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When Courts Create Rules of Return

The Hague Convention on the Civil Aspects of Child Abduction does not address crucial issues regarding the safety of a returned child.

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF CHILD ABDUCTION is a multilateral treaty with 102 sovereign signatories that provides for the expeditious return of minor children to their country of habitual or ordinary residence when one parent wrongfully removes or retains them in another country without legal permission or consent of the other parent.[1]

The overarching principle of the Convention is to protect minor children from the harmful effects of their wrongful removal or retention.[2] As stated in its preamble, "the interests of children are of paramount importance in matters relating to their custody."[3] The purpose of the Convention is to deter abduction and ensure the minor children's best interests are protected when the court of their habitual residence, which has access to all relevant evidence, is the court that rules on substantive custody matters.[4] Should

1. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89.
2. *Id.*
3. Hague Convention, *supra* note 1, at 98.
4. Habitual Residence is not defined by the Convention but typically means the minor child's ordinary residence prior to the wrongful abduction or retention. In *Monasky v. Taglieri*, 589 U.S. 68 (2020), the U.S. Supreme Court opined on the factors that determine a child's habitual residence but did not discuss rights of custody or access.

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ISBA RESOURCES >>

- Jeffrey Friedman, *Home and Away*, 113 Ill. B.J. 36 (Oct. 2025), law.isba.org/4j70YaP.
- Staci Balbirer, *What To Know Before You Take a Hague Convention Case*, Family Law (Apr. 2022), law.isba.org/47MCsbi.
- Molshree Sharma, *All Over the Map*, 106 Ill. B.J. 28 (Sept. 2018), law.isba.org/2Qjizef.

the removing parent be able to prove that, regardless of the wrongful abduction or retention, there is an exception under the Convention that applies, only then can the court of the country to which the minor child was wrongfully removed refuse the child's return.[5] Exceptions are decided on a case-by-case basis.[6]

The Convention provides numerous exceptions to return. The most asserted objection is Article 13(b), which allows a court to deny return even when a minor child has been wrongfully removed.[7] The Article applies in cases where return would place the minor child in an intolerable situation or cause a grave risk of harm,[8] such as exposure to physical or emotional abuse if returned.[9] Courts must then embark on a fact-intensive inquiry regarding a minor child's specific situation.

As suggested by the exceptions, what may generally be in the best interest of minor children may not be what is best for an individual child. To balance the competing concerns of ensuring the return of minor children to their habitual residence with preventing or ideally eliminating grave harm, courts have sometimes ordered the return of a minor child under specific conditions that the petitioning parent must comply with. These conditions are typically called "ameliorative measures" or "undertakings." Notably, these ameliorative measures are not stated in the Convention, which provides no guidance on application, parameters, or enforcement, and are created wholly by judicial discretion.

This article will discuss the split in the U.S. appellate courts on both consideration and application of ameliorative measures. Relevant to Illinois practitioners, the article will discuss the Seventh Circuit case of *Van De Sande v. Van De Sande*, which balanced the competing interests of the Convention. Finally, the article will discuss how the U.S. Supreme Court affirmed the balancing approach of *Van De Sande* in *Golan v. Saada* and resolved the threshold question of whether the consideration of ameliorative measures was mandatory.[10]

Ameliorating domestic violence

A common objection to the return of a minor child under Article 13(b)'s exception of grave risk of harm is domestic violence. The safety and well-being of a minor child is endangered such that return would place the minor child in an intolerable situation. While courts have not uniformly found that domestic violence toward a parent constitutes harm to the minor child, it is increasingly accepted that endangerment of the minor child's primary caregiver is abuse toward the minor child. Yet, while there is more uniformity in rulings that domestic violence itself subjects the minor child to harm, courts are divided on the efficacy of ameliorative measures especially with practical issues regarding enforcement or deterrence.

Split Circuits

First, Eighth, and 11th Circuits. U.S. Courts of Appeals for the First, Eighth, and 11th Circuits have held that courts are not required to consider ameliorative measures where an exception such as grave risk of harm is proven.

5. *Id.*
6. *Id.*
7. *Id.*
8. Hague Convention, *supra* note 1, at 101.
9. *Id.*
10. *Golan v. Saada*, 596 U.S. 666, 666 (2022).

TAKEAWAYS >>

- Although the Hague Convention on the Civil Aspects of Child Abduction balances ensuring the return of minor children to their habitual residence with preventing grave harm, courts have been left to determine whether ameliorative measures need to be in place to prevent harm to children upon their return.
- When a child has been removed without the consent of one parent, the Convention does provide numerous exceptions to comply with a return order, including in Article 13(b), which attempts to protect children from grave harm such as physical and emotional abuse.
- The U.S. Supreme Court in *Golan v. Saada* resolved a split in the U.S. Courts of Appeals in determining that the consideration of ameliorative measures is not mandatory.

ARGUABLY, SO LONG AS A SIGNATORY COUNTRY HAS ADEQUATE LAWS, IT CANNOT THEN BE PRESUMED TO BE UNABLE TO PROTECT MINOR CHILDREN OR CONSIDER EVIDENCE AND FACTS EFFECTIVELY.

Essentially, courts have discretion and may order these measures as a condition of return but are not required to. For example:

- In *Danaipour v. McLarey*, the First Circuit found that the minor children would be placed in grave risk of harm should they be returned to Sweden where the evidence proved one of the minor children had been sexually abused.[11] The court was not required to consider ameliorative measures or consider the protections the state of habitual residence could provide.
- In *Acosta v. Acosta,* the Eighth Circuit affirmed the district court's decision to deny return of the minor child to Peru.[12] The Court based its decision on proven abuse and found it was within its discretion to refuse to return the minor children without consideration of ameliorative measures, citing to other courts' decisions regarding these measures where there was clear evidence of violence.
- In *Baran v. Beaty*, the 11th Circuit affirmed the denial of the return of the minor children to Australia, where evidence proved severe domestic violence, and stated, "any proposed undertakings would be inappropriate given the nature of the case."[13]

Second, Third, and Ninth Circuits. Conversely the Second, Third, and Ninth Circuits have essentially mandated the consideration of ameliorative measures before denying the return of a minor child, even when the grave-risk-of-harm defense is proven successfully.

- In *Valles Rubio v. Veintimilla Castro*, the Second Circuit held "ameliorative measures such as litigation in Ecuadorian courts" were sufficient to protect the minor child and ordered return.[14]
- In *Turner v. Frowein*, the Connecticut Supreme Court explicitly found that the trial court erred in failing to conduct a full evaluation of placement options and legal standards that would protect the minor child upon return to her habitual residence of the Netherlands.[15]
- In *re Application of Adan*, the Third Circuit held that courts must consider ameliorative measures.[16]
- Likewise, the Ninth Circuit in *Gaudin v. Remis* remanded the case back to the trial court because it failed to consider "alternative remedies."[17] This case was later abrogated by *Golan v. Saada* where the U.S. Supreme Court held that while a court may consider ameliorative measures, they are not mandated to do so.[18]

The Seventh Circuit alone attempted to balance the overarching principle of the Convention, *i.e.*, to return minor children to their habitual residence, deter abduction, and prevent forum shopping while also ensuring their physical and mental safety.

The Seventh Circuit & conditions of return

In *Van De Sande v. Van De Sande*, the Seventh Circuit was required to determine whether the father's repeated domestic abuse of the mother resulted in a grave risk of harm to the minor children if returned, and if so, whether to order return to the minor children's habitual residence of Belgium subject to appropriate ameliorative measures.[19]

Jennifer and Davy Van De Sande were a married, estranged couple with two minor children—a daughter and a son—who resided in Belgium. In 2004, Jennifer took the minor children to visit her parents in the U.S. After she refused to return to Belgium with the minor children, Davy obtained an *ex parte* custody order from the Belgium court and filed for the return of the minor children in a U.S. district court. Although Jennifer provided evidence and affidavits contending grave risk of harm based on extreme, repeated physical and mental abuse, the court granted summary judgment for Davy on the basis that "there is no indication that the Belgian legal system cannot or will not protect the minor children."[20] The only condition was that Davy was required to pay the airfare for the return of the minor children.

Jennifer appealed to the Seventh Circuit, which reversed and remanded the decision by the district court.

The Seventh Circuit addressed the different purposes of the Convention and conceded that the Convention is really a "venue statute" to deter forum shopping.[21] Arguably, so long as a signatory country has adequate laws, it cannot then be presumed to be unable to protect minor children or consider evidence and facts effectively. Essentially, Belgium would be the proper venue to evaluate the weight of the domestic violence allegations and in doing so protect the minor children and determine what is in their best interest. Once a country accedes to the Convention, it would be impossible

11. *Danaipour v. McLarey*, 386 F.3d 289, 304 (1st Cir. 2004).
12. *Acosta v. Acosta*, 725 F.3d 868, 868 (8th Cir. 2013).
13. *Baran v. Beaty*, 526 F.3d 1340, 1352 (11th Cir. 2008).
14. *Valles Rubio v. Veintimilla Castro*, 813 Fed. Appx. 619, 621 (2d Cir. 2020).
15. *Turner v. Frowein*, 752 A.2d 955, 955 (Conn. 2000).
16. *In re Application of Adan*, 437 F.3d 381, 381 (3d Cir. 2006).
17. *Gaudin v. Remis*, 415 F.3d 1028, 1028 (9th Cir. 2005).
18. *Golan*, 596 U.S. at 680.
19. *Van De Sande v. Van De Sande*, 431 F.3d 567, 567 (7th Cir. 2005).
20. *Id.* at 569.
21. *Id.* at 570.

for one sovereign nation's judiciary to ascertain the efficacy or abilities of another's judicial system.

At the same time, the Convention's preamble clearly states that the Convention's main objective is to protect minor children and that treaty members are firmly convinced that the interests of children are of paramount importance in matters relating to their custody.[22]

The Seventh Circuit held that the district court erred when it defined the issue not as:

> … whether there is a grave risk of harm, but as whether the lawful custodian's country has good laws or even as whether it both has and zealously enforces such laws, disregard[ing] the language of the Convention and its implementing statute; for they say nothing about the laws in the petitioning country. The omission to mention them does not seem to have been an accident—the kind of slip in draftsmanship that courts sometimes correct in the exercise of their interpretive authority.[23]

The lack of mention of substance or efficacy of the signatory countries' laws appears to minimize the need for consideration of ameliorative measures:

> If handing over the custody of a child to an abusive parent creates a grave risk of harm to the child, in the sense that the parent may with some nonnegligible probability injure the child, the child should not be handed over, however severely the laws of the parent's country might punish such behavior.[24]

The Seventh Circuit further noted domestic relations matters are unique, as "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations."[25] In this instance, to return the minor children to Belgium and handing them over to the father when there is a nonnegligible chance that they may be harmed on the premise that the police would be able to act is, for many reasons—including the private nature of abuse itself—unrealistic at best. "The rendering court must satisfy itself that the children will in fact, and not just in legal theory, be protected if returned to their abuser's custody."[26] The Seventh Circuit relied on cases such as *Walsh v. Walsh* in its decision to prove that ameliorative measures may not always be effective.[27] The Seventh Circuit was clear that the minor children must be protected and could not be returned to their father in Belgium.[28]

In fact, Justice Posner specifically pointed to affidavits from six different individuals who illustrated a disturbing and continuous pattern of domestic violence toward Jennifer, at times in the presence of the minor children.[29] Additionally, the affidavits showed violence toward the daughter directly. The Seventh Circuit noted that beatings Jennifer received were "frequent and serious" and occurred when she was pregnant and continued after the minor children were born.[30] Davy repeatedly choked her, slammed her head against a wall, pushed her toward stairs, and kicked her. When the daughter pleaded with Davy to stop, he spanked her and shoved Jennifer out of the room when she attempted to intervene. He struck their daughter and the paternal grandmother in the head. Additionally, he verbally abused and berated Jennifer in front of the minor and he threatened to kill her and the minor children. In sum, the case contains significant data that consideration of ameliorative measures is "less appropriate" where there is unequivocal evidence of abuse.[31]

Thus there appears to be a split between the circuit courts regarding whether consideration of ameliorative measures was a mandate or discretionary and how to achieve the different goals of the Convention.

Golan v. Saada

The U.S. Supreme Court provided some resolution as to whether courts must consider ameliorative measures by unanimously holding in *Golan v. Saada* that courts have discretion to consider ameliorative measures but may decline to consider them "where it is clear that they would not work because risk is so grave" or where the court "reasonably expects" the parent will not comply.[32] The Supreme Court found that the Second Circuit erred when it elevated the court's discretion to consider ameliorative measures into a mandate, rejecting Italian citizen Isacco Saada's position that a consideration of ameliorative measures is implicit to the requirement of whether a grave risk of harm exists. Saada's attorneys implored the Supreme Court to recognize that safe-harbor laws can be obtained by the court of habitual residence to set safeguards that permit an order of return. Further, they argued that international comity between sister signatory countries was essential to consistent compliance by all treaty countries that had acknowledged that the authority of one of them (that of the habitual residence) is in principle the best place to decide questions of custody and access. Essentially, treaty signatory countries are of the same legal community and must assume they are equally capable.

THE LACK OF MENTION OF SUBSTANCE OR EFFICACY OF THE SIGNATORY COUNTRIES' LAWS APPEARS TO MINIMIZE THE NEED FOR CONSIDERATION OF AMELIORATIVE MEASURES.

Narkis Golan, a U.S. citizen, argued that the treaty makes no mention of ameliorative measures in Article 13(b); therefore, their creation was a judicial

22. *Id.*
23. *Id.* at 571.
24. *Id.*
25. *Id.*
26. *Id.*
27. See *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000).
28. *Van De Sande*, 431 F.3d at 572.
29. *Id.* at 570.
30. *Id.*
31. *Id.* at 572.
32. *Golan*, 596 U.S. at 680.

overreach and a violation of the separation of powers. Also, enforceability of these measures was problematic as each signatory is sovereign, and U.S. courts retain no power to enforce ameliorative measures. Golan argued that as the purpose of the Convention is to protect children, it would be inappropriate for a court to consider "ameliorative measures" when there is evidence that return would cause a grave risk of harm.[33] In fact, Golan's own case was illustrative of the inability of lower courts to protect, as she had obtained restraining orders in Italy and yet Saada repeatedly violated the orders and physically abused her.

The Supreme Court held that it was within the court's discretion to consider ameliorative measures, but did not provide instruction as to how much weight they should be given.[34] The Court's guidance was to limit any ameliorative measures in time and scope to facilitate a safe return of the minor child and not to usurp the court of habitual residence's power to determine custody. Second, the Court cautioned that the need to ensure the wellbeing and safety of minor children may "overcome the return remedy."[35] Finally, the Court found that the Convention requires an expeditious result, thus consideration of ameliorative measures must not cause undue delay.[36]

In conclusion, courts have discretion to consider limited-scope ameliorative measures to ensure the safe return of a minor child to their habitual residence but are not mandated to do so when it may be improper in situations where the minor child or the minor child's primary caregiver are victims of domestic abuse.

Practice tips

When seeking return. When an attorney represents a party seeking the return of a minor child, and the opposing party asserts an Article 13(b) grave-risk-of-harm defense, the attorney should refute it and provide ameliorative measures to the court as part of the rebuttal. Examples of ameliorative measures include: an order providing financial support should the parent return; mutual rules, like parenting exchanges in public places only; distance requirements from each other's workplaces; and communication in writing only, unless urgent. Additionally, if the parties mediate, these should be made part of a settlement offer when appropriate.

Additionally, attorneys should advocate for measures that restrict access or time to be mutual so that the substantive custody determinations are not colored by ameliorative measures. Propose limited-scope measures to make certain that the minor child's safety is ensured without conceding on best-interest factors of custody.

When opposing return. In representing the party objecting to the return, ensure that the frequency and escalation of abuse, where it exists, is emphasized to the court, and make the point that the pattern of behavior is not likely to stop and orders would not be a sufficient deterrent. Where possible, admit records of multiple calls to the police and medical intervention. Expert witnesses may be crucial to opine on the serious harm to the minor child and likelihood that the harm shall continue.

These cases are complex because of the multiple jurisdictions and application of the Convention in different courts. Additionally, these fact-intensive cases bring forth sensitive, emotional, and often trauma-based information. It is important to counsel clients to seek support from a therapist, their community, and family. IBJ

33. *Id.*
34. *Id.* at 683.
35. *Id.* at 680.
36. *Id.* at 683.