arrangements signatory countries could make to alleviate the "grave risk," it made clear that "if the District Court remains 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 under the convention."¹⁷⁷ Thus, while Australian courts will return a child to a country even if a "grave risk" is present, trusting the courts of that country to handle the problem, the Second Circuit, rather than blindly sending the abducted children back, allows courts to examine whether the foreign nation can effectively alleviate the "grave risk" and to deny the petition if they cannot.

C. The Clarified Standard and the Convention

In demanding that courts of the Second Circuit make this further inquiry into the interim custody options available in foreign countries, the Court of Appeals effectively placed another hurdle in the path of parents who are seeking to maintain custody of the child they abducted to the United States. Implementing this additional hurdle furthers the goals of the Convention because the federal courts have the "discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention."¹⁷⁸ Thus, by narrowing the practical applicability of the "grave risk" exception, the Second Circuit furthered the Convention's goal of allowing the courts in the state of the child's habitual residence to determine custody. The question remains whether the other stated goals of the Convention are better met by this new standard or the methods of the other circuits and nations.

Goal One: Preventing the Crossing of Borders in Search of Sympathetic Courts

One of the main goals of the Convention is to deter people from crossing international borders in search of a more sympa-

176. *Id.*

177. *Blondin II*, 189 F.3d at 250.

178. *See Friedrich*, 78 F.3d at 1067.

thetic court.¹⁷⁹ This intention is served by the clarified standard. If the decision in *Blondin I* was allowed to stand, it could have had the precedential effect of encouraging mothers in abusive marriages to abduct their children to New York, because the courts there are sympathetic to their situation. Realizing that this possibility would frustrate the goals of the Convention, the court in *Blondin II* chose instead to further the goals of the Convention and limit the application of the "grave risk" defense. The court did this by demanding that a child be returned, even if the abductor can prove that a "grave risk" exists, if there are alternative custody opportunities in that foreign country which may alleviate this "grave risk."¹⁸⁰ By placing this additional demand upon those asserting the "grave risk" defense, the Second Circuit furthered the goals of Convention for its' holding acts to deter people from taking advantage of a court that may be more sympathetic.

In the United States, only the Sixth Circuit may be more effective in preventing the crossing of borders in search of sympathetic ears.¹⁸¹ In *Friedrich v. Friedrich* the Sixth Circuit made clear that it would return children even if a "grave risk" was present absent an additional finding that the foreign nation is unwilling or unable to give the child adequate protection.¹⁸² Because the Second Circuit mandated procedural steps that courts must take in determining what, if any, custody arrangements the foreign nation has available, it may be viewed as being slightly more sympathetic to the "grave risk" defense than the Sixth Circuit. Moreover, since the district court applied the clarified standard and still found a "grave risk" to be present under the exceptional circumstances of *Blondin*, the Second Circuit may be viewed as more sympathetic to similar situations.

The courts of England and Australia have generally shown little acceptance of the "grave risk" defense, except in the most extreme of circumstances.¹⁸³ As compared to these nations

179. See *Legal Analysis, supra* note 31 at 10506. The Convention seeks to prevent a later custody decision from being influenced by a change or circumstances brought about by the unilateral action of one of the parties abducting the children to a jurisdiction they hope will be more sympathetic to their custody claims. *Id.*

180. See *Blondin II*, 189 F.3d at 248-249.

181. See *Friedrich*, 78 F.3d 1060.

182. *Id.* at 1069.

183. See *supra* Section IV(B)(ii).

the Second Circuit appears more sympathetic, because it will allow a "grave risk" defense to quash a petition if the court determines that the foreign nation offers no arrangement that will protect against the "grave risk."

Goal Two: Custody Decisions Should Take Place in the Child's Habitual Residence

The holding in *Blondin II* also furthers the principle that any debates on the merits of the custody question should take place before the competent authorities in the state of the child's habitual residence.¹⁸⁴ The Convention makes clear that courts in the country to which the child has been abducted are not authorized to make determinations such as who is the better parent.¹⁸⁵

The Court in *Blondin II*, taking heed of this demand, mandated that the district courts were to examine ameliorative measures the foreign jurisdictions would take to alleviate the risks that may be associated with the child's repatriation, but were not to determine the underlying long-term custody decisions that need to be made.¹⁸⁶ By making clear the extent of the district court's permissible examination of the foreign system, the Second Circuit sought to promote a determination of the merits of the abduction claim, but not the merits of the underlying custody claim.¹⁸⁷ In applying the clarified standard the district court asserted that it was not "making a determination as to the ultimate merits of the custody dispute" but that it was "only determining the merits of the abduction claim under the Convention."¹⁸⁸ Thus, since the clarified standard encourages an examination of the possible temporary custody arrangements pending the ultimate custody decision but does not advocate hearings on the ultimate custody deci-

184. Perez-Vera Report, *supra* note 37 at 430, para. 19.

185. See Hague Convention, *supra* note 2, at art. 16. Article 16 puts constraints upon the courts in the abducted to country from determining custody claims, and these constraints continue until the court determines that one of the exceptions applies and the child is not to be returned, or it is clear that application under the Convention will not arrive in reasonable time following receipt of notice of the wrongful removal. See *Legal Analysis*, *supra* note 31, at 10509.

186. See 189 F.3d at 248-49.

187. *Id.* at 245.

188. *Blondin III*, 78 F. Supp. 2d 298-299.

sion, it is consistent with the principles set forth by the Convention.

While other courts in the United States allow similar investigations into the situations to which the abducted child may return, none advocate deciding the ultimate merits of the custody issue. While the court in *Tahan v. Duquette* advocated some examination into the surroundings to which the child is to be sent and the basic personal qualities of those located there, it stressed that the inquiry "was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding."¹⁸⁹ In *Friedrich v. Friedrich* the Sixth Circuit recognized that "a court in the abducted to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute."¹⁹⁰ Further, the Eighth Circuit in *Nunez-Escuerdo v. Tice-Menley* held that while "the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence" the court is "not to consider evidence relevant to custody or the best interests of the child."¹⁹¹ Also, English courts recognize that the purpose of the Convention is to ensure that the best interest and custody decisions are made by the courts where the child is habitually resident.¹⁹² Similarly, in Australia, the court in *Laing and the Central Authority* held that "the very purpose of the Convention is to respect the custody orders of the jurisdiction of the country from which the child was abducted."¹⁹³ Thus, the Second Circuit and other courts who have dealt with the Convention, promoted the Convention's intention of not allowing hearings on the ultimate custody issue.

Goal Three: Expeditious Proceedings

A further goal of the Convention is to have the judicial and administrative authorities "act expeditiously in proceed-

189. 613 A.2d at 489.

190. 78 F.3d at 1063.

191. 58 F.3d at 378.

192. Re C, 2 F.C.R. at 522-23 (1999).

193. (1996) 21 Fam. L.R. at 46.

ings"¹⁹⁴ in order to ensure a prompt return of the child. The Convention stresses the necessity for speed in determinations regarding children in the realization that the "procedural and substantive decision-making should not exceed the time that the child to be placed can endure loss and uncertainty."¹⁹⁵ The demand for a speedy hearing was further stressed by the drafters when they gave the petitioning party and the Central Authorities from the petitioning state the right to demand statements from the court considering the petition explaining the reasons for the delay if the hearing should take more than 6 weeks from the date of the proceeding's commencement.¹⁹⁶

The Court in *Blondin II* authorized the district court to exercise its broad equitable discretion and develop a thorough record to facilitate its decision and to make all appropriate inquiries of the government of France in doing so.¹⁹⁷ With these additional investigatory demands, and taking into consideration the Article 13 demands of the Convention which require the court to investigate the social background of the child,¹⁹⁸ it would seem as though a court would be strained to reach a just decision while acting expeditiously in the interest of the child. Thus, courts in the Second Circuit may need to take further steps to help streamline the application of the clarified standard. Courts applying the holdings of *Nunez-Escuerdo v. Tice Menley* and *Tahan v. Duquette* may have similar difficulties in expediting the proceedings for they too require the court to make some examination into the situations awaiting the child should they be returned to the country of

194. Hague Convention, *supra* note 2, at art.11.

195. See *Blondin II*, 189 F.3d at 244 (citing Joseph Goldstein et al., THE BEST INTERESTS OF THE CHILD 42-43 (1996) (the authors explain that "[A] child may experience a given time period not according to its actual duration, measured objectively by calendar and clock, but according to her subjective feelings of impatience, frustration and loss."). *Id.*

196. See Hague Convention, *supra* note 2, at art. 11. See also, Linda K. Girdner & Janet R. Johnson, *A Judge's Guide to Risk Factors for Family Abduction and Child Recovery*, 22nd National Conference on Juvenile Justice National Council of Juvenile and Family Court Judges and the National District Attorney's Association (March 20, 1995). "If the application of the Hague Convention has not led to prompt return in other cases the seeming advantage of the Convention may be lost, which presents an additional obstacle." *Id.* at 10

197. See *Blondin II*, 189 F.3d at 249. The court further instructed that the aid of the United States Department of State should be sought in order to more effectively communicate with the foreign government. *Id.*

198. See Hague Convention, *supra* note 2, at art. 13.

habitual residence.¹⁹⁹

The Sixth Circuit in *Friedrich* realized that “any unnecessary delay renders the subsequent return more difficult for the child, and subsequent adjudication more difficult for the foreign court.”²⁰⁰ While the holdings of the Second Circuit and the Sixth Circuit are similar, unlike the Second Circuit, the Sixth Circuit did not mandate that its courts investigate the “full panoply” of alternative arrangements the foreign country can offer.²⁰¹ Thus, courts in the Sixth Circuit may be able to conduct more expeditious proceedings than the courts in the Second Circuit who must have more extensive proceedings. Further, in England, in *Re M*, the court held that when dealing with the Convention “speed is of the essence”²⁰² and in the Australian case of *Laing and the Central Authority* the court recognized that the framework of the Convention was established as such to ensure the “prompt return” of children to the state of their habitual residence.²⁰³ Since these courts expressed a willingness to rely on the other signatories to protect a child from any “grave risks,” it is clear that the proceedings there will be more swift than proceedings in the Second Circuit where all possible arrangements the foreign country can provide must be examined.

V. ENFORCING THE CONVENTION: THE BLONDIN II CLARIFIED STANDARD

A. *True to the Convention, Best for the Children*

Of all the jurisdictions that interpreted the “grave risk” exception, the Second Circuit’s standard is the most balanced approach to achieving the goals of the Convention. First, by restricting the applicability of the “grave risk” defense, the Second Circuit recognized the need to honor our treaty commitments and return abducted children in most situations. Sec-

199. 58 F.3d 374; 613 A.2d 486.

200. 78 F.3d at 1063.

201. See *Blondin II*, 189 F.3d 240; and *Friedrich*, 78 F.3d at 1063.

202. *Re M*, 1 Fam. L.R. at 1024 (1995).

203. (1996) 21 Fam. L.R. at 45.

ond, the Second Circuit safeguarded the ultimate welfare of all the children by appreciating that most will be greatly benefited if they can be safely returned to their familiar habitual residence.²⁰⁴ On remand the district court stated that the new clarified standard narrowed the "grave risk" exception "to the point where it is virtually written out of the Convention."²⁰⁵ However, even after applying the clarified standard, the district court found enough room to hold that a "grave risk" existed in the circumstances of *Blondin*.²⁰⁶ The district court's decision displays that the clarified standard protects the children and is not overly narrow, for it condones the denial of a petition when the petitioning country cannot adequately safeguard the welfare of the children. However, while the Second Circuit's clarified standard will likely return more abducted children, all jurisdictions, including the Second Circuit, need to take additional steps to expedite the "grave risk" determinations and safeguard the welfare of those returned children while they are waiting for the outcome of the custody proceedings.

B. Safeguarding the Children

While the children in *Blondin* were ultimately allowed to stay in the U.S. because of the applicability of the "grave risk" defense, it is clear that in many situations and in most jurisdictions the children will be compelled to return to the country of their habitual residence. Thus, courts in all jurisdictions need to take additional steps to assure that the children will be safe even after they are returned. This need has become more evident as the number of abductions by the primary caregiver (usually the mother) rises.²⁰⁷ Beaumont and McElevy submit that a different standard should not be applied to abductions effectuated by the primary care-giver and they suggest that if courts in the abducted to nation are given the re-

204. See *Blondin II*, 189 F.3d at 242.

205. *Blondin III*, 78 F. Supp. At 298.

206. *Id.*

207. See BEAUMONT & MCELEVY, *supra* note 1, at 262. While the summary return of a child to a situation that may be harmful is disturbing, it has been made clear that the Convention seeks to protect the interests of children collectively and that the welfare of the individual child is not the first and paramount concern. *Id.* at 29.

sponsibility to determine the child's future "the Hague Convention could not continue to exist in its present form."²⁰⁸ To support the notion that children abducted by their primary care-giver should in most cases be returned to their habitual residence, Beaumont and McEleavy suggest that "there is no conclusive evidence either way that the return of children removed or retained by primary caregivers actually results in harm," and that there is a high likelihood that the child will have strong ties with the parent and/or community left behind.²⁰⁹ Thus, if the "typical" abduction scenario increasingly features the primary care-giver as the abductor and the Convention is still strictly interpreted as to demand the child's summary return, courts in all jurisdictions must make additional efforts to assure that the child's well being is safeguarded if they are returned to their habitual residence unaccompanied by the primary care-giver.

i. Demand that the Petitioning Parent Make Undertakings to the Petitioned Court.

If a court decides to order the return of the child even after conducting hearings on the 13(b) defense, the court may still consider safeguarding the children from harm after their return.²¹⁰ Other courts in the United States should consider the approach taken by the Third Circuit in *Feder v. Evans-Feder* where the court demanded undertakings of the petitioning parent in order to safeguard the children when returned to the country.²¹¹ By demanding that the petitioning parent make certain undertakings, the courts would also be consistent with the holdings of foreign courts, as displayed in the English

208. *Id.* at 262.

209. *Id.* at 262-63. See also William M. Hilton, *Dreaming the Impossible Dream: Responding to a Petition Under the Convention on the Civil Aspects of International Child Abduction*, in THE NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (July 1, 1993). "Children of all ages develop their own culture which, while it does include their family, is unique to their physical location. As a result the removal of the child from their personal environment is . . . severely detrimental to them." *Id.* at 1.

210. See Danny J. Boggs, *Defenses to Return in a Hague Case: A View from the Bench*, in THE NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (July 1, 1993).

211. 63 F.3d 217, 226.

case of *K v. K*.²¹² In situations similar to *Blondin*, where the petitioning parent faced serious allegations of child abuse, the court should condition return of the child on the petitioning parent making undertakings. Such undertakings may include providing a separate living arrangement and access to money and food essentials, in order to allow the children to return in the company of the abducting parent/primary care-giver.²¹³ In this way the court in the abducted to country is fulfilling its duty under the Convention in safeguarding the children for the time period with which it is concerned—from abduction until the foreign courts take over—while honoring its duty to return the children. Although it has been argued that demanding undertakings is an attempt to exercise extra-judicial jurisdiction or is an adjudication on custody, this argument fails, for in requiring undertakings the court in the abducted to state is only seeking to protect the short term safety of the child until the court in the child's habitual residence is seized of the matter.²¹⁴ Thus, the court imposing the undertakings is not infringing upon the authority of the courts in the child's habitual residence.

In determining the appropriate undertakings to allow the child to return with their primary care-giver, the courts should keep the burden upon the petitioning parent manageable and should only demand that they provide the "bare minimum necessary for avoiding serious risk of harm to the child."²¹⁵ In some cases, such as in *Blondin*, the petitioning parent may not be able to make any financial guarantees that would provide an alternative living arrangement for the children and primary care-giver once they return. Only in special circumstances such as this should the court be willing to separate the children from their primary care-giver and consider allowing the welfare system of the foreign country to safeguard the children in the interim or, in the alternative, deny the petition and allow the children to remain with their primary care-giver. If a court is not convinced that the petitioning parent or the country of

212. 3 F.C.R. 207 (1998).

213. See Webb & Friedman, *supra* note 22 at 18.

214. BEAUMONT AND MCELEAVY, *supra* note 1, at 161.

215. Summary of Remarks by Adair Dyer on the Application of the Hague Child Abduction Convention to Questions of Access (Visitation) in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (Sept. 30, 1993).

the child's habitual residence will take immediate actions to assure the child's safety upon their return, the court should exercise its discretion and not return the child.

ii. Safe Harbor Orders

One of the main arguments against the imposition of undertakings is that their enforcement has depended largely on the goodwill of the petitioner making the promise, and thus will usually leave the children and the abducting parent in a vulnerable position.²¹⁶ In order to guarantee that the undertakings will be enforced, some courts have required that petitioners promising undertakings to it also make mirror orders with a court in the child's habitual residence.²¹⁷ As was seen in *C v. C*, English courts recognize these "safe harbor orders" as a means to strengthen the promises upon which undertakings are based.²¹⁸ If forced to become involved in the dispute before the child is even returned, the courts in the child's habitual residence will have a more active role in ensuring the child's well being and the court will likely be more expedient in determining the ultimate custody issues. While it appears that U.S. courts are willing to accept "safe harbor orders" when one of its citizens is the petitioner to a foreign jurisdiction,²¹⁹ when petitioned, U.S. courts should demand that the petitioner receive "safe harbor orders" from the courts in the child's habitual residence in order to ensure that the undertakings will be enforced. Thus, in order to fulfill the Convention goal of returning the child, with the child's safety as the ultimate prerogative, the petitioning parent who can afford to make undertakings, should make them to courts in both jurisdictions.

iii. Streamlined Procedures

It is clear that the Convention encourages the petitioned court to act swiftly in order to effectuate a prompt return of the abducted child. However, despite the intentions of the drafters, abduction cases often take a significant amount of

216. See BEAUMONT AND MCELEAVY, *supra* note 1, at 170.

217. See *id.* at 167, 265.

218. 2 All E.R. 465, 469 (1989).

219. See BEAUMONT AND MCELEAVY, *supra* note 1, at 167.

time to be decided. For example, *Feder v. Evans-Feder* took eight months to be decided and because of two separate appeals in *Friedrich v. Friedrich* it took four and a half years for the child to be ultimately returned to Germany.²²⁰ Thus, the following suggestions are submitted as a means to further hasten the decision making process to ensure that the children are placed into a stable environment as soon as is possible.

a. Examine the "Interim Situation" in Conjunction With Consideration of the "Grave Risk" Defense

Article 2 of the Convention makes clear that courts should make every effort to have a hearing as soon as possible in order to quickly effectuate the outcome of that hearing.²²¹ However, if the court attempts to conduct extensive hearings regarding possible psychological harm to the children, the quickened proceeding envisioned by the drafters will be undercut.²²² To avoid a protracted hearing such as this, while still protecting the safety of the children, Silberman suggested that the courts "focus less on the substance of the allegations of harm, but rather whether 'interim arrangements' as part of the return can eliminate any serious threat."²²³

Courts confronted with a "grave risk" defense and allegations of abuse at the hands of the petitioning parent should immediately contact the Central Authority of the foreign nation and the U.S. State Department to receive guidance on the "interim arrangements" the foreign country can provide. While waiting for this response, the court can continue with the proceedings and hear whatever crucial psychological or other evidence is needed. Then, as the details regarding the interim arrangements become available, the court will be in a more informed position to decide whether those arrangements can sufficiently eliminate the "grave risk." In this way the court

220. See *id.* at 254.

221. See Hague Convention, *supra* note 2, at art. 2. See also Girdner and Johnson, *supra* note 196, at 10 "[I]f the application of the Hague Convention has not led to prompt returns in other cases the seeming advantage of the Convention may be lost."

222. See Silberman, *supra* note 89, at 95. See also BEAUMONT AND MCELEAVY *supra* note 207, at 140-41. While article 13(b) should not be dealt with in an overly cursory manner, the proceedings should not become immersed in a detailed factual argument. *Id.*

223. Silberman, *supra* note 89, at 95.

can determine whether a "grave risk" exists in the context of the "interim arrangements" that may be able to alleviate the risk. Silberman suggested that the court should first investigate the nature of the "interim arrangements" and only after deciding that these arrangements will not serve to protect the children should the courts delve into a detailed examination of the "grave risk."²²⁴ However, the problem with this approach is that without an understanding of what the "grave risk" is, a court will not be able to decide whether the "interim arrangements" are capable of alleviating that risk. The district court in *Blondin* would not have been able to accurately assess the sufficiency of the "interim arrangements" if it had not conjunctively determined the nature of the children's psychological trauma. If courts interpret the "interim arrangements" in conjunction with the "grave risk" defense they may be able to save precious time in the child's life and avoid further assimilation of the child into a foreign environment which could then lead to subsequent separation difficulties.

b. Develop References of "Interim Arrangements"

While diligent research can shed light on the custodial arrangements available in foreign countries, "simple and expeditious procedures should be available to ensure that decisions are reached very quickly."²²⁵ The Convention demands that all Central Authorities "provide information of a general character as to the law of their state in connection with the application of the Convention."²²⁶ Thus, signatory countries should provide a detailed synopsis on the types of custodial arrangements that it can provide. By having a treatise on hand, the court can quickly and accurately weigh the options it has in determining whether, under the circumstances of the case, the petitioning country can alleviate the "grave risk."²²⁷ Having

224. *Id.* at 95-96.

225. EMERGENCY MEASURE IN FAMILY MATTERS, RECOMMENDATION NO. R (91) 9 ADOPTED BY THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON SEPT. 9, 1999 at 6. Suggested measures include "using all modern communications technology to facilitate the introduction and conduct of any proceedings, the transmission of requests and exchanges of information between the courts and other competent authorities and the different parties to the proceeding." *Id.*

226. Hague Convention, *supra* note 2, at art. 7(e).

227. *See Herring, supra* note 36, at 172-73. "It is imperative that both judiciary and family law practitioners become familiar with this 'particularized litigation'

readily available an explanation of the custodial arrangements a country can provide does not allow the trial judge to pass judgment on the arrangements, but instead allows the court to play an active and informed role in protecting the children, while respecting the law of the foreign nations.

VI. CONCLUSION

Courts making decisions in abduction cases often face the difficulties of being bound by the treaty obligation to return the child while hearing testimony regarding abuse that the child suffered at the hands of the petitioning parent. In *Blondin II* the Second Circuit clarified the standard for reviewing the "grave risk" defense which has been thoroughly implemented by foreign jurisdictions, but only alluded to in other circuits of the U.S. This holding may serve as a catalyst to encourage other Circuits to develop procedures that will enable the courts to honor our treaty obligations while at the same time assuring that a child caught in an unfavorable situation such as this is adequately safeguarded. In light of the fact that children are increasingly being abducted by their primary caregivers in an attempt to avoid abusive situations, additional steps must be taken by courts in all circuits to assure that the children's safety is a top priority. It is clear that this can be done within the confines of our treaty obligations if courts not only inquire into the situations that await a returning child, but go a step further and help to create a stable, safe environments for the child. Courts can do this by demanding that the petitioning parent make undertakings to it as well as to the courts in the child's habitual residence. By making these additional efforts, in many situations the petitioned court will enable a child to be returned with their primary care-giver thus minimizing the disruption to the child's life. Moreover, it must be remembered that even under the clarified analysis demand-

and exhibit a firm grasp on the 'intricacies of the convention.' *Id.* See also, Hon. James D. Garbolino, *The Cause of Action for Return Under the Hague Convention When a Child is Abducted to the United States: A View from the Bench*, in NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES (where it is suggested that select judges familiar with the convention be assigned these particular cases). See also, BEAUMONT AND MCELEAVY, *supra* note 1, at 168 (where additional methods of judicial cooperation, including conference calls between judges of the two nations, are suggested).

ed by the Second Circuit, if a court is not convinced that the child's safety will be adequately ensured it maintains the discretion to not return the child. Thus, while the holding of *Blondin II* minimizes the uses of the "grave risk" defense, it authorizes courts in the Second Circuit to make a more thorough analysis of the methods by which a country will protect the child. Through this more careful analysis and by taking an increased involvement in the creation of a safe environment for the children, courts can protect the children while in most cases assuring their return.

*Peter Glass**

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