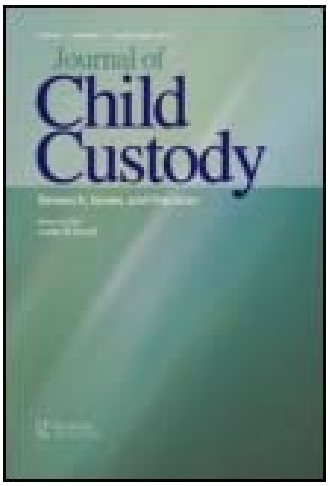

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The Role of the Mental Health Professional in Assessing Grave Risk of Harm Under the Hague Convention on the Civil Aspects of Child Abduction

Christopher C. Melcher [a]
[a] Walzer & Melcher LLP , Woodland Hills , California
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The Role of the Mental Health Professional in Assessing Grave Risk of Harm Under the Hague Convention on the Civil Aspects of Child Abduction

CHRISTOPHER C. MELCHER
Walzer & Melcher LLP, Woodland Hills, California

By international treaty between signatory countries, children under the age of 16 who have been wrongfully removed or retained from their country of habitual residence are to be returned immediately, unless the return of the child would pose a "grave risk" of harm to the child. Mental health professionals have been called upon by courts to render opinions on whether a grave risk is present, but this is ultimately a legal question for the court to decide. Experts should not state an opinion whether facts constitute a "grave risk." This article discusses the grave risk standard in detail, so mental health professionals understand the legal framework and the proper areas of inquiry for expert testimony in these cases.

KEYWORDS *Hague Convention, grave risk of harm, role of expert*

INTRODUCTION

Mental health professionals sometimes forget the limits of their expertise when a judge asks them to render an opinion in court. By definition, expert witnesses have special knowledge, training, or experience as to a particular subject, and, as a result they should not express an opinion outside that narrow area. Just because a person is appointed as an "expert witness" does not make the person an expert on any question asked of them while on the stand. Nevertheless, we continue to see judicial officers and attorneys in family law actions treat experts as if they can render an opinion on whatever

Address correspondence to Christopher C. Melcher, Esq., Walzer & Melcher LLP, 21700 Oxnard Street, Suite 2080, Woodland Hills, CA 91367. E-mail: ccm@walzermelcher.com

issue happens to be posed in the appointment order—and we see experts accepting those overly broad assignments. This article addresses the problem in the context of international child abduction cases, when a parent wrongfully removes a child from its country of habitual residence and a mental health professional is asked to render an opinion on whether returning the child poses a "grave risk of harm" to the child within the meaning of the Hague Convention on the Civil Aspects of Child Abduction[1] ("the Hague Convention" or "the Convention").

The temptation to stray from the expert's area of qualifications is high in these cases even though the grave risk defense is a legal term of art, not a mental health concept. Judicial officers and attorneys often ask mental health experts whether a grave risk is present in these cases, inviting the mental health expert to render an opinion on a legal question. But the grave risk assessment requires a thorough understanding of the legal framework that allows courts, in very limited circumstances, to deny a petition for the return of an abducted child. As mental health professionals do not make legal determinations, the ultimate question—whether a particular set of facts constitutes a grave risk of harm—should be left to courts to decide. Nonetheless, mental health professionals can play an important role in assisting the court in making a grave risk assessment. Staying within the lines of proper expert opinion protects the rights of the parties and maintains the credibility of the expert. In this article, the factors to be considered in conducting a grave risk assessment are discussed in detail, with commentary as to whether it is appropriate for a mental health professional to render an opinion as to those factors.

THE HAGUE CONVENTION

If a mental health professional is involved as an expert in an international child abduction or wrongful retention case, it is crucial that the expert understand the law in this area, because there are strict limitations on what the court may do in ruling on a petition for the return of the child. If there has been a wrongful removal of a child from its country of habitual residence, then any country that is a signatory to the Convention must order the immediate return of the child except in extremely limited circumstances, such as when returning the child would pose a grave risk of harm to the child.

Family courts and child custody evaluators are used to handling custody cases, so they tend to look at international abduction matters in the same way. However, the goal of the Convention is the immediate return of abducted children to their country of habitual residence so that country can decide custody according to its law. A Hague Convention action is not a custody case. We cannot use a best interest of the child standard or consider where we think the child would be better off living. To do so would

violate our treaty obligations with the country of habitual residence and reward the abducting parent by allowing that parent to unilaterally remove the child from the other parent and force that left-behind parent to litigate over custody in a court on the other side of the world. To ensure that children are returned promptly and to discourage forum shopping, the Convention requires that, absent extraordinary circumstances, abducted children should be returned. Domestic violence or child abuse are often raised as defenses to enforcement of the Convention, but such factors are not sufficient to block the return of a child unless it is shown by clear and convincing evidence that the country of habitual residence is unable or unwilling to protect the child.

For example, if one parent alleges that the other parent abused their child while the parties and child were living in California, would it be proper for the parent making the accusation to unilaterally move that child to Italy and require the left-behind parent to litigate over custody in Italy? California has extensive legal protections for children who have suffered abuse, so why is a move to Italy necessary to protect the child further? Legally, there is no justification for the unilateral removal of the child, because custody rights need to be determined in California in this example, and California is capable of making custody orders to protect the child as necessary. Taking the child to a faraway place may seem to be a protective measure, but parents may not take the law into their own hands. This may seem like an easy example, but we have trouble maintaining the same logic when the countries are reversed. We want children who are abducted from our country to be returned immediately, but we are not so quick to act when returning children to other countries. We have a natural desire to protect children, and, therefore, we focus on the abuse allegations instead of the legal requirements of the Convention.

The Hague Convention is a multilateral treaty among 89 countries that requires the immediate return of a child under the age of 16 who has been wrongfully removed from his or her country of habitual residence in violation of a parent's right of custody.[2] There is a narrow exception when clear and convincing evidence shows that the return of the child would pose a grave risk to the child or otherwise place the child in an intolerable situation.[3] The U.S. Congress made the following findings when adopting the Convention:

1. The international abduction or wrongful retention of children is harmful to their well-being.
2. Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
3. International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

4. [ ] Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.[4]

The Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes. "The Convention seeks 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State,' and 'to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'"[5]

As the U.S. Supreme Court stated in *Abbott v. Abbott*:

> Custody decisions are often difficult. Judges must strive always to avoid a common tendency to prefer their own society and culture, a tendency that ought not interfere with objective consideration of all the factors that should be weighed in determining the best interests of the child. This judicial neutrality is presumed from the mandate of the Convention, which affirms that the contracting states are "[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody." Convention Preamble, Treaty Doc., at 7. International law serves a high purpose when it underwrites the determination by nations to rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.[6]

MAKING A PRIMA FACIE CASE FOR RETURN OF THE CHILD UNDER THE CONVENTION

The petitioner in an action for the return of a child under the Convention "shall establish by a preponderance of the evidence … that the child has been wrongfully removed or retained within the meaning of the Convention."[7] The Convention provides as follows:

The removal or the retention of a child is to be considered wrongful where:

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[8]

The child shall be returned "forthwith" if an action for the return of the child is commenced within one year of the wrongful removal or retention.[9] The Convention ceases to apply when the child turns 16, even if the child was under the age of 16 when the petition was commenced.[10]

The parent who is petitioning the court for the return of the child has the initial burden of proof to show, by a preponderance of evidence, that there has been a wrongful removal or retention of the child from the child's country of habitual residence in violation of the left-behind parent's rights of custody. The child must be under the age of 16 at the time the return is ordered for the court to have jurisdiction under the Convention. Finally, there must be a showing that the action was commenced within one year of the wrongful removal or retention. If all of these facts are established, the court will be mandated by the treaty obligations under the Convention to order the immediate return of the child to its country of habitual residence, unless the other parent proves that one of the exceptions to the return requirement applies.[11]

There is no need for opinion testimony by a mental health expert as to these prima facie elements. The points to be established by the petitioner are purely factual questions (e.g., place of habitual residence, age of child, date action commenced) or pure legal questions (e.g., rights of custody under the law of the country from which the child was removed).

EXCEPTIONS TO THE RETURN REQUIREMENT

There are several defenses and affirmative defenses available against a petition for return of a child under the Convention. This article is not a comprehensive guide on the Convention; the focus of this article is on the aspects of the Convention that might require testimony from a mental health professional. The grave risk defense is commonly made in Hague Convention cases, and mental health experts have been appointed to express an opinion relative to grave risk. Therefore, this article focuses solely on that defense.

THE GRAVE RISK DEFENSE

A respondent who opposes the return of the child has the burden of establishing "by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies."[12] Article 13b of the Convention may relieve a country from its obligation to return the child if the respondent establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[13]

> This broad language encompasses situations involving child abuse, domestic violence, return to a war zone, or circumstances where there is

> an unacceptable risk to the child's safety. This defense is not meant to trigger an examination of issues relating to the custody of the child, i.e., whether the welfare of the child would be better served in the custody of the left-behind parent or the abducting parent. Neither does the grave risk defense envision that a court will simply compare the benefits of the living conditions of a child in one country versus another.[14]

Whether the circumstances amount to a grave risk is a legal determination. A mental health expert should not render an opinion on that ultimate question. Although a grave risk may be present due to the psychological harm that would result from the return of the child, the expert must be careful not to engage in a legal analysis by using words such as *grave risk of harm*. That term has a special legal meaning under the Convention; it is not a mental health construct. Instead, the expert should testify as to his or her opinion regarding what the expert observed or was told to assume. It is for the court to consider that opinion along with the other evidence in the case and determine whether, as a matter of law, those facts and circumstances are clear and convincing evidence of a grave risk.

In *Maurizo R. v. L.C.*, the court-appointed evaluator rendered an opinion that the return of the child "would pose a grave risk of psychological harm to the minor child."[15] Although the California Court of Appeal found that there was substantial evidence to support such a finding, the court nevertheless ordered the child to be returned to his country of habitual residence because the grave risk exception was not properly applied in that case. An expert treads in dangerous waters by expressing an opinion as to whether there is a grave risk, because petitioner's counsel is likely to cross-examine the expert as to the legal definition of that term. If the expert does not understand the intricacies of the grave risk exception, petitioner's counsel will be able to expose those failings. The expert's conclusion that a grave risk is present will be undermined, if not destroyed, if the expert makes any error in defining grave risk under the Convention. It is better to leave the law to the lawyers.

"The 'grave risk of harm' defense is raised in almost every Hague case, but it is successful in only a handful."[16] One of the reasons why the grave risk defense is difficult to establish is that it requires proof that the country of habitual residence is unwilling or unable to protect the child from further abuse, as will be discussed later in this article. If the home country has a system of protections for children similar to that of the United States, then the child should ordinarily be returned to the country of habitual residence for custody proceedings there.

The Grave Risk Exception Is Narrowly Construed

The grave risk exception is narrowly drawn to avoid frustrating the purpose of the Convention, which is to assure the prompt return of abducted children

to their place of habitual residence.[17] In keeping with the strong presumption that the child subject to proceedings under the Convention should be returned to her country of habitual residence, the grave risk exception is narrow and does not give license for a court in the abducted-to country to speculate on where the child would be happiest."[18] The intention is for children to be returned under the Convention except in the most extreme cases. Therefore, courts should narrowly construe the grave risk exception in favor of finding that the child should be returned to his or her country of habitual residence for a custody determination in that country.

Grave Risk Falls Into Two Categories

A grave risk of harm can exist in two situations: first, when the return of the child puts the child in imminent danger prior to the resolution of the custody dispute, such as returning the child to a zone of war, famine, or disease; second, when the return of the child will subject the child to serious abuse or neglect, and the country of habitual residence, for whatever reason, is incapable of giving or unwilling to give the child adequate protection prior to making a custody determination.[19] "Absent extreme circumstances in the country of habitual residence (such as war or famine), the grave risk of harm exception is established only if there is clear and convincing evidence that the child would suffer 'serious abuse' as a result of being returned."[20]

The Degree of Risk Must Be a "Grave" Risk

"The risk must be 'grave, not merely serious,' ... ."[21] In *Walsh v. Walsh*, the First Circuit Court of Appeals explained:

> Not any harm will do nor may the level of risk of harm be low. The risk must be "grave," and when determining whether a grave risk of harm exists, courts must be attentive to the purposes of the Convention. For example, the harm must be "something greater than would normally be expected on taking a child away from one parent and passing him to another"; otherwise, the goals of the Convention could be easily circumvented. Courts are not to engage in a custody determination, so "[i]t is not relevant ... who is the better parent in the long run, or whether [the absconding parent] had good reason to leave her home ... and terminate her marriage."[22]

Examples of "Grave Risk"

Although it is difficult to characterize abuse in terms of degree, "there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect."[23] Sexual abuse of the child by

the parent who is seeking the child's return is a clear example of grave risk.[24]

The facts in the following cases were sufficient to support a finding of grave risk:

- "The nature of abuse … was both physical (repeated beatings, hair pulling, ear pulling, and belt-whipping) and psychological ([the father's] profane outbursts and abuse of the children's mother in their presence). Importantly, these were not isolated or sporadic incidents."[25]
- The father repeatedly beat the mother over a seven-year period, during and after her pregnancy with his children. The father also beat the children and threatened their lives. The mother and children spent eight or nine months in shelters because of the abuse. The father twisted a piece of electrical cord around the mother's neck, threatening to kill both the mother and one of their children who she was holding at the time. The mother sought medical attention for her injuries on at least two occasions.[26]
- The husband "beat his wife severely and repeatedly in [the children's] presence," and also threatened to kill them.[27] The wife suffered "frequent and serious" beatings, including while she was seven months pregnant. The assaults on the wife occurred several times per week. Their son was not hit at all. The daughter was "spanked and hit repeatedly, but not injured."[28] The husband struck the daughter sharply in the side of the head. When the wife tried to stop the husband from hitting their daughter, he grabbed the wife by the throat and threw her out of the room. "[G]iven Davy's propensity for violence, and the grotesque disregard for the children's welfare that he displayed by beating his wife severely and repeatedly in their presence and hurling obscene epithets at her also in their presence, it would be irresponsible to think the risk to the children less than grave."[29]
- The father beat the children's mother in their presence over many years in "bloody and severe" assaults. The father hit his daughter and spit in her face. The assaults continued even after restraining orders were issued. The father broke into and ransacked the family residence twice in violation of restraining orders.[30]
- The father masturbated in front of the child and had the child masturbate him.[31]

Cases Where "Grave Risk" Did Not Exist

"[T]here are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a *grave* risk or otherwise place the child in an '*intolerable* situation' under Article 13b."[32] Abuse directed solely against a parent, rather

than the child, is generally not enough to pose a grave risk to the child.[33] For example, the facts in the following cases were not sufficient to qualify as a grave risk:

- A husband's verbal abuse and an incident of shoving directed towards his wife, "while regrettable, was insufficient to establish a grave risk of harm to the child." There was no evidence of physical or psychological abuse of the child, nor any evidence that the husband would disregard court orders.[34]
- A psychologist testified "that returning [the child] to Germany would be traumatic and difficult for the child, who was currently happy and healthy in America with his mother."[35]
- Evidence that the wife had been physically, sexually, and verbally abused by her husband was not sufficient to pose a grave risk to child when there was no evidence of abuse against the child. The wife testified that she was not allowed to leave the family home without her husband or father-in-law. She feared for her baby's safety. The court held: "The evidence is general and concerns the problems between [the wife], her husband and father-in-law … . The district court incorrectly factored the possible separation of the child from his mother in assessing whether the return of the child to Mexico constitutes a grave risk that his return would expose him to physical or psychological harm or otherwise place him in an intolerable situation."[36]
- Two incidents of a mother striking two of her four children and a generally chaotic home environment did not establish a "sustained pattern of physical abuse" necessary for the grave risk exception to apply.[37]
- A father's verbal abuse of his children did not qualify as a grave risk when there was "no credible evidence that [the father] has ever physically harmed either of the two children."[38]

Parent Versus Parent Abuse

No court has held that emotional abuse against a parent, in the absence of violence against the child or against the parent in the presence of the child, can satisfy the grave risk exception. There are cases where abuse against a parent will suffice under the grave risk exception, but only when there were repeated acts of violence against the parent in the presence of the child.[39]

Causal Link Between Child's Symptoms and Parental Abuse

There must be a causal connection between the child's symptoms and any abuse perpetrated by the parent, or those symptoms are not relevant in assessing whether returning the child would pose a grave risk of harm. For

example, in *Marriage of Forrest & Eaddy,* the court held that evidence of the child's self-mutilation and suicidal ideation were not sufficient to establish a grave risk of harm because there was no clear and convincing evidence linking the source of that behavior to the parent who was seeking the child's return. The court explained:

> Although there was some evidence suggesting that Ashlee had engaged in self-mutilation and once contemplated suicide while she was living in Australia, … no evidence was presented to establish that any such conduct on Ashlee's part resulted from the fact that she was living in Australia rather than California or, put another way, that she would have refrained from engaging in similar conduct if she had been in her father's care.[40]

The purpose of the grave risk exception in cases of child abuse is to protect the child from being further victimized by an abusive parent who is seeking the child's return.[41] In *Blondin II* there was a grave risk to the children because they suffered abuse at the hand of their father, and they witnessed violence against their mother, over many years in France. The evidence showed that returning the children to France would cause a recurrence of their post-traumatic stress disorder. In affirming the denial of the Hague Convention petition under the grave risk exception, the Second Circuit Court of Appeals noted:

> Our interpretation of Article 13(b) by no means implies that a court must refuse to send a child back to its home country in any case involving allegations of abuse, on the theory that a return to the home country poses a grave risk of psychological harm. Rather, we reach our conclusion on the basis of the specific facts presented in this case and, in particular, on the absence of testimony contradicting Dr. Solnit's conclusions.[42]

When assessing the cause of the child's symptoms, courts and mental health professionals must consider the effect the wrongful removal from the child's country of habitual residence has had on the child and the impact that removal has had on the parent-child relationship. It may be likely that the child is experiencing problems as a result of being separated from the left-behind parent. As the U.S. Supreme Court stated in *Abbott v. Abbott*:

> An abduction can have devastating consequences for a child. "Some child psychologists believe that the trauma children suffer from these abductions is one of the worst forms of child abuse." A child abducted by one parent is separated from the second parent and the child's support system. Studies have shown that separation by abduction can cause psychological problems ranging from depression and acute stress disorder to posttraumatic stress disorder and identity-formation issues. A child

> abducted at an early age can experience loss of community and stability, leading to loneliness, anger, and fear of abandonment. Abductions may prevent the child from forming a relationship with the left-behind parent, impairing the child's ability to mature.[43]

If the evidence supports more than one potential cause for the child's symptoms, the court cannot make a finding under the clear and convincing standard that the left-behind parent caused those symptoms. Moreover, if a parent causes distress to a child by wrongfully removing the child, that parent cannot use those symptoms as evidence to prevent the child from being returned.

Parental Attachment May Not Be Considered

The effect of returning a child might have on the parent-child attachment "is a determination pertinent only to the merits of the underlying custody dispute which must be resolved not by a Hague court, but rather the courts of the child's habitual residence."[44] In *Asvesta*, a one-year-old child had been twice spirited between the United States and Greece. Both parents filed petitions under the Convention for the return of the child. A conflict arose between the courts of both counties. The court in the United States held that the court in Greece erred when it refused to return the child to the United States on the basis that there was "a severe danger that [his] return to the USA to [sic] expose him to mental tribulation, since he will be deprived of his mother's presence, affection, love and care at the delicate age of 12 months, he will be deprived of the security and stability that he feels near his mother and his mental bond with her will be broken."[45] The Ninth Circuit Court of Appeals held that "the Greek court stepped out of its role as a Hague Convention tribunal by inquiring into the best interests of the child."[46] The court explained that "allowing an exception to return in cases involving young children wrongfully removed or retained by their mothers would swallow the Convention's rule of return."[47]

The logic in *Asvesta* was also applied *Friedrich v. Friedrich,* where the court noted that "a parent cannot 'be allowed to abduct a child and then–when brought to court–complain that the child has grown used to the surroundings to which [she was] abducted."[48] Refusing to return an abducted child to his or her country of habitual residence because the child is attached to the abducted parent (who refused to go back to that country) or because the child has become situated in the new country would allow the abducting parent to benefit from his or her own wrongdoing. Since the goal of the Convention is to deter abductions, attachment to the parent or new surroundings is not as a legitimate factor in determining whether to return the child pursuant to the Convention.[49]

Whether the Home Country Can Protect the Child Pending a Custody Determination

In making the risk assessment, the inquiry is whether a grave risk of harm exists from the time the child is returned to his or her country of habitual residence until the time that country can make a custody determination.[50] The question is not whether the child would be at risk of harm over the course of his or her childhood if returned.[51] The Sixth Circuit Court of Appeals interpreted the grave risk exception in the same manner in *Simcox v. Simcox*. In *Simcox*, the court highlighted the need for courts to limit the grave risk inquiry, lest they delve into matters of custody:

> [I]n considering whether a "grave risk" exists and whether any undertakings can ameliorate it, a court should primarily focus on the time period between repatriation and the determination of custody by the courts in the child's homeland … . [A]n inquiry that focuses on too lengthy a period of time runs the risk of turning into a "child's best interests" analysis, which is not the proper standard under the Convention.[52]

Therefore, the following rule has been developed: Even in cases of serious abuse or neglect, a court may not deny a petition for the return of a child under the Convention unless it is shown that (1) the country of habitual residence cannot or will not adequately protect the child against the risk posed to the child, *and* (2) there are no alternative remedies or conditions that can be imposed to avoid or reduce the risk that would otherwise exist by returning the child.[53] In *Maurzio R.*, the mother wrongfully removed the child from Parma, Italy, to California. Even though the court found a grave risk of harm to the child based on the evidence presented, the mother failed to show that Italy was unable to protect the child against any future abuse. Therefore, the court ordered the child to be returned to Italy for a custody determination in Italy. The court said:

> We are confident the trial court [in California] can fashion such undertakings [for the return of the child to Italy], and that the courts in Italy are fully able to make arrangements to protect Leo's mental health pending the outcome of custody proceedings there. Indeed, by issuing a stay away order and retaining jurisdiction to make additional orders necessary, the Italian family court has already demonstrated its willingness and likely ability to protect the child pending custody proceedings there. In the event that Mother decides not to return to Italy with Leo the trial court shall appoint a guardian or a "child welfare escort" (our term), to escort Leo back to Italy for further custody proceedings there. Once Leo has been presented to appropriate Italian authorities, the work and responsibility of the California courts shall be completed. We must at all times be cognizant that just as there are California governmental agencies with expertise in addressing the needs of at risk children, so too there are

> agencies in the Italian government fully capable of addressing such needs. The fact that Leo might suffer severe stress and anxiety based on separation from Mother makes him no different from many children in similar positions vis-à-vis one parent or another in our own state, where an international abduction was not the trigger. In those cases, we look to the courts and agencies like DCFS to provide the child with the counseling, support, and environment to ensure that potential psychological harms are averted. Likewise, we must acknowledge that the Italian government has the same capacity to address the needs, physical and psychological, of children under its jurisdiction.[54]

Whether Conditions Should be Imposed on the Return of the Child

The court noted in *Simcox v. Simcox,* that the imposition of conditions on the return of a child that do not further the purposes of the Convention are questionable, "particularly when they address in great detail issues of custody, visitation, and maintenance."[55] The court in *Simcox* classified abusive situations into three broad categories and explained how conditions should, or should not be, imposed in each case.

> First, there are cases in which the abuse is relatively minor. In such cases it is unlikely that the risk of harm caused by return of the child will rise to the level of a grave risk or otherwise place the child in an intolerable situation under Article 13b. In these cases, undertakings designed to protect the child are largely irrelevant; since the Article 13b threshold has not been met, the court has no discretion to refuse to order return, with or without undertakings. Second, at the other end of the spectrum, there are cases in which the risk of harm is clearly grave, such as where there is credible evidence of sexual abuse, other similarly grave physical or psychological abuse, death threats, or serious neglect. In these cases, undertakings will likely be insufficient to ameliorate the risk of harm, given the difficulty of enforcement and the likelihood that a serially abusive petitioner will not be deterred by a foreign court's orders. [ ]Third, there are those cases that fall somewhere in the middle, where the abuse is substantially more than minor, but is less obviously intolerable. Whether, in these cases, the return of the child would subject it to a grave risk of harm or otherwise place it in an intolerable situation is a fact-intensive inquiry that depends on careful consideration of several factors, including the nature and frequency of the abuse, the likelihood of its recurrence, and whether there are any enforceable undertakings that would sufficiently ameliorate the risk of harm to the child caused by its return.[56]

The question of undertakings (i.e., whether to place conditions on return of the child) is a very difficult aspect of the case. A mental health professional can provide suggestions to the court as to how to minimize the

impact of the return on the child. This may include a recommendation for some limited counseling prior to the return, or even a guardian to accompany the child during the return trip.[57]

Proper Areas of Inquiry for Mental Health Expert

As can be seen, the grave risk analysis is a multi-faceted legal question. A mental health expert can properly contribute an opinion regarding some of the issues that make up the grave risk analysis. For example:

- How has the child been affected as a result of any abuse perpetrated against the child by the left-behind parent?
- How long has the child been experiencing symptoms relating to any abuse perpetrated against the child by the left-behind parent?
- What was the extent, severity, and frequency of any abuse perpetrated against the child by the left-behind parent?
- How has the child been affected as a result of any abuse the child witnessed against the fleeing parent by the left-behind parent?
- How has the child been affected as a result of any abuse the child witnessed by the left-behind parent against any siblings?
- How would the child be affected if the child were ordered to be immediately returned to his or her country of habitual residence?
- What orders are recommended to protect the child or reduce the risk of harm to the child between the time the child is returned to the child's country of habitual residence and the time custody orders are made in that country?

This is not meant to be an exhaustive list. It is merely an example of how a mental health expert should ask the court to define the questions the expert is to investigate regarding the grave risk analysis. The mental health expert should take steps to ensure that the scope of the appointment is properly limited and that the expert's role is clearly defined.[58]

CONCLUSION

A child who is at the center of an international custody dispute will no doubt be greatly affected by the conflict between the parents and the resulting move from the child's country of habitual residence to another country. Returning the child can result in additional stress and uncertainty to the child, especially when the fleeing parent has cut off all contact between the child and the left-behind parent after the removal or interfered with the parent-child relationship. These cases are supposed to be handled quickly, but delays occur and this further affects the child.

Family law courts and child custody evaluators are used to handling custody cases and may slip into comfortable ways of analyzing these issues by applying the best interest standard or by favoring their own country over the child's country of habitual residence. It is important to remember that Hague Convention actions are not custody cases. When a mental health professional is asked to render an opinion as to grave risk, the expert should express an opinion as to the matters within his or her expertise and avoid testifying as to whether the facts constitute a grave risk.

NOTES

1. Hague Convention on the Civil Aspects of International Child Abduction art. 4, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Abduction Convention].

2. A list of signatories can be found at www.hcch.net, by going to the Child Abduction section, then to Contracting States.

3. Speculation cannot support a finding under the clear and convincing evidence standard. Proof is clear and convincing when it is "[c]lear, explicit, and unequivocal; [s]o clear as to leave no substantial doubt; or [s]ufficiently strong to demand the unhesitating assent of every mind. [Citations]." 2 CHRISTOPHER R. AITKEN ET AL., JEFFERSON'S CALIFORNIA EVIDENCE BENCHBOOK §47.4 (4th Ed. 2010); *see* Copp v. Paxton, 45 Cal. App. 4th 829, 846 (1996).

4. 42 U.S.C. §11601(a)(4) (2006).

5. Abbott v. Abbott, 130 S. Ct. 1983, 1989 (2010) (quoting Hague Abduction Convention, *supra* note 1, at art. 1).

6. *Id*. at 1996 (quoting Hague Abduction Convention, *supra* note 1, at Convention Preamble).

7. 42 U.S.C. §11603(e)(1)(A) (2006).

8. Hague Abduction Convention, *supra* note 1, at art. 3.

9. *Id*., at art. 12.

10. *Id*. at art. 4.

11. *Bardales*, 181 Cal. App. 4th at 1270; 42 U.S.C. §11601(a)(4).

12. 42 U.S.C. §11603(e)(2)(A); In re Marriage of Witherspoon, 155 Cal. App. 4th 963, 974 (2007).

13. Hague Abduction Convention, *supra* note 1, at art. 13.

14. JAMES D. GARBOLINO, FEDERAL JUDICIAL CENTER, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES xv (2012).

15. Maurizio R. v. L.C., 201 Cal. App. 4th 627, 627 (2011).

16. JEREMY D. MORLEY, THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR THE FAMILY LAWYER (2012).

17. Asvesta v. Petroutsas, 580 F.3d 1000, 1004 (9th Cir. 2009).

18. In re Marriage of Forrest & Eaddy, 144 Cal. App. 4th 1202, 1211 (2006) (internal quotes omitted).

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

20. *Marriage of Forrest & Eaddy* 144 Cal. App. 4th at 1211 (citing Blondin v. Dubois (Blondin III), 238 F.3d 153, 163 n.11 (2nd Cir. 2001); Walsh v. Walsh, 221 F.3d 204, 218 (1st Cir. 2000)).

21. Gaudin v. Remis, 415 F.3d 1028, 1037 (9th Cir. 2005) (quoting Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10,510 (Mar. 26, 1986) [hereinafter Hague Convention Text and Analysis]).

22. *Walsh*, 221 F.3d at 218–19 (internal citations omitted).

23. Simcox v. Simcox, 511 F.3d 594, 607–08 (6th Cir. 2007).

24. *Id*. at 603.

25. *Id*. at 608.

26. Blondin v. Dubois (Blondin II), 189 F.3d 240, 243 (2nd Cir. 1999).

27. Van De Sande v. Van De Sande, 431 F.3d 567, 569 (7th Cir. 2005).

28. *Id*. at 570.

29. *Id*.

30. *Walsh*, 221 F.3d at 210–11, 219–20.
31. Danaipour v. McLarey, 286 F.3d 1 (1st Cir. 2002).
32. *Simcox*, 511 F.3d at 608.
33. *See, e.g.*, Whallon v. Lynn, 230 F.3d 450, 460 (1st Cir. 2000).
34. *Id.*
35. *Friedrich*, 78 F.3d at 1069.
36. Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376–77 (8th Cir. 1995).
37. McManus v. McManus, 354 F. Supp. 2d 62, 69–70 (D. Mass. 2005).
38. In re D.D., 440 F. Supp. 2d 1283, 1299 (M.D. Fla. 2006).
39. *See, e.g.*, *Whallon*, 230 F.3d at 460.
40. *Marriage of Forrest & Eaddy*, 144 Cal. App. 4th at 1219.
41. Hague Convention Text and Analysis, *supra* note 22, at 10,510.
42. *Blondin III*, 238 F.3d at 163 n. 12.
43. *Abbott*, 130 S. Ct. at 1989 (internal citations omitted).
44. *Asvesta*, 580 F.3d at 1020.
45. *Id.*
46. *Id.* at 1021.
47. *Id.*
48. *Friedrich*, 78 F.3d at 1069.
49. *Maurizio R.*, 201 Cal. App. 4th at 640
50. *Gaudin*, 415 F.3d at 1037; *Cuellar*, 596 F.3d at 510.
51. *Gaudin*, 415 F.3d at 1037.
52. *Simcox*, 511 F.3d at 607 (citing Hague Convention Text and Analysis, *supra* note 22, at 10,510).
53. *Marriage of Forrest & Eaddy*, 144 Cal. App. 4th at 1212 (citing *Friedrich*, 78 F.3d at 1069; *Gaudin*, 415 F.3d at 1037; *Blondin II*, 189 F.3d at 248–50).
54. *Maurizio R.*, 201 Cal. App. 4th at 641–42.
55. *Simcox*, 511 F.3d at 606.
56. *Id.* at 608–09 (footnote and internal citation omitted).
57. *Maurizio R.*, 201 Cal. App. 4th at 644.
58. Ass'n of Family & Conciliation Courts, Model Standards of Practice for Child Custody Evaluation (2006), *available at* http://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf.