



1-1-2015

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Recommended Citation

Liz LaFoe, *Save the Children: The Eighth Circuit Correctly Applies the Grave Risk Defense in Acosta v. Acosta*, 29 Emory Int'l L. Rev. Recent Dev. 2113 (2015).

Available at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments/28>

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SAVE THE CHILDREN: THE EIGHTH CIRCUIT CORRECTLY APPLIES THE GRAVE RISK DEFENSE IN *ACOSTA V. ACOSTA*

Liz LaFoe*

ABSTRACT

*The Hague Convention on the Civil Aspects of International Child Abduction was enacted for the protection of children as well as the deterrence of international forum shopping in custody disputes. If returning children to their home nation would pose a grave risk to their safety, it is acceptable for them to remain with the abducting parent until courts make an official custody determination. Showing a grave risk of harm is an allowable affirmative defense under the statute. In *Acosta v. Acosta*, the Eighth Circuit allowed the petitioner's children to remain in the United States, finding that returning them to their home nation of Peru would subject them to a grave risk of harm. A circuit split currently exists on the affirmative defense of grave risk of harm. Some courts end their analysis once a grave risk of harm is proven. Others, such as the Eighth Circuit in *Acosta*, take the further step of assessing whether the home nation would take measures to protect the children if they were returned.*

INTRODUCTION

Child abduction is against the law.¹ In cases of domestic violence, however, sometimes the woman's only feasible escape necessitates taking her child out of the country.² The Hague Convention on the Civil Aspects of International Child Abduction was enacted for the protection of children as well as the

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¹ Parental Kidnapping Prevention Act, 28 U.S.C. § 1738(A) (1980); Hague Convention on the Civil Aspects of International Child Abduction, opened for signature Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter "Hague Convention"]; International Child Abduction Remedies Act, 42 U.S.C. § 11603(e) (1994) [hereinafter "ICARA"]. See generally, Sharon Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669 (2001).

² Nelson, *supra* note 1, at 669–70.

deterrence of international forum shopping in custody disputes.³ Even in cases of domestic violence, the Hague Convention outlaws the removal of the child from his abusive parent by the victim parent.⁴ Exceptions, in the form of the affirmative defenses, are built into the Act.⁵ If returning children to their home nation would pose a grave risk to their safety, it is acceptable for them to remain with the abducting parent until courts can make an official custody determination.⁶ Interpreting this international law and its Grave Risk exception present unique challenges to U.S. Courts. The Eighth Circuit's recent decision, *Acosta v. Acosta*, demonstrates a correct interpretation of the statute and application of the grave risk defense.⁷

I. FACTS

In 2002, Ricardo Acosta, a Peruvian citizen, married Anne, a U.S. citizen in Minnesota.⁸ During their marriage, Ricardo verbally abused Anne, had frequent outbursts in front of the children, and became violent.⁹ One of their children, M.A.A., showed severe behavioral problems while attending a Peruvian school.¹⁰ Ricardo and Anne saw a counselor, but by 2010 their relationship deteriorated to the point where they were sleeping in separate rooms and Anne was "afraid of Ricardo."¹¹

Anne and Ricardo agreed in November 2010 that she would take the children to Minnesota to visit relatives over the holidays, December through

³ See generally, Tracy Bateman Farrell, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act*, 42 U.S.C.A. § 11603(e)(2)(A), 56 A.L.R. Fed. 2d 163 (2013); Julieta Chiquillo, *Mother's Arrest at D/FW Airport Shows Difficulties of International Custody Disputes*, DALLAS MORNING NEWS (Sept. 14, 2014), www.dallasnews.com/news/crime/headlines/20140914-mother-s-arrest-at-dfw-airport-shows-difficulties-of-international-custody-disputes.ece; Keith Perry, *Former Met Detective Jailed in Singapore for Trying to Snatch Custody Battle Child*, TELEGRAPH (Sept. 10, 2014), <http://www.telegraph.co.uk/news/uknews/crime/11087889/Former-Met-detective-jailed-in-Singapore-for-trying-to-snatch-custody-battle-child.html>.

⁴ See generally, Farrell, *supra* note 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Acosta v. Acosta*, 725 F.3d. 868 (8th Cir. 2013).

⁸ *Id.* at 871.

⁹ *Id.* at 872 (explaining that Ricardo pushed child M.A.A. onto a bed, became enraged at a taxi driver and "shattered the taxi's windshield").

¹⁰ *Id.* (stating that M.A.A. told teachers "he wanted to kill himself" and the principal of the school testified that "M.A.A.'s behavior problems were the third most severe she had seen in her nineteen years of teaching").

¹¹ *Id.*

February.¹² Ricardo did not join them, despite encouragement from Anne's parents.¹³ During the visit, Anne and her parents did not allow Ricardo to speak to the children over the phone.¹⁴ Meanwhile, "M.A.A. had violent outbursts, wet his bed at night, and said he wished he were dead."¹⁵

In early February, before the scheduled return to Peru, Anne told Ricardo she wanted a divorce and was keeping the children in America.¹⁶ Then Anne, her brother Jeffrey, and two of Anne's co-workers, LeBoo and Johansen, went to Peru to collect her and the children's belongings.¹⁷ Once they arrived at Ricardo's apartment, Anne called Ricardo to let him know she was "packing her things."¹⁸ Ricardo responded in an outrage "telling Anne and Jeffrey that he loved his family and that he was going to kill himself."¹⁹ Then, he "arrived at the apartment building in a rage, crashing his car into a pole and smashing a window of the taxi waiting for Anne and the others."²⁰ Despite attempts to keep him out, Ricardo kicked open the apartment door, breaking it apart and forcing entry.²¹

Once inside, "Ricardo began throwing items at Anne[,] . . . grabbed a knife from the kitchen and chased the men while Anne and LeBoo retreated to a back room. . . [then Ricardo] chased Johansen outside, where he cut Johansen's leg with a knife"²² while Anne's brother "begged for his life."²³ Finally, Ricardo "forced his way into the back room" and battered both LeBoo and Anne.²⁴ He did this despite the arrival of the police, "who stood passively by until finally taking action to restrain [him]."²⁵

Even after Anne returned to the United States, Ricardo called her and her family multiple times with death threats directed at her, the children, and himself.²⁶ Anne then met with Minnesota police where they issued an arrest

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 872–73.

²⁴ *Id.* at 873.

²⁵ *Id.*

²⁶ *Id.*

warrant for Ricardo.²⁷ In March 2011, directly following Ricardo's custody action for the children in Peru, "Anne filed for dissolution of marriage in Minnesota, in which she sought custody of the children."²⁸ However, her petition was dismissed due to lack of jurisdiction.²⁹

In May 2011, during his visit to Miami, Florida, Ricardo was arrested and extradited to Minnesota.³⁰ Thereafter, he pled guilty to violating a Minnesota statute criminalizing "terroristic threats," and served his probation sentence in Peru.³¹ While on probation, he was "allowed to visit with his children via video conference, which he did on only one occasion."³² Ricardo then sought the return of his children under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) and 42 U.S.C. § 11601 *et seq.*, the corresponding U.S. law.³³

The U.S. District Court for the District of Minnesota found that, although Anne had wrongfully detained the children, returning them would expose them to a grave risk of harm.³⁴ Ricardo's petition was denied and he appealed on the basis that the court erred in (1) finding a grave risk of harm; (2) admitting expert testimony; and (3) dismissing his claim against Anne's parents.³⁵ Anne cross-appealed that the district court erroneously denied one of her affirmative defenses.³⁶

The Eighth Circuit affirmed the district court and dismissed Anne's cross-appeal.³⁷ The court held: (1) it was within the district court's discretion to admit the expert testimony; (2) clear and convincing evidence supported the finding that returning the children to Peru would place them in grave risk of harm; and (3) it was within the district court's discretion to refuse to return the children, even if safety measures were taken.³⁸

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 871.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 869.

II. LEGAL BACKGROUND

A. *The Hague Convention*

The chief aim of the Hague Convention was to keep parents from abducting children to engage in international forum shopping.³⁹ Parents can seek the return of their children to the children's home nation so that its courts can resolve custody disputes and decide visitation rights and related civil law matters.⁴⁰ In his article, *International Family Law*, Robert G. Spector artfully summarizes the requirements for obtaining a return order:

To obtain a return order *the petitioner must prove* that: (1) the child was abducted from, or retained from returning to, the country of the child's *habitual residence*; (2) the petitioner had a "*right of custody*" under the law of the abducted-from State that is recognized under the Convention; and (3) the *petitioner was actually exercising those rights*, or would have exercised those rights but for the abduction.⁴¹

These petitions can be heard in federal or state court.⁴² If the court finds for the petitioner, the children are returned to the petitioner's country for further proceedings (*i.e.*, the court hearing the petition cannot itself resolve any further disputes, including those concerning dissolution of marriage, child custody, and visitation rights).⁴³

The Convention allows five exceptions to the mandated return of children to their country of habitual residence.⁴⁴ Any of these exceptions allow the child to remain in the country, typically with the abducting parent. The exceptions are raised as affirmative defenses and are "strictly construed so as to honor the objectives of the Convention."⁴⁵ The defenses are: (1) the abductor had the consent of the petitioner to take the children; (2) the petitioner was *not* exercising his or her custody rights when the children were "wrongfully" taken; (3) a statute of limitations bars petitions after one year; (4) returning the children would be a human rights violation in that it would force the child to

³⁹ See Farrell, *supra* note 3.

⁴⁰ Robert G. Spector, *International Family Law*, 47 A.B.A. INT'L L. YEAR IN REV. 147, 148 (Spring 2013).

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ Nelson, *supra* note 1, at 672.

⁴⁴ *Id.* at 675.

⁴⁵ *Id.* (citing ICARA, 42 U.S.C. §11601(a)(4), (b) (1994)).

endure conditions that “shock the conscience;” and (5) *returning the child would place the child in grave risk of harm*.⁴⁶

The first three defenses are proved using a preponderance of the evidence standard.⁴⁷ The last two require “*clear and convincing evidence*.”⁴⁸ The defense that returning the children would be a human rights’ violation was “controversial” during the Convention and has never been used.⁴⁹ The grave risk defense is the most commonly used defense⁵⁰ and was successfully raised in *Acosta v. Acosta*.

The Hague Convention does not attempt to address the adequacy of the laws concerning children in any country; the drafters were aware that due to familial privacy and parental control of children, even with perfect laws, abuse can and does go undetected.⁵¹ If a grave risk defense is not successfully asserted, the child must return to his or her country of habitual residence.⁵²

The United States signed and ratified the Hague Convention on Civil Aspects of International Child Abduction.⁵³ The U.S. Congress drafted and adopted the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11, as well as 42 U.S.C. §§ 11603(e)(2)(A), which codified the burden of proof requirements for parents seeking to prove the different exceptions to keep their children in the abducted to nation.⁵⁴

B. *Prior Case Law*

Although the Hague Convention’s requirements for obtaining a return order are straightforward,⁵⁵ prior court decisions show conflicts about the application of the Grave Risk Defense, particularly regarding issues of spousal abuse without physical abuse to the children,⁵⁶ psychological harm to the children,⁵⁷

⁴⁶ *Id.* at 675–76.

⁴⁷ *Id.* at 675.

⁴⁸ *Id.* at 676 (emphasis added).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See Khan v. Fatima*, 680 F.3d 781, 793 (7th Cir. 2012).

⁵² *See Cuellar v. Joyce*, 596 F.3d 505 (9th Cir. 2010).

⁵³ Farrell, *supra* note 3, §2.

⁵⁴ *Id.*

⁵⁵ *See supra* Part III.A.

⁵⁶ *Compare Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 376–77 (8th Cir. 1995) (finding husband’s physical, sexual, and verbal abuse of mother insufficient to show grave risk of harm to child), *and Croll v. Croll*, 66 F. Supp. 2d 554, 562 (S.D.N.Y. 1999) (finding grave risk assertion unsuccessful because child was not injured, despite multiple assaults to mother), *with In re Walsh*, 221 F.3d 204, 206, 222 (1st Cir. 2001)

and whether the country of the child's habitual residence would take satisfactory measures to ameliorate the risk.⁵⁸

The Grave Risk Defense has evolved in that the interpretation of psychological harm under the Hague Convention may now include the potential for post-traumatic stress disorder and separation anxiety.⁵⁹ Psychological harm is also asserted in cases where children have witnessed the physical abuse of their mother, but not experienced physical abuse themselves.⁶⁰ This was not in issue in *Acosta*, however, since the district court found that returning the children would subject them to a grave risk of harm, as it was likely Ricardo would verbally abuse, threaten, and possibly violently harm them as well as continue his abuse toward Anne and others.⁶¹

A split exists among the federal courts concerning whether to assess if the country of habitual residence would take satisfactory ameliorative measures to

(overturning district court's decision that husband's severe beatings of his wife when she was seven months pregnant—in front of children—was insufficient for grave risk of harm to children and holding grave risk defense was successfully asserted). “[C]hildren are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser.” *Id.* at 220.

⁵⁷ See *Blondin v. Dubois*, 78 F. Supp. 2d 283, 294–95 (S.D.N.Y. 2000) (finding potential for post-traumatic stress disorder and long-term psychological harm sufficient for finding of grave risk); see also *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995) (suggesting that potential psychological harm to child as a result of separation from the child's mother may be sufficient for finding of grave risk).

⁵⁸ Compare *Rodriguez v. Rodriguez*, 33 F. Supp. 2d 456, 462 (D. Md. 1999) (holding that the grave risk defense was successfully asserted, and children were not eligible to return to foster care in country of habitual residence), and *Steffen F. v. Severina P.*, 966 F. Supp. 922, 930 (D. Ariz. 1997) (if grave risk is asserted, child may stay with abductor in lieu of foster care in country of habitual residence), with *Blondin v. Dubois*, 189 F.3d 240, 249 (2d Cir. 1999) (remanding to district court for a determination of protective measures available in country of child's habitual residence and whether those measures were sufficient to warrant returning the child), and *Blondin v. Dubois*, 78 F. Supp. 2d 283, 283 (S.D.N.Y. 2000) (finding no protective measures in country of habitual residence sufficient to warrant the return of the child and returning the child would result in psychological harm due to separation from the mother), and *In re Application of Adan*, 437 F.3d 381, 385 (3d Cir. 2006), and *Belay v. Getachev*, 272 F. Supp. 2d 553, 555 (D. Md. 2003), and *Raijmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953, 957 (E.D. Mich. 2001).

⁵⁹ See *Blondin*, 78 F. Supp. 2d at 294–95 (finding potential for post-traumatic stress disorder and long-term psychological harm sufficient for finding of grave risk); see also *Rydder*, 49 F.3d at 373 (finding potential psychological harm to child as a result of separation from the child's mother may be sufficient for finding of grave risk).

⁶⁰ See *Nunez-Escudero*, 58 F.3d at 376–77 (finding husband's physical, sexual, and verbal abuse of mother insufficient to show grave risk of harm to child); *Croll*, 66 F. Supp. 2d at 562 (finding grave risk assertion unsuccessful because child was not injured, despite multiple assaults to mother); but see *In re Walsh*, 221 F.3d at 206, 222 (overturning district court's decision that husband's severe beatings of his pregnant wife, in front of children, was insufficient for grave risk of harm to children and holding grave risk defense was successfully asserted).

⁶¹ *Acosta v. Acosta*, 725 F.3d 868, 876–77 (8th Cir. 2013).

protect the children if returned.⁶² Some courts, such as the Eighth Circuit in *Acosta*, do consider whether the country of habitual residence is willing and able to ensure the children's safety.⁶³ Others simply determine whether the parent has proved the grave risk defense. If so, they find for the parent, without taking the further step of analyzing ameliorative measures.⁶⁴

Whether courts should analyze a country's ability to take preventative measures to ensure a child's safety upon their return is currently the most notable point of contention regarding the grave risk defense.⁶⁵ This additional step is not in the text of the Hague Convention or corresponding statutes.⁶⁶ In *Acosta*, the Eighth Circuit did consider whether Peru, the country of the children's habitual residence, could take measures to ameliorate the risk of harm to the children if they were returned.⁶⁷ A detailed discussion of the court's analysis follows.

III. THE INSTANT DECISION

The Eighth Circuit affirmed the District of Minnesota court's finding that Anne could keep her children in the United States because she successfully raised the affirmative defense that returning the children would pose a grave

⁶² Compare *Rodriguez*, 33 F. Supp. 2d at 462 (finding that once the grave risk defense was successfully asserted, children were not eligible to return to foster care in country of habitual residence), and *Steffen F.*, 966 F. Supp. 2d at 930 (finding that if grave risk is asserted, child may stay with abductor in lieu of foster care in country of habitual residence), with *Blondin*, 189 F.3d at 249 (remanding to district court for a determination of protective measures available in country of child's habitual residence and whether those measures were sufficient to warrant returning the child), and *Blondin*, 78 F. Supp. 2d at 288–89 (finding no protective measures in country of habitual residence sufficient to warrant the return of the child, and returning the child would result in psychological harm due to separation from the mother), and *In re Application of Adan*, 437 F.3d at 385, and *Belay*, 272 F. Supp. 2d at 555, and *Raijmakers-Eghaghe*, 131 F. Supp. 2d at 957.

⁶³ See *Acosta*, 725 F.3d at 877; *Blondin*, 189 F.3d at 249 (remanding to district court for a determination of protective measures available in country of child's habitual residence and whether those measures were sufficient to warrant returning the child); *In re Application of Adan*, 437 F.3d at 390; *Belay*, 272 F. Supp. 2d at 558; *Raijmakers-Eghaghe*, 131 F. Supp. 2d at 957; *Gaudin v. Remis*, 415 F.3d 1028, 1036 (9th Cir. 2005).

⁶⁴ See *Rodriguez*, 33 F. Supp. 2d at 462; *Steffen F.*, 966 F. Supp. at 93; *Danaipour v. McLarey*, 386 F.3d 289, 303 (1st Cir. 2004) (finding that father sexually abusing youngest daughter was sufficient to prove grave risk, and further analysis of whether Sweden could take protective measures was unnecessary); *Van De Sande v. Van De Sande*, 431 F.3d 567, 570–72 (7th Cir. 2005) (analyzing whether a country can protect the children if returned, and ignoring the statutory text of the of the Hague Convention, which only requires a showing of grave risk); *Baran v. Beaty*, 526 F.3d 1340, 1346 (11th Cir. 2008) (reasoning that once grave risk is shown, the Hague Convention does not require an assessment of whether the country of habitual residence could take ameliorative measures).

⁶⁵ Nelson, *supra* note 1, at 690–91.

⁶⁶ See *supra* Part II.A

⁶⁷ See *Acosta*, 725 F.3d at 877.

risk of harm.⁶⁸ Ricardo, the father, raised the following issues on appeal: the court erred in finding (1) “a grave risk of harm”; (2) “admitting certain expert testimony”; and (3) “dismissing his claim against Anne’s parents.”⁶⁹ Anne cross-appealed with another exception to the Hague Convention.⁷⁰

The court focused on points one and two, did not address point three, and “dismiss[ed] Anne’s cross-appeal as moot.”⁷¹ The standard of review was *de novo* for the assessment of the grave risk defense because it is a “mixed question of law and fact,”⁷² and the district court’s admission of the expert testimony was reviewed for abuse of discretion.⁷³ The court briefly reviewed and affirmed the district court’s admission of the expert testimony first.⁷⁴ The remainder of the opinion discusses and analyzes the grave risk defense and the possibility of sufficient ameliorative measures.⁷⁵

Anne’s expert testified as to “several factors [which] indicated that returning the children to Peru would subject them to a high risk of harm.”⁷⁶ The district court admitted his testimony under Federal Rule of Evidence 702.⁷⁷ Ricardo’s argument on appeal was a “challenge to the factual basis of [the expert’s] testimony” in that Ricardo felt the testimony was “uncorroborated” and told “only Anne’s side of the story.”⁷⁸

Based on the expert’s interviews with Anne and M.A.A., as well as the expert’s review of the evidence (which included medical records, school records, threatening voicemails from Ricardo, and court files), the Eight Circuit agreed with the district court that the expert’s opinion was based in

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *Id.* at 874 (citing *Silverman v. Silverman*, 338 F.3d 886, 896 8th Cir. 2003)).

⁷³ *Id.* (citing *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1014 (8th Cir. 2012)).

⁷⁴ *Id.* at 874–75.

⁷⁵ *See id.* at 875–77.

⁷⁶ *Id.* at 875.

⁷⁷ *Id.* at 874. Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s . . . knowledge will help the trier of fact . . . (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

⁷⁸ *Acosta*, 725 F.3d at 874–75.

fact.⁷⁹ Further, the expert “clearly stated the factual basis for his opinions and was subjected to cross-examination on the issue.”⁸⁰

Next, the court assessed the Hague Convention and the grave risk defense (i.e., the Article 13b Exception).⁸¹ The court highlighted that the purpose of the Hague Convention is to assure custody disputes are settled in the “appropriate jurisdiction” and prevent parents from international forum shopping.⁸² The grave risk defense, the court said, is a “narrow exception,” which is proved through “clear and convincing evidence,” and exists in cases of “serious abuse and neglect.”⁸³

Ricardo argued that the facts of the case did not support the district court’s finding of a grave risk of harm.⁸⁴ Furthermore, he argued that the court abused its discretion in failing to order the Peruvian court to take measures to ensure the children’s safety, thus warranting their return.⁸⁵ The Eighth Circuit disagreed, highlighting the district court’s finding of facts concerning Ricardo’s “violence, threats . . . [and] verbal abuse towards the children, Anne, [and] others.”⁸⁶ Although Ricardo did not physically abuse the children, the court noted an absence of physical abuse does not negate the possibility of a grave risk of harm under the Hague Convention.⁸⁷

Ricardo further asserted “finding a grave risk of harm based on [these facts] will allow courts to refuse to return a child whenever there is any indication of domestic violence, no matter how slight.”⁸⁸ The court denied this assertion based on the evidence, including the expert testimony and factual findings of the district court, which “show that Ricardo does not have the emotional fortitude to acknowledge custody of his children may ultimately be with Anne.”⁸⁹ The court made clear its concern about the safety and lives of the

⁷⁹ *Id.* at 874.

⁸⁰ *Id.*

⁸¹ *Id.* at 875.

⁸² *Id.*

⁸³ *Id.* (internal citations omitted).

⁸⁴ *Id.* at 876.

⁸⁵ *Id.* at 877.

⁸⁶ *Id.*

⁸⁷ *Id.* at 876 (citing *Baran v. Beaty*, 526 F.3d 1340 (11th Cir. 2008)). The Acosta court quoted the Baran court, stating, “despite the absence of evidence showing that the father abused the child in the past, [his] alcohol abuse, violent temper, abuse of the mother in the child’s presence, and threats to hurt the child justified a finding of a grave risk of harm.” *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

children if they were returned to Peru, particularly if a Peruvian court took the children from Ricardo and gave custody to Anne, which seemed highly likely.⁹⁰

The Eighth Circuit went on to cite two cases from the First and Seventh Circuits where the children were returned to their countries of habitual residence because the domestic violence in the home was not found to rise to a level sufficient for the grave risk defense.⁹¹ This was in response to Ricardo's claim that finding a grave risk of harm in his case would ensure courts always found a grave risk of harm in even "slight" domestic violence cases.

Finally, the opinion addressed Ricardo's argument that the district court should have returned his children to him because Peru could have taken measures to "ameliorate" the risk of harm.⁹² Although the court cited the Hague Convention and noted that courts do not have to return children once the abducting parent has proven a grave risk of harm—and many are reluctant to do so—they still indulged Ricardo's argument. The court noted that Ricardo bears the burden of proof for showing Peru would take measures to ameliorate the risk to the children if they were returned (i.e., the Peruvian government and law enforcement would successfully protect the children).⁹³

Ricardo did not suggest any measures to the district court. On appeal, his suggestions were limited to services the Peruvian government already had in place (e.g., "protection orders, battered women shelters, and a domestic abuse hotline").⁹⁴ So Ricardo did not succeed in proving Peru would protect the children if they were returned.⁹⁵ The Eighth Circuit also pointed out the fact that the Peruvian police had failed to promptly and immediately restrain Ricardo when he was attacking Anne and her friends. This weighed strongly against Ricardo's assertion that Peru would ameliorate the risk of grave harm.⁹⁶

⁹⁰ *Id.*

⁹¹ *Id.* (citing *Altamiranda Vale v. Avila*, 538 F.3d 581, 587 (7th Cir. 2008) (rejecting grave risk defense where father struck his son with a video-game cord once) and *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000) (rejecting grave risk where father verbally abused and shoved mother a single time)).

⁹² *Id.* at 877.

⁹³ *Id.* (citing *Simcox v. Simcox*, 511 F.3d 594, 606 (6th Cir. 2007) and *Van De Sande v. Van De Sande*, 431 F.3d 567, 573 (7th Cir. 2005)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Therefore, the Eighth Circuit held it was within the district court's discretion to admit the expert testimony and that clear and convincing evidence supported the finding that returning the children to Peru would place them in grave risk of harm.⁹⁷

IV. COMMENT

Acosta v. Acosta was well reasoned and the Eighth Circuit reached the correct result. Given the severity of the abuse in this case, the threats, verbal assaults, and violent acts towards Anne, the children, and family and friends, returning the children to Peru would have subjected them to a grave risk of harm. Even in the United States, Anne and her children were—and perhaps continue to be—at risk in that Ricardo made frequent threatening phone calls to Anne and her family and even came to Miami in an attempt to abduct his children.

Although, the Eighth Circuit correctly decided the case, the court's discussion evinced little. First, when the court responded to Ricardo's argument that finding a grave risk of harm in his case would lead courts to refuse to return children in any case of "slight" domestic violence, he cited two domestic violence cases from the First and Seventh Circuit where the courts declined to find a grave risk of harm. Second, the court allowed Ricardo to argue for the return of his children based on steps Peru could take to ameliorate the risk.

The first criticism is a small one. Because of Ricardo's obvious lack of knowledge concerning domestic violence, and his own propensity towards it, the court's time was not well spent providing him with examples of "slight" domestic violence cases where a grave risk was not found.⁹⁸ A better opinion would have attempted to educate Ricardo and other readers about the policy behind the grave risk defense, which exists to protect children from domestic violence, a worldwide problem.

Pointing out the existence of cases involving "slight" domestic violence, particularly when those cases were not binding on the Eighth Circuit,⁹⁹

⁹⁷ *Id.*

⁹⁸ The two cases the court cited were: *Altamiranda Vale v. Avila*, 538 F.3d 581, 587 (7th Cir. 2008) (rejecting grave risk defense where father struck his son with a video-game cord once) and *Whallon v. Lynn*, 230 F.3d 450, 460 (1st Cir. 2000) (rejecting grave risk where father verbally abused and shoved mother a single time). *Id.*

⁹⁹ *Id.*

suggests an acceptable level of domestic violence exists. Even a hint of tolerance for domestic violence does not serve abusers, or society, well. On the other hand, the court well spent a considerable portion of the opinion highlighting the severity of the abuse in this case and the grave risk of danger Ricardo poses to his children.

The second criticism is more substantive. Once grave risk is proven, the text of the Hague Convention and 42 U.S.C. § 11601 does not require courts to analyze whether the country of habitual residence would take measures to ameliorate the risk of harm to the children. A circuit split currently exists. Some courts stop their analysis once the parent has proven the grave risk defense. Others, such as the Eighth Circuit in *Acosta*, take the further step of assessing whether the petitioning parent's country would take ameliorative measures sufficient to protect the children from the grave risk of harm.¹⁰⁰

Common sense suggests courts should act in the best interests of the child. So if the court has found returning the child to the petitioning parent's country would jeopardize his or her safety, the inquiry should end there. Considering whether the country would take ameliorative measures is without merit.

In this case, the court gave cursory consideration to Ricardo's argument that Peru would keep the children safe. The court pointed out his failure to suggest *any* ameliorative measures to the district court, and noted the only protections he suggested on appeal were measures already in place in Peru for all domestic violence victims: restraining orders, abuse hotlines, etc.¹⁰¹ The court also noted the lack of timely response on the part of the Peruvian police when Ricardo was attacking Anne and her friends.¹⁰² The court should not have discussed the possibility of amelioration and considered Ricardo's suggestions because the law allows the analysis to end once the grave risk defense is proven.

Ricardo's arguments failed and the court reached the right result. Too much time and attention was devoted to his assertion that his abuse was not serious enough to merit a successful assertion of the grave risk to the children, particularly given the harm children incur just watching their father intentionally abuse their mother. And the court should have ended its analysis

¹⁰⁰ See *supra* Part II.B.

¹⁰¹ See *supra* Part III.

¹⁰² See *id.*

after affirming the district court's finding of the grave risk defense instead of going on to assess the possibility of ameliorative measures.

CONCLUSION

In *Acosta*, the Eighth Circuit rendered a thoughtful opinion prioritizing the safety of the children involved because the court allowed them to remain in the United States, finding that returning them to Peru would subject them to a grave risk of harm. The opinion is problematic in that the court entertained, albeit briefly, Ricardo's argument that his violence did not rise to the level of posing a grave risk of harm to his family. The court also did not stop its analysis once Anne proved returning the children would place them in grave risk of harm. As the court pointed out, the text of the Hague Convention did not require them to address Ricardo's argument that Peru would take measures to keep the children safe.

Because a circuit split currently exists on the interpretation of the grave risk defense and whether an assessment of ameliorative measures is required, the subject is ripe for Supreme Court review. Ideally, the Supreme Court will one day resolve the split in favor of the parent who has proven returning the children would place them in grave risk of danger, empowering the circuit and district courts to end their analysis once grave risk is proven instead of going on to consider ameliorative measures.