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Women's rights and child abductions under the Hague Convention

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Abstract

The Hague Convention on Civil Aspects of International Child Abduction is a multinational treaty designed to protect children internationally from the harmful effects of parental abduction. The Convention requires a mandatory return of a child who was wrongfully removed or retained outside the country of her habitual residence unless a narrow defense preventing return can be proven. When drafted, it was assumed that most abductors would be non-custodial parents disappointed by an adverse custody decision in the home country. It is now clear that women have been disproportionately affected because in many, if not most, U.S. cases, the respondents, that is, the parents accused of the abduction, are the children's primary caregivers. When the child's home country is not willing or capable of protecting the mother and the child, they are forced to flee from often near-lethal danger. Therefore, many cases brought under the Hague Convention involve severe domestic violence. The Hague Convention allows courts to deny the return if it would expose the child to a "*grave risk of physical or psychological harm*." Nonetheless, a limited judicial understanding of domestic violence, coupled with societal gender biases, has impeded the application of this defense. Several recent developments discussed in this essay reflect a growing understanding of the lasting traumatic impact of domestic violence on these child victims.

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KEYWORDS
Davies v Davies, domestic violence, family law, Hague convention, *Saada v Golan*, Supreme court, United States, victimization of women, women's rights

1 | INTRODUCTION

1.1 | What is the Hague Convention?

The Hague Convention is a multilateral treaty to which the United States and over one hundred other countries are signatories. It is designed to protect children internationally from the harmful effects of removal from their home country to another country by one parent who has custodial rights but without the consent of another parent. To this end, the Convention established an unusually rapid, expedited process of *6 weeks* for the courts (usually federal rather than state) to formulate a decision on behalf of the child. The child usually remains in the country to which he or she was taken until the court determines whether the return should be ordered.

Article I of the Convention states that its primary goals are: (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and (b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States (Hague Convention, 1980).

Each of the signatory member states of the Hague Convention has a Central Authority, which helps to locate abducted children, encourages resolutions of parental abduction cases, and processes requests for the return of children in what are known as both "incoming" and "outgoing" cases. In the United States, the Office of Children's Issues within the Department of State serves as the Central Authority for the U.S. Government.

From the outset, it is important to understand that The Convention is not a mechanism for resolving custody disputes (Hague Convention, 1980). Consistent with the Convention, the International Child Abduction Remedies Act ("ICARA"), through which the Convention is implemented in the United States, "empowers courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims" (*Golan v. Saada*, 2022).

Hague Convention determinations require an entirely different kind of litigation and evaluation of the parties than what typically occurs in family law cases. The litigation focuses solely on the question of whether the child must be returned to his or her "country of habitual residence." The fundamental guiding purpose of the Convention is to ensure that custodial issues are decided by the child's home country by promptly returning the child there rather than in the court of the country to which the child was abducted by a parent (Perez-Vera, E, 1988, para.19).

The Convention requires that a child determined to have been "wrongfully removed or retained" be promptly returned. The taking or retention is considered "wrongful" if the petitioner proves by a preponderance of the evidence that: (i) the child was removed from or retained outside of the child's country of habitual residence; (ii) the removal or retention was in breach of the petitioner's custody rights; and (iii) those custody rights were actually exercised at the time of removal or retention or would have been exercised but for the removal or retention. Once this burden is met, the Convention requires that the child be returned.

The drafters of the Hague Convention recognized, however, that there are circumstances where the return may be inappropriate. Thus, the Convention provides for five narrow defenses to the mandatory return: (a) the 1-year and well-settled defense—where the child has been in the new country for one year or more and/or is well-settled there; (b) consent or acquiescence—petitioner consented or subsequently acquiesced to the removal or retention; (c) mature child objection; (d) human rights and fundamental freedoms; and (e) grave risk or intolerable situation, also known as an "Article 13(b)" defense.

Article 13(b) of the Hague Convention provides that "the judicial or administrative authority of the requested state is not bound to order the return of the child if [the party opposing repatriation] establishes that…there is a grave

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risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (Hague Convention, 1980).

The drafters of the Hague Convention clearly recognized that it is the child's safety that should be of paramount concern in Hague Convention cases. The Explanatory Report, cited above, explained that defenses, that is, exemptions to the return, "derive from a consideration of the interests of the child…. [T]the interest of the child is not being removed from its habitual residence…gives way before the primary interest of any person in not being exposed to physical or psychological danger…." (Perez-Vera, 1988, p. 29). The United States Supreme Court recently confirmed that the "safety of the child" is a primary concern under the Convention (*Golan v. Saada*, 2022).

Grave risk of harm is the most frequently invoked defense that is argued in the majority of the cases that come to trial (Cleary, 2020). Indeed, while the drafters anticipated that the typical abductor would be a non-custodial parent disappointed by or fearing an adverse custody decision by a court in the child's home country, this is no longer true. Over time it has become clear that in many, if not most, Hague Convention cases brought in U.S. courts to secure a child's return, the respondents, i.e., "the taking parents," are primary caregivers escaping an abusive relationship. These are situations where the home country did not protect the parent and child despite what may be the law on the books. In other words, the law is not enforced, and thus, the parent flees out of fear. Thus, it is a last-resort decision (Edleson et al., 2010, p.9).

Many, perhaps most cases, invoking the grave risk of harm exception arise in the context of severe domestic abuse (Souratgar *v*. *Lee*, 2013). Most U.S. courts agree that in such cases, the parent opposing the return of the child must demonstrate that the child—not the parent who fled with the child—would be exposed to a grave risk of harm upon return. In this country, the International Child Abduction Remedies Act, through which the Hague Convention is implemented, requires that grave risk of harm be proven by "clear and convincing evidence." (22 U.S.C. § 9003(e) (2) (A). It is a very high bar that, until recently, could be met only in cases of severe physical abuse directed at the child.

1. Establishing the Grave Risk of Harm Defense in the Domestic Violence Context

Domestic violence is defined as a long-standing pattern of control and intimidation in the context of an intimate relationship (Am. Psych. Assn., 1996; Rakovec-Felser, 2014). This dynamic in a relationship is created and maintained through multiple vehicles of control across many areas of the victim's personal life, including physical abuse, sexual abuse, emotional abuse, psychological abuse, medical neglect, financial manipulation, legal manipulation, social isolation, threats to a child of the relationship, and threats to deploy others in service of the abuser's goals (Vasiliauskaitė Z. & Robert Geffner, 2020).

Several of these vehicles, especially those that do not require overt physical violence, can easily go unrecognized in the public sphere but are readily identifiable by professionals as markers of domestic violence. There is a massive, reliable body of interdisciplinary research that elucidates the true nature of domestic violence and its impact on both adult and child victims. It is essential to recognize that the damage does not depend specifically on violent acts but rather on other forms of intimidation and control, such as threatening the safety of children both during and after separation. This strategy is commonly seen in litigation (Stark, E. 2007; Drozd, 2012).

Domestic violence happens in the privacy of a home, between family members, over extended periods, and often leaves no visible marks or injuries. And while society may consider certain acts, such as corporal punishment of women or children or forced sex, as obviously criminal in other contexts, it may deem them acceptable if they happen at home or between members of a family (Mulligan, 2009). Therefore, persistent gender biases and attitudes embedded in a socio-cultural context play a very significant part in these cases as they are reflected in the law and the enforcement of the law. The tendency to disbelieve allegations of abuse and the willingness to trivialize these matters as if merely "he said, she said" disputes or worse, "it takes two to tango," where both parties' credibility is questioned, easily obscures, and even prevents public recognition of the nature of domestic violence. The dynamics, cycles, and persistence of domestic violence and coercive control (the term used now for this multi-faceted dynamic that goes far beyond actual violence) have all been well-researched by many scholars. Nonetheless, sexist attitudes

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about women, who are the most likely abducting parent, often result in minimizing and even denying the impact on both adult and child victims.

Societal attitudes toward interfamilial relationships and the role of the wife are perhaps the most significant obstacles to the recognition of acts of domestic violence and to an effective legal system for protecting victims. In her excellent studies of custody cases, Professor Joan Meier of the National Family Violence Law Center at Georgetown Law School, explains that some courts have discounted "survivors' credibility in part because of a judge's lack of training and/or misunderstanding of domestic violence." (Meier, J. 2021). Judges are also often unaware of the effect on victims of this kind of chronic traumatic exposure, that is, almost inevitable PTSD, as well as how PTSD presents in the behavior of victims in court. Of course, implicit gender stereotypes are always in the background, given the ubiquitous nature of unconscious bias (Meier, 2020; Milchman, 2017).

Because of these persistent, systemic problems, it is perhaps unsurprising that intimate partner violence against women has often been neglected or outright ignored in family courts, where shared custody or parental authority was treated as the default ruling, regardless of the child's perspective and regardless of the history of abuse. As the Human Rights Commission to the United Nations recently acknowledged, "[f]amily court systems worldwide are being impacted by 'deeply embedded gender bias,' which is leaving women and children vulnerable to violence and 'immense suffering.'" (Asalam, 2023) The bias is greater against minority women and women from lower socio-economic circumstances, as happens not infrequently in cases arising under the Hague Convention.

2. Traditional Approaches to the Grave Risk of Harm Defense

Further adding to the complexity of the issues presented by domestic violence is the narrow view adopted by the legal community of what domestic violence means and how it impacts children. Perhaps due to the lack of training on domestic violence for judges and lawyers who, respectively, decide and argue these cases, in the earlier years of the Hague Convention, the U.S. courts presented with a grave risk of harm defense concentrated solely on the presence of *physical* harm, requiring proof of physical abuse of the child that resulted in demonstrable physical injuries in order to establish the exception. This is problematic for several reasons. First, it is often an almost impossible burden to meet for a mother who has fled her home and is without resources of any kind or access to documents (*Nunez-Escudero v. Tice-Menley*, 1995). Second, and even more important, focusing solely on the physical injuries of the child without considering the psychological impact on such a child ignores the much larger problem at hand, as described below.

For decades, courts have held that domestic violence is relevant only when it seriously endangers the child. "Sporadic or isolated incidents of physical discipline directed at the child, or some limited incidents aimed at persons other than the child, even if witnessed by the child" [are not sufficient to prove grave risk] "sustained pattern of physical abuse and/or propensity for violent abuse" [must be demonstrated] (Souratgar *v*. *Lee*, 2013).

Thus, for many years, courts were ordering the children to be returned to their abusive fathers even in the face of evidence of severe abuse of the mothers usually witnessed by the child. For example, in *Souratgar v*. *Lee*, the district court directed that the child be returned to Singapore because, although the district court credited the mother's testimony of abuse, the abuse was never directed at the child. (Souratgar *v Lee*, 2013, pp. 104–105). In affirming the district court's finding, the Second Circuit held that "[f]or us to hold evidence of spousal conflict alone, without a clear and convincing showing of grave risk of harm to the child, to be sufficient to decline repatriation, would unduly broaden the Article 13(b) defense and undermine the central premise of the Convention: that wrongfully removed child be repatriated so that questions over their custody can be decided by courts in the country where they habitually reside" (Souratgar *v*. *Lee*, 2013).

While the courts have focused solely on physical abuse, the mental health community has long recognized that domestic violence is infinitely more complex than a "fight" between two parents or how often someone is assaulted. There is a consensus in the mental health profession and among researchers in developmental science that witnessing domestic violence, for example, an assault on a primary caregiver, can be as harmful to a child as being a direct

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subject of abuse (Geffner, R. et al., 2009). Moreover, it is also understood that once a batterer has no access to the mother, it is common to turn that aggression toward the child (Zhao & Yu, 2019; Bragg, 2003; Carlson, 2000; Chang et al., 2008; Katz, 2022). Nonetheless, the courts have not integrated this basic knowledge about trauma into their decisions in these cases (Weiner, 2008).

Stephanie Brandt, M.D., has shared this vignette about her testimony in the case of *Elyashiv* v. *Elyashiv* in 2005 (*Elyashiv v. Elyashiv*, 2005). Judge Bloch began the trial by declaring that he thought that domestic violence was a matter of how many times a man hit his wife. Dr. Brandt found herself in the position of having to explain that this was incorrect. To his credit, he asked for what became a lecture from the stand on this subject and the impact on children who are, in fact, the sole focus of these cases. With this tutorial, Judge Bloch was able to understand the insidious nature of the prior and ongoing damage to the Elyashiv children and prevented their future traumatization by declining to return the children. (Brandt, S., personal communication, June 2023).

3. Recent Positive Developments in the Law

Although, as noted above, the Hague Convention allows the court not to return the child if doing so would expose such a child to "grave risk of physical or psychological harm," historically, consideration of abuse by the courts has centered solely around physical abuse. At the same time, there has been a growing awareness and a near-universal consensus among psychologists and psychiatrists that domestic abuse, including psychological abuse and other non-physical means of control and intimidation, can have far-reaching traumatic effects on children. For the "grave risk' cases, which are always about assessing the future safety of a child, it is essential to understand that the risk to children is not merely from direct physical harm. Psychological abuse and emotional neglect can have a much worse impact. The danger of a child witnessing domestic violence is codified and made explicit in the DSM diagnostic manual itself (American Psychiatric Association, 2013).

Witnessing domestic violence may have physical, psychological, behavioral, and neurobiological effects and can last a lifetime. These effects often include depression, anxiety disorders, behavioral disorders, and various developmental delays. In addition, it is almost inevitable that children in this context will develop post-traumatic stress disorder.

These effects can occur regardless of whether children are direct victims of such abuse, witness the abuse, or are otherwise exposed to it by becoming aware of the violence. for example, hearing noises, and seeing bruises (Katz, 2022; Lieberman, A., 2011; McTavish, J, 2016). DSM now recognizes childhood PTSD, which can be due entirely to the child witnessing, directly or indirectly, abuse of his or her primary caregiver (Carlson, 2000; Edleson et al., 2008; Finkelhor et al., 2015; Leemis et al., 2018; Zhao & Yu, 2019).

These effects are especially severe in young children who cannot protect themselves and have no capacity to understand their situation. It must be recognized that a young child experiences violence directed at a primary caretaker as a life-threatening event to him as he is dependent on this adult for everything. This damage is even further magnified when the perpetrator is a parent or a "significant figure" in the child's life (Bragg, 2003; Lieberman, 2011). This is a form of trauma called 'betrayal trauma' that involves harm by a loved and trusted parent. To integrate the dual nature of a batterer parent—"is he good or bad," "do I believe what I see or hear?"—these are questions that are beyond a young child's intellectual, psychological, and emotional capacity to answer (Freyd, 1996). Based on our substantial interdisciplinary understanding of the serious dangers that domestic violence poses, the U.S. Surgeon General has declared domestic violence to be the number one health concern in our country (Leemis et al., 2018).

Nowadays, even untrained lay people understand that grave psychological injuries can be sustained by children without experiencing any physical injuries. This is evidenced by the tremendous outcry over the "zero tolerance" policy of separating migrant children from their parents (Gil-García et al., 2021). Those children generally suffered no physical injuries, yet the terrible psychological toll inflicted upon them is well understood by most people.

A. Recognition of Psychological Abuse in Cases Under the Hague Convention

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Recently, some courts presented with the grave risk of harm defense have begun to recognize the psychological impact of domestic violence on children. An instructive example is a 2017 case from the U.S. District Court for the Southern District of New York (*Davies* v. *Davies*, 2017).

In *Davies*, the District Court found that the child suffered severe psychological harm primarily from witnessing a great deal of abuse of his mother, which justified allowing the child not to be returned to his state of habitual residence:

> The evidence at trial showed beyond any doubt that
> [petitioner]'s behavior toward both [respondent] and [the child], and in [the child]'s presence, was extremely violent, unpredictable, outrageous, menacing, and dangerous. It was a pervasive, manipulative violence that left few physical scars, but which was nonetheless severely damaging to [respondent] and runs an almost certain risk of continuing to negatively affect [the child]. (*Davies v. Davies*, 2017, p.18).

Many courts, however, are still using an unjustifiably narrow definition of harm. As recently as January 2018, the Fifth Circuit affirmed a district court's return of a child because there was no "objective evidence" of "physical abuse" of the child, which the district court noted was "the more pertinent issue for the likelihood of grave risk of harm to [the child." (*Soto v. Contreras*, 2018).

B. Recognition That Abuse of the Mother Has a Severe Impact on a Child

While, as noted above, allegations of domestic violence have been historically minimized by the court system, a deeper understanding of the many forms of domestic violence and its impact on children is making it more difficult for the courts to ignore these well-researched facts. Consistent with the growing body of scientific research, some courts considering cases arising under the Hague Convention are also beginning to recognize that abuse of a parent has a tremendous and terrifying impact on children.

An excellent example can be found in the recent case of *Jacquety v. Baptista*, argued in the S.D.N.Y (*Jacquety v. Baptista*, 2021). In that case, the trial court declined to return the child to Morocco, finding that the child would face a grave risk of harm if returned, considering the impact the father's abuse of the mother had on the child by virtue of her witnessing the abuse:

> [T]his Court has found by clear and convincing evidence…that [the child] experiences PTSD due to domestic violence, that returning her to Morocco will exacerbate her PTSD, and that she faces grave risk of harm if returned to Morocco. Those findings are supported all the more by [the child] herself in what she reported to [the expert], including that her dad "smacked" her mother many times, used bad language, yelled, was verbally abusive, and broke things in the home; that incidents of that nature happened a lot; that "[her father] kept smacking [her mother]" even though "she never does something"; that [the child] felt "bad" and worried for her mother's safety, "because she's my mom and no one can touch her like that"; that she "didn't trust [her] dad at all"; and that she "was afraid [her dad] would smack [her] mom again." And although [the child] has tried to stop thinking of the violence, "like 100 times," "it didn't work," and she "tr[ies] to forget all day long but it always comes back." In short, [the child] was exposed to sustained and serious violence that continues to haunt her. (*Id.* 2021, p. 379.)

C. Key Role of Expert Testimony

In grave risk of harm cases, expert testimony by mental health professionals trained in forensics is essential. Expert opinions figure prominently in the court's opinions of the grave risk defense. Experts are needed to issue an opinion

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explaining how the facts of the case relate to the applicable legal standard. It is a very focused evaluation directed at a risk assessment and is not about the quality of parenting or the child's "best interests" as it would be in a custody case. These evaluations are more akin to emergency room evaluations where the sole issue is the safety of the child. These evaluations, when done correctly, serve a dual purpose.

First, they provide an in-depth view of the victim's mental state and its relevance to the Hague statute and its exceptions. Second, an expert should be educating the court concerning general principles and concepts with which the court may not be familiar, such as the definition and effects of domestic violence and the impact of PTSD.

Under the rules of evidence, only experts can state an opinion, including opinions on the ultimate issue (i.e., what decision the Court should make). The Federal Rules of Evidence 704(a) states that "an opinion is not objectionable just because it embraces an ultimate issue." Thus, in a grave risk case, the expert can state an opinion on whether returning the child would expose him/her to grave risk of physical/psychological harm (Federal Rules of Evidence, Rule 702).

Starting with the trial court's decision in *Blondin* in 1999, courts have relied heavily on the expert's opinions when declining to return the children to their state of habitual residence (*Blondin v. Dubois*, 1999). In *Blondin*, Dr. Albert Solnit, a revered child psychiatrist, was the expert who evaluated the *Blondin* children and opined that the children suffered severe trauma because of their father's abuse and that returning the children to their country of habitual residence (France) would necessarily retraumatize them. Dr. Solnit, with Anna Freud and J. Goldstein, wrote the groundbreaking treatise on *The Best Interests of Children*, in which they outlined the primary areas of psychological concern to children that judges should consider in custody rulings. These principles were subsequently incorporated into and used as part of the legal standard in custody cases across the United States (Goldstein et al., 1979; Goldstein & Solnit, 1996).

Courts rely heavily on expert testimony in the Hague Convention decisions. For example, in the *Davies*, the trial court relied upon the following testimony of Dr. Brandt in declining to order the return of the child:

> Dr. Stephanie Brandt, a psychiatrist with over thirty years of clinical and academic experience, submitted a report and testified as an expert at trial. The Court found Dr. Brandt to be amply qualified to testify on the matters at issue in this case… Dr. Brandt diagnosed [respondent] with a quite severe case of [Post Traumatic Stress Disorder… called dissociative type. (*Davies v. Davies*, 2017).

Dr. Brandt further testified that there is a consensus in the scientific community that the effects of abuse are essentially the same whether the abuse is directed at the child or whether the child is witnessing the abuse. Based on the expert's observations, Judge Brichetti concluded that returning [the child] to a place where this [abuse] occurred and to the care of somebody who has abused the mother would set off a tremendous traumatic reaction in [the child]. (*Davies v. Davies*, 2017, p.17).

The same was true of the expert in *Jacquety v. Baptista*:

> Dr. Goslin concluded that [the child] was exposed to domestic violence by her father toward her mother on multiple occasions. Dr. Goslin determined that there is "clear and compelling evidence" that [the child] suffers from PTSD and opined that [the child] is at serious risk of an increase in her PTSD symptoms and negative impact on her development if she were to return to Morocco (*Jacquety v.* Baptista, 2021).

Based on her discussions with both [the child] and [the respondent], Dr. Goslin found that [the child] exhibited certain trauma-related symptoms that are

> "common manifestations of trauma response when a child has witnessed one parent harming another parent. [In other words, [the child]'s symptoms are consistent with those exhibited by children

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> exposed to domestic violence. [The child]'s symptoms include trauma avoidance, hypervigilance, and heightened startle, which]is a common PTSD reaction that develops following exposure to domestic violence. [The child] also experiences intrusive memories. [According to Dr. Goslin, the child] would not be able to recover from her PTSD if she returned to Morocco. It is] extremely likely that [the child] would feel less safe if she were returned to Morocco even though [the parents] would not be living together. Dr. Goslin predicts "with a great deal of certainty" that if returned to Morocco, whether with [respondent] or without her, [the child]'s PTSD symptoms would increase, and her developmental functioning would regress. The outcome would be even worse if [the child] were to be separated from [respondent] as [respondent] is her primary caregiver (*Jacquety v. Baptista*, 2021, pp. 365–368).

Courts analyzing cases involving grave risk of harm should consider the following factors:

- Did the petitioning parent abuse or mistreat the child?
- Did the petitioning parent abuse or mistreat the other parent?
- Did the child witness or was otherwise exposed to domestic violence?
- Has the child suffered physical or psychological trauma as a result?
- Is there a substantial risk of danger, and damage, whether due to external factors or the child's mental state, if the child is returned?

D. Recent Elimination of Consideration of Ameliorative Measures in Cases

1.2 | Involving grave risk of harm

Until recently, even after a finding that a grave risk of harm exists, some courts, including the U.S. Courts of Appeals for the Second, Third, and Sixth Circuits, have required a determination beyond "grave risk." They have been required to determine whether "any ameliorative measures by the parents and by the authorities of the [home] state… [exist] that can reduce whatever risk might otherwise be associated with a child's repatriation." (*Blondin v. Dubois*, 2d Cir., 1999). In these courts, even after a finding of grave risk of harm, a child could still be returned if the court determined that the child could be protected from grave risk upon the return. Ameliorative measures ordered by the courts have included transportation costs, shelter, support allowance, and free legal assistance for the respondent, a pledge not to prosecute the respondent for child abduction, as well as an order that the petitioner stay away from the child.

However, they rarely involved any real understanding of how to ensure the safety of the child. In a recent study, Edleson et al. determined that none of the litigants who were subject to these measures obeyed these orders once the child was in the home country (Edleson et al., 2010).

Fortunately, there has been a growing concern regarding the inadequacy and unenforceability of such protective measures in a foreign country following the child's return (*Saada v. Golan*, 2019a, 2019b; *Valles Rubio v. Veintimilla Castro*, 2020).

These concerns were recently addressed by the Supreme Court of the United States. In a unanimous decision by SCOTUS in 2022 (*Golan v Saada*, 2022), the U.S. District Court for the Eastern District of New York found that the mother met her burden of proving by clear and convincing evidence that the child would suffer a grave risk of harm if returned to Italy. The court, nonetheless, directed a return of the child after considering the ameliorative measures. These orders involved directing the father to pay the mother $30,000 and to stay away from the mother and child. On appeal, the Second Circuit vacated the district court's decision and remanded the case, that is, sent it back to the original judge, for a determination of whether there were any other enforceable or sufficiently guaranteed ameliorative measures available. The Circuit Court ruled that to eliminate a grave risk of harm, the ameliorative measures must be either enforceable by the district court or supported by other sufficient guarantees of performance. The appellate court further found that because the district court could not enforce its rules with respect to the father staying away

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from the child in Italy, the grave risk of harm could not be appropriately ameliorated by that measure alone. (*Saada v. Golan*, 2019a, 2019b). And yet, shockingly, given what we know about the impact of domestic violence on young children, on remand, the original judge in the district court still ordered the parties to petition the Italian courts for an order directing the father to stay away from the child, and this order was entered in Italy. Relying solely on that order and no further assurances, the district court then granted the father's petition for the child to be returned. She determined that the father was likely to comply with the Italian court order based on his history of compliance with court orders (and despite Edleson's excellent research indicating that this is likely false). In addition, the district court increased the amount the father was to pay to the mother to cover her and the child's living expenses during the custody proceeding in Italy, but ignored the fact that risk to the child would continue, not the least because of the inevitable continued contact between the parents. (*Saada v. Golan*, 2020a, 2020b). Regrettably, the Second Circuit affirmed this approach, despite the overwhelming evidence that this child, age 3 at the time of the original trial, would not be safe. No measures were ordered that involved anything about this child except the requirement that the father have 'some' parent counseling. This is in direct contradiction to all that is known about the impact of trauma on children. This is an excellent example of the way in which the courts lag behind in their recognition of the needs of children. It also reflects the power of judges, as these cases are not decided by juries.

Because of the conflicts between various circuits regarding ameliorative measures, the U.S. Supreme Court granted certiorari to hear this case. On June 15, 2022, the U.S. Supreme Court unanimously ruled that in cases arising under the Hague Convention, courts are no longer obligated to consider ameliorative measures when there has been a determination that a child would face a grave risk of harm if returned to her habitual residence (*Golan v. Saada*, 2022). The Supreme Court explicitly recognized that the Hague Convention's primary goal is, first and foremost, the safety of the child: "The Convention does not pursue return exclusively or at all costs. Rather, the Convention 'is designed to protect the interests of children and their parents,' and children's interests may point against return in some circumstances." (*Golan v. Saada*, 2022).

The *Golan v. Saada* ruling profoundly impacts victims of domestic violence and their children in future Hague Convention cases. The Supreme Court explicitly recognized that domestic violence happens in the home and is not limited to physical abuse, and in these complex situations, there are no simple conditions that can afford adequate protection. In fact, the Supreme Court explicitly directed that a court may decline to impose ameliorative measures when it is clear they would not work because the risk is grave, citing examples of sexual abuse, physical or psychological abuse, serious neglect, and violence in the home, or when the court reasonably expects that the measures will not be followed (*Golan v. Saada*, 2022).

Despite the Supreme Court's ruling, this case was once again remanded to the original judge. She then, once again, directed that the child be sent back to Italy, finding that there were sufficient safety measures to protect the child despite a finding of grave risk by clear and convincing evidence. This was the decision even though no evidence was permitted to be heard in court about this child for the nearly 4 years that had passed since the original decision. This case involves a child who has many other very serious risk factors complicating a safety assessment, for example, autism, and bereavement. This 6-year-old boy has now also suffered the loss of his mother, who died suddenly in October 2022, four months after the SCOTUS decision. Thus, there is still an order to move him out of the only home he has ever known to be returned to a father he does not know, whom he witnessed strangling and raping his mother. It is impossible to explain the reasoning behind this decision given the incentive of a unanimous SCOTUS Decision. But *Saada v. Golan* illustrates the continued disconnect between the law and what we know definitively from psychological and developmental research (*Saada v. Golan*, 2023).

2 | CONCLUSION

Several positive trends are emerging in Hague Convention litigation. Certainly, there is now a wealth of professional literature and research unequivocally explaining the complexity of domestic violence. Especially important is the

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undeniable fact that psychological abuse of parent and child can be as damaging as physical harm. There is more clarity as to its impact on children, who are the proper focus of these cases. Additionally, thanks to the Supreme Court, there is no longer a mandatory requirement for courts to consider ameliorative measures after findings of grave risk of harm. Dispensing with the belief that a court in the U.S. can ensure a child's safety abroad with its orders was long overdue.

However, there is still much work to be done, as the Saada v. Golan case illustrates. Even after the Supreme Court's opinion, the Eastern District of New York nonetheless intends to direct that the child be returned to Italy despite the Supreme Court specifically stating that ameliorative measures should not be considered in cases of domestic violence.

Progress is often slow, certainly when it involves addressing long-standing prejudices. The mental health professional community has been instrumental in educating and informing the legal community, but developmental science is not the wheelhouse of federal judges, some of whom continue to deny the near-lethal nature of the kind of abuse of women, that is common in Hague cases. Despite expert evaluation of the parents and children in these cases, it remains true that there is a societal tendency to disbelieve the "taking" parent (usually a woman) (Tuerkheimer, D., 2021; Fineman, 2013; Fineman & Grear, 2016) and provide support (like ameliorative measures) to the abusive (usually a man) parent. Why is that? Sadly, despite the areas of progress, the ongoing backlash against advancements in women's rights now even includes an attack on reproductive freedoms (*Dobbs* 2022). For the reasons outlined in this article, litigation surrounding children's needs often reflects societal attitudes and prejudices toward women, who are often judged to be dishonest, and who oftentimes have far fewer resources (financial and otherwise) than fathers. In addition, in proceedings arising under the Hague Convention, there is no requirement that counsel be appointed. Thus, women are often dependent on the goodwill of pro bono attorneys who take these cases. Therefore, in a myriad of ways, these cases reflect the very divisions and polarizations that continue to plague our society. Because of these reasons, the battle for women's and children's rights will continue for years to come.

CONFLICT OF INTEREST STATEMENT

There are no conflicts of interest.

ENDNOTES

[1] Preponderance of the evidence standard is the lowest evidentiary standard in our legal system. Under the preponderance of the evidence standard, all petitioner is required to do is to prove that something is "more likely than not."

[2] In most cases, a child's habitual residence will not be in dispute. When it is, the United States Supreme Court has held that "habitual residence" must be determined by consideration of all relevant circumstances, including (a) the shared intent of the parents, especially for younger children who are not capable of acclimatization; (b) whether the child has "acclimatized" to the new country; and (c) all circumstances surrounding the relocation, such as, for example, if a caregiver was "coerced" into relocation.

[3] Petitioner must prove by a preponderance of the evidence that he or she had and actually exercised "custody rights" prior to removal or retention. "Custody rights" are liberally construed based on the law of the country of habitual residence. They do not require a court order of custody.

[4] "Clear and convincing evidence" is a higher evidentiary standard than "preponderance of the evidence" and requires a proof that the evidence is "highly and substantially more likely to be true than untrue."

[5] The Second Circuit includes New York State.

[6] The authors were respectively the counsel and expert for the Respondent-mother in the matter of *Davies* v. *Davies*, and Dr. Brandt was the expert for the now deceased Respondent, Narkis Golan, in the matter of *Saada v. Golan*.

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